Environmental Hearing Board

Adjudications and Opinions

1998

Volume I

COMMONWEALTH OF PENNSYLVANIA
George J. Miller, Chairman

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

1998

Chairman	GEORGE J. MILLER
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Secretary	WILLIAM T. PHILLIPY IV

City by Volume and Page of the
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Thus: 1998 EHB 1

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1998.

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

ADJUDICATIONS

OPINIONS

1998 DECISIONS

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CNG TRANSMISSION CORPORATION and PENN FUEL GAS, INC.	:	
v.	:	**EHB Docket No. 97-169-MR (Consolidated with 97-170-MR)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and N.E. HUB PARTNERS, L.P., Permittee	:	**Issued: January 2, 1998**

OPINION AND ORDER
ON
MOTION FOR LEAVE TO AMEND APPEAL

by Robert D. Myers, Member

Synopsis:

A Motion for Leave to Amend Appeal under 25 Pa. Code § 1021.53(b)(1) is denied where, contrary to 25 Pa. Code § 1021.53(d), the Appellant failed to support the Motion's factual allegations with affidavits. A Motion for Leave to Amend Appeal under 25 Pa. Code 1021.53(b)(3) will be granted, upon the Appellant's filing of a verification for the Motion, where the addition of the proposed alternate or supplemental legal issue will cause no prejudice to the other parties.

OPINION

On August 19, 1997, CNG Transmission Corporation (CNG) filed a Notice of Appeal with the Board challenging the Department of Environmental Protection's (Department) issuance of two gas well permits, Permits Nos. 37-117-20168 and 37-117-20169, to N.E. Hub Partners, L.P.

(Permittee). These permits allow Permittee to drill two salt cavern gas storage wells in Farmington Township, Tioga County, Pennsylvania. CNG's appeal was docketed at EHB Docket No. 97-169-MR.[1]

On December 15, 1997, CNG filed the instant Motion for Leave to Amend Appeal. On December 29, 1997, Permittee filed a Response and Memorandum of Law in opposition to the Motion. On December 29, 1997, the Department filed a letter with the Board concurring with Permittee's Response.[2]

The Board's Rules of Practice and Procedure provide that, after 20 days from the filing of an appeal, the Board may grant leave to amend the appeal upon motion by the appellant. 25 Pa. Code § 1021.53(b). The motion is governed by the procedures set forth in 25 Pa. Code §§ 1021.70 and 1021.74 **except** that the motion shall be verified and supported by affidavits. 25 Pa. Code § 1021.53(d). The Board may grant leave to amend the appeal if the appellant establishes that the requested amendment satisfies **one** of the following conditions: (1) it is based upon specific facts, identified in the motion, that were discovered during discovery of hostile witnesses or Department employees; (2) it is based upon facts, identified in the motion, that were discovered during preparation of the appellant's case, that the appellant, exercising due diligence, could not have previously discovered; or (3) it includes alternate or supplemental legal issues, identified in the motion, the addition of which will cause no prejudice to any other party or intervenor. 25 Pa. Code

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[1] Penn Fuel Gas, Inc. (Penn Fuel) also appealed the Department's issuance of the permits. Penn Fuel's appeal was docketed at EHB Docket No. 97-170-MR. On September 30, 1997, the two appeals were consolidated.

[2] Appellant Penn Fuel did not file a letter or any other response to the Motion.

§ 1021.53(b).

CNG first seeks leave to amend its appeal under 25 Pa. Code § 1021.53(b)(1) because, in reviewing documents produced by the Department during discovery, CNG learned that the Department does not intend to require Permittee to obtain a noncoal surface mining permit or a noncoal underground mining permit in connection with Permittee's extraction of salt from the salt caverns. (Motion at para. 13.) However, contrary to 25 Pa. Code § 1021.53(d), CNG has not filed any affidavits with its Motion to support this factual assertion. Absent any supporting affidavit, the Board cannot grant CNG's Motion under 25 Pa. Code § 1021.53(b)(1).[3]

CNG also seeks leave to amend its appeal under 25 Pa. Code § 1021.53(b)(3), which allows the addition of alternate or supplemental legal issues that will cause no prejudice to any other party. The alternate or supplemental legal issue presented by CNG here is whether the Department abused its discretion or acted contrary to law in issuing the gas well permits without requiring Permittee to obtain a noncoal underground mining permit and a noncoal surface mining permit in connection with Permittee's extraction of salt from the salt caverns.[4] (Motion at para. 14.) We have not been persuaded that the addition of this legal issue will cause prejudice to the other parties and, therefore, are inclined to grant CNG's Motion. However, CNG has failed to verify its Motion as required by 25 Pa. Code § 1021.53(d). Accordingly, upon the filing with the Board of a verification to the

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[3] We also note that CNG failed to file a verification with its Motion.

[4] In its Response, Permittee alleges that Permittee has already obtained a noncoal underground mining permit and is applying for a noncoal surface mining permit. (Permittee's Response at paras. 10-12.) At this stage of the proceedings, we offer no opinion on the merits of the issue.

Motion, CNG's Motion will be granted.[5]

[5] As noted above, CNG has not supported its Motion with affidavits, which is contrary to the requirements of 25 Pa. Code § 1021.53(d). However, unlike subsections 1 and 2 of 25 Pa. Code § 1021.53(b), subsection 3 does not require the moving party to establish that it discovered specific facts under certain circumstances. Subsection 3 only requires that the proposed amendment include an alternate or supplemental legal issue which will cause no prejudice to any other party.

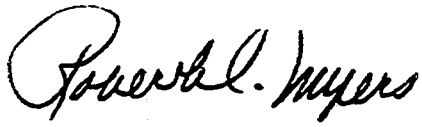
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CNG TRANSMISSION CORPORATION and PENN FUEL GAS, INC.	:	
v.	:	**EHB Docket No. 97-169-MR (Consolidated with 97-170-MR)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and N.E. HUB PARTNERS, L.P., Permittee	:	**Issued: January 2, 1998**

ORDER

AND NOW, this 2nd day of January, 1998, it is ordered that, upon the filing of a verification to CNG Transmission Corporation's Motion for Leave to Amend Appeal, the Motion will be granted.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: January 2, 1998

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

DATED: January 2, 1998

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MARWELL, INC.	:	
	:	
v.	:	**EHB Docket No. 97-057-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 5, 1998**

OPINION AND ORDER ON MOTION FOR RECONSIDERATION

by Robert D. Myers, Member

Synopsis:

A Motion for Reconsideration of a final order under 25 Pa. Code § 1021.124 is denied when it is based upon recent legislation which supposedly creates a permanent bonding moratorium for oil and gas wells drilled prior to April 18, 1985 and the age of Appellant's wells has not been established. In addition, the Board measures the validity of Department action on the basis of the law existing at the time of the action. The recent legislation does not change the status of the law at the time when the Department took its action.

OPINION

On December 10, 1997, we issued an Opinion and Order granting summary judgment in favor of the Department of Environmental Protection (Department) and against Appellant Marwell,

Inc. On December 18, 1997, Appellant filed a timely[1] Motion for Reconsideration under 25 Pa. Code § 1021.124 of our Rules of Practice and Procedure. On December 29, 1997, the Department filed its Answer to the Motion.

In granting summary judgment, we rejected Appellant's claim that its 130 oil and gas wells were "Pre-Act" wells qualifying for a bonding moratorium. The age of the wells was not supported by affidavit or otherwise but, since they had already been bonded on the effective date of the 1992 amendatory legislation creating the moratorium, they were not eligible. In its Motion for Reconsideration, Appellant calls our attention to legislation signed by the Governor on or about December 2, 1997, and effective immediately, which Appellant contends creates a permanent moratorium.

House Bill 1027, Printer's No. 2530, amends the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §§ 51-732. Section 13 adds several new sections, including 1934-A, which reads as follows:

> Bonds for certain wells. -- No bond or bond substitute shall be required for any well drilled prior to April 18, 1985, where such well would have otherwise been subject to the bonding requirements of section 215 or 603.1 of the Act of December 19, 1984 (P.L. 1140, No. 223), known as the "Oil and Gas Act."

Appellant argues that its 130 wells were all drilled prior to April 18, 1985,[2] and are, therefore, exempt from any bonding requirement. In an effort to establish the age of the wells, Appellant

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[1] Requests for reconsideration of final orders must be filed within 10 days of the date of the final order. 25 Pa. Code § 1021.124(a).

[2] Actually, the allegation in paragraph 7 of the Motion uses the date April 18, 1995; but, since the operative date in the recent legislation is April 18, 1985, we have concluded that Appellant's date is a typographical error.

attaches to the Motion a 15-page exhibit appearing to be copies of drilling permits. This documentary evidence should have been presented as part of Appellant's response to the Department's Motion for Summary Judgment. Reconsideration is not warranted where factual evidence could have been presented to the Board earlier with the exercise of due diligence. 25 Pa. Code § 1021.124(a)(2)(iii). Certainly, this factual evidence, which undoubtedly was in Appellant's possession during the pendency of the Motion for Summary Judgment, could have been presented earlier.

The 15-page exhibit suffers from another fatal flaw that would have rendered it useless to us even if filed earlier. It is not supported by an affidavit meeting the requirements of Pa. R.C.P. No. 1034.4, one of the summary judgment rules incorporated by reference into our motion practice at 25 Pa. Code § 1021.73(b). The verification attached to the Motion for Reconsideration is not sufficient since it is not based on personal knowledge and does not show affirmatively that the signer is competent to testify to the facts alleged in the Motion. *Goodman Group, Ltd. v. DEP*, EHB Docket No. 97-149-MR (Opinion and Order issued August 8, 1997); *Pickelner v. DER*, 1995 EHB 359.

With the age of the wells still in limbo, the applicability of House Bill 1027, Printer's No. 2530, has not been established. But even if we could overlook these deficiencies, we would still deny Appellant's Motion. We have held that the Board applies the law in effect at the time the Department took its action in order to measure its validity. *Hilltown Township v. DEP*, 1996 EHB 1499, 1506 n. 6. Here, the Department acted on February 6, 1997, nearly 10 months prior to the effective date of the amendatory legislation. The action was clearly valid, as we held in our December 10, 1997 Opinion, and Appellant has not given us any compelling or persuasive reason for reconsidering it. 25 Pa. Code § 1021.124(a).

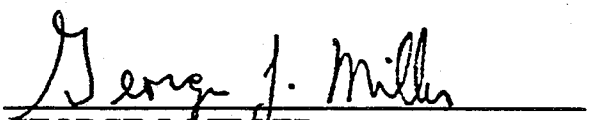
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARWELL, INC.	:	
	:	
v.	:	**EHB Docket No. 97-057-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

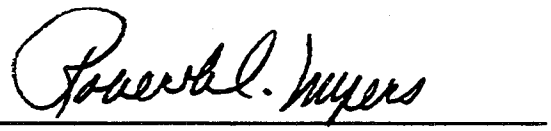
ORDER

AND NOW, this 5th day of January, 1998, it is ordered that Appellant's Motion for Reconsideration is **denied**.

ENVIRONMENTAL HEARING BOARD

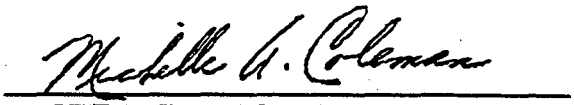


GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: January 5, 1998

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

COUNTY OF BERKS, et al.	:	
	:	
v.	:	**EHB Docket No. 97-215-MG**
	:	**(Consolidated with 97-216-MG**
	:	**and 97-217-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASTE MANAGEMENT DISPOSAL SERVICES OF PENNSYLVANIA, INC.	:	

J. WILLIAM FONTAINE, II, et al.	:	
	:	
v.	:	
	:	**EHB Docket No. 95-246-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASTE MANAGEMENT DISPOSAL SERVICES OF PENNSYLVANIA, INC.	:	**(Consolidated with 95-247-MG)**
	:	**Issued:** January 7, 1998

OPINION AND ORDER ON MOTIONS FOR RECONSIDERATION AND CLARIFICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Board grants a Motion for Reconsideration and Petition for Clarification of an order denying the request of a Permittee that prior appeals be reinstated. This will assure that no party is prejudiced with respect to any contention they may choose to make before the Board or the

Commonwealth Court as a result of the Department's reconsideration of its issuance of a permit for the expansion of a municipal waste facility in accordance with the Board's mandate to consider the comments on the permit application by one of the affected counties which had not been given required notice of the permit application or as a result of the Board's 1996 partial summary judgment requiring the Department to consider those comments.

OPINION

BACKGROUND

On December 22, 1997, the Department of Environmental Protection (Department) filed a Motion for Reconsideration of the Board's December 12, 1997 Order and the Permittee, Waste Management Disposal Services of Pennsylvania, Inc. (Waste Management) filed a motion for a Petition of Clarification of the same order. That order denied Waste Management's application to reinstate the appeals of Messrs. Fontaine and Scott in which the County of Berks had intervened. These appeals were consolidated by the Board at EHB Docket No. 95-246-MG.

In the initial appeals, the Board on November 6, 1996 granted the motion of the Intervenor, Berks County, for partial summary judgment with respect to Berks County's contention that it was not properly given notice of Waste Management's permit application for an expansion of the Pottstown landfill and an opportunity to comment on that application. In that Opinion and Order, the Board remanded the matter to the Department for further consideration not inconsistent with the Board's Order and Opinion following the receipt of comments from Berks County and said that jurisdiction is relinquished. That Opinion and Order also granted the Motion for Summary Judgment of Waste Management with respect to the standing of Messrs. Fontaine and Scott to raise the issue of absence of notice to Berks County and stated that the remaining issues raised by the Motions for

Summary Judgment of Waste Management are moot.

Because the Appellants and the Intervenor raised a number of other issues in the appeal, the Board gave the Department guidance with respect to other issues in the case relating to post-closure trust funding obligations, odor emissions, land use, aviation safety and the need for a federal air permit, but did not finally resolve any of those issues. *Fontaine v. DEP,* 1996 EHB 1333.

Waste Management appealed the Opinion and Order on Summary Judgment to the Commonwealth Court. On February 19, 1997, the Commonwealth Court issued an order quashing the appeal "it appearing that the orders appealed are interlocutory," and the Pennsylvania Supreme Court denied Waste Management's subsequent Petition For Allowance of Appeal.

It appears from exhibits to the new appeals consolidated at EHB 97-215-MG that following the Board's remand to the Department for consideration of the comments of Berks County, the Berks County Commissioners submitted comments on the permit by letter dated February 27, 1997. Those comments were reviewed and, after due consideration, the Department rejected those comments in a comment and response document. In addition, the Department held a public hearing on April 23, 1997 at which time it received comments on both the waste permit and the application for a permit under the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. §§ 4001-4106, which it also rejected in a comment and response document. A separate comment and response document addressing the comments regarding the air permit was to be issued when the Department acts on the application for the air permit. (Ex. C to Notice of Appeal at 97-215-MG)

Following the Department's reconsideration in accordance with the Board's mandate, Berks County and Messrs. Fontaine and Scott filed the appeals which are now docketed as consolidated

EHB Docket No. 97-215-MG. In these appeals, the Appellants not only contest the propriety of the Department's reconsideration in accordance with the Board's remand, but also seek a determination that the Board's Order on Summary Judgment had the effect of invalidating the permit issued by the Department. Appellants claim that this entitles the Appellants to raise not only the issues raised in the previous appeals which the Board did not decide, but would also entitle them to raise issues which were not raised in the previous appeals and do not appear to be related to the Department's consideration of the County of Berks comments. Some of these contentions could not have been raised in the previous appeal because they are based on changes in applicable law and in the Department's regulations after the Board's decision in the earlier appeals.

DISCUSSION

Both Waste Management and the Department contend that the Board's Order refusing to reinstate the appeals is inconsistent with the Commonwealth Court's determination that the Board's decision on summary judgment was interlocutory. We do not agree because the Board's Order in requiring reconsideration clearly looked forward to the possibility of further review of any decision the Department might make on reconsideration to reaffirm its issuance of the permit. Accordingly, that order was interlocutory and the issue as to whether or not the Department abused its discretion in deciding to reject the comments of Berks County may be fully considered by the Board in the new appeals. In *P.R. Hoffman Materials v. Workmen's Compensation Appeal Board (Zeigler)*, 694 A.2d 358 (Pa. Cmwlth. 1997), the Commonwealth Court held that the affirmance of a decision of the Workmen's Compensation Judge granting benefits to claimant was interlocutory because the Appeal Board remanded the case to the Workmen's Compensation Judge for determination of the amount of penalties on the Claimant's penalty petition which she filed with the Board during the pendency

of the Employer's appeal challenging the Workmen's Compensation Judge's award of benefits. The Court held that since the Workmen's Compensation Appeal Board had jurisdiction to impose penalties, it properly remanded the matter to the Workmen's Compensation Judge for calculation of the amount even though the penalty proceedings had not been instituted until after the compensation award was entered. Accordingly, the Court held that the Board's Order granting benefits to the claimant was interlocutory and would not become final until after the amount of the penalty was determined. Similarly, in this case, the Board's remand of the matter to the Department for further consideration was clearly within its jurisdiction so that its order granting summary judgment on the claim that Berks County was entitled to notice and a right to comment was interlocutory.[1]

Similarly, the issues which were left undecided on the Board's Opinion on Summary Judgment, including the issues of aviation safety and the need for a federal air permit, can be fully adjudicated in the new appeals. Once the Department acted in accordance with the Board's directions on remand, a procedural vehicle is required to frame the issues that any appellant might want to present as to whether or not the Department properly complied with the Board's mandate and did not abuse its discretion in reaffirming its issuance of the permit. A new appeal is an appropriate vehicle for framing those issues. In addition, all of the issues raised by the Department's

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[1] As Berks County points out an appeal from a partial summary judgment frequently is interlocutory. *Stempo v. Department of Transportation*, 632 A.2d 971 (Pa. Cmwlth. 1993). Under Rule 311(f) of the Pennsylvania Rules of Appellate Procedure, an administrative remand may be appealed as of right only if the decision on remand does not involve the exercise of administrative discretion or if the remand order decides an issue which could ultimately evade appellate review if an immediate appeal is not allowed.

response to the comments of Berks County in reconsidering the issuance of the permit can be adjudicated based on the issues framed by the new appeals.

The Department and Waste Management also contend that the refusal to reinstate the earlier appeals may deprive them of a right to review by the Commonwealth Court of the Board's previous decision that the Department was required to consider the comments of Berks County. The Board does not in any way seek to deny either the Department or Waste Management of its right to review of that decision in the Commonwealth Court. If the Board should sustain the position of Appellants in the new appeals, we believe that the issue of whether the Board's decision to grant summary judgment to Berks County in the original appeals would be fully ripe for review before the Commonwealth Court. If the Board does not sustain the present appeals, it would appear that this issue would be entirely moot.

The Board recognizes, however, that technical rules of appellate jurisdiction might be raised to bar them from seeking review of the Board's 1996 partial summary judgment in an appeal from whatever subsequent judgment may be made in the new appeals unless the previous appeals are reinstated. Indeed, Appellants' responses to the motions for reconsideration and clarification appear to argue that the right to seek review of the Board's 1996 partial summary judgment in the Commonwealth Court has already been waived by virtue of their failure to request reconsideration of that order or to request certification for an interlocutory appeal from the order.[2]

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[2] We express no opinion on these contentions, but leave those issues to be resolved by the Commonwealth Court in the event either the Department or Waste Management seek review of the Board's 1996 partial summary judgment order when these appeals are finally disposed of by the Board. We note, however, that the Board's rules at 25 Pa. Code § 1021.123(c), specifically provide that a failure to seek reconsideration of an order by the Board will not result in a waiver of any issue.

Accordingly, we believe that the Board's December 12, 1997 order refusing to reinstate the appeals presents a risk that the Department and Waste Management may be deprived of their right to obtain review of the Board's 1996 partial summary judgment. This circumstance presents an extraordinary circumstance which justifies the Board's reconsideration of its December 12, 1997 order refusing to reinstate the previous appeals under 25 Pa. Code § 1021.123(a). For this reason, the Board will grant the Department's Motion for Reconsideration and Waste Management's Petition for Clarification and order the reinstatement of the previous appeals without prejudice to the contention of any party with respect to any issue before the Board in any of these appeals. This will assure that all issues relating to the scope of the Board's review of the Department's action on reconsideration may be presented to the Board and a prompt hearing on the merits can be held on those contentions which the Board may subsequently determine are properly now before it. In addition, all of these appeals will be consolidated under one docket number for all purposes of discovery, dispositive motions and the hearing on the merits so as to avoid the necessity of filing duplicate papers in each of these appeals.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COUNTY OF BERKS, et al.	:	
	:	
v.	:	**EHB Docket No. 97-215-MG**
	:	**(consolidated)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASTE MANAGEMENT DISPOSAL SERVICES OF PENNSYLVANIA, INC.	:	

J. WILLIAM FONTAINE, II	:	
	:	
v.	:	
	:	**EHB Docket No. 95-246-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASTE MANAGEMENT DISPOSAL SERVICES OF PENNSYLVANIA, INC.	:	**(consolidated)**

ORDER

AND NOW, this 7th day of January, 1998, the motions of the Department of Environmental Protection and of Waste Management Disposal Services of Pennsylvania, Inc. for reconsideration and clarification are hereby **GRANTED**.

1. Paragraph 1 of the Board's December 12, 1997 Order is hereby vacated and the appeals consolidated at EHB Docket No. 95-246-MG are hereby reinstated without prejudice to (a)

any argument that any of the parties may make with respect to what issues are properly before the Board in these appeals, (b) any argument that the Department or Waste Management may choose to make with respect to the appealability of the Department's letter informing Appellants of the results of the Department's reconsideration as directed by the Board and (c) any appeal the Department or Waste Management may choose to take from the Board's grant of summary judgment to Berks County in the previous appeals.

2. All of these appeals are hereby consolidated at the following docket number and under the following caption:

County of Berks, et al.	:	
	:	
v.	:	
	:	**EHB Docket No. 97-215-MG**
Commonwealth of Pennsylvania,	:	**(consolidated with 97-216-MG**
Department of Environmental	:	**97-217-MG, 95-246-MG and**
Protection and Waste	:	**95-247-MG)**
Management Disposal Services	:	
of Pennsylvania, Inc.	:	

3. All parties are encouraged to file promptly any motions they may have with respect to the issues which are properly before the Board following the Department's reconsideration of the permit based on the comments of Berks County or the appealability of the Department's letter informing the Appellants of the results of its reconsideration.

EHB Docket No. 97-215-MG
(Consolidated with 97-216-MG
and 97-217-MG)
EHB Docket No. 95-246-MG
(Consolidated with 95-247-MG)

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: January 7, 1998

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ENVIRONMENTAL HEARING BOARD
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WILLIAM T. PHILLIPY I
SECRETARY TO THE BOA

ASSOCIATED WHOLESALERS, INC. and SUNSHINE MARKETS, INC.	:	
v.	:	**EHB Docket No. 97-080-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARK CENTERS LIMITED PARTNERSHIP, Permittee	:	**Issued:** January 16, 1998

OPINION AND ORDER ON PETITION FOR RECONSIDERATION

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Department of Environmental Protection's and Permittee's petitions for reconsideration are granted. The Board will reconsider an opinion and order denying a motion to dismiss where there is a need for clarification of our opinion. The Board has held that the "extraordinary circumstances" standard for reconsideration of interlocutory orders is meant to set a standard which is at least as high as that for final orders. Reconsideration is appropriate under this standard where the Board's ruling was based on a legal ground which had not been proposed by any party.

In a third-party appeal of the issuance of a Section 404 Permit dismissal is inappropriate where it is unclear that the moving party is clearly entitled to a judgment as a matter of law because we cannot determine whether or not the permit is an appealable action.

OPINION

This matter was initiated with Associated Wholesalers, Inc.'s (AWI) and Sunshine Market Inc.'s (Sunshine) (collectively, Appellants) April 8, 1997 appeal challenging a January 28, 1997 Department of Environmental Protection (Department) letter and the issuance of a federal Section 404 Clean Water Act Pennsylvania State Programmatic General Permit No. WL 4097401 for proposed site improvements at the Mark Plaza Shopping Center, a Mark Land Development, in Edwardsville, Luzerne County. The letter, sent to Mark Centers Limited Partnership (MCLP), informed MCLP that after reviewing the documents the Department 1) determined that a Water Obstruction and Encroachment Permit is not required in accordance with the provisions of the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. § 693.1 - 693.27 and its accompanying regulations; and 2) enclosed a Section 404 Clean Water Act Pennsylvania State Programmatic General Permit (PASPGP), providing authorization for an activity waived under the regulations.

The Board has issued one previous opinion in this appeal. That opinion, granting in part and denying in part, the motions to dismiss, is the subject of the petition now before us. We issued the opinion and order on December 22, 1997. The Department filed a petition for reconsideration of the decision on January 2, 1998. MCLP joined in that motion for reconsideration on January 8, 1998. On Jaunary 12, 1998 Appellants filed an answer to the petition and a supporting memorandum of law.

In our decision on the motion to dismiss, we noted that dismissal was appropriate only where no material factual disputes remained and the moving party clearly was entitled to judgment as a matter of law. We denied the motions to dismiss regarding the portion concerning the Section 404

Permit because the Department and MCLP failed to establish that they were entitled to judgment as matter of law on that aspect. We held that the Department and MCLP could not prevail with respect to that issue because the Section 404 Permit is an appealable action.

The Department requests that we reconsider the motion to dismiss because the Board denied the motion regarding the Section 404 Permit. According to the Department, the Board's denial of the motion on the grounds that it was an appealable action constitutes "extraordinary circumstances" justifying reconsideration. The Department expressed concern that our opinion and order on the motion to dismiss relied on Sections 404(g) and 404(h) of the Clean Water Act instead of Section 404(e) which was the basis of the permit's issuance. MCLP joins in this request.

Appellant contends that the petition should be denied. Appellant alleges denial is appropriate because the Department failed to prove the standard for granting such extraordinary relief. Furthermore, the Board's ruling regarding the issuance of the PASPGP is substantively correct and properly will allow the parties to address the issue of whether the Department correctly applied the Dam Safety and Encroachments Act and its accompanying regulations.

Prior to the effective date of Board Rule Section 1021.123, 25 Pa. Code § 1021.123, effective August 31,1996, the Board had only one rule regarding reconsideration, and it did not, by its terms, distinguish between interlocutory and final orders. It provided that the Board would grant reconsideration of orders only for:

> compelling and persuasive reasons..., generally limited to instances where:
>
> (1) The decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief the question.

> (2) The crucial facts set forth in the application are not as stated in the decision and would justify a reversal of the decision. In such a case, reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing.

Former 25 Pa. Code § 1021.122(a).[1] While the language of the rule might seem to embrace interlocutory orders, Board case law has held that the criteria above applied only to final orders. *See, e.g. Krivonak v. DEP*, 1995 EHB 993. For interlocutory orders, we held that the party requesting reconsideration had to show that "exceptional circumstances" were present as well. *See, e.g. Adams Sanitation Company, Inc. v. DER*, 1994 EHB 1482.

Although Section 1021.123 refers to "extraordinary circumstances," as opposed to "exceptional circumstances," and does not refer to the criteria for final orders, we do not view the new rule as a departure from our past practice of requiring parties requesting reconsideration of interlocutory orders to show that they meet the criteria for reconsideration of a final order, and, in addition that special circumstances exist which warrant the Board taking the extraordinary step of revisiting an interlocutory order. This Board has held that by referring to "extraordinary circumstances," Section 1021.123 meant to set a standard for reconsideration of interlocutory orders which is at least as high as that for final orders.

The Board's current rules provide that we will reconsider final orders for "compelling and persuasive reasons," including:

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[1] Under the latest amendments to the Board's rules, Section 1021.122 now pertains to reopening of a record prior to adjudication. 26 Pa. Bull. 4222 (1996). Sections 1021.123 and 1021.124 of the Board's rules pertain to reconsideration of interlocutory and final orders, respectively. *Id.*

(1) The final order rests on a legal ground or factual finding which has not been proposed by an party.

(2) The crucial facts set forth in the petition
(i) Are inconsistent with the findings of the Board.
(ii) Are such as would justify a reversal of the Board's decision.
(iii) Could not have been presented earlier to the Board with the exercise of due diligence.

25 Pa. Code § 1021.124(a). Therefore, for the Department to show that it is entitled to reconsideration it must satisfy the criteria listed above and that special circumstances are present which justify the Board taking the extraordinary step of reconsidering an interlocutory order.

Is reconsideration appropriate ?

The circumstances surrounding the motion to dismiss are "extraordinary" for purposes of Section 1021.123(a) of our rules. By failing to dispose of the motion regarding the Section 404 Permit on the basis of Section 404(g) and (h), we ruled on a legal ground which had not been proposed by any party. Thus, though our decision on that portion of the motion to dismiss was an interlocutory order, it could have a great impact on the resolution of this appeal. Given these circumstances reconsideration is appropriate.

Motion to dismiss

On May 19, 1997 MCLP filed its Motion to Dismiss and supporting memorandum of law. On June 13, 1997 Appellants filed their response and supporting memorandum. On June 23, 1997 the Department filed its Motion to Dismiss only on the grounds that the letter and Section 404 Permit are not appealable actions. On July 3, 1997 MCLP filed its reply brief in support of its May 19, 1997 motion to dismiss. On July 17, 1997 Appellants filed their answer and supporting memorandum in opposition to the Department's motion to dismiss.

The facts of this case are not in dispute for purposes of the motions. MCLP sought the necessary governmental approvals to demolish a building located on property previously or currently used for a shopping center to make way for the construction of a new building on the same site. As part of the proposed project there will be placement of fill material. Due to the anticipated fill activity and the project's proximity to Toby Creek, MCLP's engineering consultant forwarded its plans for preliminary review to the Department for it to determine whether a Water Obstruction and Encroachment Permit was required under the Pennsylvania Dam Safety and Encroachment Act and its accompanying regulations. By a January 28, 1997 letter, which is the basis of this appeal, the Department advised MCLP of its determinations after having reviewed the January 9, 1997 letter and attachments. The Department determined that the proposed project did not constitute a water obstruction or encroachment within the floodway of Toby Creek, that the placement of fill in the floodway of the small watercourse is regulated by the Dam Safety and Encroachment Act, and that the requirements for a state permit were waived for a water obstruction in a stream or floodway with a drainage area of 100 acres or less.

The Department moves for dismissal of the Section 404 objection Appellants raised in their notice of appeal. The Department contends that it did not make the determination regarding the Section 404 Permit, that it did not issue the PASPGP-1 or make any determination whether the federal permit should have been issued, and that all criteria were set and authorization was made by the Army Corps of Engineers pursuant to Section 404(e).

Appellants allege that the Board's ruling is substantively correct because the Department plays a role in the PASPGP process, and therefore, that role is an appealable action. The appeal will allow the parties to address the issue of whether the Department correctly applied the regulations of

the Dam Safety and Encroachment Act.

We offer a clarification of our earlier decision. We have held that the Board will dismiss an appeal only where there are no material factual disputes and the law is clear that the moving party is clearly entitled to a judgment as a matter of law. *Tinicum Township v. DEP*, 1996 EHB 816. Neither the Department nor MCLP as the moving parties have demonstrated that they are entitled to judgment as a matter of law. The Department states that the Secretary of the Army under the Army Corps of Engineers' direction issued the instant PASPGP-1 pursuant to Section 404(e) of the federal Clean Water Act, citing Exhibit A of its Motion to Dismiss. That exhibit is titled, "December 1995 Pennsylvania State Programmatic General Permit PASPGP-1" and cites Section 404(e), and other sections of the federal Clean Water Act as well as state law as authorities for the issuance for the permit. However, Appellants attached to their Notice of Appeal a copy of a PASPGP-1 which is titled, "Pennsylvania State Programmatic General Permit PASPGP-1 December 1995." In that document there is no specific section authorization citation. Rather the only cited authorization is "provisions of Section 404 of the Clean Water Act." This version also states, "It has been determined that the project as authorized by the Pennsylvania Department of Environmental Protection (PADEP) Authorization _____ Qualifies for the PASPGP-1. Accordingly you are authorized to undertake the activity pursuant to: ...." It is clear from these documents that different versions of the PASPGP-1 exist. Neither document has an identifying date to indicate which is the most recent version. Appellants' version was faxed to Appellants' counsel on March 25, 1997 by the Department engineer, Mary Hastings, who signed the January 28, 1997 letter. The attached fax cover sheet states that "Following is the language of the PASPGP authorization which accompanied waiver letter No. WL 4097401 to Mark Centers L.P. ...." Looking at the evidence in a light most

favorable to the non-moving party we used that version in making our decision.

If the Secretary of the Army issued the PASPGP under Section 404(e) authorization without further action of the Department then the Department's contention is correct. However, Sections (g) and (h) provide for the State to issue the PASPGP. 33 U.S.C. § 1344(g) and (h). It is unclear from the alleged PASPGP used by the Department which section was the basis for the issuance of the PASPGP so we have an issue of fact as to the section under which the permit was issued. In either instance, the Department determined that the applicant qualified for the permit issuance so this is an appealable action.

Therefore, for the reasons stated above we affirm our earlier holding that the Department failed to prove it was entitled to judgment on the issue of the Section 404 permit as a matter of law. The Board will give the parties an opportunity to address the matter in a hearing.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ASSOCIATED WHOLESALERS, INC. and SUNSHINE MARKETS, INC.	:	
v.	:	**EHB Docket No. 97-080-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARK CENTERS LIMITED PARTNERSHIP, Permittee	:	

ORDER

AND NOW, this 16th day of January, 1998, the Department's and MCLP's petitions for reconsideration are granted and, upon reconsideration, the Department's motion to dismiss is denied regarding the Section 404 Permit.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: January 16, 1998

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

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Northeast Region

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WILLIAM T. PHILLIPY
SECRETARY TO THE BO

THOMAS C. MULL	:	
	:	
v.	:	**EHB Docket Nos. 97-182-R and 97-184-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 16, 1998**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board's jurisdiction does not attach to an appeal unless the appeal is filed with the Board within 30 days after the appellant has received written notice of the action. The Department of Environmental Protection's (Department) motions to dismiss for lack of subject matter jurisdiction are granted where the notices of appeal are filed with the Board in an untimely manner.

OPINION

On August 19, 1997, Thomas C. Mull (Appellant) filed two notices of appeal challenging two civil penalty assessments issued by the Department of Environmental Protection (Department) for violations at his mine. According to Paragraph 2(d) of both notices of appeal, the Appellant received notice of the Department's actions on July 19, 1997. According to the return receipts, the Appellant received the civil penalty assessments on July 17, 1997. The Department filed separate motions to dismiss each appeal for lack of subject matter jurisdiction. The Department asserts that

since both appeals were untimely filed, the Board does not have jurisdiction over the appeals.[1]

In order for the Board to have jurisdiction over an appeal pursuant to 25 Pa. Code § 1021.52(a), the appeal must be filed with the Board within 30 days after an appellant receives written notice of the Department's action. *Sweeney v. DEP*, 1995 EHB 544. It has long been the law that where we would otherwise have subject matter jurisdiction over an appeal, the untimely filing of it deprives us of that jurisdiction. *Rostosky v. Department of Environmental Resources*, 364 A.2d 761 (Pa. Cmwlth. 1976).

In the present case, the Board did not receive the Appellant's notices of appeal until August 19, 1997. Even if we look to the July 19, 1997 date on which the Appellant claims to have received the assessments, the Appellant filed his appeals 31 days after he received the assessments. According to the July 17, 1997 date of receipt on the return receipts, the Appellant filed his notices of appeal 33 days after he received the assessments. In either case, the appeals are untimely, thereby divesting the Board of subject matter jurisdiction.

Accordingly, the following order is entered:

[1] The Appellant failed to respond to either of the Department's motions.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THOMAS C. MULL	:	
	:	
v.	:	EHB Docket Nos. 97-182-R and 97-184-R
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 16th day of January, 1998, the Department of Environmental Protection's Motions to Dismiss are **granted** and the appeals are dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

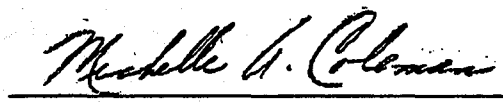
GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: January 16, 1998

c: **DEP Bureau of Litigation:**
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Southwestern Region

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North Huntingdon, PA

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

MYRON A. YOURSHAW and CHARLES J. YOURSHAW	:	
v.	:	**EHB Docket No. 97-039-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and READING ANTHRACITE CO., Permittee	:	**Issued: February 4, 1998**

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT
OR TO LIMIT ISSUES

By George J. Miller, Administrative Law Judge

Synopsis:

A motion for summary judgment or in the alternative to limit issues in an appeal from a second renewal of a permit is granted under the doctrine of administrative finality as to those grounds for appeal which do not arise from changed legal or factual conditions between the time the original permit was issued and the second renewal of the permit. The motion is denied as to those grounds for appeal which appear to be based on events that occurred between the first and second renewal of the permit and may provide grounds for the claim that the Department should not have renewed the permit a second time under 25 Pa. Code § 86.55(g). The motion is granted as to other grounds for appeal because they raise issues of enforcement requiring the Department to exercise its prosecutorial discretion and are therefore not reviewable by the Board.

OPINION

The Department of Environmental Protection (Department) originally issued a surface mining permit and a related NPDES permit to Reading Anthracite Company (Reading) in 1985 and first renewed these permits in 1990. The present controversy was initiated with the February 10, 1997 filing of a *pro se* notice of appeal[1] by Myron A. Yourshaw and Charles J. Yourshaw (collectively Appellants) to the January 10, 1997 second renewal of Surface Mining Permit No. 54713002R2 and NPDES Permit No. PA0123293 (collectively permit) by the Department. The renewal permit authorized Reading to continue operating a surface mine located in New Castle Township, Schuylkill County, Pennsylvania.

Currently before the Board are Reading's October 14, 1997 motion for summary judgment or in the alternative to limit issues and the Appellants' response[2] to the motion. Reading contends that the Appellants cannot now challenge the permit renewal since they failed to challenge the same permit on either of the two prior occasions. Both parties submitted supporting memoranda of law on their positions and accompanying exhibits. By a letter dated November 6, 1997, the Department joined in Reading's motion.

DISCUSSION

Summary judgment may be entered as a matter of law whenever there is no genuine issue of any material fact and only in those cases where the right is clear and free from doubt. *Martin v.*

---

[1] In response to an order permitting the Yourshaws to file additional information to perfect their appeal, the Yourshaws filed additional information on February 21, 1997.

[2] The Appellants filed a "reply brief" which we will regard as a response to Reading's motion.

Sun Pipe Line Company, 666 A.2d 637 (Pa. 1995); Pa.R.C.P. 1035.2(1). The motion must be viewed in the light most favorable to the nonmoving party. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995). In order to prevail on a motion for summary judgment, the moving party must show through interrogatories, answers, deposition transcripts, pleadings, affidavits and responses to requests for admissions that the facts support the motion and no material facts are in dispute. *See* Pa.R.C.P. 1035.1-1035.5. It is Reading's position that it should be granted summary judgment as a matter of law because the Appellants are barred from challenging the second permit renewal under existing case law and the doctrine of administrative finality.

Administrative Finality

Under the doctrine of administrative finality, "one who fails to exhaust his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his statutory remedy." *Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977). The Board has held that where a party aggrieved by an administrative action of the Department fails to appeal that action, neither the content nor the validity of the Department's action or the regulations underlying it may be attacked in a subsequent administrative or judicial proceeding. *People United to Save Homes v. DEP*, 1996 EHB 1428, 1432.

The doctrine of administrative finality has been applied in the case of a permit renewal and permit reissuance to bar a third party from raising objections to issues which appeared in the original permit where the third party failed to file an appeal from the original permit issuance. *Reading Anthracite Company v. DEP*, EHB Docket No. 95-196-C (Opinion issued June 18, 1997). In the case of an appeal of a permit reissuance or renewal, the appellant may challenge only those issues

which have arisen between the time the permit was first issued and the time it was reissued or renewed. *Borough of Ridgeway v. DER*, 1994 EHB 1090, 1102. Therefore, if an uncontested permit is reissued, then matters necessarily considered during the original issuance proceeding are unappealable upon reissuance. *Blevins v. DER*, 1986 EHB 1003.

In addition to fourteen enumerated objections, the Appellants' notice of appeal consists of a narrative complaint divided into three sections entitled: blasting, reclamation plan, and discharge permits and approvals. The Appellants identified the following objections in their notice of appeal:

> . . .
> 3. No surface mining was conducted in the area prior to 1985.
> . . .
> 5. No proof of land ownership and falsification of deeds.
> 6. No hydrological study was performed on this side relative to the active pressure of the water on existing underground mines.
> 7. No plan exists to seal this mine or line the surface with clay to prevent contaminants of underground water source from the sulfur water.
> 8. No impact study was done on what will happen if a 50 & 100 year flood with the 85 acre sulfur dam on the town of St. Clair that will be in elevation 40 feet below that of the top of the dam.
> . . .
> 10. No preblast survey performed because the state deemed it unnecessary, therefore, how can they determine new damage from old damage.
> 11. No operation or reclamation plan showing the existing and final contours.
> 12. The eastern highwall has no benching or fall zones provided.
> . . .
> 14. The emotional stress placed on the residence [sic] of the community by both DEP and the mining company not considering the peoples [sic] wishes.

Reading contends that because the Appellants failed to appeal the issues in question in either 1985 when the permit was originally issued or 1990 when the permit was first renewed, those issues are now final and the Appellants are precluded from challenging them in this appeal.

The Appellants have admitted that their ownership of the allegedly affected property predates the 1985 original permit by the Department and that the Department's files on the permit renewals

have been available for the Appellants' review. (Reading's Motion, Request for Admissions, No. 1, 2, 16, 18, 19, 22, and 23) In response to Request for Admission No. 24, the Appellants have admitted that the second renewal permit and its accompanying modules contain no significant changes in the permit area, methods of operation or blasting since the permit's original issuance. The Appellants contend that the present renewal permit allows the mining to go deeper than did the prior permit. However, this claim is refuted by both the deposition testimony of Mr. Laslow, a Department hydrogeologist supervisor, and the Department's Answers to Appellants' Interrogatories. As such, the Appellants are precluded from raising these issues to the extent they existed as a factual matter prior to the time of the permit's original issuance or first renewal.

Objections 1, 4 and 9 to the Second Renewal

Both Reading and the Appellants contend that the Board's decision in *Richards v. DER*, 1990 EHB 382 supports their respective positions. In that case, we held that summary judgment was not appropriate where the appeal raised factual claims based on events arising after the issuance of the permit indicating that the Department should not have renewed the permit under 25 Pa. Code § 86.55(g). That section provides in pertinent part:

> (g) A permit will not be renewed if the Department finds one of the following:
> (1) The terms and conditions of the existing permit are not being satisfactorily met.
> (2) The present mining activities are not in compliance with the environmental protection standards of the Department.
> (3) The requested renewal substantially jeopardizes the operator's continuing ability to comply with the acts, this title and the regulatory program on existing permit areas.
> . . .

The Appellants' claim that the eastern highwall has become unsafe since the last permit renewal (Notice of Appeal 3.1; Appellants' Brief at 3) and their contention that nearby homes have been

damaged by blasting since the first renewal of the permit (Notice of Appeal 3.9; Appellants' Brief at 4, 5) may provide a basis for concluding that the mining activities prior to the second renewal of the permit were not in compliance with the Department's environmental protection standards. In addition, the Appellants' contention that the absence of sediment traps (Notice of Appeal 3.4; Appellants' Brief at 4) may fall into the category of the terms and conditions of the existing permit not being satisfactorily met. However, the other issues raised in their brief are barred by the doctrine of administrative finality.

We would normally grant summary judgment as to the claim that the permit should not have been renewed because the Appellants' response to the motion with respect to their claims under 25 Pa. Code § 86.55(g) for summary judgment is not supported by affidavits or other evidence of record. We do not do so here only because the Appellants are proceeding *pro se* and may not be aware of this requirement for a response to a motion for summary judgment. The Appellants are cautioned that they must provide such evidence in the event the Permittee should renew its motion as to the Appellant's claim that the permit should not have been renewed under 25 Pa. Code. § 86.55(g).

Enforcement Issues

The Yourshaws also identified the following objections in their notice of appeal:

2. Mining within 300 feet of the homes without homeowners [sic] variance.

. . .

13. The top of the eastern mine area is now closer than 300 feet from structure as well as the southern mining line.

. . .

Reading contends that the operator is rightfully within the permit area as originally granted and the Appellants' objections are barred under the doctrine of administrative finality. (Reading's Motion,

Request for Admissions No. 24; Mr. Laslow Deposition at 37) Our examination of the evidence filed in support of the motion requires us to agree. In addition, to the extent that these are conditions that have occurred since the second renewal, these concerns are operational enforcement issues which fall within the Department's prosecutorial discretion. An agency's exercise of prosecutorial discretion involves a determination of whether or not to pursue enforcement actions against those it regulates. *Ridenour v. DEP*, 1996 EHB 928, 929. It is well-established that the Department's exercise of its prosecutorial discretion is not reviewable by the Board. *Id.*

In several conference calls held with the Appellants and counsel for the other parties, the Appellants have also expressed a desire to be compensated for damage which they claim has been done to their homes by blasting conducted under the permit. That desire cannot be satisfied by the Board because the Board has no jurisdiction over such claims. The Appellants are free to pursue those claims in a court of appropriate jurisdiction.

Accordingly, the following order is entered:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MYRON A. YOURSHAW and CHARLES J. YOURSHAW	:	
	:	
v.	:	**EHB Docket No. 97-039-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and READING ANTHRACITE CO., Permittee	:	

ORDER

AND NOW, this 4th day of February, 1998, upon consideration of the Permittee's motion for summary judgment or in the alternative to limit issues, it is hereby ordered that:

1. The motion is DENIED with respect to those grounds for appeal which appear to be based on events that occurred since the first renewal of the permit pertaining to the Appellants' Objections 1 (unsafe highwall), 4 (absence of sediment traps), and 9 (blasting) as set forth in the notice of appeal.

2. The motion is GRANTED with respect to all other grounds for appeal as consistent with this opinion.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: **February 4, 1998**

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

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Southcentral Region

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Charles J. Yourshaw
St. Clair, PA

For Permittee:
James P. Wallbillich, Esq.
CERULLO, DATTE & WALLBILLICH
Pottsville, PA

jlp/bl

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAF

THROOP PROPERTY OWNER'S ASSOCIATION, et al.	:	
v.	:	**EHB Docket No. 97-164-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, Permittee	:	**Issued: February 5, 1998**

OPINION AND ORDER
ON MOTION FOR SANCTIONS
AND MOTION FOR PROTECTIVE ORDER

by Robert D. Myers, Member

Synopsis:

A Motion for Sanctions based on a party's failure to serve answers to written discovery requests on or before a date set by the Board is denied where the party filed a timely motion to extend the deadline, and the Board granted an extension. A Motion for Protective Order against interrogatories and requests for production of documents is denied where the moving party failed to attach the interrogatories to the motion and where the requests for production of documents refer to the interrogatories and cannot be understood without the interrogatories.

OPINION

On July 30, 1997, Appellants filed a Notice of Appeal with the Board challenging the Department of Environmental Protection's (Department) June 10, 1997 issuance of Major

Modification, Phase II, Solid Waste Permit No. 101247, which pertains to the Keystone Sanitary Landfill in Dunmore and Throop Boroughs, Lackawanna County. At the time, Appellants were represented by David L. Kurtz, Esquire.

On October 3, 1997, Keystone Sanitary Landfill, Inc. (Permittee) filed a Motion to Correct Caption. On October 28, 1997, having received no response to Permittee's Motion, the Board issued a Rule to Show Cause why the Board should not grant the Motion. On November 11, 1997, the Board was advised that Attorney Kurtz was out of the country, and that Appellants had retained Wendy E. Carr, Esquire, as replacement legal counsel for purposes of requesting an extension of deadlines. Attorney Carr filed a letter in response to the Rule to Show Cause on November 13, 1997. The Board subsequently issued an Opinion and Order denying the Motion to Correct Caption but modifying the caption to acknowledge the multiple appellants in this case.

On November 12, 1997, Permittee filed a Motion for Sanctions, or in the Alternative, [a Motion] to Compel Appellants to Respond to Discovery Requests & [a] Motion for Protective Order. Permittee claimed that the motions should be granted because Appellants failed to answer Permittee's written discovery requests. On November 23, 1997, Attorney Carr filed a Limited Entry of Appearance and an Answer to Permittee's motions. On November 26, 1997, Attorney Carr also filed a Motion to Extend Deadlines on behalf of Appellants; Permittee filed an Answer thereto on December 5, 1997. On December 11, 1997, the Board issued an Order stating in relevant part that: (1) Appellants shall have legal counsel file an unlimited entry of appearance by December 26, 1997 or notify the Board that they shall appear *pro se*; and (2) Appellants shall serve answers to Permittee's written discovery requests by January 12, 1998. The Board did not impose sanctions but admonished Appellants to pursue the appeal with diligence lest the Board impose sanctions at

a later date, including dismissal of the appeal.

On December 23, 1997, Attorney Carr filed an unlimited Entry of Appearance. On January 12, 1998, the date by which Appellants were to answer Permittee's written discovery requests, Appellants filed a second Motion to Extend Deadlines. Appellants asserted therein that Attorney Carr had attempted to obtain a public file review appointment with the Department, but that the first available appointment was not until January 15, 1998. On January 14, 1998, Permittee filed an Answer to Appellants' Motion to Extend Deadlines. On January 15, 1998, the Board issued an Order extending the deadline for service of answers to Permittee's written discovery requests to January 22, 1998.

On January 14, 1998, Permittee filed the instant Motion for Sanctions and another Motion for Protective Order. Permittee asserts in the Motion for Sanctions that, because Appellants failed to answer Permittee's written discovery requests by January 12, 1998, the Board should dismiss the appeal and order Appellants to reimburse Permittee for all costs associated with Permittee's first and second Motions for Sanctions, including reasonable attorney fees. With respect to the Motion for Protective Order, Permittee asks that the Board relieve Permittee of its obligation to respond to Appellants' written discovery requests because the requests are extremely broad and because a response would be expensive. Appellants have not filed a response to these motions.

The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure, including dismissal of an appeal against the offending party. 25 Pa. Code § 1021.125; *Westmark Diversified, Inc. v. DEP*, EHB Docket No. 96-089-C (Opinion issued March 18, 1997). The Board will not ordinarily impose discovery sanctions unless a party defies an order compelling discovery. *Griffin v. Tedesco*, 513 A.2d 1020 (Pa. Super. 1986); *DER v. Chapin*

& Chapin, 1992 EHB 751.

In this case, the Board ordered Appellants to serve answers to Permittee's written discovery requests by January 12, 1998. It is true that Appellants failed to meet this deadline. However, on January 12, 1998, Appellants filed a Motion to Extend Deadlines. Under the Commonwealth's General Rules of Administrative Practice and Procedure, whenever the Board requires that an act be done within a specified time, the time fixed may for good cause be extended upon motion made before the expiration of the period originally prescribed. 1 Pa. Code § 31.15(a)(1); *see* 25 Pa. Code § 1021.17(c). Here, the Board received Appellants' Motion to Extend Deadlines before the close of business on January 12, 1998; thus, the motion was filed before the expiration of the period originally prescribed. The Board subsequently determined that there was good cause to extend the January 12, 1998 deadline to January 22, 1998. Because the Board ultimately extended Appellants' original deadline for serving answers to Permittee's written discovery requests, we deny Permittee's Motion for Sanctions.

In its Motion for Protective Order, Permittee alleges that Appellants' written discovery requests are too broad, and that preparing responses to them would be too expensive. Permittee refers specifically to Appellants' First Set of Interrogatories and Appellants' First Request for Production of Documents. (Motion for Protective Order at para. 30 and Exh. A.) However, Permittee has not attached the interrogatories to the Motion. Moreover, although Permittee *has* attached the request for production of documents to the Motion, these requests cannot be understood without the interrogatories. Indeed, each request for production of documents merely refers to one of the interrogatories and requests any documents that are to be identified in response to that particular interrogatory. (Motion for Protective Order, Exh. A.) Thus, absent the interrogatories,

the Board cannot determine whether Appellants' written discovery requests are too broad or whether preparing a response to them would be expensive. Therefore, we deny Permittee's Motion for Protective Order.

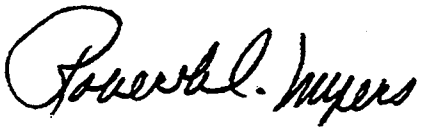
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THROOP PROPERTY OWNER'S ASSOCIATION, et al.	:	
v.	:	**EHB Docket No. 97-164-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, Permittee	:	

ORDER

AND NOW, this 5th day of February, 1998, it is ordered that Permittee's Motion for Sanctions is **denied.** It is further ordered that Permittee's Motion for Protective Order is **denied.**

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: February 5, 1998

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

GEMSTAR CORPORATION	:	
	:	
	:	
v.	:	**EHB Docket No. 97-010-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** February 10, 1998
	:	
	:	

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Board affirms the assessment of a civil penalty against a waste tire processing facility in the amount of $174,500 for offenses arising from violation of the Solid Waste Management Act and the Department's regulations and violations of conditions of the facility's residual waste permit. This is a reduction of the original $225,000 penalty assessed by the Department because the Department failed either to sustain its burden of proving some of the violations or failed to prove that penalties were a "reasonable fit" with the gravity of the offense.

BACKGROUND

This is an appeal by Gemstar Corporation (Gemstar) which was filed on January 9, 1997. Gemstar appeals from the Department of Environmental Protection's (Department) order and assessment of civil penalty dated December 11, 1996 for failure to operate Gemstar's tire processing facility in accordance to the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as*

amended, 35 P.S. §§ 6018.101-6018.1003, the regulations thereunder and Gemstar's residual waste permit. A hearing on the merits was held for two days on September 2 and September 3, 1997, before Administrative Law Judge George J. Miller. Following the hearing, the parties filed requests for findings of fact and conclusions of law and supporting legal memoranda. The record consists of the pleadings, a transcript of 411 pages and 44 exhibits.[1] After a full and complete review of the record and briefs, we make the following:

FINDINGS OF FACT

1. The Department of Environmental Protection (Department) is the executive agency charged with administering and enforcing the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001; and Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended*, 51 P.S. § 510-17, and the regulations thereunder.

2. Gemstar Corporation (Gemstar) is a Pennsylvania corporation maintaining a business address of RD 1, Coopersburg, PA 18936. (Ex. B-1, ¶1)

3. Gemstar's facility is located at 2785 Richlandtown Pike, Springfield Township, Bucks County, on tax parcel number 42-9-61. (N.T. 41; Ex. B-1 at ¶4)

4. On June 14, 1989, Gemstar obtained solid waste permit number 301184 from the Department to operate a waste tire processing facility. (Exs. B-1 at ¶ 8, C-1(a))

5. Gemstar's solid waste permit was amended on January 8, 1993. (Exs. C-1(b); B-1 at ¶9)

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[1] Gemstar's exhibits admitted into evidence are referenced as "Ex. A-__"; the Department's as "Ex. C-__." A stipulation was entered into by both parties as Ex. B-1. The notes of testimony are designated "N.T."

6. The Ski Bros., Inc. (Ski Bros.) automobile junkyard operation is immediately adjacent to Gemstar's facility and access to Gemstar is provided by an unimproved dirt road running through the junkyard. (N.T. 66; Exs. C-4(b); B-1 at ¶6)

7. A parcel of land owned by William and Janice Heichel is also adjacent to Gemstar's facility. (N.T. 44; Ex. B-1 at ¶7)

8. Gemstar's permit contains the following provisions, either explicitly in the permit or in supporting documents:

a. that the waste tire piles not exceed 50 feet by 200 feet in surface area (10,000 square feet), nor exceed 20 feet in height (N.T. 33; Ex. C-1(b), condition 1);

b. that Gemstar maintain and submit to the Department an accurate accounting of the quantity of waste tires which have been brought to the facility and processed at the facility (C-1(b), condition 10);

c. that a minimum of 50 feet be maintained between waste tire piles to allow for the unobstructed movement of emergency personnel and equipment and to minimize the risk of fire spreading from one pile to the others. (N.T. 24-25).

9. There was an existing inventory of tires on the site at the time the permit was originally issued. (N.T. 367)

10. Thomas Fausto is the vice president of Gemstar and has run the company for the last couple of years. (N.T. 356; Ex. B-1 at ¶ 3)

11. Mr. Fausto testified that he shredded tires from 1993 until 1995. (N.T. 363)

12. James A. Pagano is the Operations Supervisor for Bucks and Montgomery County for the Department. He has been with the Department for approximately 18 years and has held the

position of Operations Supervisor since August 1994. (N.T. 39-40)

13. Mr. Fausto testified that he met with Mr. Pagano in 1994 and found out for the first time that there was a problem with the height, width and length of the tire piles. He explained to Mr. Pagano that he had what he believed to be a Form 37 issued by "Mr. Dinesh" which granted him permission to operate his facility even though the tire piles were not in conformance with the requirements of his permit. (N.T. 364)

14. Mr. Fausto believed that his permit allowed 744,000 tires on the property. He derived this because his permit allowed 600,000 in whole tires and 144,000 in stored shredded tires. (N.T. 405)

15. Mr. Fausto testified that at one meeting Mr. Pagano suggested that he stop taking in tires as a show of good faith. (N.T. 406-407)

16. He also testified that it was never his intention to remove tires from the premises without processing them further. He considered the shredding of tires as one part of a multi-phase operation and felt that he could not make money by simply shredding tires and removing them from the property. Instead, tires would be moved off-site once they were processed after shredding. (N.T. 388; 402-404)

17. As of December 11, 1996, the date of the administrative order, Gemstar had applied for, but had not received necessary permits from the Department to further process the shredded tires. (See N.T. 404)

18. Gemstar continued to bring additional tires to the facility from 1993 until approximately November or December of 1995. (N.T. 55-56)

19. Mr. Pagano visited the site in November, 1994.

a. He observed that the tires in the front portion of the property were piled irregularly. (N.T. 48-49)

b. He guessed that the height of the piles was anywhere from 20-30 feet. (N.T. 58-59)

c. The fire lanes for the most part were 10-15 feet wide. (N.T. 48-49)

20. He did not measure the height and width of the tire pile because it was difficult to measure the height due to the mounded shape; he could not climb up onto the piles. (N.T. 58-59)

21. The inspection report dated November 9, 1994, does not specifically note a violation for the dimensions of the tire piles, however, the narrative portion describes the size of the tire piles and the report notes a violation of Section 297.201(b) of the regulations. (N.T. 289)

22. The inspection report stated that the "piles of tires do not appear to be in the proper configuration of 200 ft. x 50 ft. x 20 ft . . . The piles are arranged in irregular shapes and appear to be greater than 20 feet high in some locations and much larger than 200 ft. x 50 ft." (Ex. C-6o at 5)

23. Christopher Smolar is a Solid Waste Specialist for the Department. He inspects waste facilities in response to citizens' complaints. He was first assigned to inspect Gemstar's facility sometime in the fall of 1995. (N.T. 104-105)

24. He inspected the site on several occasions, including October 16, 1995; January 4, 1996; March 14, 1996; April 5, 1996; June 20, 1996; July 24, 1996; August 30, 1996. (See Exs. C-6a-C-6g)

25. He testified that the tire piles at Gemstar's facility have always been too big as long as he has been inspecting. (N.T. 137)

26. There were no significant changes in the amount of tires during the time he inspected

Gemstar's site. The tire piles were not really moved around. (N.T. 176-177)

27. Mr. Smolar noted that at some point two piles totaling 25,000 tires were added. (N.T. 176)

28. The new tire piles were partly on the Ski Bros. property. From what he had been told and from what he had seen, these were tires that were generated from the junkyard's scrapping of cars. (N.T. 219)

29. The October 16, 1995 inspection report mentions a 15 foot figure regarding the height but does not say what the actual height of the tire pile is. (N.T. 309-310)

30. When Mr. Smolar inspected the site in January 1996, there were tires next to Gemstar's property within the junkyard. Mr. Fausto told Mr. Smolar that these tires came from Ski Bros. and that Gemstar was responsible for all the tires including the ones generated by Ski Bros. (N.T. 225)

31. However, the subsequent inspection report dated March 14, 1996, notes that these tires were the property of Ski Bros. (Ex. C-6c)

32. Mr. Smolar testified that he did not observe tires in the woods when he visited the site as a trainee with Mr. Savage in 1995. (N.T. 221-223)

33. The first time he noticed tires in the woods was the March, 1996 inspection. (N.T. 221-223)

34. Nancy Roncetti has been the Solid Waste Operations Manager in the Waste Management Program of the Department since 1993. Her responsibilities include overseeing the Department's compliance and monitoring programs relating to facilities regulated under the Solid Waste Management Act. She reviewed the worksheet used to calculate the civil penalty. (N.T. 233-

234; 248)

35. A worksheet was used to calculate the amount of civil penalty to be assessed against Gemstar. The information which underlies the civil penalty worksheet comes from the record that exists for the violations that were documented at the site, including inspection reports and notices of violation. (N.T. 249; 278-279)

36. A penalty was calculated for the days when a violation was observed but not for the days in between. (N.T. 254)

37. The Department calculated penalties for all of the violations based solely upon the severity of the violation and the degree of wilfulness.

a. The worksheet provides ranges of penalty for severity as follows: $1,000 - $5,000 for low; $5,000 - $12,000 for moderate; and $12,500 - $25,000 for severe.

b. The range of penalties for wilfulness is as follows: $0 for accidental; $500 - $5,000 for negligent; $5,000 - $12,500 for reckless; and $12,500 - $25,000 for wilful.

c. To calculate the amount of penalty for each violation an amount was charged for the severity of the violation and was added to an amount charged for the degree of wilfulness.

(Ex. A-6; N.T. 248-51)

38. The civil penalty worksheet assessed a penalty of $64,000 for violation of 25 Pa. Code § 297.201, on September 28, 1993; November 9, 1994; October 16, 1995; January 4, 1996; March 14, 1996; April 5, 1996; June 20, 1996; July 24, 1996; and August 30, 1996. These violations

specifically related to the dimensions of the tire piles. (Ex. A-6)

a. This violation was deemed to have a low degree of severity. The Department assessed $1,000 for one day of violation on September 28, 1993, $2,000 for one day of violation on November 9, 1994, and $3,000 for each of seven days of violation found on each of the subsequent inspections. (Ex. A-6)

b. The Department found the degree of wilfulness for violations on September 28, 1993, November 9, 1994 and October 16, 1995 to be negligent conduct and charged an additional $500, $1,000 and $1,500 respectively.

c. Violations for inspections dated January 4, 1996, March 14, 1996, April 5, 1996, June 20, 1996 and July 24, 1996, and August 30, 1996, were for reckless conduct and $5,000, $5,500, $6,000, $6,500, $7,000 and $7,500 in penalties were added to the amounts calculated for severity.

(Ex. A-6)

39. Ms. Roncetti testified that she was not sure what the basis was for the penalty for the September 28, 1993 violation. (N.T. 283)

40. Inspection reports dated October 16, 1995, January 4, 1996, April 5, 1996 and July 24, 1996 all note a requirement of 2500 square feet and 15 feet in height for the tire pile dimensions. This dimension is from a Department guidance document. The correct dimension should have coincided with what is in the permit. (N.T. 295; 304; 312; 314)

41. Ms. Roncetti testified that she does not know if the inspector was thinking of the guideline or permit conditions when he checked off a violation for tire dimensions on the inspection report. (N.T. 313)

42. Ms. Roncetti testified that if the narrative of an inspection report generally describes tires off the permitted area then dimensioning of the tire piles is exceeded. Even though the inspector used the wrong guideline as far as the area occupied by the tire piles, there is still a violation because they are more than 20 feet high and not in discrete piles (N.T. 307; 316-317)

43. In the October 16, 1995 inspection report, the word dimension is not specifically noted but there are references to the number of tires in piles and that tires are stored outside the permitted area. (N.T. 295)

44. The January 4, 1996, April 5, 1996 and July 24, 1996 inspection reports do not mention the dimension of the piles but do discuss the condition of the tire piles. (N.T. 304)

45. The August 30, 1996 inspection report notes that Condition 1 of Gemstar's permit limits the storage of piles of tires to 10,000 square feet and a height of 20 feet. (N.T. 316)

46. There is no fence or any other type of marker that indicates where the boundary of the facility is. (N.T. 133)

47. The Department assessed civil penalties for seven violations of 25 Pa. Code § 297.212(b) which required Gemstar to construct and maintain a fence around the perimeter of the site. These violations occurred on October 16, 1995; January 4, 1996; March 14, 1996; April 5, 1996; June 20, 1996; July 24, 1996; and August 30, 1996.

a. The Department found the violation to be of low severity and charged $3,000 for each violation.

b. In addition, the Department found Gemstar's conduct to be reckless and charged $5,000 for the first violation and added $500 for each violation thereafter.

c. The total penalty for these violations totaled $66,500.

(Ex. A-6)

48. The violation for failure to construct and maintain a fence was considered reckless rather than negligent because it was clearly indicated in the regulations, and Gemstar should have known from the time of the issuance of the permit that a fence was necessary. (N.T. 318)

49. Gemstar was charged a civil penalty for two violations for failing to maintain proper records on November 9, 1994 and August 30, 1996. (N.T. 134; Ex. A-6; Order and Civil Penalty Assessment ¶ 12(c))

a. The first violation was of low severity and negligent conduct, and the penalty calculated was $1,500.

b. The second violation was low severity and reckless conduct, and the penalty calculated was $11,000.

(Ex. A-6)

50. In 1994, James Pagano observed that the fire lanes were 10 to 15 feet wide. (N.T. 48-49)

51. In 1996, the fire lanes were still between 10 to 15 feet wide. (N.T. 52-53) Mr. Pagano believed that the fire lanes may have shrunk a foot or so even though he never measured them. (N.T. 74-75)

52. The Department's regulations require adequate space "to allow the unobstructed movement of emergency personnel and equipment" in the operating area of a facility. Mr. Smolar also testified that the fire lanes are supposed to prevent the spread of fire from one tire pile to another. (25 Pa. Code § 297.252(d); N.T. 136)

53. Mr. Fausto testified that he burrowed lanes in the existing tire piles and made them as wide as he could. (N.T. 267-268)

54. He had what he believed to be a Form 37 in which the Department appeared to approve the fire lanes by noting that all of the Department's concerns which had been outlined in an August 6, 1990 letter had been addressed. (N.T. 367-68; Ex. A-7)

55. A Form 37 is a document which must be submitted by the permittee after a facility has been constructed which certifies that the facility has been built in accordance with what was in the permit application. Thereafter an inspection is done to confirm that the work was completed. (N.T. 35-36)

56. Specifically, Mr. Dinesh Rajkotia noted on a report dated October 22, 1990, that "[T]he area field specialist and myself visited the Gemstar Company and the deficiencies outlined in our Aug. 6, 1990 letter has [sic] been corrected. The company can now operate the processing equipment." (Ex. A-7 at 3)

57. Mr. Fausto explained this to members of the Department during the November 9, 1994 inspection. (N.T. 383-384)

58. Anthony Riccardi is an expert fire inspector. He is currently the fire marshal in Lower Salford Township. He has been a firefighter for 48 years. (N.T. 343-345)

59. He testified that he has been to Gemstar's site as part of an annual inspection and was also there a couple of times at the behest of Mr. Fausto. In his opinion, the width of the fire lanes was adequate. (N.T. 347; 348-350; see also, Ex. C-6o at p. 5)

60. He explained that it would not be prudent to send men or equipment into the midst of a tire fire because of the intense heat and denseness of the smoke. (N.T. 348; 352-54)

61. Mr. Smolar's March 14, 1996 inspection report states that the fire lanes are adequate. (Ex. C-6c)

62. The Department charged Gemstar with four civil penalties for failing to maintain adequate fire lanes on April 5, 1996; June 20, 1996; July 24, 1996; and August 30, 1996.

a. Each violation was of low severity and $5,000 per day was charged.

b. The first violation on April 5, 1996 was found to be negligent and $1,000 was calculated and added to the total penalty for the violation. The subsequent three violations were found to be reckless and the Department added $5,500, $6,000 and $6,500 respectively.

(Ex. A-6)

63. Gemstar was assessed two civil penalties for violating 25 Pa. Code § 297.219(a) and 25 Pa. Code § 297.219(b), relating to the control of mosquitos at the site on August 30, 1996. (Ex. A-6)

64. Mr. Pagano testified that while there were mosquitos in the woods, the mosquitos in the permitted area were not bad. (N.T. 53)

65. The mosquitos in the tire pile in the woods became evident when the pile was disturbed. (N.T. 135-36)

66. For severity, the Department charged $4,000 for each violation.

67. Gemstar was found to be reckless and charged an additional $6,000 for the violation of § 297.219(b), because given the number of tires at the site it would be virtually impossible to adequately control the mosquitos. (N.T. 323)

68. The Department also assessed an additional $4,000 for negligence related to causing

or allowing the attraction, harborage or breeding of mosquitos, a violation of 25 Pa. Code § 297.219(a). (N.T. 322; Ex. A-6)

69. Dr. Stanley G. Green is an entomologist with cooperative extension at Penn State University. (N.T. 178; 182) He is an expert in, among other things, the breeding habits of mosquitos. He visited the site approximately three times at the request of Art Carlson of the Bucks County Health Department. His purpose was to determine if there were mosquitos breeding on the site and what mosquitos were breeding on the site. (N.T. 187)

70. After his initial investigation, he determined that none of the species of mosquitos on the site travel more than a quarter of a mile from the site. People were complaining that they were being bitten about a mile and a half from the site. Further, two of the species he found at the site are not human feeders. (N.T. 189-90)

71. He summarized his findings in a report dated May 26, 1995, and he recommended some chemicals for Mr. Fausto to use to control mosquitos at the site. Mr. Fausto was already doing some control at the time. (Ex. A-4; N.T. 190)

72. The second visit was at the request of Mr. Fausto. He requested that he see what mosquitos were breeding and if there were any changes. In the June 19, 1996 report, Dr. Green noted that he found a rockpool mosquito, a type of mosquito that prefers blood from birds, and a tree hole mosquito which breeds in tree holes and artificial containers including tires. Tree hole mosquitos will feed on human blood. (N.T. 191-92)

73. He requested Mr. Carlson and residents of the area to provide mosquito samples to determine what types of mosquitos were biting residents. He never received any samples so he was unable to actually pinpoint what mosquitos were biting whom. (N.T. 193-94)

74. There are other places in the vicinity of Gemstar that might harbor and breed mosquitos. (N.T. 194-95)

75. Dr. Green also wrote a report on October 2, 1996. He cited a visit when he was there with a supplier of chemical. He again requested a sample of mosquitos that were bothering people. (N.T. 196-97; Ex. A-5)

76. In his expert opinion, the maximum flying distance of the mosquito that prefers humans is only about half a mile. He only spoke to a couple of residents who were bothered by mosquitos. One lived between a mile and a mile and a half was not bothered. One who was bothered lived a mile and a half from the site. (N.T. 200)

77. Mr. Pagano suggested that Mr. Fausto create an access road to help control the mosquitos in the woods. This access road was constructed. (N.T. 66)

78. The Department was aware of the information supplied by Dr. Green and was aware that Mr. Fausto had attempted to spray the area to control mosquitos, yet because Gemstar failed to comply with the permit and remove tires from the site, the conduct was nevertheless considered reckless. (N.T. 323-325)

79. The condition of the access road was poor and remained virtually unchanged from November 1994 until August 1996. (N.T. 52, 54-55)

80. Mr. Smolar testified that during his June 1996 inspection imbedded metal in the road had been cleaned up. However, there was some deep erosion in the road from the spring rain. (N.T. 124-125)

81. During the July 1996 inspection, the erosion in the road was not fixed. (N.T. 130-131)

82. The Department assessed civil penalties for eight violations of 25 Pa. Code 297.213(d) for failure to maintain the access roads on November 9, 1994; October 16, 1995; January 4, 1996; March 14, 1996; April 5, 1996; June 20, 1996; July 24, 1996; and August 30, 1996.

a. These violations were of low severity and the Department calculated $1,000 for each day of violation.

b. The Department found Gemstar's conduct to be negligent for the November, 1994, October, 1995 and January, 1996 offenses. To the amount calculated for severity the Department added $500 for the first offense and added $500 for each day of violation thereafter.

c. The Department found Gemstar's conduct to be reckless for the March 1996, April 1996, June 1996, July 1996, and August 1996 inspections. In addition to the amount charged for the severity of the violation, the Department calculated $5,000 for the first reckless offense and added $500 for each day of violation thereafter.

d. The total amount assessed was $41,000.

83. Mr. Smolar testified that based on the site itself there is no real way he could tell the boundaries of the site because there were no fences or markers. He learned about the actual boundaries in the summer of 1996 when he looked at aerial photographs and tax maps. (N.T. 108)

84. Gemstar was charged a civil penalty for two offenses relating to its failure to mark the perimeter of the site.

a. The first offense was for November 9, 1994. The penalty was $1,000 for low severity and an additional $2,000 because the conduct was negligent.

b. The second penalty for August 30, 1996 was also low severity and the Department charged $1,000, but the conduct was found to be reckless and the Department added $5,000 for this aspect of the penalty.

c. The total penalty noted on the worksheet for failing to mark the perimeter of the site was $13,500. However, when the penalties calculated are added together, the amount is $9,000. (N.T. 259, Ex. A-6)

85. Gemstar was also assessed a penalty for failure to prevent erosion on the site. (N.T. 261; Ex. A-6)

86. The inspection report for August 30, 1996, notes that there was a large erosion gully southwest of the tire shredder that had not been repaired since it developed in the summer. Additionally there was a drainage ditch across the access road which was causing erosion. (Ex. C-6g)

87. The Department assessed $5,000 because the violation was of low severity and added $10,000 for reckless conduct. (Ex. A-6)

88. Gemstar was also assessed a penalty for six offenses relating to its failure to use an alternate permitted waste disposal facility during temporary shutdown. These offenses were noted on the inspections which occurred on January 4, 1996; March 14, 1996; April 5, 1996; June 20, 1996; July 24, 1996; and August 30, 1996. (N.T. 261)

89. Gemstar had indicated back-up facilities that it would use in the event of temporary shutdown in its permit application. (N.T. 262)

90. Nancy Roncetti testified that the premise of this penalty was the Department's position that Gemstar had exceeded its storage capacity. (N.T. 262)

91. An estimate of the number of tires on the Gemstar site was performed in the October

16, 1995 inspection report.

a. The report estimated that there were 540,000 tires on the site which included 75,000 chipped tires, 450,000 whole tires, and 15,000 baled tires.

b. The report stated the inspector's belief that Gemstar is only permitted to store 144,000 tires in total

(Ex. C-6a)

92. Gemstar's permit provides that "[t]he maximum amount of processed tires stored on the site is not be [sic] exceed 144,000 (one week's inventory). (Ex. C-1(b), Condition 9)

93. Mr. Smolar performed a tire count on November 5, 1996. He estimated that there were 696,345 tires on the Gemstar, Ski Brothers, and Heichel properties combined. There were 17,176 tires on the Ski Brother's property, 124,471 on the Heichel property, and the remaining tires were on the Gemstar property. (N.T. 173-74; Ex. C-5)

94. The procedure used to estimate the number of tires can be off by 100,000 tires. (N.T. 302)

95. The offenses related to Gemstar's failure to utilize alternate waste disposal were found to be of low severity and the Department calculated $4,000 for each day of violation. The Department also added amounts for the wilfulness of the violations.

a. Gemstar's conduct was reckless because it was aware of what should have been done. (N.T. 262)

b. The Department added $5,000 for the first day of violation and added $500 to the wilfulness portion of the penalty for each day of violation thereafter. (Ex. A-6)

c. The total penalty for these violations was $61,500. (Ex. A-6)

96. Although the sum of the penalties calculated on the Department's worksheet totaled $331,000 the Department assessed a total penalty of $225,000 to be consistent with other penalties assessed under similar circumstances. (N.T. 252-253; Ex. A-6)

DISCUSSION

In an appeal from a civil penalty assessment, the Department bears the burden of proof. 25 Pa. Code § 1021.101(b). The assessment of a civil penalty is an exercise of the Department's discretion. *Goetz v. DER*, 1993 EHB 1401, *affirmed,* 2612 C.D. 1993 (Pa. Cmwlth. filed October 17, 1994). Thus it must prove by a preponderance of the evidence that (1) Gemstar violated the applicable statutes and regulations, and (2) the amount of the penalty assessed for the violations reflects an appropriate exercise of discretion. *Shay v. DEP*, 1996 EHB 1583, *affirmed*, 175 C.D. 1997 (Pa. Cmwlth. filed November 17, 1997). We will not consider whether we would assess the same penalty in the same amount as the Department did, but will only determine whether there is a "reasonable fit" between each violation and the amount of penalty assessed. Only where we find that the Department abused its discretion will we substitute our own to modify an assessment. *Id.*

The authority to assess civil penalties for violations of the Solid Waste Management Act is provided by Section 605, which provides that the Department may assess a penalty of up to $25,000 per offense. Section 605 states that:

> In determining the amount of the penalty the department shall consider the willfulness of the violation, damage to air, water, land or other natural resources of the Commonwealth or their uses, cost of restoration and abatement, savings resulting to the person in consequence of such violation, and other relevant factors.

35 P.S. § 6018.605. The section further states that "[e]ach violation for each separate day and each

violation of any provision of this act, any rule or regulation under this act, any order of the department, or any term or condition of a permit shall constitute a separate and distinct offense under this section." *Id.*

The order which assessed the civil penalty detailed the violations of the Solid Waste Management Act committed by Gemstar, but assessed the $225,000 penalty in a single paragraph without noting what portion of the penalty was attributable to which violation. (Order and Civil Penalty Assessment at ¶¶ 12(a)-(k)(violations); ¶ K(penalty assessment)). Thus our analysis of the civil penalties must be guided by the Department's civil penalty worksheet which was used by the compliance officer to calculate the amount of the penalty. (Exhibit A-6) We will deal with each violation in order.

Tire Pile "Dimensions"

Gemstar's permit required the tire piles at the site to be arranged in piles which do not exceed 10,000 square feet horizontally or a height of 20 feet. (Finding of Fact No. 8) The Department charges that the tire piles at the site exceeded these dimensions on nine inspection dates. Joseph Pagano, an Operations Supervisor for the Department, visited the site in November, 1994. He testified that he estimated that the tire piles were anywhere from 20 to 30 feet in height and were piled irregularly. (Finding of Fact No. 19) The inspection report stated that the "piles of tires do not appear to be in the proper configuration of 200 ft. x 50 ft. x 20 ft . . . The piles are arranged in irregular shapes and appear to be greater than 20 feet high in some locations and much larger than 200 ft. x 50 ft." (Finding of Fact No. 22)

Christopher Smolar is a Solid Waste Specialist responsible for inspecting the Gemstar site since October, 1995. He testified that on each occasion that he inspected the site, the tire piles were

too big. (Finding of Fact No. 25) There were no significant changes in the amount of tires during the time he inspected Gemstar's site. The tire piles were not really moved around. Mr. Smolar noted that at some point two piles totaling 25,000 tires were added. The new tire piles were partly on the Ski Bros. property. From what he had been told and from what he had seen, these were tires that were generated from the junkyard scrapping of cars. (Finding of Fact Nos. 26-31)

The Department assessed nine penalties for the failure to maintain the tire piles in the proper configuration. These violations arose from inspections which occurred on September 28, 1993, November 9, 1994, October 16, 1995, January 4, 1996, March 14, 1996, April 5, 1996, June 20, 1996, July 24, 1996, and August 30, 1996. (Finding of Fact No. 38) The Department calculated the penalty based on two elements of Section 605 of the Solid Waste Management Act: the severity of the violation and the degree of willfulness. The calculation utilized $1,000 for low degree of severity in 1993, $2,000 for low severity in 1994, and $3,000 for low severity for each of the six days of violation thereafter. Additionally, the Department added an amount for negligence for the first three days of violation which began at $500 and increased in increments of $500 for each day of violation. Beginning with the January 1996 violation, a premium was added for recklessness in the amount of $5,000 and increasing in increments of $500 for each day of violation. The total calculated for the nine days of violation related to the size of the tire piles was $64,000. (Finding of Fact No. 38)[2]

Unfortunately, there was no evidence admitted at the hearing to support the penalty arising from the September 28, 1993 inspection. The inspection report was not admitted into evidence, and

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[2] The compliance specialist who calculated this penalty totaled the penalty in the amount of $64,000. When the violations are actually added together, the total is $64,500.

Nancy Roncetti, who is responsible for overseeing the Department's compliance and monitoring programs in the Solid Waste program, testified that she was not sure what the basis was for the penalty. (Finding of Fact No. 39)[3] Chris Smolar was not yet employed by the Department at that time and Joseph Pagano did not testify about visiting the site in September 1993. Because the Department failed to sustain its burden of proving the fact of a violation on September 28, 1993, we will reduce the penalty assessment by $1,500, the amount calculated for that day of violation.

We find that the Department sustained its burden of proving the violations for the other days in the civil penalty calculation. Gemstar argues that only two of the inspection reports dated November 9, 1994 and August 30, 1996, noted the correct tire pile dimension of 10,000 square feet horizontally and 20 feet in height. (Finding of Fact No. 45) The remaining reports state that the tire piles are a concern and should not exceed 2500 square feet horizontally and 15 feet in height. (Finding of Fact No. 40) However, Chris Smolar testified that during the time he had been inspecting the site the size of the tire piles had remained virtually unchanged; if anything there were more tires present on the site. (Finding of Fact Nos. 25, 26) If the tire piles were too large in November 1994 and too large in August 1996 and remained virtually unchanged throughout that period, it is reasonable to assume that the violation existed between those times even though the incorrect dimension was noted on the inspection reports.

We also find that the amount calculated for the severity portion of the civil penalty calculation is a reasonable fit with the seriousness of the violation. However, the Department has provided no basis for basing the penalty for November 1994 and October 1996 on negligence, but

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[3] The compliance specialist who actually calculated the civil penalty on the worksheet is no longer employed by the Department and was not called as a witness at hearing. (N.T. 252)

significantly raising the amount of the penalty thereafter because the violations were transformed into reckless violations of the law.[4] As Mr. Smolar noted, conditions at the site remained virtually unchanged. Nancy Roncetti did not provide any specific rationale for this change in position. The Department does not address this issue in either of its briefs in this matter. While we agree that increasing the severity of penalties for continued violations serves the purpose of discouraging recidivism, we also believe that a nearly 80% jump in a penalty assessment goes beyond serving this purpose and must somehow be justified. *See Empire Sanitary Landfill, Inc. v. DER*, 1994 EHB 30, 83, *rev'd on other grounds*, 514 C.D. 1994 (Pa. Cmwlth. filed May 19, 1995)(reducing a civil penalty where the Department failed to adduce sufficient evidence to support tripling a penalty for a second violation of the Solid Waste Management Act). While it is reasonable to increase the amount of penalty, the penalty increases here should stay within the negligence range of $500 - $5,000. We will substitute our discretion and reduce the portion of the civil penalty attributed to the wilfulness of the violation as follows: for January 4, 1996 we will reduce the amount from $5,000 to $2,000; March 14, 1996, from $5,500 to $2,500; April 5, 1996, from $6,000 to $3,000; June 20,

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[4] We have defined the various levels of culpability in the context of civil penalty assessments:

> An intentional or deliberate violation of law constitutes the highest degree of wilfulness and is characterized by a conscious choice on the part of the violator to engage in certain conduct with knowledge that a violation will result. Recklessness is demonstrated by a conscious disregard of the fact that one's conduct may result in a violation of the law. Negligent conduct is conduct which results in a violation which reasonably could have been foreseen and prevented through the exercise of reasonable care.

Phillips v. DER, 1994 EHB 1266, *affirmed*, 2651 C.D. 1994 (filed June 16, 1995 Pa. Cmwlth.)(quoting *Southwest Equipment Rental, Inc. v. DER*, 1986 EHB 465, 475).

1996 from $6,500 to $3,500; July 24, 1996 from $7,000 to $4,000; and August 30, 1996 from $7,500 to $4,500.

In sum, the civil penalty assessed for failure to maintain the tire piles in proper configuration is reduced to $44,500

Failure to Construct and Maintain a Fence or Other Suitable Barrier

There is no fence or any other type of marker that indicates the boundary of the facility. (Finding of Fact No. 46) The Department assessed civil penalties for seven violations of 25 Pa. Code § 297.212(b) which required Gemstar to construct and maintain a fence around the perimeter of the site. (Finding of Fact No. 47) The Department found the violation to be of low severity and charged $3,000 for each violation. The Department found Gemstar's conduct to be reckless and charged between $5,000 and $8,000 for this aspect of the penalty. The total penalty for these violations totaled $66,500. (Finding of Fact No. 47) The violation for failure to construct and maintain a fence was considered reckless rather than negligent because it was clearly indicated in the regulations and Gemstar should have known from the onset of the issuance of the permit that a fence was necessary. (Finding of Fact No. 48)

Gemstar does not contest the fact of the violation, but argues that the penalty is unreasonable. Specifically, Gemstar argues that (1) a fence is unnecessary because Gemstar is located within the property of the junkyard; (2) the topography of the site and the surrounding scrap yard provide a suitable barrier; and (3) there has only been one instance of unauthorized access.

The fact that Gemstar is surrounded by another property does not relieve it of the responsibility for providing a suitable barrier to prevent unauthorized access. The junkyard is not part of the permitted facility. Nor does the surrounding topography provide an adequate barrier

against intruders. *See Tinicum Township v. DEP*, EHB Docket 95-266-MG (consolidated) (Adjudication issued December 8, 1997).

While there is no question that Gemstar violated 25 Pa. Code § 297.212(b) by failing to erect a fence around the Gemstar property, we can not say that there is a "reasonable fit" between the penalty of $66,500 and the gravity of these violations, in comparison to what the Department assessed for, in our view, the more serious violation which relates to the configuration of the tire piles. Since there is no evidence that there has been harm to the environment or a serious threat from intruders, we will reduce the severity portion of the penalty from $3,000 to $1,000 per offense. Gemstar admits in its brief that Gemstar's conduct was reckless, but contends that this aspect of the penalty should remain consistent at $5,000 for each violation. (Gemstar Brief at 7) We agree and reduce the penalty accordingly. The total penalty for seven offenses related to Gemstar's failure to construct and maintain a fence is reduced to $42,000.[5]

Recordkeeping

Gemstar was charged a civil penalty for two violations for failing to maintain proper records accounting for the quantity of waste tires that have been brought to the facility. The first violation was $1,000 of low severity and $500 for negligent conduct. The second violation was $3,000 for severity and $8,000 for reckless conduct. The total penalty for the two violations was $12,500. (Finding of Fact No. 49)

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[5] Gemstar also argues that the penalty tallies were "run up" and that the Department increased the frequency of inspections of the site. This argument is irrelevant as it is well within the Department's discretion to inspect a facility at whatever interval it chooses. Moreover, simply because the Department has been indulgent in enforcement in the past does not prevent it from subsequently performing its duty to enforce the law. *Lackawanna Refuse Removal, Inc. v. Department of Environmental Resources*, 442 A.2d 423 (Pa. Cmwlth. 1982).

Gemstar challenges the reasonableness of the penalty assessed for these violations. Specifically it argues that there is no basis for increasing the penalty from $1,500 for the first violation to $11,000 for the second violation. The Department does not address each violation in its brief, but argues that the total penalty is justified because "[w]ithout such records, the DEP is limited in its ability to determine compliance with tire count limitation and with the ratios for processing and importing tires." (Department Post-Hearing Brief at 15-16) Yet none of the witnesses provided testimony that the second violation was so much more serious than the first violation that a 600% increase in the penalty for one violation over the other was justified. Although some new tires had been added to the site between November 1994 and August 1996, the number of tires at the site remained virtually unchanged. (Finding of Fact Nos. 26, 27) Therefore the difficulty created by Gemstar's failure to maintain its records was not intensified a great deal between 1994 and 1996.

However, some penalty for the August 1996 violation is fitting. Following the Department's logic that the records are important in order to track the number of tires present at the site, and in consideration that a few additional tires were added to the site which should have been tracked, it is appropriate to assess a $3,000 penalty for the failure to keep proper records in August 1996. The Department's $1,500 penalty for the violation which occurred in November, 1994 is reasonable. In sum, the total penalty for failing to keep adequate records of tires at the site is $4,500.

Fire Lanes

The next set of penalties are based on inspections conducted on April 5, June 20, July 24 and August 30, 1996, when the Department determined that there was not adequate space between the tire piles to allow for "unobstructed movement of emergency personnel and equipment" in violation of 25 Pa. Code § 297.252(d). (Order and Civil Penalty Assessment ¶ 12(e)). Gemstar's permit

requires the lanes between the piles to be at least 50 feet wide. (Finding of Fact No. 8 (e)) Mr. Pagano testified that in August 1996, the fire lanes were narrow - between 10 to 15 feet wide. (Finding of Fact No. 51)

Anthony Riccardi, an expert fire inspector, testified that in his opinion, the widths of the fire lanes was adequate. (Finding of Fact No. 59) He explained that it would not be prudent to send men or equipment into the midst of a tire fire because of the intense heat and denseness of the smoke. (Finding of Fact No. 60)

Gemstar argues that this penalty should be voided because (1) Mr. Fausto was led to believe by the Department that the fire lanes were adequate, and (2) the fire lanes are in fact adequate according to an expert firefighter.

Mr. Fausto testified that he burrowed lanes in the existing tire piles and made them as wide as he could. (Finding of Fact No. 53) He believed that the Department approved the fire lanes by noting that all of the Department's concerns which had been outlined in an August 6, 1990 letter had been addressed. (Finding of Fact No. 56) Specifically, Mr. Dinesh Rajkotia noted on a report dated October 22, 1990, that "[T]he area field specialist and myself visited the Gemstar Company and the deficiencies outlined in our Aug. 6, 1990 letter has [sic] been corrected. The company can now operate the processing equipment." (Finding of Fact No. 56) Mr. Fausto explained this to members of the Department during the November 9th inspection. (Finding of Fact No. 57) Further, Mr. Smolar's March 14, 1996, inspection report states that the fire lanes are adequate. (Finding of Fact No. 61)

It is clear that the condition of the fire lanes at the Gemstar site was a violation of the Solid Waste Management Act and Gemstar's permit. Section 297.252(d) of the Department's regulations

require that "[a]dequate space shall be maintained to allow the unobstructed movement of emergency personnel and equipment to an operating area of the facility." 25 Pa. Code § 297.252(d). The fact that a fire marshall would not send a fire truck into a facility using fire lanes is irrelevant. The proper place to challenge that aspect of the regulation is at promulgation in the Environmental Quality Board. Further, it is not contested that Gemstar's permit requires lanes of 50 feet between tire piles. The fact that the Department appeared to allow Gemstar to operate while out of compliance with its permit is irrelevant in this case and does not prevent the Department from subsequently enforcing the provisions of the permit. *Lackawanna Refuse Removal, Inc. v. Department of Environmental Resources*, 442 A.2d 423 (Pa. Cmwlth. 1982). The inspection report for each day of violation noted either that there were not enough fire lanes, that the fire lanes were inadequate, and/or the fire lanes were not kept clear of tires. (Exs. C-6d; C-6e; C-6f; C-6g; *see also* N.T. 231) Thus the Department sustained its burden of proving the violations relating to the fire lanes.

The Department charged Gemstar with four civil penalties, totaling $39,000 for failing to maintain adequate fire lanes. Each violation was in the range of low severity and the Department calculated $5,000 per violation. Added to the $5,000 was $1,000 for negligent conduct for the first violation. The subsequent three violations on June 1996, July 1996 and August 1996 were found to be reckless, and the Department added $5,500, $6,000 and $6,500, respectively. (Finding of Fact No. 62) While we find that the Department's charge for the severity of the violation is reasonable, there is no support in the record for finding Gemstar to be reckless rather than negligent. There is nothing in the record to indicate a change in circumstances from April 1996 to June 1996 which would indicate that Gemstar's conduct became reckless. Mr. Fausto believed that he had permission

from the Department to operate with the narrow fire lanes and also believed that the lanes were adequate as far as the fire authorities were concerned. Therefore we will reduce the culpability aspect of the penalties for June 1996, July 1996 and August 1996 to $1,500, $2,000 and $2,500 respectively. The total penalty for violations resulting from inadequate fire lanes is reduced to $27,000.

Control of Mosquitos

Gemstar was assessed two civil penalties for violating 25 Pa. Code § 297.219(a) and 25 Pa. Code § 297.219(b), relating to the control of mosquitos at the site on August 30, 1996. (Finding of Fact No. 63) For severity, the Department charged $4,000 for each violation. Gemstar was found to be reckless and charged an additional $6,000 for the violation of § 297.219(b), because given the number of tires at the site it would be virtually impossible to adequately control the mosquitos. (Finding of Fact No. 67) The Department also assessed $4,000 for negligence related to causing or allowing the attraction, harborage or breeding of mosquitos, a violation of 25 Pa. Code § 297.219(a). (Finding of Fact No. 68) The total penalty for both of these violations was $18,000.

During the August 30, 1996 inspection Mr. Pagano testified that mosquitos in the permitted area were "not bad." (Finding of Fact No. 64) However, there were mosquitos in tire piles that were located in the woods on the adjacent property. Mr. Smolar testified that the mosquitos in the tire pile in the woods became evident when the pile was disturbed. (Finding of Fact No. 65)

Gemstar argues that it took all reasonable measures to control mosquitos at the site and that the Department failed to provide sufficient evidence that the mosquitos which were present constituted a nuisance. Specifically, Gemstar consistently sprayed the tire piles and had built an access road at the suggestion of the Department to help control mosquitos in the wooded area. Also,

Gemstar presented the testimony of Dr. Stanley Green, an urban entomologist. Dr. Green testified that the types of mosquitos which were breeding at the site typically do not travel more than a quarter of a mile. (Finding of Fact No. 69) The complainants that he was aware of lived a mile or more away from the site. Further, there were other places in the area which harbor mosquitos. (Finding of Fact No. 74) Although Dr. Green requested the Department of Health and residents who were complaining about mosquitos to provide samples of mosquitos which were alleged to be troublesome, he never received any samples. (Finding of Fact No. 73)

We find that there is insufficient evidence to support both violations for which the Department charged penalties. Section 297.219 provides that:

> (a) The operator may not cause or allow the attraction, harborage or breeding of vectors.
>
> (b) The operator shall prevent and eliminate conditions *not otherwise prohibited* by this subchapter that are harmful to the environmental or public health, or which create safety hazards, odors, dust, noise, unsightliness and other public nuisances.

25 Pa. Code § 297.219 (emphasis added). We believe that the evidence supports a civil penalty for violation of 25 Pa. Code § 297.219(a). Tires for which Gemstar had taken responsibility were providing habitat for mosquitos, a common vector. Gemstar did not present evidence that it was impossible to control mosquitos in the area and certainly it could have removed these tires to remove the breeding ground for the insects. We find the penalty for this violation is a reasonable fit and we sustain it.

However, we do not believe that the Department can also assess a penalty for subsection (b) of the regulation. There was no evidence at hearing that there was conduct by Gemstar that was "not otherwise prohibited" by solid waste regulations. Allowing mosquito habitat to exist was already

prohibited by subsection (a). We have held that where one section of the statute is a catchall provision that covers violations not otherwise dealt with in the statute, the Department can not use the same evidence to assess two penalties. *Empire Sanitary Landfill v. DER*, 1994 EHB 30, *rev'd on other grounds*, 514 C.D. 1994 (Pa. Cmwlth. filed May 19, 1995). Therefore a separate penalty can not also be assessed for the same conduct under subsection (b). *DER v. Trevorton Anthracite Co.*, 1978 EHB 8, 14, *affirmed*, 400 A.2d 240 (Pa. Cmwlth. 1979)("The settled law regarding when merger occurs of two offenses . . . is determined by whether each offense requires proof of facts additional to those involved in the other.")(citations omitted); *see also DEP v. Silberstein*, 1996 EHB 619; *Goetz v. DER*, 1991 EHB 1433. Accordingly we vacate the $10,000 penalty for violation of 25 Pa. Code § 297.219(b).

Failure to Maintain Access Roads

Access to Gemstar is provided by an unimproved dirt road running through the Ski Bros. junkyard. (Finding of Fact No. 6) The condition of the access road was poor and remained virtually unchanged from November 1994 until August 1996. (Finding of Fact No. 79) However, Mr. Smolar testified that during his June, 1996 inspection imbedded metal in the road had been cleaned up. There was some deep erosion in the road from the spring rain. (Finding of Fact No. 80) During the July 1996 inspection, the erosion in the road was not fixed. (Finding of Fact No. 81)

The Department assessed civil penalties for eight violations of 25 Pa. Code 297.213(d) for failure to maintain the access roads on November 9, 1994; October 16, 1995; January 4, 1996; March 14, 1996; April 5, 1996; June 20, 1996; July 24, 1996; and August 30, 1996. These violations were of low severity and the Department calculated $1,000 for each day of violation. The Department found Gemstar's conduct to be negligent for the November 1994, October 1995 and January 1996

offenses. The Department charged $500 for the first offense and added $500 for each day of violation thereafter. The Department found Gemstar's conduct to be reckless for the March 1996 inspection, April 1996, June 1996 inspection, July 1996 inspection and August 1996 inspection. The Department calculated $5,000 for the first reckless offense and added $500 for each day of violation thereafter. The total amount assessed was $41,000. (Finding of Fact No. 82)

Section 297.213(d) requires that an access road for a residual waste facility "be paved or surfaced with asphalt, gravel, cinders or other equivalent material." 25 Pa. Code § 297.213(d). Gemstar does not argue that it is not in violation of this regulation. The only aspect of this penalty challenged by Gemstar is the portion calculated for the wilfulness aspect of the penalty. Gemstar argues first that there is no justification for increasing the penalty within the range of negligence for the first three offenses, and second that there is no justification for increasing the penalty to recklessness for the next five offenses.

We approve of the Department's approach of increasing penalties for subsequent offenses relating to violations of the regulations. As a permittee is notified of violations it is not unreasonable to increase a penalty in order to discourage further violation. Therefore, we approve the penalties calculated for November 9, 1994, October 16, 1995 and January 4, 1996. However, as we stated previously, we believe that the Department must provide some explanation for increasing the culpability of Gemstar from negligent to reckless. There was testimony on the record that the condition of the road remained virtually unchanged. One of the few details noted by Mr. Smolar was on his June 20, 1996 inspection where he wrote that imbedded metal in the road had been cleaned up, although a spring rain had caused some erosion. There was no changed activity reported in March 1996, or any of the other inspections for which Gemstar was found to be reckless.

Accordingly, we will reduce Gemstar's culpability to negligence and calculate $2,000 for the wilfulness aspect of the March 14, 1996 penalty; $2,500 each for the April 5, 1996 and June 20, 1996 offenses; $3,000 for the July 24, 1996 offense; and $3,500 for the August 30, 1996 offense. The total penalties for failing to maintain the access road in accordance with the regulations is reduced to $24,500.

Failure to Mark the Perimeter of the Site

Mr. Smolar testified that based on the site itself there is no real way he could tell the boundaries of the site because there were no fences or markers. He learned about the actual boundaries in the summer of 1996 when he looked at aerial photographs and tax maps. (Finding of Fact No. 83)

Gemstar was charged a civil penalty for two offenses relating to its failure to mark the perimeter of the site. The first offense was for November 1994. The penalty was $1,000 for low severity and $2,000 because the conduct was negligent. The second penalty for August 1996 was also low severity and the Department charged $1,000, but the conduct was found to be reckless and the Department calculated $5,000 for this aspect of the penalty. The total penalty noted on the worksheet for failing to mark the perimeter of the site was $13,500. However, when the penalties calculated on the worksheet are added together, the amount is $9,000. (Finding of Fact No. 84)

Again, Gemstar does not challenge the fact of the violations related to its failure to mark the perimeter of the site. Instead it contends that the violation poses no environmental threat and does not cause pollution, therefore the penalty is excessive.

The environmental threat posed by a violation of the regulations is but one factor that the Department may consider when assessing a civil penalty. The fact that a violation does not create

a harm to the environment, alone, is not sufficient to demonstrate an abuse of the Department's discretion in calculating a civil penalty. Therefore we will not disturb the Department's penalty calculation but note that we will take into account the mathematical error on the worksheet and assess $9,000 for Gemstar's failure to mark the perimeter of the site.[6]

Failure to Prevent Erosion

Gemstar was also assessed a penalty for failure to prevent erosion on the site on August 30, 1996. The Department assessed $5,000 because the violation was of low severity and added $10,000 for reckless conduct. Gemstar contests this penalty arguing that it is the same violation as failing to maintain the access road. We disagree.

The inspection report for August 30, 1996, notes that there was a large erosion gully southwest of the tire shredder that had not been repaired since it developed in the summer. Additionally there was a drainage ditch across the access road which was causing erosion. (Finding of Fact No. 86) The regulatory requirements requiring a residual waste operator to prevent erosion is different than the regulatory requirements which require the access road to be paved. Different facts are relevant to each of these offenses, therefore the Department was well within its authority to charge a separate violation for failing to control erosion at the site. We further find that the penalty assessed by the Department was reasonable.

Failure to Utilize Alternate Method of Waste Disposal

Gemstar was also assessed a penalty for six offenses relating to its failure to use an "alternate

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[6] We note that the Department raised the level of culpability for the second offense from negligent to reckless. We could reduce the penalty on this basis consistent with other penalties in this case, but we decline to do so here because we believe that a total penalty of $6,000 for the second offense is a reasonable penalty and the Department's error is harmless.

permitted waste disposal facility during temporary shutdown." These offenses were noted on the inspections which occurred on January 4, 1996, March 14, 1996, April 5, 1996, June 20, 1996, July 24, 1996 and August 30, 1996. (Finding of Fact No. 87) Gemstar had indicated back-up facilities that it would use in the event of temporary shutdown in its permit application. (Finding of Fact No. 88) Nancy Roncetti testified that the basis of this penalty was that Gemstar had exceeded its storage capacity and was not in operation. (Finding of Fact No. 89)

These violations were found to be of low severity and the Department calculated $4,000 for each day of violation. Gemstar's conduct was reckless because it was aware of the regulatory and permit requirements. The Department added $5,000 for the first day of violation and added $500 for each day of violation thereafter. The total penalty for these violations was $61,500. (Finding of Fact No. 95)

Gemstar does not allege that it processed or otherwise disposed of tires from January 1996 until August 30, 1996. Rather it argues that the Department assessed this penalty because Gemstar had exceeded its storage capacity and that this position is based upon an incorrect understanding of the storage provisions of Gemstar's permit.

The evidence concerning the permitted storage capacity of Gemstar is less clear than it could have been because neither party introduced into evidence relevant portions of the permit application which were incorporated into the permit and which noted the storage capacity of whole tires for the Gemstar site. However, counsel on the record agreed that Gemstar's storage capacity for whole tires appeared to be 600,000. (N.T. 301) Gemstar's permit also allows it to store 144,000 processed tires. (Finding of Fact No. 92)

We do not believe that the Department sustained its burden of proving a violation of the

regulation relating to the use of alternate waste disposal. Nancy Roncetti testified that waste operators were required to use alternate waste disposal when their storage capacity had been exceeded. The regulation specifically provides that:

> An alternate permitted solid waste processing or disposal facility shall be available for use if the facility is shut down for a period that extends beyond the permitted storage capacity of the facility.

25 Pa. Code § 297.271(a). We find that the Department failed to prove that Gemstar's storage capacity was exceeded and that it was therefore required to utilize alternate waste disposal.

The number of tires on the site was estimated twice by the Department. On October 16, 1995, the Department estimated that there were 450,000 whole tires, 15,000 tires in bales and 75,000 chipped tires. These figures are below the 600,000 whole tires and 144,000 processed tires that Gemstar is allowed to have onsite by its permit. (Finding of Fact No. 90)[7]

The number of tires on the site was also estimated on November 5, 1996. Mr. Smolar estimated that there were 696,345 tires on the Gemstar, Ski Brothers, and Heichel properties combined. There were 17,176 tires on the Ski Brother's property, 124,471 on the Heichel property, and the remaining 554,698 tires were on the Gemstar property. (Finding of Fact No. 93) His worksheet also notes that there were 96,688 shredded tires on the Gemstar site, but it is unclear whether this is included in the total count or is in addition to the total count. (Ex. C-5) Although there was testimony that Mr. Fausto took responsibility for some tires that were stored on the Ski Brother's property, it is unclear that he was responsible for *all* the tires on the Ski Brother's property

---

[7] The inspection report notes that Gemstar is in violation of its storage capacity noting the 144,000 figure. However, according to the explicit provision of the portion of Gemstar's permit which is in the record this number only refers to processed tires. (Ex. C-1(b), Condition 9).

or for the tires on the Heichel property. (Finding of Fact No. 30) There was testimony that tires were generated by the junkyard when it scrapped cars. Therefore the Department did not prove that Gemstar was responsible for tires stored on the Ski Bros. property. (Finding of Fact No. 28) Mr. Smolar even noted in an inspection report that tires he observed previously were the property of Ski Bros. and not Gemstar. (Finding of Fact No. 31) Hence there is not clear evidence that Gemstar had more than 600,000 whole tires and 144,000 processed tires that were either on its property or that it was responsible for. Since the Department failed to sustain its burden of proof, we are constrained to vacate this penalty.

The Department argues that Gemstar's permit explicitly required it to dispose of three tires for every tire that it imported and since it failed to do so the $61,500 penalty was justified. Specifically, the January 4, 1996 inspection report noted that additional tires were brought to the Gemstar site. Gemstar was therefore required to dispose of tires from its existing inventory either using its own equipment or using alternative disposal. Since it had suspended its operations, it was required to make alternate arrangements to dispose of the appropriate number of tires.

It is true that Gemstar was in violation of the ratio provision of its permit. However, this matter was not raised in the Administrative Order and Penalty Assessment, nor did any Department witness testify that violation of this permit condition formed the basis for the assessment of the civil penalty. Gemstar is entitled to notice and an opportunity to defend against penalties assessed by the Department. *Cf. Wilbar Realty, Inc. v. Department of Environmental Resources*, 663 A.2d 857 (Pa. Cmwlth 1995), *petition for allowance of appeal denied*, 674 A.2d 1079 (Pa. 1996). Therefore the Department can not, after the close of the hearing, provide bases for a civil penalty that were not provided either explicitly or implicitly in the Administrative Order or even through testimony at the

hearing. Therefore, this violation of Gemstar's permit condition can not form the basis for a civil penalty assessment that Department witnesses stated was based on violation of 25 Pa. Code § 297.271(a).

Conclusion

In sum, we approve civil penalties against Gemstar in the amount of $174,500. The Department reduced its total calculated penalties of $331,000 by 30% to arrive at the final figure of $225,000. Ms. Roncetti testified that the reason for this reduction was to bring the Gemstar penalty in line with other penalties assessed under similar circumstances. (Finding of Fact No. 96) We find, therefore, that the $174,500 penalty is reasonable as it is and there is no need to apply the 30% reduction used by the Department.

CONCLUSIONS OF LAW

1. The Department has the burden of proof in this matter and must prove by a preponderance of the evidence that Gemstar violated the applicable statutes and regulations and the amount of the penalty assessed for the violations reflect an appropriate exercise of its discretion.

2. Gemstar failed to comply with the condition of its permit that the tires be arranged in piles of 200 feet by 50 feet by 20 feet on November 9, 1994; October 16, 1995; January 4, 1996; March 14, 1996; April 5, 1996; June 20, 1996; July 24, 1996; and August 30, 1996. A civil penalty of $44,500 is reasonable for these offenses.

3. Gemstar failed to construct a fence around the perimeter of its site in violation of 25 Pa. Code § 297.212(b) on October 16, 1995; January 4, 1996; March 14, 1996; April 5, 1996; June 20, 1996; July 24, 1996 and August 30, 1996. A civil penalty of $42,000 is reasonable for these offenses.

4. Gemstar failed to maintain proper records on November 9, 1994 and August 30, 1996. A civil penalty of $4,500 is reasonable for these offenses.

5. Gemstar failed to maintain 50 foot fire lanes between the piles of tires on its site on April 5, 1996; June 20, 1996; July 24, 1996; and August 30, 1996. A civil penalty of $27,000 is reasonable for these offenses.

6. Gemstar was in violation of 25 Pa. Code § 297.219(a) for failing to adequately control the breeding of mosquitos at the site on August 30, 1996. A civil penalty of $8,000 is reasonable for this offense.

7. The Department failed to sustain its burden of proving a violation of 25 Pa. Code § 297.219(b).

8. Gemstar failed to pave and maintain its access road in violation of 25 Pa. Code § 297.213(d) on November 9, 1994; October 16, 1995; January 4, 1996; March 14, 1996; April 5, 1996; June 20, 1996; and August 30, 1996. A civil penalty of $24,500 is reasonable for these offenses.

9. Gemstar failed to mark the perimeter of its site in violation of 25 Pa. Code § 297.211, on November 9, 1994 and August 30, 1996. A civil penalty of $9,000 is reasonable for these offenses.

10. Gemstar failed to prevent erosion at its site in violation of 25 Pa. Code § 297.232, on August 30, 1996. A civil penalty of $15,000 is reasonable for this offense.

11. The Department failed to sustain its burden of proving that Gemstar failed to comply with 25 Pa. Code 297.271(a) which requires a residual waste operator to utilize alternate waste disposal during temporary shutdown when its storage capacity is exceeded.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GEMSTAR CORPORATION	:	
	:	
v.	:	**EBB Docket No. 97-010-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 10th day of February, 1998, it is hereby ORDERED that Gemstar's appeal of Paragraphs 12(d), and 12(f) with respect to violation of 25 Pa. Code § 297.219(b) of the Department of Environmental Protection's Order and Civil Penalty Assessment dated December 11, 1996, is hereby sustained. Gemstar's appeal of the remaining paragraphs is dismissed.

It is further ORDERED that Gemstar's appeal of the $225,000 civil penalty is sustained in part and dismissed in part consistent with the foregoing opinion. Gemstar shall pay civil penalties in the amount of $174,500. The amount is due and payable immediately to the Solid Waste Abatement Fund. The Prothonotary of Bucks County is ordered to enter the full amount of the civil penalty as a lien against any property of Gemstar Corporation together with interest at the rate of 6% per annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: February 10, 1998

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library
For the Commonwealth, DEP:
Wm. Stanley Sneath, Esquire
Southeast Region
For Appellant:
Norman Matlock, Esquire
Philadelphia, PA

ml/rk/bl

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

DARLENE K. THOMAS, et al.	:	
	:	
v.	:	**EHB Docket No. 95-206-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LAMAR TOWNSHIP BOARD OF SUPERVISORS	:	**Issued:** February 12, 1998

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board grants in part and denies in part a Department motion to dismiss.

An appellant waives any objections he fails to raise in a timely notice of appeal.

Under the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20a (Sewage Facilities Act), the Department will consider only the proposed method of sewage treatment and disposal when reviewing a plan revision. However, because the Board is reluctant to grant motions to dismiss on any but the clearest of issues, the Board will not dismiss an objection to a plan revision approval where the issues the appellants intend to raise remain nebulous, the appellants are appearing *pro se*, and there is a possibility that dismissing the objection would preclude the appellants from having a meaningful opportunity to challenge certain aspects of the plan revision approval.

Section 3 of the Sewage Facilities Act, 35 P.S. § 750.3, the declaration of policy of the Act, does not confer any rights, duties, or powers itself. It merely explains the Legislature's reasons for enacting the Sewage Facilities Act.

Section 5(g) of the Sewage Facilities does not require that the Department cooperate with private organizations.

The Board will not dismiss objections alleging misconduct by local agencies in revising their official plan where the objections are made by *pro se* appellants and the clear implication of the objections is that the Department erred by approving the plan revision.

The Department does not have a duty under section 10(6) of the Sewage Facilities Act, 35 P.S. § 750.10(6), to encourage the use of alternative sewer systems, or to require the use of less costly or invasive experimental systems.

OPINION

This matter was initiated with the September 25, 1995, filing of a Notice of Appeal by Darlene Thomas, L. Carl Rumbalski, Truman and Miriam Neff, and Lewis Barner (collectively, Appellants). The appeal challenges an August 29, 1995, letter sent from the Department of Environmental Protection (Department) to the Lamar Township Board of Supervisors (Lamar Township) informing it of the Department's conditional approval of two related requests to revise official sewage facilities plans under the Sewage Facilities Act: one filed by Lamar Township, and one filed by Porter and Walker Townships. The revised sewage facilities plans provide for the construction of a 400,000 gallon-per-day sewage treatment facility that will serve portions of Lamar, Porter and Walker Townships. The townships formed a joint municipal authority, the East Nittany Valley Joint Municipal Authority (ENVJMA), to implement the revised plans.

The Board has issued two previous opinions in this appeal. On May 9, 1996, we granted in part and denied in part a Motion to Compel filed by Appellants. On May 29, 1997, we denied a Motion for Joinder filed by Appellants.

Currently before the Board is a Department motion to dismiss, filed with a supporting Memorandum of Law on November 20, 1995.[1] Appellants filed a Response on January 16, 1996.[2] The Department did not file a reply memorandum. The Department maintains that Appellants cannot raise the issues at paragraphs 1, 3, 4(b), 5, 7, 9, 11, and 12 of their Notice of Appeal. Appellants, meanwhile, contend that they can raise those issues.

Although the Department calls its motion a "Motion to Dismiss," the Motion requests only that we dismiss certain objections in the Notice of Appeal--not that we dismiss the entire appeal.

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[1] The Board did not rule on the Motion sooner because the parties requested a stay shortly after the Motion and Response were filed. We granted that request, and, after several extensions, the stay expired on March 18, 1997. Subsequently, on April 11, 1997, the proceedings were continued until October 3, 1997--also at the request of the parties.

[2] Appellants' Response did not conform to the Board's rules of practice and procedure, 25 Pa. Code Chapter 1021. The document Appellants submitted as their "Response" appears to be both a response and a memorandum of law opposing the Motion to Dismiss. The first page of the document contains seven numbered paragraphs. The first four paragraphs simply repeat allegations in the first four paragraphs of the Department's Motion. The next three paragraphs do not correspond to single paragraphs in the Department's Motion. The Appellants' simply seek to characterize the relief requested in the remainder of the Motion, then state that it should not be granted. The following two pages of Appellants' document appear to be the supporting memorandum of law.

Section 1021.70(e) of the Board's rules of practice and procedure, 25 Pa. Code § 1021.70(e), provides, "A response to a motion shall set forth in correspondingly-numbered paragraphs all factual disputes and the reason the opposing party objects to the motion." The phrase "correspondingly-numbered paragraphs" means that the response should have a paragraph responding to each paragraph in the motion. The paragraph in the response should admit or deny the averments in the motion--in whole or in part--and explain the response, if necessary. Appellants' filing does not conform to this criteria. Although Appellants have opted to proceed without legal representation, they are nevertheless responsible for complying with the Board's rules.

Thus, despite its title, the Department's Motion is actually a motion for partial dismissal or motion to limit issues, and we will treat it accordingly.

We will examine each of the contested paragraphs from the Notice of Appeal separately below.

Paragraph 1

In paragraph 1 of their Notice of Appeal, Appellants assert:

> The original [Department] requirement that a sewer system be installed was directed solely to the Lamar interchange at Rte. 64/I-80.
>
> > a. Extension of the proposed sewer to the remainder of the Rte. 64 corridor and the Mackeyville/Rote arc was added by local agencies. The extension was neither mandated nor needed. . . .
> >
> > b. The attached [Department] acceptance letter refers to the expanded project as ambitious. Other correspondence and personal communication indicate that [the Department] was surprised at the extension, and look upon it as an unsolicited gift.
> >
> > c. Lamar Township is sparsely populated farmland. Accordingly, the local agencies and [the Department] are in violation of Sect. 5(d)(4) by not considering all aspects of planning, zoning, population estimates, engineering and economics.

The Department argues that we should strike paragraph 1 because Appellants seek to raise issues that the Department need not consider under the Sewage Facilities Act or Article I, section 27, of the Pennsylvania Constitution. In support of its position, the Department argues that, when reviewing official plan revisions, it need only consider the proposed method of sewage treatment and disposal--not planning, zoning, population, or the other concerns raised in paragraph 1 of Appellants' Notice of Appeal. Appellants, however, contend that the Department had a duty to consider those

issues under the Sewage Facilities Act and Article I, section 27.[3]

Although Appellants' Response cites Article I, section 27, and additional provisions of the Sewage Facilities Act, Appellants only raised the issue of compliance with section 5(d)(4) of the Sewage Facilities Act, 35 P.S. §§ 750.5(d)(4), in their Notice of Appeal. Since an appellant waives any objections it fails to raise in a timely notice of appeal, *Pennsylvania Game Commission v. DER*, 509 A.2d 877 (Pa. Cmwlth. 1986), *aff'd* 555 A.2d 812 (Pa. 1989), we need only resolve whether the Department had a duty *under section 5(d)(4)* to consider all aspects of planning, zoning, and the other factors listed in paragraph 1 of the Notice of Appeal. We need not determine whether the Department had a duty to consider those factors pursuant to Article I, section 27, or the other provisions of the Sewage Facilities Act Appellants cite in their Response.

Section 5(d) of the Sewage Facilities Act provides, in pertinent part:

> (d) Every official plan shall:
>
> (4) Take into consideration all aspects of planning, zoning, population estimates, engineering and economics so as to delineate with all practicable 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.

Section 10 of the Sewage Facilities Act, 35 P.S. § 750.10, meanwhile, provides:

> The [D]epartment shall have the power and its duty shall be:

---

[3] Appellants urge us to ignore *Payne v. Kassab,* 312 A.2d 86 (Pa. Cmwlth 1973), *aff'd* 361 A.2d 263 (Pa. 1976), and extensive Board precedent relying on that decision, because they contend the Commonwealth Court's construction of Article I, section 27, in *Payne* is incorrect. Suffice it to say that we will not second-guess the Court's interpretation of Article I, section 27. Until the Pennsylvania Constitution is changed or the courts overturn the decision, *Payne* is controlling.

> (2) To approve or disapprove official plans and, at its discretion, to approve or disapprove revisions thereto in accordance with regulations of the [D]epartment.

Taken together, sections 5(d)(4) and 10(2) of the Sewage Facilities Act might seem to suggest that the Department has the duty to consider zoning and some of the other factors listed at section 5(d)(4) when reviewing plan revisions. But that is not how the provisions have been construed. The Commonwealth Court and the Board have examined the scope of the Department's review of official plan revisions on numerous occasions. Both have consistently held that, under the Sewage Facilities Act, the Department need only consider the proposed method of sewage treatment and disposal. *Community College of Delaware County v. Fox*, 342 A.2d 468 (Pa. Cmwlth. 1975), *appeal dismissed as moot*, 381 A.2d 448 (Pa. 1977); *Oley Township v. DEP,* 1996 EHB 1359; *Kise v. DER*, 1992 EHB 1580. The Department has the duty of ensuring statewide water quality management, regional pollution control, and watershed management; local government agencies, meanwhile, are responsible for planning, zoning, and similar functions--even where those functions relate to plans for sewage systems. *Community College of Delaware County v. Fox*; *Lower Towamensing Township v. DER*, 1993 EHB 1442.

Nevertheless, we will deny the Department's Motion to Dismiss with respect to paragraph one of the Notice of Appeal. We have several reasons for doing so. First, the Board is ordinarily reluctant to grant a motion to dismiss on any but the clearest of issues, since it precludes an appellant from making his case. Second, given the wording of paragraph 1, the precise issues Appellants intend to raise remain nebulous at this stage of the proceedings. Third, Appellants are appearing *pro se.* While this does not excuse them from complying with the Board's rules, we realize that some

of the vagueness in paragraph 1 may result from Appellants' unfamiliarity with the law, as opposed to careless drafting of their Notice of Appeal. And, last, despite the Commonwealth Court's decisions and our own construing the Sewage Facilities Act, we are concerned that dismissing challenges like Appellants' might effectively preclude individuals aggrieved by certain aspects of a plan revision from having a meaningful opportunity to challenge the revision. Since a plan revision is not final until the Department approves it, a person aggrieved by the local agencies' role in a revision cannot challenge the revision until the Department approves it. If the Department does not approve the revision until after the time for challenging the local agencies' role has expired, the person aggrieved by the local agencies' action might be unable to challenge the local agencies' role: his right to appeal the local agency's role would expire before the plan revision became final. We do not necessarily believe that the Department is wrong when it argues that it need only consider the proposed method of sewage treatment and disposal. However, given the vagaries of the law and Appellants' pleading, we feel it would be inappropriate to deny Appellants an opportunity to proceed further on their claim at this stage in the proceedings.

Paragraph 3

In paragraph 3 of their Notice of Appeal, Appellants aver:

> [The Department] is in violation of Section 3(1) (7) [of the Sewage Facilities Act] by accepting the proposed plan because it ignores:
>
> a. the diminishment of open lands . . .;
>
> b. aesthetics; and,
>
> c. quality of life . . . .

The Department argues that Appellants cannot prevail on the issues in Paragraph 3 because those issues do not relate to the effectiveness of the method chosen for sewage treatment or disposal. Appellants, meanwhile, assert in their Response that they can raise the issues in Paragraph 3 because those issues involve violations of Sewage Facilities Act regulations and Appellants' rights under Article I, section 27.

We can dispense from the outset with the arguments that Appellants' make in their Response. Even assuming the issues in paragraph 3 involve violations of Article I, section 27, or regulations promulgated pursuant to the Sewage Facilities Act, paragraph 3 would not withstand the Department's Motion. Paragraph 3 is quite specific. It does not allege violations of the Department's regulations or Article I, section 27. It only avers that the Department violated "section 3(1)(7)" of the Sewage Facilities Act.[4] Issues not raised by an appellant in its notice of appeal are deemed waived unless the appellant shows good cause for raising them later. *Pennsylvania Game Commission v. DER*, 509 A.2d 877 (Pa. Cmwlth. 1986), *aff'd on other grounds*, 521 Pa. 121, 555 A.2d 812 (1989); *NGK Metals Corp. v. DER*, 1990 EHB 376. Since Appellants' Notice of Appeal failed to raise the issue of compliance with the Department's regulations or Article I, section 27, Appellants waived those issues.

The only remaining question, therefore, is whether Appellants can prevail on their claim that the Department violated section 3(1)(7) of the Sewage Facilities Act. After examining section 3, we conclude that they cannot.

---

[4] Although Appellants refer to "section 3(1)(7)," of the Sewage Facilities Act, there is no such provision of the Act. (Section 3 of the Act does have a subsection (1), but there is no sub-subsection (7) beneath that subsection.) Presumably, Appellants mean to refer to subsections (1) through (7) of section 3 of the Act, 35 P.S. §§ 750.3(1)-750.3(7).

Section 3, the declaration of policy for the Sewage Facilities Act, provides:

> It is hereby declared to be the policy of the Commonwealth of Pennsylvania through this act:
>
> (1) To protect the public health, safety and welfare of its citizens through the development and implementation of plans for the sanitary disposal of sewage waste.
>
> (2) To promote intermunicipal cooperation in the implementation and administration of such plans by local government.
>
> (3) To prevent and eliminate pollution of waters of the Commonwealth by coordinating planning for the sanitary disposal of sewage wastes with a comprehensive program of water quality management.
>
> (4) To provide for the issuance of permits for on-lot sewage disposal systems by local government in accordance with uniform standards and to encourage intermunicipal cooperation to this end.
>
> (5) To provide for and insure a high degree of technical competency within local government in the administration of this act.
>
> (6) To encourage the use of the best available technology for on-site sewage disposal systems.
>
> (7) To insure the rights of citizens on matters of sewage disposal as they may relate to this act and the Constitution of this Commonwealth.

Section 3 does not require that the Department consider the issues Appellants raise in paragraph 3 of their Notice of Appeal. Section 3 is the declaration of policy for the Act. As such, it merely explains the Legislature's reasons for enacting the Act. While declarations of policy may be used to construe ambiguities in other portions of an act, *see, e.g., Department of Labor and Industry v. Unemployment Compensation Board of Review,* 24 A.2d 667 (Pa. Super. 1942), we know of no decision holding that they confer any rights, duties, or powers themselves. It is a cardinal

principle of administrative law that agencies have only those powers expressly conferred, or necessarily implied, by statute. *See, e.g., DER v. Butler County Mushroom Farm*, 499 Pa. 509, 454 A.2d 1 (1982), and *Costanza v. DER*, 606 A.2d 645 (Pa. Cmwlth. 1992). Since section 3 does not expressly confer any authority on the Department, nor is such a delegation implicit in section 3's provisions, it is more reasonable to conclude that the Legislature intended section 3 to simply explain the purpose behind the other provisions of the Act, than to assume that the Legislature intended section 3 to confer additional authority to the Department--authority not delegated to it under section 10, 35 P.S. § 750.10, or the other provisions of the Act.

Paragraph 4(b)

In paragraph 4 of their Notice of Appeal, Appellants aver:

> [The Department] ignored the requirement to show need for the proposed sewer project.
>
> > a. [The Department] accepted the opinion of 5 or 6 groups interested in economic development. . . ;
> >
> > b. [The Department] ignored wishes of nearly 700 residents, counting them as one voice because their names appeared as a petition. [The Department] is in violation of [section] 5(g) [of the Sewage Facilities Act, 35 P.S. § 750.5(g)].

In its Motion and supporting Memorandum, the Department argues that Appellants cannot prevail on the issue raised in paragraph 4(b) because section 5(g) of the Sewage Facilities Act merely *authorizes* the Department to cooperate with private organizations; it does not *require* that the Department do so. Appellants do not address the Department's arguments on section 5(g) in their Response. Instead, they argue that the Department had to consider each of their opinions separately

pursuant to Article I, section 27. Appellants also argued that the Board should not "artificially separate" subsection (b) from the rest of paragraph 4 but should preserve the entire paragraph "for further proceedings."

We are not persuaded by Appellants' argument that Article I, section 27, requires that the Department cooperate with them. Appellants waived that argument for the same reason they waived their Article I, section 27, argument regarding paragraph 3 of the Notice of Appeal: they failed to raise the issue in their Notice of Appeal. Nor are we persuaded by Appellants' argument that we should refuse to "artificially separate" paragraph 4(b) from the rest of paragraph 4. This is not a situation where the objection at 4(b) is inextricably intertwined with the other objections raised in paragraph 4; the objection Appellants raise in 4(b) is quite distinct from their other objections. It would be pointless to require the parties to go forward on an issue that Appellants may be doomed to lose from the outset.

Turning to the merits of the Department's Motion with respect to paragraph 4(b), it is clear that Appellants cannot prevail with respect to that objection. Section 5(g) of the Sewage Facilities Act provides, "For purposes of this act, the department is authorized to cooperate with appropriate private organizations." Even assuming Appellants qualified as an "appropriate private organization," they still could not prevail in their section 5(g) claim. As the Department contends, section 5(g) does not *require* that the Department cooperate with private organizations; it merely authorizes the Department to do so if it chooses. Since the Department has no duty to cooperate with Appellants, much less consider all of their opinions individually, we shall grant the Department's Motion with respect to paragraph 4(b).

Paragraph 5

In paragraph 5 of their Notice of Appeal, Appellants allege:

> [The Department] is in support of development, not protection or the environment as is mandated and set forth in its policy in [section 3 of the Sewage Facilities Act, 35 P.S. § 750.3].
>
> > a. The current plan would insure the commercial development of the Rte. 220/I-80 interchange, thus destroying farmland and impacting upon wildlife usage.
> >
> > b. The plan would lead to residential development of farmland, leading to the suburbanization of the area and consequent reduction of land and wildlife usage.

The Department contends that Appellants cannot prevail on the issues in paragraph 5 because those issues are planning and zoning issues and do not relate to the effectiveness of the method selected for sewage treatment and disposal in the plan revision. Appellants disagree. They argue that they are entitled to raise the issues in paragraph 5 under Article I, section 27, of the Pennsylvania Constitution.

The Department is entitled to prevail on this paragraph for the same reasons they prevailed on paragraph 3, above. Paragraph 5 of Appellants' Notice of Appeal was quite specific: it only averred that the Department violated section 3 of the Sewage Facilities Act. Therefore, Appellants waived any objections that they may have had with respect to Article I, section 27. Nor can Appellants establish any violations of section 3 of the Sewage Facilities Act, since that is the declaration of policy for the Act and does not confer any powers, rights, or duties. Accordingly, we will grant the Department's Motion with respect to paragraph 5 of the Notice of Appeal.

Paragraphs 7, 8, and 9

In paragraphs 7, 8, and 9 of their Notice of Appeal, Appellants assert:

7. Walker, Porter and Lamar Townships as well as the Sewer Authority designated by them are in violation of [s]ection 5(d)(3) thru (8) [of the Sewage Facilities Act, 35 P.S. §§ 750.5(d)(3)-750.5(d)(8)] because they have failed to:

a. address the dumping of polluted waters into Fishing Creek;

b. consider all aspects of planning, including cost;

c. establish procedures for delineating and acquiring rights of ways;

d. set forth a time schedule;

e. propose methods of financing the project. . . .

8. The local agencies are in violation of [section] 5(h) [of the Sewage Facilities Act, 35 P.S. § 750.5(h)] because they prevented adequate input by residents in the proposed plan and failed to survey their needs and desires:

a. by preventing discussion;

b. by claiming a different governmental body was responsible, thereby sending residents from one agency to the other;

c. by withholding requested information.

9. Acceptance of proposed project should be negated because the local agencies deceived residents by telling them the sewer system was (is) mandated by DEP.

The Department argues that the Board does not have jurisdiction over paragraphs 7, 8, and 9 because the issues raised there concern alleged wrongdoing by local agencies, not the Department. Appellants respond that the Department, by virtue of its role as "overseer" under the Sewage Facilities Act, has an obligation to ensure that plan revisions comply with all aspects of the law before approving them.

We will not dismiss the objections listed in paragraphs 7, 8, and 9 of Appellants' Notice of Appeal. Although they do not expressly refer to misconduct on the part of the Department itself, the

clear implication of those objections is that *the Department erred* by approving the plan revision where local agencies engaged in the conduct alleged. We must broadly construe objections raised in notices of appeal. *Croner, Inc. v. Department of Environmental Resources*, 589 A.2d 1183 (Pa. Cmwlth. 1991); *Bradford Coal Company, Inc. v. DEP*, 1996 EHB 888. Furthermore, Appellants are appearing *pro se*. Given these facts, the objections Appellants listed in paragraphs 7, 8, and 9 are sufficient to withstand the Department's Motion to Dismiss.

Paragraph 11

In paragraph 11 of their Notice of Appeal, Appellants aver that the Department violated sections 3(2), 3(7), and 5(h) of the Sewage Facilities Act, 35 P.S. §§ 750.3(2), 750.3(7), and 750.5(h), because "it did not assure proper dispensing of public information and adequate discussion by and before local agencies." In its Motion and supporting Memorandum, the Department argues that nothing in section 3 of the Sewage Facilities Act requires that it dispense public information, and that, while it is required to *promote* intermunicipal cooperation, it need not actually achieve that result. Appellants, meanwhile, argue that the Department *is* responsible for achieving municipal cooperation.

We will grant the Department's Motion with regard to Appellants' section 3(2) and 3(7) claims.[5] As noted previously, in our analysis of paragraphs 3 and 5 of the Notice of Appeal, section 3 is the declaration of policy for the Act. As such, it does not independently confer any rights, duties, or powers, but is simply meant to serve as a guide for construing any ambiguities present in

[5] Although the Department requests judgment with respect to all of paragraph 11, the Department failed to address Appellants' claim that it violated section 5(h) of the Act. Therefore, we will not grant its Motion with respect to section 5(h).

other portions of the Act. As a result, the Department has no duty under section 3 "to assure proper dispensing of public information and adequate discussion by and before local agencies," as Appellants contend.

Paragraph 12

In paragraph 12 of their Notice of Appeal, Appellants aver:

> [The Department] is in violation of [section] 10(6) [of the Sewage Facilities Act, 35 P.S. § 750.10(6)] because it has accepted plans for an expensive sewer project
>
> a. without encouraging alternative sewer systems where possible;
>
> b. knowing, or should have known that biotechnological methods are in the experimental stages that would be both less invasive and less costly;
>
> c. knowing that [the Department] has contacted a research group in Michigan using comparable new technology.

In its Motion and supporting Memorandum, the Department argues that Appellants cannot prevail on paragraph 12 because: (1) Appellants challenge the cost, not the efficacy of the system in the plan revision approval; (2) the Department lacks the authority to consider cost; and (3) Appellants' Notice of Appeal failed to provide any information on systems that were less expensive than those approved in the plan revision. Appellants, meanwhile, contend the issues raised in paragraph 12 are appropriate because the Sewage Facilities Act is intertwined with the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 (Clean Streams Law), and section 5 of the Clean Streams Law, 35 P.S. § 691.5(a), requires that the Department consider "the state of scientific and technical knowledge," and "the immediate and long-range economic impact upon the Commonwealth and its citizens."

Although Appellants seek to defend the issues they raised in paragraph 12 by pointing to section 5 of the Clean Streams Law, the Clean Streams Law is irrelevant here. Appellants did not aver in their Notice of Appeal that the Department violated section 5 of the Clean Streams Law. They asserted that the Department violated *section 10(6) of the Sewage Facilities Act.* Having limited their challenge in the Notice of Appeal to section 10(6), Appellants cannot now expand the challenge to include section 5 of the Clean Streams Law. As noted previously, an appellant waives any objections it fails to raise in its notice of appeal. *Pennsylvania Game Commission v. DER*, 509 A.2d 877 (Pa. Cmwlth. 1986), *aff'd* 555 A.2d 812 (Pa. 1989). Therefore, whether paragraph 12 can withstand the Department's Motion to Dismiss turns on whether the objections Appellants seek to raise are valid under section 10(6) of the Sewage Facilities Act.

After a careful examination of section 10(6), we conclude that it does not require that the Department do what Appellants allege in paragraph 12. Section 10 provides:

> The Department shall have the power and its duty shall be:
>
> . . .
>
> > (6) To cooperate with local agencies, the advisory committee and industry in studying and evaluating new methods of sewage disposal. For the purpose of investigating innovative or alternative on-lot sewage systems, the Department may enter into contracts with private entities.

Nothing in section 10(6) requires that the Department encourage the use of alternative sewers systems as Appellants allege in paragraph 12(a) of their Notice of Appeal. Nor would the Department have violated section 10(6) even assuming it had issued the plan revision approval knowing that less invasive and costly experimental methods exist, as Appellants allege in the remaining subsections of paragraph 12. Section 10(6) requires only that the Department cooperate

in *"studying and evaluating* new methods of sewage disposal." (emphasis added) It does not require that the Department consider such technology when reviewing plan revisions, much less that it do so where--as Appellants' aver here--the technology remains in the "experimental" stage. Accordingly, we will grant the Department's Motion with respect to paragraph 12.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DARLENE K. THOMAS, et al.	:	
	:	
v.	:	**EHB Docket No. 95-206-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LAMAR TOWNSHIP BOARD OF SUPERVISORS	:	

ORDER

AND NOW, this 12th day of February, 1998, it is ordered that the Department's Motion to dismiss is:

1) granted with respect to paragraphs 3, 4(b), 5, and 12 of the Notice of Appeal, and paragraph 11 of the Notice of Appeal to the extent that it alleges that the Department violated sections 3(2) and 3(7) of the Act, 35 P.S. §§ 750.3(2) and 750.3(7).

2) denied in all other respects.

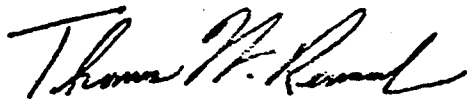
ENVIRONMENTAL HEARING BOARD

George J. Miller

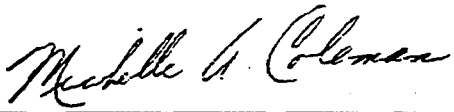
GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: February 12, 1998

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAF

READING ANTHRACITE COMPANY	:	
	:	
v.	:	**EHB Docket No. 95-196-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PORTER ASSOCIATES, INC., Permittee, and KOCHER COAL COMPANY, INC., Intervenor	:	**Issued: February 17, 1998**

OPINION AND ORDER ON INTERVENOR'S MOTION FOR SUMMARY JUDGMENT AND PERMITTEE'S MOTION FOR SUMMARY JUDGMENT AND, IN THE ALTERNATIVE, MOTION TO LIMIT ISSUES

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board grants in part and denies in part a motion for summary judgment and a motion for summary judgment/motion to limit issues. The administrative finality doctrine bars an appellant from challenging a surface mining permit renewal on the basis that he owns the coal and surface rights in the permit area where the appellant could have raised the same issue with respect to previous Department actions but failed to do so.

The administrative finality doctrine does not bar an appellant from challenging a permit renewal on the basis that he never consented to ash disposal where (1) the only previous Department action concerning ash disposal is a permit modification, (2) the appellant was not directly involved with the application for the modification, and (3) notice of the modification was not published in the *Pennsylvania Bulletin*.

OPINION

This matter was initiated with the September 11, 1995, filing of a Notice of Appeal by Reading Anthracite Company (Reading). Reading challenges the Department of Environmental Protection's (Department) renewal of an anthracite surface mining permit (permit renewal) under the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §1396.1-1396.19a (Surface Mining Act). The permit renewal authorized Porter Associates, Inc. (Porter) to operate a surface mine and dispose of coal refuse and fly ash or bottom ash (collectively, ash) on a site (mine site) in Porter Township, Schuylkill County.

Kocher Coal Company (Kocher) joined the proceedings on April 4, 1996, when the Board granted a Kocher Petition to Intervene. Kocher had agreed to purchase the mine site in a May 1, 1967, contract with Reading. (Stipulation of Facts to Establish Record for Motion for Summary Judgment, "Stip.," para. 9.)

In its Notice of Appeal, Reading avers that:

(1) it still owns the mine site;

(2) it gave Kocher the right to occupy the mine site as part of the May 1, 1967 contract, but never gave Kocher the right to allow others to conduct surface mining activities there or the right to operate an ash disposal facility there;

(3) Kocher identified itself as the owner of the mine site on the consent to enter form submitted with the original surface mining permit application;

(4) neither the original surface mining permit application nor the Department's later actions show that Reading gave Porter the right to mine coal, or consented to Porter's use of the mine site for surface mining activities or ash disposal.

According to Reading's Notice of Appeal, the Department violated sections 86.37(a)(1) and 86.55(d) of its regulations, 25 Pa. Code §§ 86.37(a)(1) and 86.55(d), by issuing the permit. Reading

contends that the Department violated section 86.37(a)(1) because, by authorizing ash disposal without Reading's consent, the Department did not require a "complete and accurate" permit application. With respect to section 86.55(d), meanwhile, Reading argues that the Department erred because:

> (1) section 86.55(d) provides that applications for renewal must include the ownership and control information required for permit applications under section 86.62 of the regulations; and,
>
> (2) section 86.62 requires that permit applications contain the names and addresses of all persons:
>
> > (a) owning the surface in the permit area within the proposed permit area (25 Pa. Code § 86.62(a)(1)(ii)),
> >
> > (b) owning the coal to be mined (25 Pa. Code § 86.62(b)(1)(ix)), and,
> >
> > (c) who have a relationship with the permit applicant allowing them to determine how the coal will be mined (25 Pa. Code § 86.62(b)(1)(x)).

The Board has issued one previous opinion in this appeal. On June 18, 1997, we denied a Motion to Dismiss filed by Kocher and a Motion for Summary Judgment/Motion to Limit Issues filed by Porter. Since then, Porter and Kocher have filed a second set of motions seeking dismissal of Reading's appeal. Those motions are the subject of this opinion and order.

Porter filed a Motion for Summary Judgment/Motion to Limit Issues and a supporting Memorandum of Law on September 9, 1997. Reading filed a Response and Memorandum of Law opposing Porter's Motion on September 15, 1997. On October 17, 1997, the Department filed a letter stating that it joined in Porter's Motion. Porter did not file a Reply to either Reading's Response or the Department's letter.

Kocher, meanwhile, filed a Motion for Summary Judgment and a supporting Memorandum of Law on September 15, 1997. Reading filed a Response and Memorandum of Law opposing Porter's Motion on October 1, 1997.[1] Porter filed a Reply Brief on October 14, 1997.

Besides the exhibits that Porter, Kocher, and Reading submitted in support of their respective filings, all parties to the appeal--Reading, Porter, the Department, and Kocher--also filed a Stipulation of Facts (Stipulation) to be considered with the Motions.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions of record--and affidavits, if any--show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997). When deciding motions for summary judgment, we view the record in the light most favorable to the nonmoving party, *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995), and will enter summary judgment only where the right is clear and free from doubt. *Hayward v. Medical Centre of Beaver County*, 608 A.2d 1040 (Pa. 1992). A similar rule applies to motions to limit issues: We will limit issues only where it is clear that no material factual disputes are involved and the moving party is entitled to judgment as a matter of law. *Tinicum Township v. DEP*, 1996 EHB 816, 822.

1. THE PARTIES' ARGUMENTS

Porter and Kocher raise similar issues in their Motions. Both argue that Reading could have argued that it owns the mine site with respect to earlier Department actions concerning the site. Therefore, they maintain, the doctrine of administrative finality bars Reading from raising that issue

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[1] The Department filed no response to Kocher's motion.

now.[2] Reading, meanwhile, argues that administrative finality does not apply because its claim goes to whether the application for the permit *renewal* was adequate given the alleged deficiencies in the ownership information. According to Reading, whether the ownership information in Porter's previous applications was accurate or not, Porter had a duty to correct any incorrect information in its previous applications when it filed the renewal application. Therefore, Reading contends, the administrative finality doctrine does not apply because it is attacking the permit renewal itself, not simply using its appeal as a collateral attack on the Department's previous actions. However, Reading also alleges that, even if administrative finality would ordinarily apply, the doctrine should not apply here because (1) Kocher misrepresented its status as owner of the mine site in the previous actions; (2) the notice concerning the previous actions was inadequate to put Reading on notice; (3) Reading did not become aware of the misrepresentation in time to appeal the previous actions; (4) Reading notified Porter before the permit renewal that it, Reading, was the owner of the mine site; and, (5) Porter failed to update its renewal application to show that Reading was the owner and that Reading had consented to Porter's activities.

2. ANALYSIS

Porter, Kocher, and Reading all devote a considerable portion of their argument to rearguing

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[2] Porter also argues that administrative finality bars Reading from challenging the transfer of the permit as improper. However, Reading never asserts in its Notice of Appeal that the transfer of the permit was improper.

Any issue not raised by an appellant in its notice of appeal is deemed waived unless good cause is shown for raising it at a later time. *Pennsylvania Game Commission v. DER*, 509 A.2d 877 (Pa. Cmwlth. 1986) *aff'd*, 555 A.2d 812 (Pa. 1989); *NGK Metals Corp. v. DER*, 1990 EHB 376. Since Reading's Notice of Appeal does not argue that the transfer of the permit was improper, Reading is deemed to have waived that issue, and we need not decide whether the doctrine of administrative finality would apply.

issues resolved in our previous decision in this appeal, denying Kocher's Motion to Dismiss and Porter's Motion for Summary Judgment/Motion to Limit Issues. There, we held that the doctrine of administrative finality did not bar Reading from challenging the permit renewal on the basis that the permit renewal application failed to list Reading as the owner of the relevant coal and surface area. We explained that administrative finality did not apply to this claim because the claim went to the adequacy of the permit renewal application and could not have been brought with respect to the Department's previous actions involving the mine site. We also refused to dismiss Reading's claim that the Department erred by authorizing ash disposal at the mine site without Reading's consent. With regard to that aspect of our decision, we wrote:

> Although at first glance it appears that the doctrine of administrative finality applies here because this issue could have been raised in a prior appeal, we must also reject the argument for this allegation on the basis that Reading did not have adequate notice to raise this issue earlier. According to the evidence offered by Porter notice of the modification only was published in a newspaper of general circulation, *The Citizen Standard* of Valley View, Schuylkill County. Porter, however, has not offered evidence that Reading received that notice or had access to that notice since it is not in the circulation area of that newspaper. . . . [U]nder Board Rule 1021.52, 25 Pa. Code § 1021.52, an appellant has 30 days from receipt of the written notice of the action or within 30 days after notice of the action has been published in the *Pennsylvania Bulletin*. . . . Here Porter has failed to prove that Reading received adequate notice of the modification by either of these methods.

Reading Anthracite Company v. DEP, EHB Docket No. 95-196-C (Opinion issued June 18, 1997) pp. 9-10.

Before turning to the merits of the parties' arguments, we must first determine whether we will revisit issues resolved in our prior opinion. Porter does not expressly address the reconsideration issue in its second Motion and Memorandum of Law. However, by requesting that we revisit issues resolved in our previous opinion, Porter is indirectly requesting reconsideration.

Kocher makes the same request more directly in its second Motion and Memoranda. There, Kocher expressly requests that we revisit the issues resolved in our previous opinion and modify our decision. Although Reading opposes any modification of our previous opinion, Reading concedes in its Memorandum of Law opposing Kocher's motion that we have the authority to reconsider the issues.

A. IS RECONSIDERATION APPROPRIATE?

Ordinarily, the Board is reluctant to reconsider issues resolved in interlocutory orders unless the parties file a petition for reconsideration in accordance with section 1021.123 of the Board's rules of practice and procedure, 25 Pa. Code § 1021.123. Section 1021.123 provides for reconsideration of interlocutory orders under certain circumstances, provided that the party seeking reconsideration files its petition within 10 days of the Board order. This provides parties with an opportunity to seek reconsideration of important issues, while still minimizing repeat litigation and allowing the parties to know which issues have been resolved. Obviously, it is in the interest of the parties and of judicial economy to avoid litigating the same issues more than once.

However, despite our ordinary reluctance to reconsider interlocutory issues absent a petition for reconsideration, we will do so here. We have a number of reasons for that decision. First, a petition for reconsideration here might well have complicated matters, rather than simplified them.[3]

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[3] We disposed of two motions in our previous opinion: one filed by Porter and another filed by Kocher. We denied the Kocher motion on procedural grounds, holding that we could not consider the exhibits offered in support of the motion because they had been attached to the memorandum of law in support, and denied the Porter motion on substantive grounds. Had Kocher filed a petition for reconsideration of that decision, we would likely have denied it given the procedural defects in Kocher's motion. Therefore, for the Board to rule on that motion with the defects cured, Kocher would have had to petition for permission to file the corrected motion with the Board, and we would have to issue another opinion. Porter, however, was also dissatisfied with

Second, the parties have fully reargued the administrative finality issue in their submissions with respect to the second set of Motions, so there is no question that the parties have had an opportunity to fully argue the issue--despite the absence of a formal motion for reconsideration. And third, upon further reflection and detailed consideration of the Parties' filings with respect to the second set of motions, we believe a reevaluation of our previous decision is in order.

B. ADMINISTRATIVE FINALITY

1. Does the doctrine of administrative finality preclude Reading from challenging the issuance of the permit renewal on the basis that Porter never obtained Reading's consent to enter the mine site?

In its Notice of Appeal, Reading argues that the Department erred by issuing the permit renewal because Porter never obtained Reading's consent to enter the mine site. Porter and Kocher, however, insist that Reading could have raised this objection with respect to previous Department actions concerning the mine site and, therefore, the doctrine of administrative finality bars Reading from raising the issue now.

Under the doctrine of administrative finality, "one who fails to exhaust his statutory remedies may not thereafter raise an issue that could have and should have been raised in the proceeding afforded by his statutory remedy." *DER v. Wheeling-Pittsburgh Coal Corp.*, 348 A.2d 765, 767 (Pa.

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our opinion. Since we denied its motion based, at least in part, on substantive arguments Porter had raised regarding administrative finality, Porter would usually have had to file a petition for reconsideration for us to revisit those issues. Thus, we would have simultaneously confronted different types of motions--a petition for permission to file the corrected motions from Kocher and a petition for reconsideration from Porter--concerning different issues regarding the same opinion and order.

Rather than filing separate motions, Porter and Kocher filed a Joint Petition for Leave to Amend or Permission to File New Motions for Summary Judgment.

Cmwlth. 1975), *aff'd,* 375 A.2d 320 (Pa. 1977), *cert. denied,* 434 U.S. 969 (1977) (quoting *Philadelphia v. Sam Bobman Department Store Company*, 149 A.2d 518, 521 (Pa. Super. 1959)). Therefore, if Reading could have asserted that Porter required its consent to enter the mine site with respect to a previous Department action, and Reading failed to appeal that action, the administrative finality doctrine would ordinarily preclude Reading from raising the issue here.[4]

Although Reading could have argued that Porter required its consent to enter the mine site with respect to a previous Department action, Reading failed to do so. Section 1021.52(a) of the Board's rules, 25 Pa. Code § 1021.52(c), provides that the Board has jurisdiction over appeals of Department actions filed "within 30 days after the party appellant has received written notice of the action or within 30 days after notice of the action has been published in the *Pennsylvania Bulletin.* . . ." Kocher signed the landowner consent agreement submitted with the original permit application on October 20, 1989. (Stipulation, para. 11-12.) The Department issued the permit on June 25, 1990, and the *Pennsylvania Bulletin* published notice of it on July 21, 1990. (Stipulation, para. 16 and 17.) Therefore, to the extent that Reading contends that Kocher did not have the authority to sign the landowner consent agreement, Reading could have raised that issue in an appeal to the original permit. Reading, however, failed to file an appeal of that permit within 30 days of publication of notice in the *Pennsylvania Bulletin.*

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[4] The fact that an issue is relevant to a subsequent Department action does not necessarily mean that the administrative finality doctrine does not apply. (Otherwise, there would be no need for the administrative finality doctrine; it would be subsumed within the law of relevance.) So long as the issue could have been raised in a previous Department action, the administrative finality doctrine applies. Thus, while the issue of whether Porter had a valid consent to enter from the landowner would ordinarily be relevant in an appeal of a permit renewal, administrative finality would still bar litigation of that issue if it could have been raised with respect to one of the Department's previous actions concerning the site.

Similar reasoning applies to the extent that Reading argues that Porter required its consent to enter the mine site. Kocher agreed on February 15, 1991, to allow Porter to conduct surface mining activities at the mine site. (Stipulation para. 23.) Porter then submitted an application to the Department requesting the transfer of Kocher's surface mining permit, which the Department granted on October 3, 1991. (Stipulation para. 24 and 27.) The *Pennsylvania Bulletin* published notice of the permit transfer October 26, 1991. (Stipulation para. 28.) Nevertheless, Reading failed to file an appeal of the transfer within 30 days of publication of notice in the *Pennsylvania Bulletin.*

Since Reading had the opportunity previously to challenge both Kocher's consent to enter and Porter's failure to secure Reading's permission to enter the mine site, the administrative finality doctrine would ordinarily bar Reading from raising those issues now. However, Reading argues that the administrative finality doctrine should not apply because (1) Kocher misrepresented its status as owner of the mine site in the previous actions; (2) the notice concerning the previous actions was inadequate to put Reading on notice that they involved property Reading owned; (3) Reading did not become aware of the misrepresentation in time to appeal the previous actions; (4) Reading notified Porter before the permit renewal that it, Reading, was the owner of the mine site; and, (5) Porter failed to update its renewal application to show that Reading was the owner and that Reading had consented to Porter's activities.

Upon reconsideration, we disagree with Reading. The administrative finality doctrine *does* apply here. Reading cites no legal authority, nor are we aware of any, which supports the exception to the administrative finality doctrine which Reading asks us to recognize. Furthermore, although Reading argues that the notice in the *Pennsylvania Bulletin* was inadequate to put it on notice that *its* property was involved in the Department's actions, upon reconsideration of this issue, we find

that there is no statutory or regulatory requirement that the notice published in the *Pennsylvania Bulletin* actually identify the owner of the surface area or coal.

The principal thrust of Reading's argument is that it would be "unfair" to prevent Reading from raising the consent and ownership issues because doing so would reward Kocher and Porter for allegedly misrepresenting Kocher's relationship with the property, and would deprive Reading of property rights. Reading's concerns in this regard, however, are misplaced. They are based on a fundamental--though common--misapprehension of the Department's permitting process. When the Department issues a permit, permit renewal, etc., the permit only authorizes activity *with respect to the Commonwealth*; it does not give the permittee carte blanche to conduct the activity irrespective of the preexisting rights of third parties.[5] In the case of the permit renewal at issue here, for instance, the permit renewal just means that the Department will allow Porter to do something which would be illegal without a permit: to conduct surface mining activities and dispose

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[5] *See, e.g., Bernie Enterprises, Inc. v. DEP*, 1996 EHB 239. *Bernie* involved an appeal of a permit under the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1- 693.27, authorizing the permittee to install and maintain a storm sewer pipe on the appellant's land. The appellant argued, among other things, that the permit burdened his land by requiring that he acquiesce in the installation and maintenance of the pipe. The Board, however, rejected that argument. Noting that the permit expressly stated that it conferred no property rights upon the permittee, we held that the permit merely authorized the installation and maintenance of the pipe *vis-á-vis* the Commonwealth, and that the permittee would have to acquire the right to enter upon the land and install the pipe independent of the permit. *See also Miller v. DEP*, EHB Docket No. 95-234-C (Opinion issued March 31, 1997).

As in *Bernie,* the permit renewal involved in the instant appeal contains language expressly stating that the permit renewal does not affect the right of other private parties. The very first paragraph of the Limits of Authorization in Porter's permit renewal provides, "The issuance of this permit does not convey any property rights in either real or personal property, or any exclusive privileges, nor does it authorize any injury to private property or any invasion of personal rights." (Stipulation, Ex. A.)

of fly and bottom ash at the mine site. The permit does not independently give Porter a right to enter the property, a right to extract the coal, or any other rights with respect to Reading. To the extent that Reading argues that neither Porter nor Kocher secured its permission for the activities at the mine site, Reading's recourse lies not with the Board, but with the Court of Common Pleas in an action for trespass.

Sound public policy supports this conclusion. Although Reading appeals the permit renewal, all that Reading really asserts is that the Department was wrong regarding the ownership of the mine site in that it allowed itself to be duped by the alleged misrepresentations in the applications submitted by Porter and Kocher. Reading never asserts that the Department knew or had reason to know that the applications were incorrect. Therefore, were we to accept Reading's position, we would have to rule that the Department has a duty to look behind each facially valid surface mining permit application and determine whether the person represented as the owner in the application is in fact the actual owner.[6] This would not only unreasonably tax the Department's limited resources, but would lie well outside the Department's established field of expertise. Such property disputes, when they arise, are best left to the Courts of Common Pleas, which routinely handle such matters.[7]

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[6] While the Department does not have a *duty* to look behind each facially valid surface mining permit to determine whether the person represented as the landowner is the actual landowner, there is a check in place to dissuade applicants from misrepresenting the facts in their permit applications. Section 86.18 of the Department's regulations, 25 Pa. Code § 86.18, provides that applications must be verified by a responsible official, and, under section 18.6 of the Surface Mining Act, 52 P.S. § 1396.18f, anyone who violates the provisions of 18 Pa.C.S. sections 4903 (pertaining to false swearing) or 4904 (relating to unsworn falsification to authorities) may be subject to civil and criminal penalties.

[7] *Pond Reclamation v. DEP*, EHB Docket No. 96-147-R (Opinion issued May 15, 1997). *See also Einsig v. Pennsylvania Mines Corporation*, 452 A.2d 558, 568 (Pa. Cmwlth. 1982) ("The consideration of rights flowing from contracts of sale are best addressed by a court of common pleas,

2. Does the doctrine of administrative finality preclude Reading from challenging the permit renewal on the basis that neither Porter nor Kocher obtained Reading's consent for the ash disposal activities authorized in the permit renewal?

In its notice of appeal, Reading argues that the Department erred by issuing the permit renewal because Reading owned the mine site and never consented to ash disposal there. Porter and Kocher contend that Reading could have raised this issue with respect to previous Department actions concerning the mine site and, therefore, the doctrine of administrative finality bars Reading from raising the issue now.

Whether the administrative finality doctrine prevents Reading from arguing that Porter required its consent to dispose of ash at the site depends on whether (1) Reading could have raised that issue in an appeal of a previous Department action at the site, and (2) Reading failed to do so before that action became final. It is unclear, based on the documentation submitted in support of the motion, that Reading had an opportunity to appeal one of the previous actions on the basis that Porter required its consent to dispose of ash at the mine site and that Reading failed to raise that issue before the action became final.

Although a number of Department actions involve the mine site, only one deals with ash disposal there: the permit modification. On September 25, 1990, Kocher submitted an application to modify its permit to allow ash disposal, which the Department granted on January 23, 1991. (Stipulation, para. 17 and 21.) However, neither the Stipulation nor the exhibits submitted in support of the motions indicate that notice of the modification was ever published in the *Pennsylvania Bulletin.*

---

and not by DER, whose expertise does not extend to the analysis of chains of title and the limitations therein.")

The fact that notice of the permit modification may never have been published in the *Pennsylvania Bulletin* is significant because the permit modification is not final with respect to Reading--and, therefore, the administrative finality doctrine does not apply--until at least 30 days after notice of the action is published in the *Pennsylvania Bulletin*. Section 4(c) of the Environmental Hearing Board Act (the Environmental Hearing Board Act), Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. § 7514(d) provides that "no action of the [D]epartment adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the [B]oard. . . ." Section 1021.52(a) of the Board's rules of practice and procedure, 25 Pa. Code § 1021.52(a), meanwhile, provides that the Board's jurisdiction extends only to appeals of Department actions filed "within 30 days after the party appellant has received written notice of the action or within 30 days after notice of the action has been published in the *Pennsylvania Bulletin*. . . ."

Precisely when the 30-day appeal period starts to run depends on the prospective appellant. Where, as here, it is a person not already directly engaged in a Department action, the appeal period starts to run only upon publication of notice in the *Pennsylvania Bulletin*--even if the appellant may have had prior written notice. *See, e.g., Lower Allen Citizens Action Group, Inc. v. DER*, 538 A.2d 130 (Pa. Cmwlth. 1988). Since there is no indication here that the *Pennsylvania Bulletin* ever published notice of the permit modification, Porter and Kocher have failed to prove that Reading failed to file a timely appeal of the modification, and the administrative finality doctrine does not apply to issues Reading could have raised in that appeal. Consequently, Kocher and Reading are not entitled to summary judgment on their argument that the administrative finality doctrine bars Reading from arguing that it never consented to ash disposal activities occurring at the mine site. Porter's motion to limit issues is denied with respect to this issue for the same reason.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

READING ANTHRACITE COMPANY	:	
	:	
v.	:	**EHB Docket No. 95-196-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PORTER ASSOCIATES, INC., Permittee, and KOCHER COAL COMPANY, INC., Intervenor	:	

ORDER

AND NOW, this 17th day of February, 1998, it is ordered that Kocher's Motion for Summary Judgment and Porter's Motion for Summary Judgment/Motion to Limit Issues:

(1) are granted with respect to Reading's allegation that the Department erred by approving the permit renewal because Porter never obtained Reading's consent to enter the mine site.

(2) are denied in all other respects.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: February 17, 1998

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

For the Commonwealth, DEP:
Dennis A. Whitaker, Esq.
Southcentral Region

For Appellants:
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Matthew E. Turowski, Esq.
CERULLO, DATTE & WALLBILLICH
Pottsville, PA

For Permittee:
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HOURIGAN, KLUGER, SPOHRER & QUINN
Wilkes-Barre, PA

For Intervenor:
Charles E. Gutshall, Esq.
RHOADS & SINON
Harrisburg, PA

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TELECOPIER 717-783-4738

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PAUL L. WASSON	:	
	:	
v.	:	**EHB Docket No. 97-136-C**
	:	**(Consolidated with 97-222-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 17, 1998**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion for summary judgment is granted in part and denied in part. The administrative finality doctrine bars an appellant from challenging a Department order directing him to reclaim pits used to dispose of brine and other production fluids where (1) he previously agreed to a consent order and agreement (consent order) requiring him to reclaim the pits, and (2) he neither reclaimed the pits nor appealed the consent order.

The Department has the authority under section 215 of the Oil and Gas Act, 58 P.S. § 601.215, to declare a bond forfeit for failure to reclaim pits as required by the consent order. Similarly, the Department has the authority under section 210 of the Oil and Gas Act, 58 P.S. § 601.210, to order owners or operators of oil or gas wells to plug wells, if the Department establishes that the wells are "abandoned" and the owner or operator fails to show that the wells are either orphan wells or have inactive status.

The Board will not dismiss an appeal in response to a Department motion for summary judgment where the Department's motion fails to address key issues raised in the notice of appeal.

OPINION

This matter was initiated with the June 30, 1997, filing of a Notice of Appeal by Paul L. Wasson (Appellant), challenging a May 30, 1997, order issued by the Department of Environmental Protection (Department). The order pertained to certain lands leased for oil production in Foster and Lafayette townships in McKean County. It directed Appellant and Wasson Drilling Company, Inc. (Wasson Drilling) to reclaim unlined pits used for the disposal of brine and other production fluids, and to plug the 41 wells on the property. Appellant's Notice of Appeal averred that:

> (1) the Department does not have the authority under the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, *as amended*, 58 P.S.§§ 601.101-601.605 (Oil and Gas Act), or any other statute or regulation to order Appellant to reclaim the pits;
>
> (2) the order was based on erroneous information;
>
> (3) the order amounted to a "taking" of Appellant's property without just compensation because it required that Appellant plug wells that still have economic value; and,
>
> (4) the order violated Appellant's rights to due process and equal protection under the United States and Pennsylvania Constitutions because Appellant is physically and financially unable to comply with the order's requirements.

Appellant filed another appeal relating to the same property on October 21, 1997. Originally docketed at EHB Docket No. 97-222-R, the appeal challenged a declaration of bond forfeiture the Department issued on September 19, 1997. The declaration informed Appellant and Wasson Drilling that $3,000 phased deposit of collateral bond #9017067228 had been forfeited because they

failed to comply with a May 23, 1996, consent order (consent order).[1] Among other things, the consent order required that Appellant and Wasson Drilling reclaim the pits and bond the wells. In his Notice of Appeal, Appellant raised the same objections to the declaration that he had raised previously to the order. In addition, he asserted that: (1) he is destitute and cannot complete the bond payments; (2) he complied with many provisions of the consent order; (3) there is already an appeal pending seeking the forfeiture of the $3,000 paid towards the phased deposit bond.[2]

Appellant's appeal at EHB Docket No. 97-222-R was reassigned from Administrative Law Judge Thomas Renwand to Administrative Law Judge Michelle Coleman on November 11, 1997. On November 19, 1997, we consolidated both appeals at EHB Docket No. 97-136-C. The Department filed identical Motions for Summary Judgment in both appeals on October 30, 1997, together with supporting Memoranda of Law.[3] In its Motion, the Department contends that it is entitled to summary judgment with respect to the order and declaration because:

(1) Appellant is the owner and operator of the oil wells;

---

[1] Where an owner or operator of 200 wells or less has insufficient financial resources to obtain a bond for a well drilled prior to April 18, 1985, he may collateralize a bond with phased deposits to the State Treasurer. *See* 58 P.S. § 601.215(d)(1)(ii), and 25 Pa. Code § 78.309. Where, as here, between 26 and 50 wells are involved, the owner or operator must make an initial payment of $3,000 and at least $1,300 annually. *See* 58 P.S. § 601.215(d)(1)(ii)(B).

[2] It is unclear to what "pending appeal" Appellant is referring. The appeal of the declaration of forfeiture identified only one related appeal--the appeal of the order--and the order did not address forfeiture of the bond. Furthermore, since the appeal of the declaration of forfeiture and the appeal of the order are now consolidated, any problems which might have arisen from separate appeals of the order and declaration have now been cured.

[3] Since the Motions and Supporting Memoranda are identical, and the appeals have since been consolidated, we shall treat the Motions as one Motion filed with respect to the consolidated appeal.

(2) Appellant disposed of brine, oil, and other production fluids in the pits without a permit;

(3) Appellant agreed to reclaim the pits as part of the consent order;

(4) Appellant has not reclaimed the wells;

(5) Appellant failed to plug the wells, despite not having used the wells to produce gas or liquids for more than 12 months; and,

(6) neither the Oil and Gas Act nor any other relevant statute requires that the Department consider the economic impact of the order or declaration.

Appellant failed to file his Response and Memorandum in Opposition to the Department's Motion until December 15, 1997--three weeks after his response was due.

Because Appellant's Response and Memorandum were so long overdue, we shall disregard them. However, we will refrain from entering summary judgment against Appellant simply based on his failure to file a timely response.[4]

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions of record--and affidavits, if any--show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997). When deciding motions for summary judgment, we view the record in the light

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[4] When ruling on motions for summary judgment, the Board looks to Rules 1035.1 to 1035.5 of the Pennsylvania Rules of Civil Procedure. *See, e.g., Tranguch v. DEP*, EHB Docket No 95-255-C (Opinion issued February 25, 1997). Pa.R.C.P. 1035.3(a) provides that, in response to a motion for summary judgment, "[t]he adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within 30 days after service of the motion . . . ." Pa.R.C.P. 1035.3(d), meanwhile, provides, "Summary judgment may be entered against a party who does not respond." The explanatory comment accompanying Rule 1035.3 explains, "The rule permits entry of judgment for failure to respond to the motion . . . ."

most favorable to the nonmoving party, *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995), and will enter summary judgment only where the right is clear and free from doubt. *Hayward v. Medical Centre of Beaver County*, 608 A.2d 1040 (Pa. 1992).

We will address the issues raised by the Department's Motion individually below.

I. Does the Department have the authority under the Oil and Gas Act or other state statutes to order Appellant to reclaim the pits?

Appellant argues that neither the Oil and Gas Act nor any other state statute gives the Department the authority to order him to reclaim the pits. The Department argues that it has that authority by virtue of the consent order issued to Appellant and section 206 of the Oil and Gas Act, 58 P.S. § 601.206. We need not resolve the Department's argument concerning section 206 of the Act because we find the Department's argument on the consent order dispositive.

The Department has established the central facts concerning the pits. While Appellant and Wasson Drilling own and operate the wells on the leases, Appellant did not have a permit to place brine or other production fluids into the pits there. (Exhibit 2, paragraph E; Exhibit 3, paragraph 5) Nevertheless, in the consent order, Appellant concedes that he and Wasson Drilling used the unlined, unapproved pits to dispose of brines and other production fluids, and that, by doing so, he created a public nuisance under section 502 of the Oil and Gas Act, 58 P.S. 601.502; section 307(c) of the Clean Streams Law, 35 P.S. § 691.307(c); and section 601 of the Solid Waste Management Act, 35 P.S. § 6018.601. (Exhibit 2, paragraphs F and I) Appellant also admits in the consent order that the use of the pits violated section 207(a) of the Oil and Gas Act, 58 P.S. § 601.207(a); section 307 of the Clean Streams Law, 35 P.S. § 691.307; section 301 of the Solid Waste Management Act, 35 P.S. § 6018.301; and sections 78.54 and 78.57 of the Department's regulations, 25 Pa. Code §§

78.54 and 78.57. (Exhibit 2, paragraph H) The consent order required, among other things, that within 60 days, Appellant and Wasson Drilling had to submit a plan and schedule for the reclamation of the pits by July 31, 1996. (Exhibit 2, paragraph 10(a)) Appellant and Wasson Drilling have not reclaimed the pits. (Exhibit 1, Requests for Admissions and Answers to Requests for Admissions, paragraph 7; Exhibit 3, paragraphs 6-7)

Appellant cannot challenge the Department's authority to order him to reclaim the pits because the Department had previously ordered Appellant to reclaim them in the consent order.[5] Under the doctrine of administrative finality, "one who fails to exhaust his statutory remedies may not thereafter raise an issue that could have and should have been raised in the proceeding afforded by his statutory remedy." *DER v. Wheeling-Pittsburgh Coal Corp.*, 348 A.2d 765, 767 (Pa. Cmwlth. 1975), *affirmed* 375 A.2d 320 (Pa. 1977) (quoting *Philadelphia v. Sam Bobman Department Store Company*, 149 A.2d 518, 521 (Pa. Super. 1959)). A consent order is an appealable action. *Throop Property Owners v. DER*, 1988 EHB 391; *Burroughs v. DER*, 1992 EHB 1084. Therefore, assuming Appellant could challenge the terms of a consent order that he had previously agreed to, he had to appeal the consent order *itself*. Having failed to appeal it, Appellant cannot collaterally attack the consent order here, in his appeal of the Department's May 30, 1997, order and September 19, 1997, declaration of bond forfeiture.

II. Does the Department have the authority under the Oil and Gas Act, or other state statutes, to order that the wells be plugged?

Appellant argues that neither the Oil and Gas Act nor any other state statute authorizes the

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[5] Significantly, Appellant agreed in the consent order that he would not challenge its content, validity, or findings. (Exhibit 2, paragraph 26)

Department to order him to plug the wells. The Department, meanwhile, insists that the wells are "abandoned wells" and that it has the authority to order Appellant to plug the wells by virtue of section 210 of the Oil and Gas Act, 58 P.S. § 601.210. Appellant concedes that he has not plugged the wells. (Exhibit 1, Requests for Admissions and Answers to Requests for Admissions, paragraph 5; Exhibit 3, paragraph 7)

Section 103 of the Oil and Gas Act provides, in pertinent part, that an "abandoned well" is "any well that has not been used to produce, extract or inject any gas, petroleum or other liquid within the preceding 12 months." Appellant concedes that he has not produced, extracted, or injected any gas, petroleum, or other liquid from the wells in over 12 months. (Exhibit 1, Requests for Admissions and Answers to Requests for Admissions, paragraph 4) Therefore, Appellant's wells are abandoned wells within the meaning of section 103.

Section 210 of the Act provides that owners or operators of abandoned wells must plug them unless the wells have inactive status or are orphan wells.[6] For purposes of determining whether an owner or operator of abandoned wells has a duty to plug the wells under section 210, we have treated the issue of whether the wells are orphan wells or have inactive status as an affirmative defense.[7]

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[6] Section 210 provides, in pertinent part:

> (a) Upon abandoning any well, the owner or operator thereof shall plug the well in a manner prescribed by regulation of the [D]epartment in order to stop any vertical flow of fluids or gas within the well bore unless the [D]epartment has granted inactive status of such well pursuant to section 204 [58 P.S. § 601.204] or the well has been approved by the Department as an orphan well pursuant to section 203 [58 P.S. § 601.203].

[7] It would appear, based on some of the exhibits submitted in support of the Department's Motion, that Appellant missed a payment on his phased collateral bond. Assuming that is the case, the Department would have the authority to order Appellant to plug the wells--whether or not they are inactive or orphan--pursuant to section 78.309 of the Department's regulations, 25 Pa. Code §

In *Kenco Oil & Gas, Inc. v. DEP*, 1996 EHB 325, for instance, we ruled on a Department motion for partial summary judgment concerning alleged abandoned wells. We determined that the Department had established the wells were abandoned and held that the Department was entitled to summary judgment on the entire appeal because Appellant had failed to provide the Board with any authority for its failure to act. We see no reason to treat the instant appeal any differently. The Department establishes in its motion that Appellant abandoned the wells, and, in response, Appellant failed to show that the wells were either orphan wells or had inactive status. Accordingly, the Department is entitled to summary judgment on whether it had the authority to order Appellant to plug the wells.

III. Does the Department have the authority under the Oil and Gas Act or other state statutes to declare the bond forfeit?

In his Notice of Appeal, Appellant argues that the Department erred by declaring the bond forfeit because: (1) he complied with many provisions of the consent order; and (2) Appellant is destitute and cannot afford to complete the payments on the bond. In its Motion for summary judgment, the Department argues that it has the authority to declare the bond forfeit under section 215 of the Act, 58 P.S. § 601.215, because Appellant failed to comply with the restoration and plugging requirements in the Act and its accompanying regulations. In addition, the Department argues that the economic impact of a bond forfeiture is relevant only during enforcement proceedings and, consequently, Appellant cannot raise the issue now.

We agree that the Department has the authority to declare the $3,000 Appellant paid towards

---

78.309(a)(2)(ii)(B). Since the Department failed to raise the issue in its Motion, however, we will not address it here.

his bond forfeit under section 215 of the Oil and Gas Act. Section 215(c) provides, in pertinent part, "If the well owner or operator fails . . . to comply with the applicable requirements of this act identified in subsection (a) . . . the Department may declare the bond forfeited." Subsection (a)(3) of section 215, 58 P.S. § 601.215(a)(3), meanwhile, provides that operators must "faithfully perform all of the . . . restoration . . . requirements" of the Act. By failing to reclaim the pits in accordance with the Department's consent order, Appellant violated section 215(a)(3) of the Act, and, therefore, the Department had the authority under section 215(c) to declare his bond forfeit. Accordingly, to the extent that Appellant avers that the Department exceeded its authority under the Oil and Gas Act by declaring his bond forfeit, the Department is entitled to judgment as a matter of law.

IV. Issues raised in Appellant's Notice of Appeal which the Department did not address in its Motion for Summary Judgment.

The Department's Motion failed to address a number of the claims Appellant raised in his Notice of Appeal. The Department never responded, for instance, to Appellant's claims that (1) the order amounted to a "taking" of Appellant's property without just compensation because it required him to plug wells that still have economic value, or (2) the order violated Appellant's rights to due process and equal protection under the United States and Pennsylvania Constitutions because Appellant is physically and financially unable to comply with its requirements. Since the Department failed even to address these issues in its Motion, we will not grant the Department summary judgment on them. The Department has shown that certain aspects of the order and declaration of forfeiture were authorized under the Oil and Gas Act. But, if Appellant can show that those same aspects of the Department's actions are unconstitutional, he could still prevail on them.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PAUL L. WASSON	:	
	:	
v.	:	**EHB Docket No. 97-136-C**
	:	**(Consolidated with 97-222-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

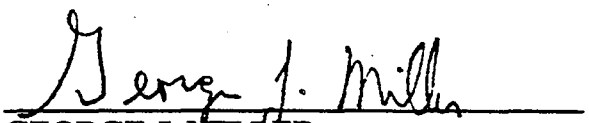
ORDER

AND NOW, this 17th day of February, 1998, it is ordered that the Department's Motion for Summary Judgment is:

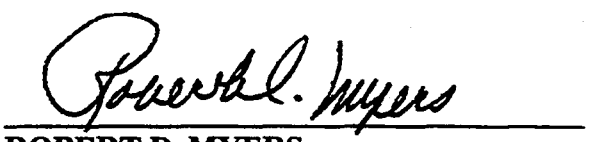
(1) granted to the extent that Appellant avers that the Department lacks the authority under the Oil and Gas Act to order him to reclaim the pits, to plug the wells, and to declare his bond forfeit; and,

(2) denied in all other respects.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 97-136-C
(Consolidated with 97-222-C)

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: February 17, 1998

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

For the Commonwealth, DEP:
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Northwest Region

For Appellant:
Charles Jeffrey Duke, Esquire
PECORA & DUKE
Bradford, PA

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TELECOPIER 717-783-4738

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

ROBERT B. GOODALL	:	
	:	
v.	:	**EHB Docket No. 97-210-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 18, 1998**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

When the Department of Environmental Protection (Department) reinstates a suspended surface mining permit, the Board will grant the Department's motion to dismiss the appeal for mootness since no effective relief can be granted.

OPINION

This matter was initiated with the October 8, 1997 filing of a *pro se* notice of appeal by Robert B. Goodall (Appellant) challenging the Department of Environmental Protection's (Department) suspension of Surface Mining Permit No. 63823020 (permit), located in Robinson Township, Washington County. The site is commonly known as the Roman Mine.

In June 1997, the Department learned that the Roman Mine permit application did not contain a Consent of Landowner form (Supplemental C) as required pursuant to Section 4(a)(2)(F) of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as*

amended, 52 P.S. § 1396.4(a)(2)(F), and 25 Pa. Code § 86.64. In a letter dated July 31, 1997, the Appellant was contacted by the Department and asked to submit a Supplemental C for the Roman Mine within 30 days. In a letter dated September 8, 1997, the Department suspended the permit since it had not received the Supplemental C by the designated deadline. Subsequently, the Department received an acceptable Supplemental C for the Roman Mine and reinstated the permit in a letter dated October 1, 1997.

Currently before the Board is the Department's motion to dismiss the appeal for mootness. The Department asserts that because the Board can no longer grant effective relief to the Appellant, the appeal should be dismissed. In reviewing the Department's motion, we must view it in a light most favorable to the non-moving party. *Florence Township. v. DEP*, 1996 EHB 282.

We have held on more than one occasion that when this Board can no longer provide meaningful relief, an appeal is moot. *Moriniere v. DER*, 1995 EHB 395; *New Hanover Corporation v. DER*, 1991 EHB 1127. Here, the Department's action being appealed is the suspension of the Appellant's permit. Because the permit has been reinstated, the Board can no longer grant the Appellant any meaningful relief as to that action.[1] Additionally, in a letter dated February 6, 1998, the Department stipulated that it will not seek any civil penalty from the Appellant as a result of the permit suspension and it will not use the permit suspension against the Appellant for purposes of evaluating his compliance history in the future. Since the Appellant has already obtained the relief

[1] In the Appellant's memorandum in support of his response to the Department's motion to dismiss for mootness, he states: "I am seeking an adjudication to protect me from future harassment by the [Department]." The Board is not empowered to resolve potential future actions which the Department may take. In order for the Board's jurisdiction to apply, there must be some Department action to form the subject matter of our adjudication. *Magarigal v. DER*, 1992 EHB 455.

he sought, the appeal must be dismissed as moot.

Accordingly, the following order is entered:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT B. GOODALL	:	
	:	
v.	:	**EHB Docket No. 97-210-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 18th day of February, 1998, the Department of Environmental Protection's Motion to Dismiss is **granted** and the appeal is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 97-210-R

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: February 18, 1998

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

For the Commonwealth, DEP:
Michael J. Heilman, Esq.
Southwestern Region

For Appellant:
Robert B. Goodall
Bulger, PA

jlp

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

MYRON A. YOURSHAW and CHARLES J. YOURSHAW	:	
v.	:	**EHB Docket No. 97-039-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and READING ANTHRACITE CO., Permittee	:	**Issued: February 24, 1998**

OPINION AND ORDER ON MOTION TO COMPEL

By George J. Miller, Administrative Law Judge

Synopsis:

Before the Board is a motion to compel answers to interrogatories and production of documents filed by the Appellants. Also before the Board are the Permittee's objections to the motion and counter-motion for a protective order. The Board grants the Appellants' motion with respect to three interrogatories and grants the Permittee's counter-motion with respect to the remaining interrogatories and requests for document production. The Permittee will be required to answer the Appellants' interrogatory with respect to experts by supplying information required by an interrogatory permitted under Rule 4003.5(a)(1) of the Pennsylvania Rules of Civil Procedure relating to any expert witness the Permittee intends to call at the hearing on the merits.

OPINION

The motion to compel was filed in connection with a *pro se* appeal challenging the Department of Environmental Protection's (Department) second renewal of a surface mining and NPDES permit (collectively permit) issued to Reading Anthracite Company (Permittee).[1] Although the Appellants' motion is labeled "motion to compel interrogatory testimony", it also seeks to compel the production of documents in 18 of the total 23 requests. The Permittee's response to the motion includes a counter-motion for a protective order pending the Board's decision on its motion for summary judgment or in the alternative to limit issues.

DISCUSSION

The Appellants submitted 23 requests to the Permittee which included a mixture of interrogatories and requests for document productions. The Permittee responded with general objections to all of the interrogatories and requests for document production. The Permittee contends that the Board's Order of July 29, 1997 extended the discovery period but limited the Appellants to discovery of experts whom the Permittee intends to call at the time of the hearing. The Permittee objects to the interrogatories, noting that the "Interrogatories go much further and beyond that Order." (Permittee's General Objection 4) The Board's Order states that "[t]he Appellants and the Permittee may serve additional interrogatories . . . which may include interrogatories as to the qualifications and opinions of expert witnesses . . . ." The Board's Order does not limit the Appellants to the extent asserted by the Permittee.

Nevertheless, the Appellants' interrogatories and requests for document production are

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[1] For a complete description of this case, see *Yourshaw v. DEP*, EHB Docket No. 97-039-MG (Opinion issued February 4, 1998).

limited by the Board's decision on the Permittee's motion for summary judgment or in the alternative to limit issues in this appeal at EHB Docket No. 97-039-MG (Opinion issued on February 4, 1998). In that decision, the Board held that the issues in this case should be limited to those events that occurred between the first and second renewal of the permit and may provide grounds for the claim that the Department should not have renewed the permit a second time under 25 Pa. Code § 86.55(g). The issues in this case were limited to the Appellants' objections raised in the notice of appeal alleging an unsafe highwall, absence of sediment traps and blasting that has caused structural damage. Therefore, the Appellants' interrogatories and production of document requests must be limited to those questions seeking information about the highwall, absence of sediment traps and blasting. In addition, Rule 4003.5(a)(1) of the Pennsylvania Rules of Civil Procedure permits certain interrogatories with respect to any expert witness the Permittee intends to call at the hearing on the merits. Interrogatory Nos. 12, 20 and 22 are the only requests that involve these issues and are consequently the only requests that the Board may review.

Interrogatory 12 asks the Permittee to reveal "how [it] evaluated that [its] blasting did not and is not causing structural damage to any homes or structures in the area." The Permittee objected, noting that the requested information was not relevant to issues raised in the appeal. Since the Appellants did in fact raise this issue in Objection 9 of their notice of appeal and the issue is within the scope of this appeal as previously determined by the Board, the motion to compel is granted.

Interrogatory 20 requests the Permittee to "[p]roduce who determined that the high walls on both the East and South are structurally sound." The Permittee objected to this request on the grounds that the question is not intelligible and it appears to be directed to the Department. We disagree. The question is within the scope of this appeal and requests specific information which

should be within the possession of the Permittee. If the Permittee is not the party who determined that the high walls are structurally sound, it may respond accordingly. Otherwise, it should identify who made any such determination and state that person's qualifications as requested by this interrogatory. The motion to compel is granted.

Interrogatory 22 asks the Permittee to produce information relating to potential expert witnesses. While the Appellants' interrogatory is not proper under Rule 4003.5(a)(1) of the Pennsylvania Rules of Civil Procedure, the Permittee will be required to answer the Appellants' interrogatory with respect to experts by supplying information required by an interrogatory permitted under Rule 4003.5(a)(1). The motion to compel is granted.

Accordingly, the following order is entered:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MYRON A. YOURSHAW and CHARLES J. YOURSHAW	:	
v.	:	**EHB Docket No. 97-039-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and READING ANTHRACITE CO., Permittee	:	

ORDER

AND NOW, this 24th day of February, 1998, upon consideration of the Appellant's motion to compel answers to interrogatories and production of documents and the Permittee's counter-motion for a protective order, it is hereby ordered that:

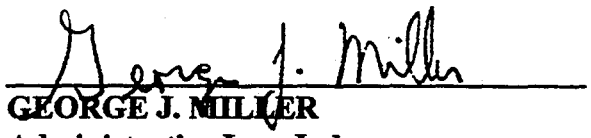
1. The motion to compel answers to Interrogatory Nos. 12 and 20 is GRANTED. These responses are to be made within 30 days of the date of this Order. The Permittee's motion for protective order is DENIED with respect to Interrogatory Nos. 12 and 20.

2. The Permittee is directed to respond to Interrogatory No. 22 within 30 days of the date of this Order by providing the information which it would be required to provide under Rule 4003.5(a)(1) of the Pennsylvania Rules of Civil Procedure when responding to an interrogatory with respect to any expert witness it intends to call at the hearing on the merits.

3. The motion to compel answers to the remaining Interrogatories is DENIED consistent with this opinion. The Permittee's motion for protective order is GRANTED with respect to the remaining Interrogatories.

EHB Docket No. 97-039-MG

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: February 24, 1998

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

For the Commonwealth, DEP:
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Southcentral Region

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BERWICK AREA JOINT SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 95-165-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NESCOPECK BOROUGH, Permittee	:	**Issued:** February 26, 1998

ADJUDICATION

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

An appeal is dismissed for lack of standing where: (1) the Appellant is a joint sewer authority incorporated pursuant to the Municipality Authorities Act of 1945;[1] as such, the Appellant exists for the purpose of acquiring, owning and operating all of the public sewage collection and treatment facilities within its constituent municipalities; (2) the Appellant challenges the Department's approval of a non-constituent municipality's Official Sewage Facilities Plan, which allows the non-constituent municipality to construct a new sewage treatment plant instead of connecting to the sewage system of a constituent municipality; (3) the Appellant claims that it has standing because its customers will have to pay a higher sewage treatment rate as a result of the Department's action; (4) the Appellant has no customers; and, (5) even if the Appellant had

[1] Act of May 2, 1945, P.L. 382, *as amended*, 53 P.S. §§ 301-401.

customers, as a matter of law, a joint sewer authority created pursuant to the Municipality Authorities Act of 1945 does not have standing to assert the claims of individual property owners.

PROCEDURAL HISTORY

On August 3, 1995, the Berwick Area Joint Sewer Authority (Joint Authority) filed a Notice of Appeal with the Board challenging the Department of Environmental Protection's (Department)[2] July 5, 1995 approval of Nescopeck Borough's (Nescopeck) Official Sewage Facilities Plan Update (Plan). The Department's action allows Nescopeck to replace its existing sewage treatment plant with a new facility (Nescopeck Alternative) instead of connecting to the Borough of Berwick's sewage treatment plant (Berwick Alternative). The Joint Authority claims that Nescopeck's Plan lacks sufficient documentation to support the Nescopeck Alternative and does not properly consider the Berwick Alternative. The Joint Authority argues that the Berwick Alternative is more cost effective, and that the Berwick Alternative is consistent with public policy favoring consolidation of sewage treatment facilities.

On October 5, 1995, the parties filed a Stipulation for Third-Party Determination of [the] "Cost" Issue. The parties requested therein an extension of deadlines in order to allow the parties to resolve the cost issue through a third party. The Board granted the extension on October 13, 1995. The Board granted additional extensions on December 19, 1995, February 26, 1996, and April 17, 1996 for other valid reasons.

On June 28, 1996, the Board set the case for hearing in September 1996. On July 31, 1996, at the request of the parties, the Board rescheduled the matter for hearing in November 1996. On

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[2] When Appellant filed the Notice of Appeal in August of 1995, the Department was known as the Department of Environmental Resources.

September 3, 1996, the Joint Authority filed its pre-hearing memorandum. On September 16, 1996, Nescopeck and the Department filed their pre-hearing memoranda. However, at the parties' request, the Board rescheduled the case for hearing in December 1996. On October 31, 1996, Nescopeck and the Department filed supplemental pre-hearing memoranda.

On November 12, 1996, Nescopeck filed a Motion in Limine to Strike Stipulation for Third-Party Determination of "Cost" Issue (Motion in Limine) and a supporting brief. On November 21, 1996, because of issues raised in a November 19, 1996 conference call, the Board stayed the proceedings until February 3, 1997. On February 6, 1997, the Joint Authority filed an Answer and Brief in opposition to Nescopeck's Motion in Limine. On February 18, 1997, the Department filed a Response and Memorandum of Law in support of the Motion in Limine.

On March 4, 1997, the Board set the case for hearing in May 1997. On March 18, 1997, at the request of the parties, the Board rescheduled the matter for hearing in July 1997. On June 2, 1997, the Department filed a Motion to Shift Burden of Proceeding (Motion to Shift) and a Motion for Leave for All Parties to File Amended Pre-hearing Memoranda (Motion for Leave). On June 3, 1997, the Board issued an Opinion and Order denying Nescopeck's Motion in Limine. On June 5, 1997, with the consent of the parties, the Board issued an order granting the Department's Motion to Shift and Motion for Leave.

On June 10, 1997, the Department notified the Board that the Joint Authority's appeal is related to *Borough of Berwick v. DEP*, EHB Docket No. 97-098-MR, another appeal pending before the Board. However, neither the Department nor the other parties requested that the Board consolidate the appeals for hearing.

On June 12, 1997, the Joint Authority filed its amended pre-hearing memorandum. On June

26, 1997, the Department filed its amended pre-hearing memorandum, and, on June 27, 1997, Nescopeck filed its amended pre-hearing memorandum. On July 3, 1997, the Joint Authority filed a Stipulation of Undisputed Facts (Stipulation).

On July 8, 1997, Nescopeck filed a Motion to Dismiss Appeal. Nescopeck argued therein that the Joint Authority's appeal should be dismissed because the Joint Authority lacks standing to contest the Department's approval of Nescopeck's Plan and because, on April 4, 1997, the Department issued a letter to the Borough of Berwick and the Municipal Authority of Berwick prohibiting new connections to Berwick's sewer system.

The Board held hearings on July 8, 9, 10, 11 and 14, 1997. The Joint Authority filed its post-hearing brief on September 29, 1997. The Department and Nescopeck each filed post-hearing briefs on November 3, 1997.

FINDINGS OF FACT

1. The Berwick Area Joint Sewer Authority (Joint Authority) was incorporated on December 30, 1994 pursuant to the Municipality Authorities Act of 1945 by the Borough of Berwick, the Borough of Briar Creek, and Briar Creek Township for the purpose of acquiring, owning, and operating all of the public sewage collection and treatment facilities within its constituent municipalities. (Stipulation, No. 30.)

2. The Joint Authority neither owns nor operates the Borough of Berwick's sewage treatment plant or the sewage collection systems of the Borough of Berwick, the Borough of Briar Creek, or Briar Creek Township. (Stipulation, No. 91.) Neither the Berwick Municipal Authority nor the Borough of Briar Creek nor Briar Creek Township have transferred their assets to the Joint Authority. (Stipulation, Nos. 30, 119.) As of the July 9, 1997 hearing before the Board, the Joint

Authority did not have, and has never had, any actual sewage customers. (N.T. at 374, 403.)

3. In addition to its original constituent municipalities, the Joint Authority is authorized by its incorporation documents to provide sewer service to additional surrounding communities as either members or customers of the Joint Authority. (Stipulation, No. 31.)

4. Nescopeck Borough is a municipality located across Nescopeck Creek from the Borough of Berwick. Nescopeck currently owns and operates public sewage collection and treatment facilities within its own boundaries. Nescopeck is not one of the Joint Authority's constituent municipalities. (Stipulation, Nos. 16, 32.)

5. On May 11, 1995, Nescopeck submitted to the Department an Official Sewage Facilities Plan (Plan) which proposed extensions of the existing sewage collection system and replacement of the existing treatment plant (Nescopeck Alternative). (Stipulation, Nos. 15, 35.) The Plan also discussed constructing a pump station and force main to transport Nescopeck's sewage flow across the Susquehanna River to the Borough of Berwick's treatment plant (Berwick Alternative). (Stipulation, Nos. 15, 36.) The Plan stated that the Berwick Alternative was not selected because of its cost and because it would cause Nescopeck to lose its self-dependency. (Stipulation, No. 37.)

6. On July 5, 1995, the Department approved Nescopeck's Plan to construct an updated sewage treatment plant, having determined that the Plan complied with the laws of the Commonwealth and the rules and regulations of the Department. (Stipulation, Nos. 19, 42.)

7. Following approval of the Plan, the Joint Authority filed a timely appeal to this Board. (Stipulation, Nos. 20, 45.)

DISCUSSION

Standing

As a threshold matter, we must address Nescopeck's contention that the Joint Authority lacks standing to challenge the Department's approval of Nescopeck's Plan. Generally, in order to have standing to contest a government action, the appellant must be "aggrieved" by that action. *Belitskus v. DEP*, EHB Docket No. 96-196-MR (Opinion issued October 21, 1997). This means that the appellant must have a substantial, direct, and immediate interest in the controversy that is distinguishable from the interest shared by other citizens. *Sprague v. Casey*, 550 A.2d 184 (Pa. 1984); *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975); *Florence Township v. DEP*, 1996 EHB 282.

A party has a "substantial" interest so long as the party has an interest which surpasses the common interest of all citizens in seeking compliance with the law. *Empire Coal Mining & Development, Inc. v. Department of Environmental Resources*, 623 A.2d 897 (Pa. Cmwlth. 1993), *appeal denied* 629 A.2d 1384 (Pa. 1993). A party has a "direct" interest so long as the party was harmed by the challenged action or order. *Id.* A party has an "immediate" interest so long as there is a causal connection between the action or order complained of and the injury suffered by the party asserting standing. *Id.* An interest is "immediate" only where there is a sufficiently close connection between the challenged action and asserted injury. *Tessitor v. Department of Environmental Resources*, 682 A.2d 434 (Pa. Cmwlth. 1996).

In this case, the Joint Authority argues that it has standing to pursue this appeal because, as a result of the Department's approval of the Nescopeck Alternative, *its customers* will have to pay a higher sewage treatment rate. Nescopeck and the Department counter that the Joint Authority

actually has *no customers* at the present time. Moreover, even if the Joint Authority had customers, as a matter of law, the Joint Authority does not have standing to assert the rights of *its customers*. For the following reasons, we conclude that the Joint Authority lacks standing to pursue this appeal against the Department.

First, we note that the Joint Authority does *not* assert that *it* is "aggrieved" by the Department's action in this case, that *it* has an interest in this controversy which surpasses the common interest of all citizens in seeking compliance with the law, or that *it* will be harmed by the Department's action. Rather, the Joint Authority contends that *its customers* are "aggrieved" by the Department's action, that *its customers* have a substantial interest in this litigation, and that *its customers* will be harmed as a direct result of the Department's approval of the Nescopeck Alternative.

Second, we note that, as of the July 9, 1997 hearing before this Board, *the Joint Authority has no actual sewage customers*. Indeed, the Joint Authority has stipulated that it does not currently own or operate any sewage treatment facility or sewage collection system. This is because, although the Joint Authority was incorporated under the Municipality Authorities Act of 1945 on December 30, 1994 for the purpose of acquiring, owning, and operating the public sewage collection and sewage treatment facilities within its constituent municipalities, none of the constituent municipalities has yet transferred its assets to the Joint Authority. (Finding of Fact, No. 2.)

Third, even if the Joint Authority had customers, as a matter of law, a joint sewer authority created under the Municipality Authorities Act of 1945 has no standing to sue the Department on behalf of individual property owners. In *Ramey Borough v. Department of Environmental Resources*, 327 A.2d 647 (Pa. Cmwlth. 1975), Ramey Borough challenged a Department order

requiring that the borough construct a sewage treatment facility. Ramey Borough claimed that the Department's order would require property owners to pay unreasonable "tap-on" and maintenance fees. The Commonwealth Court held that Ramey Borough lacked standing to assert this claim on behalf of individual property owners. The Court explained that Ramey Borough was nothing more than a third party without any interest in the property of its residents. Like Ramey Borough, the Joint Authority here is merely a third party without any interest in the claims of individual property owners.

In *Department of Environmental Resources v. Borough of Carlisle*, 330 A.2d 293 (Pa. Cmwlth. 1974), the Borough of Carlisle and the Carlisle Borough Sewer System Authority appealed a Department order which restricted the issuance of new sewage connection permits. One of the issues considered by the Commonwealth Court was whether the Department's procedures in issuing the order infringed upon the property rights of private citizens. The Commonwealth Court held that neither the Borough of Carlisle nor the Carlisle Borough Sewer System Authority had standing to assert the rights or claims of individual property owners. In support of its holding, the Court stated that the borough and the sewer authority exist merely for the purpose of carrying out specific local government functions. *See Strasburg Associates v. Newlin Township*, 415 A.2d 1014 (Pa. Cmwlth. 1980); *see also Snelling v. Department of Transportation*, 366 A.2d 1298 (Pa. Cmwlth. 1976).

Like the Borough of Carlisle and the Carlisle Borough Sewer System Authority, the Joint Authority exists for certain limited purposes. Under Section 4(A) of the Municipality Authorities Act of 1945,[3] the Joint Authority is "a body corporate and politic" which exists "for the purpose of

[3] Act of May 2, 1945, P.L. 382, *as amended*, 53 P.S. § 306(A).

acquiring, holding, constructing, improving, maintaining and operating, owning, leasing ..., and providing financing for insurance reserves" with respect to sewer system projects. The Joint Authority does *not* exist in order to represent the interests of individual property owners against the Department.[4]

In sum, because the Joint Authority has not alleged harm to any substantial interest of its own, because the Joint Authority alleges harm to non-existent customers, and because the Joint Authority cannot legally represent the interests of individual property owners against the Department, we hold that the Joint Authority lacks standing to pursue this appeal. Accordingly, the appeal is dismissed.

CONCLUSIONS OF LAW

1. Because the Joint Authority has failed to assert that it is "aggrieved" by the Department's approval of Nescopeck's Plan, the Joint Authority lacks standing to appeal the Department's action.

2. Because the Joint Authority asserts that its customers are "aggrieved" by the Department's action and because the Joint Authority has no customers, the Joint Authority lacks standing to appeal the Department's action.

3. As a joint sewer authority created under the Municipality Authorities Act of 1945, the Joint Authority lacks standing to represent the interests of individual property owners against the Department.

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[4] Section 4(B)(n) of the Municipality Authorities Act of 1945, 53 P.S. § 306(B)(n), authorizes the Joint Authority to do "all acts necessary and convenient for the promotion of its business and the general welfare of the Authority." However, the Joint Authority does not claim that it has challenged the Department's action here for the promotion of its business and the general welfare of the Authority.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BERWICK AREA JOINT SEWER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 95-165-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NESCOPECK BOROUGH, Permittee	:	

ORDER

AND NOW, this 26th day of February, 1998, it is ordered that the appeal in the above matter is dismissed for lack of standing.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: February 26, 1998

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

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Southwestern Region

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For Permittee:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

TRI-STATE CONCERNED CITIZENS	:	
	:	
v.	:	**EHB Docket No. 96-204-R**
	:	**(Consolidated with 96-202-R**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 96-201-R)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and ENVIROTROL, INC.,	:	**Issued : March 3, 1998**
Permittee		

OPINION AND ORDER ON MOTION FOR PERMISSION TO PROCEED IN FORMA PAUPERIS

By: Thomas W. Renwand, Administrative Law Judge

Synopsis

The Board denies the Appellant's Motion to Proceed *In Forma Pauperis* because it has no authority to provide a party with a court reporter nor does it have the authority to order the court reporter to provide deposition transcripts to the party free of charge. In addition, the Board has no authority to order the Department or Permittee to provide requested documents to the Appellant without the payment of reasonable photocopying charges.

OPINION

Presently before the Board is Tri-State Concerned Citizens' (TSCC) Motion for Permission to Proceed *In Forma Pauperis* (Motion). The Motion is opposed by both the Pennsylvania Department of Environmental Protection (Department) and the Permittee, Envirotrol, Inc. (Envirotrol). TSCC has appealed the Department's September 3, 1996 issuance of a permit

authorizing Envirotrol to operate a commercial hazardous waste storage and treatment and residual waste processing facility.

TSCC contends it is a grass-roots environmental group that cannot afford to hire legal counsel or pay the costs of litigation. Therefore, TSCC is requesting an order from this Board providing that all deposition testimony be given to TSCC free of charge; that the Board provide TSCC with a court reporter to take testimony of Envirotrol, the Department, and any other witnesses TSCC wishes to depose; that TSCC be given copies of any depositions already taken in the Appeal; and that TSCC not be required to pay any photocopying charges for documents requested in discovery. TSCC does not cite any statue, regulation, or case law in support of its specific requests and our research did not locate any.

The Department and Envirotrol correctly point out that TSCC has filed an unverified Motion that does not establish that TSCC or its members do not have the assets to pay these costs. Rule 240 of the Pennsylvania Rules of Civil Procedure requires a detailed affidavit to support a motion to proceed *in forma pauperis*. However, and more importantly, the Rule only allows the tribunal to waive filing fees or bonds necessary to file the appeal. The Environmental Hearing Board has no filing fees. Moreover, no bond was required in this case for TSCC to file its appeal.

The Board has no authority to grant the relief requested by TSCC in its Motion and declines to do so.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRI- STATE CONCERNED CITIZENS	:	
	:	
v.	:	**EHB Docket No. 96-204-R**
	:	**(Consolidated with 96-202-R**
COMMONWEALTH OF PENNSYLVANIA	:	**and 96-201-R)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and ENVIROTROL, INC.,	:	
Permittee	:	

ORDER

AND NOW, this 3rd day of March, 1998, the Motion of Tri-State Concerned Citizens for Permission to Proceed *In Forma Pauperis* is **denied.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: March 3, 1998

cc: **DEP Bureau of Litigation:**
Attention: Brenda Houck, Library

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Southwestern Region

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WILLIAM T. PHILLIPY I
SECRETARY TO THE BOA

READING ANTHRACITE COMPANY	:	
	:	
v.	:	**EHB Docket No. 95-196-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PORTER ASSOCIATES, INC., Permittee, and KOCHER COAL COMPANY, INC., Intervenor	:	**Issued: March 11, 1998**

OPINION AND ORDER ON INTERVENOR'S PETITION FOR RECONSIDERATION

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A petition for reconsideration is denied. Reconsideration of an interlocutory order is appropriate only where "extraordinary circumstances" are present, and a defect in a motion for summary judgment cannot be cured through a petition for reconsideration.

OPINION

The factual backdrop of this appeal has been set forth in detail in our February 17, 1998, Opinion and Order, which granted in part and denied in part a Kocher Coal Company (Kocher) Motion for Summary Judgment and a Porter Associates, Inc. (Porter) Motion for Summary Judgment/Motion to Limit Issues. The appeal was initiated with the September 11, 1995, filing of a Notice of Appeal by Reading Anthracite Company (Reading). Reading challenges the Department of Environmental Protection's (Department) renewal of an anthracite surface mining permit (permit renewal) under the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945,

P.L. 1198, *as amended*, 52 P.S. §1396.1-1396.19a (Surface Mining Act). The permit renewal authorized Porter to operate a surface mine and dispose of coal refuse and fly ash or bottom ash (collectively, ash) on a site (mine site) in Porter Township, Schuylkill County.

Kocher intervened in the proceedings on April 4, 1996. It had agreed to purchase the mine site in a May 1, 1967, contract with Reading.

In its Notice of Appeal, Reading avers that:

(1) it still owns the mine site;

(2) it gave Kocher the right to occupy the mine site as part of the May 1, 1967, contract, but never gave Kocher the right to allow others to conduct surface mining activities there or the right to operate an ash disposal facility there;

(3) Kocher identified itself as the owner of the mine site on the consent to enter form submitted with the original surface mining permit application;

(4) neither the original surface mining permit application nor the Department's later actions show that Reading gave Porter the right to mine coal, or consented to Porter's use of the mine site for surface mining activities or ash disposal.

Reading avers that, by issuing the permit renewal, the Department violated sections 86.37(a)(1) and 86.55(d) of its regulations, 25 Pa. Code §§ 86.37(a)(1) and 86.55(d).

The Board has issued two previous opinions in this appeal. On June 18, 1997, we denied a Motion to Dismiss filed by Kocher and a Motion for Summary Judgment/Motion to Limit Issues filed by Porter. Later, on February 17, 1998, we issued an opinion granting in part and denying in part a Kocher Motion for Summary Judgment and a Porter Motion for Summary Judgment/Motion to Limit Issues. Although Porter and Kocher established that a previous permit modification authorized ash disposal activities at the mine site, we denied their motions to the extent they argued that administrative finality bars Reading from challenging the permit renewal. Specifically, we held

that (1) a Department action becomes final only after the appeal period runs; (2) for third-party appellants, like Reading, the appeal period starts to run only upon publication of notice in the *Pennsylvania Bulletin*; (3) the Porter and Kocher motions did not establish when--or even if--the *Pennsylvania Bulletin* published notice of the modification allowing ash disposal; and, (4) because it was unclear whether the *Pennsylvania Bulletin* published notice of the modification, we could not be certain that the appeal period had ever started to run with respect to Reading.

On February 27, 1998, Kocher filed the instant petition, requesting that we reconsider our February 17, 1998, decision to the extent that we denied summary judgment on whether the doctrine of administrative finality prevents Reading from challenging the ash disposal activities authorized in the permit renewal. The petition does not aver that we erred in our analysis of Kocher's Motion for Summary Judgment. Instead, it simply notes that the *Pennsylvania Bulletin* published notice of the permit modification on February 16, 1991, and requests that we reconsider our opinion on that basis.

In a letter filed with the Board on March 6, 1998, Porter indicated that it joined in Kocher's petition. Reading, meanwhile, filed a Response to Kocher's petition on March 9, 1998. In its Response, Reading argues that Kocher could have shown in its motion for summary judgment that notice was published in the *Pennsylvania Bulletin*, and that Kocher should not be allowed to correct that defect through a petition for reconsideration.

Section 1021.123 of the Board's rules, 25 Pa. Code § 1021.123, provides that a petition for reconsideration of an interlocutory order must demonstrate that "extraordinary circumstances" are present. To show that "extraordinary circumstances" exist, the petition must meet the criteria for reconsideration of final orders, and, in addition, show that special circumstances are present which

justify the Board taking the extraordinary step of reconsidering an interlocutory order. *Miller v. DEP*, EHB Docket No. 95-234-C, (Opinion issued March 31, 1997). Section 1021.124(a) of the Board's rules, 25 Pa. Code § 1021.124(a), provides that the Board will reconsider final orders for "compelling and persuasive reasons," including:

> (1) The final order rests on a legal ground or factual finding which has not been proposed by any party.
>
> (2) The crucial facts set forth in the petition
>
> (i) Are inconsistent with the findings of the Board.
>
> (ii) Are such as would justify a reversal of the Board's decision.
>
> (iii) Could not have been presented earlier to the Board with the exercise of due diligence.

25 Pa. Code § 1021.124(a). Therefore, for Kocher to show that it is entitled to reconsideration of its Motion for Summary Judgment, Kocher had to show that reconsideration would satisfy the criteria listed above and--in addition--that special circumstances are present which justify the Board reconsidering an interlocutory order.

Kocher has failed to show that the circumstances here fall within the criteria for reconsideration of final orders under section 1021.124, much less that the circumstances are "extraordinary" under § 1021.123. Kocher does not argue that our decision denying summary judgment rested on legal grounds or factual findings not proposed by any party. Nor does Kocher maintain that any of the other provisions of section 1021.124(a) apply. Instead, Kocher simply seeks to have us reconsider its Motion for Summary Judgment considering certain information that Kocher neglected to include in the motion: namely, the date the *Pennsylvania Bulletin* published notice of the modification. We have previously held that a party may not use reconsideration to cure a defect in its motion for summary judgment. *See Adams Sanitation Company, Inc. v. DEP*, 1994 EHB 1482.

That is clearly what Kocher is attempting to do here. Kocher's Motion for Summary Judgment should have included the date the *Pennsylvania Bulletin* published notice of the modification. Kocher cannot cure that defect in its Motion for Summary Judgment through a Petition for Reconsideration.

Accordingly, we deny Kocher's Petition for Reconsideration.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

READING ANTHRACITE COMPANY	:	
	:	
v.	:	**EHB Docket No. 95-196-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PORTER ASSOCIATES, INC., Permittee, and KOCHER COAL COMPANY, INC., Intervenor	:	

ORDER

AND NOW, this 11th day of March, 1998, it is ordered that Kocher's Petition for Reconsideration is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 11, 1998

See following page for service list.

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

READING ANTHRACITE COMPANY	:	
	:	
v.	:	**EHB Docket No. 95-196-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PORTER ASSOCIATES, INC., Permittee, and KOCHER COAL COMPANY, INC., Intervenor	:	**Issued: March 12, 1998**

OPINION AND ORDER ON APPELLANT'S PETITION FOR RECONSIDERATION

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A petition for reconsideration is denied. Reconsideration of an interlocutory order is appropriate only where "extraordinary circumstances" are present.

A previous opinion and order ruling that the administrative finality doctrine bars an appellant from raising certain issues is appropriate where the appellant could and should have raised those issues with respect to a prior Department action.

OPINION

The factual backdrop of this appeal has been set forth in detail in our February 17, 1998, Opinion and Order, which granted in part and denied in part a Kocher Coal Company (Kocher) Motion for Summary Judgment and a Porter Associates, Inc. (Porter) Motion for Summary Judgment/Motion to Limit Issues. The appeal was initiated with the September 11, 1995, filing of

a Notice of Appeal by Reading Anthracite Company (Reading). Reading challenges the Department of Environmental Protection's (Department) renewal of an anthracite surface mining permit (permit renewal) under the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §1396.1-1396.19a (Surface Mining Act). The permit renewal authorized Porter to operate a surface mine and dispose of coal refuse and fly ash or bottom ash (collectively, ash) on a site (mine site) in Porter Township, Schuylkill County.

Kocher intervened in the proceedings on April 4, 1996. It had agreed to purchase the mine site in a May 1, 1967, contract with Reading.

In its Notice of Appeal, Reading avers that:

> (1) it still owns the mine site;
>
> (2) it gave Kocher the right to occupy the mine site as part of the May 1, 1967, contract, but never gave Kocher the right to allow others to conduct surface mining activities there or the right to operate an ash disposal facility there;
>
> (3) Kocher identified itself as the owner of the mine site on the consent to enter form submitted with the original surface mining permit application;
>
> (4) neither the original surface mining permit application nor the Department's later actions show that Reading gave Porter the right to mine coal, or consented to Porter's use of the mine site for surface mining activities or ash disposal.

The Notice of Appeal also asserts that the Department violated sections 86.37(a)(1) and 86.55(d) of its regulations, 25 Pa. Code §§ 86.37(a)(1) and 86.55(d), by issuing the permit.

The Board has issued three previous opinions in this appeal. On June 18, 1997, we denied a Motion to Dismiss filed by Kocher and a Motion for Summary Judgment/Motion to Limit Issues filed by Porter. On February 17, 1998, we issued an opinion granting in part and denying in part a

Kocher Motion for Summary Judgment and a Porter Motion for Summary Judgment/Motion to Limit Issues. On March 11, 1998, we issued an opinion denying a Kocher Petition for Reconsideration.

On February 27, 1998, Reading filed the instant petition, requesting that we reconsider our February 17, 1998, decision to the extent that we ruled that the doctrine of administrative finality bars Reading from arguing that Porter had a duty to update the land ownership information in its permit renewal application. Reading's petition avers that "the Board did not give adequate or proper consideration" to Reading's argument; that, by granting summary judgment to Porter and Kocher on the issue, we would "countenance a separate violation of the Department's regulations"; and, that we erred by concluding that the permit renewal application was facially valid because Porter's application simply stated that the source of the title was "unknown."

Kocher filed a Response to the petition on March 9, 1998. In its response, Kocher argues that the Board gave appropriate consideration to Reading's argument that the Board did not authorize a separate violation of the Department's regulations by granting summary judgment. Kocher also argues that the permit applications were facially valid.

Section 1021.123 of the Board's rules, 25 Pa. Code § 1021.123, provides that a petition for reconsideration of an interlocutory order must demonstrate that "extraordinary circumstances" are present. To show that "extraordinary circumstances" exist, the petition must meet the criteria for reconsideration of final orders, and, in addition, show that special circumstances exist which justify the Board taking the extraordinary step of reconsidering an interlocutory order. *Miller v. DEP*, EHB Docket No. 95-234-C, (Opinion issued March 31, 1997).

Section 1021.124(a) of the Board's rules, 25 Pa. Code § 1021.124(a), provides that the Board will reconsider final orders for "compelling and persuasive reasons," including:

(1) The final order rests on a legal ground or factual finding which has not been proposed by any party.

(2) The crucial facts set forth in the petition

(i) Are inconsistent with the findings of the Board.
(ii) Are such as would justify a reversal of the Board's decision.
(iii) Could not have been presented earlier to the Board with the exercise of due diligence.

25 Pa. Code § 1021.124(a).

Reading has failed to show that the circumstances here fall within the criteria for reconsideration of final orders under section 1021.124. Nor has it shown that special circumstances exist here warranting reconsideration of an interlocutory order.

Reading argues that Porter "had a duty to update ownership information in its renewal application under 25 Pa. Code §§ 85.55 and 86.662." (Reading's Petition for Intervention, p. 2.) However, neither of these regulations relates to updating information in applications. Section 85.55 of the Department's regulations pertains to certain records municipalities must keep under the Bluff Recession and Setback Act, Act of May 13, 1980, P.L. 48, 32 P.S. §§ 5201-5215. As for Reading's reference to section "86.662" of the Department's regulations, there is no regulation with this number. Presumably, Reading means to refer to sections 86.55 and 86.62, 25 Pa. Code §§ 86.55 and 86.62. Section 86.55(g)(5) of the Department's regulations provides that the Department will not renew a permit if it determines that the applicant has failed to update information the Department requires. Section 86.62(d), meanwhile, provides that, when applicants for a permit are notified that the permit will be approved, they "shall either update, correct or submit a statement that no change has occurred" in the information submitted in their application.

Even assuming these regulations would require Porter to update information in its permit

renewal application if the information had been misstated in the application for the original permit, that does not necessarily mean that Reading could object to the accuracy of that information in this proceeding. As we noted in the opinion Reading asks us to reconsider:

> The fact that an issue is relevant to a subsequent Department action does not necessarily mean that the administrative finality doctrine does not apply. (Otherwise, there would be no need for the administrative finality doctrine; it would be subsumed within the law of relevance.) So long as the issue could have been raised in a previous Department action, the administrative finality doctrine applies. Thus, while the issue of whether Porter had a valid consent to enter from the landowner would ordinarily be relevant in an appeal of a permit renewal, administrative finality would still bar litigation of that issue if it could have been raised with respect to one of the Department's previous actions concerning the site.

Reading Anthracite Company v. DEP, EHB Docket No. 95-196-C (Opinion issued February 17, 1998), p. 9, n. 4. Thus, even assuming the Department's regulations impose a duty upon persons applying for a permit renewal to update any incorrect information they have previously provided, whether a third-party can challenge the permit renewal on that basis depends on whether the information was correct in the original permit application or certain other applications concerning the site. The doctrine of administrative finality bars litigation of issues which could have been raised in an appeal of the prior Department action. *Department of Environmental Resources v. Wheeling-Pittsburgh Coal Corp.*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977). If the permittee submitted different information in previous applications, or if the information was correct when the previous application was submitted but is now outdated, then administrative finality would not bar a third-party appellant from raising the issue in an appeal of the permit renewal. The appellant would not have had an opportunity to litigate

the issue previously. But if the same information was submitted as part of a previous application, and the underlying circumstances have not changed, then administrative finality would bar an appellant from raising the issue, since it could have been raised with respect to the previous Department action.

As we explained in considerable detail in our February 17, 1998, opinion, Reading could have raised the issue of whether Porter required its consent to enter the mine site in an appeal of the original permit. Accordingly, the doctrine of administrative finality precludes Reading from raising that issue in this appeal.

The same reasoning extends to Reading's argument that the permit applications were not "facially valid" because they identified the source of title for the property as "unknown." The language Reading objects to, concerning the source of the title being "unknown," does not appear in the application for permit renewal, but rather in the application for the original surface mining permit. (The application for permit renewal, at Exhibit T of the Stipulation, and the application for the original surface mining permit, at Exhibit D of the Stipulation, p. 605.) Any challenges Reading has with respect to the original permit should have been raised in an appeal of that permit. The administrative finality doctrine bars Reading from raising those issues in an appeal of the permit renewal.

Accordingly, we deny Reading's Petition for Reconsideration.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

READING ANTHRACITE COMPANY	:	
	:	
v.	:	**EHB Docket No. 95-196-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PORTER ASSOCIATES, INC., Permittee, and KOCHER COAL COMPANY, INC., Intervenor	:	

ORDER

AND NOW, this 12th day of March, 1998, it is ordered that Reading's Petition for Reconsideration is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 12, 1998

See following page for service list.

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SECRETARY TO THE BOARD

JOHN and LISA FORCE and WANDA and BARRY YEAGER	:	
v.	:	**EHB Docket No. 96-054-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** March 13, 1998

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Board dismisses an appeal of the Department's denial of a private request to order a Township to revise its Official Sewage Facilities Plan. The Appellants failed in their burden of proving that the Official Plan was not being implemented or was inadequate to meet the residents' sewage disposal needs for purposes of the Sewage Facilities Act because the Township's plan has made public sewage disposal available in their area as a remedy for their malfunctioning on-lot sewage systems. The Township's plan does not, and is not required to, provide for how the cost of connecting Appellants' homes to the public sewer system is to be paid.

BACKGROUND

This is an appeal by Lisa A. and John R. Force and Wanda and Barry M. Yeager (collectively Appellants) filed on March 6, 1996, from the Department of Environmental Protection's denial of

their private request under the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20(a) (Sewage Facilities Act). A hearing in this matter was held on December 3 and 4, 1997, before Administrative Law Judge George J. Miller. The parties have filed proposed findings of fact and conclusions of law with supporting legal memoranda. The record consists of 25 exhibits, a transcript of 440 pages and a stipulation filed by the parties on December 1, 1997.[1]

FINDINGS OF FACT

1. Appellants John R. Force and Lisa A. Force, husband and wife, are the residents and record owners of the premises at 1415 Sunrise Lane in Lower Pottsgrove Township, Montgomery County, Pennsylvania. (Ex. B-1, ¶2; N.T. 100)

2. Appellants Barry M. Yeager and Wanda Yeager, husband and wife, are the residents and record owners of the premises at 1411 Sunrise Lane in Lower Pottsgrove Township, Montgomery County, Pennsylvania. (Ex. B-1, ¶3)

3. The Department of Environmental Protection (Department) 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. §§ 750.1-750.20(a) (Sewage Facilities Act); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001, and the rules and regulations promulgated thereunder. (Ex. B-1, ¶1)

4. The Appellants' properties are two of three residential properties which front only

[1] The notes of testimony are hereafter designated as N.T.; the Appellants' exhibits are designated as Ex. A- ; the Department's Exhibits are cited as Ex. C- . The stipulation filed by the parties was admitted into evidence as Ex. B-1.

on Sunrise Lane and are contiguous with no other public or private streets. (N.T. 115)

5. The Appellants' properties are currently served by malfunctioning on-lot sewage disposal systems. (Ex. B-1, ¶8)

6. Vicky Schweitzer is an environmental health specialist with the Montgomery County Health Department and a certified sewage enforcement officer. (N.T. 25)

7. She has had ongoing involvement with the investigation of the septic systems at the Sunrise Lane properties. (N.T. 32)

8. From her observation, she agrees that the malfunctioning sewage systems on Sunrise Lane pose a serious public health problem. (N.T. 60)

9. Lisa Force testified that problems resulting from the malfunctioning sewer include soggy yards, complaints from neighbors, the odor of sewer, and the family's drinking water usage is affected. Further, she must empty her bath and laundry water out of the house and into the yard rather than into her septic system. The only water that goes into the septic system is from the toilet, the bathroom sink and the kitchen sink. (N.T. 121-26)

10. The third of the residential properties which fronts only on Sunrise Lane is the property of Mr. and Mrs. Carl Swartz located at 1413 Sunrise Lane. This property is located between the Appellants' properties. (N.T. 244)

11. The Swartz property is also served by a malfunctioning on-lot septic system. (N.T. 41-42; 251-54)

12. Sunrise Lane is bounded on the east by the Pottsgrove Intermediate School owned by the Pottsgrove School District. (Ex. B-1, ¶4)

13. The sewer mains nearest to Sunrise Lane are located on Buchert Road and Hilltop

Road as indicated on the existing sanitary sewer plan contained within the Lower Pottsgrove Township Act 537 Plan. (Exs. B-1, ¶6; A-12)

14. Sunrise Lane is a private, gravel road serving the Appellants' properties and the Swartz property. It is a dead end street approximately 700-800 feet in length with an outlet on Buchert Road, a public road to the south. There is no outlet from Sunrise Lane to the north. (N.T. 116-17)

15. By letter dated April 10, 1995, the Appellants requested Lower Pottsgrove Township to revise or implement its Official Sewage Facilities Plan. (Ex. B-1, ¶9; A-13)

16. The Township denied this request by letter dated June 6, 1995. (Ex. A-14)

17. By letter dated July 31, 1995, the Appellants made a request under Section 5 of the Sewage Facilities Act, 35 P.S. § 750.5 and 25 Pa. Code § 71.14 for the Department to order the Township to revise or implement its official Sewage Facilities Plan. (Exs. B-4, ¶10; A-15)

18. In the private request, the Appellants asked "the Pennsylvania Department of Environmental Protection or the Lower Pottsgrove Township to revise or implement its official plan so that we are permitted an opportunity to hook up to the Lower Pottsgrove sewer system without prohibitive costs." The Appellants said they were, "willing to pay our fair share but it is unfair and unrealistic to expect us to foot the bill for what we believe to be the township's share of the cost." (Exs. B-1, ¶11; A-15)

19. The Department requested comments from the Montgomery County Department of Health and the Township. (Exs. B-1, ¶¶12-13; C-3; C-4)

20. By letter dated November 3, 1995, the county submitted comments to the Department essentially confirming the existence of malfunctions on the Appellants' properties and agreeing that

connection to public sewers would be appropriate. (Exs. B-1, ¶¶14, 15; A-10)

21. By letter dated November 8, 1995, the Township submitted comments to the Department. The Township commented that connection of the Appellants' properties to public sewers would be consistent with the Township's Official Sewage Facilities Plan and no revision would be necessary. The Township further commented that it was not able to use public dollars to assist in the construction of a sewer line or "service lateral" on private property but that it was prepared to assist the property owners with determining the requirements for connection to the system. (Exs. B-1, ¶¶16, 17; A-16)

22. By letter dated February 6, 1996, the Department denied the Appellants' private request. (Exs. B-1, ¶18; A-18)

23. The Department informed the Appellants that a revision to the plan was unnecessary because the Township was willing to permit the connection to the public sewer and the issue of the allocation of cost between the Township and the Appellants was outside the Department's authority. (Ex. A-18)

24. On the five year growth area/ten year growth area map attached to the Official Sewage Facilities Plan, Sunrise Lane is included within an area already sewered and as such the plan provides for sewers for Sunrise Lane. On the existing sanitary sewer plan attached to the Official Sewage Facilities Plan, Sunrise Lane is indicated as an area not currently served by sewer. The narrative portion of the plan addresses on-site sewage disposal alternatives at page 21. (Exs. B-1, ¶¶19, 20; A-12 at Fig. 3-4; A-12, p.21)

25. The Township's Official Plan does not expressly provide for connecting the Appellants' houses to public sewers. (N.T. 343; 400-03; Ex. A-12)

26. The Township has made proposals to the Appellants regarding extending public sewers to their property but they did not pursue these proposals because the Appellants felt they were too expensive. (N.T. 129-33; 167-87; Exs. A-14; C-13; C-14; C-16)

27. In October 1993, the Township met with the Appellants to discuss their desire to be connected to the public sewer system. (N.T. 268)

28. In November 1993, the Township presented a proposal which included capping the cost of bidding and constructing the sewer line at $15,400 to the Appellants for providing sewers to their properties. (N.T. 268-69; Ex. C-14)

29. The Appellants rejected the November 1993 offer because it was more than they wanted to spend for sewers. (N.T. 168; 225)

30. Gregory Prowant is the Township Manager of Lower Pottsgrove Township. He also serves as the Manager for the Township Authority. He has been with the Township since March 1990 and is responsible for the day-to-day operation of the sewer system which includes the Official Sewage Facilities Plan. (N.T. 193-94)

31. In an effort to address the concerns of the Appellants about the cost of the sewers, Mr. Prowant sent a questionnaire to Mr. and Mrs. Force in order to apply for federal funding to help pay for the sewers. (N.T. 270-71; Ex. C-12)

32. The Forces' household income was too high to qualify for the federal funds. (N.T. 271)

33. The Department had a meeting with the Township in the spring of 1995. The purpose of the meeting was an exchange of information where the Township related to the Department some of the information they had available considering the problems on Sunrise Lane and possible

solutions. They also discussed other alternatives, including on-site rehabilitation and community systems on the site. (N.T. 335-36)

34. On April 4, 1997, the Township met with the Appellants and the Department. (N.T. 275; 357-58)

35. The Township presented several options at the April 4th meeting for providing public sewers to the Appellants, including a gravity line to Buchert Road, three separate grinder pumps with three force mains, one pump station serving three houses, and three pump stations going from one common force main. (N.T. 360-61)

36. The Township sent to the Appellants a letter dated June 3, 1997, which Mr. Prowant testified accurately reflected the results of the April 4, 1997 meeting. It included an offer by the Township that its authority would pay the $10,000 cost for the engineering and legal work and for making the street connection and would accept a lien on the Appellants' property in the amount of $7,000-$8,000 to help pay for the sewer connection. (N.T. 278; Ex. C-13)

37. Glenn Stinson is a Water Quality Specialist Supervisor for the Sewage Facilities Program with the Department. He has held that position since January 1980. (N.T. 327-28)

38. Mr. Stinson testified that although there are some technologies that could provide a long-term solution on individual sites, many of these alternatives are expensive. (N.T. 354; 380-81)

39. Further, he noted that the thrust of the Township's Official Plan is that if there is a septic failure in an area that is located within an existing sewered area, the solution is to hook into the sewer system and not come up with new on-lot alternatives where the sewer line is acceptable. (N.T. 384)

DISCUSSION

The Appellants bear the burden of proof in this appeal. *Young v. DER*, 1993 EHB 380, *affirmed*, 1032 C.D. 1993 (Pa. Cmwlth. filed May 26, 1994). In order to sustain this burden the Appellants must show that the Department abused its discretion by failing to properly apply the provisions of the Sewage Facilities Act and the regulations thereunder pertaining to a private request for a revision of a municipality's official plan, namely 35 P.S. §§ 750.5 (b) - (b.2) and 25 Pa. Code § 71.14. *See Warren Sand & Gravel v. Department of Environmental Resources,* 341 A.2d 556, 565 (Pa. Cmwlth. 1975). We are constrained to hold that the Department properly applied these provisions and did not abuse its discretion in denying the Appellants' private request.

Our review of this case is governed by Section 5(b) of the Sewage Facilities Act, 35 P.S. § 750.5(b), which provides that "[a]ny person who is a resident . . . in a municipality may file a private request with the department requesting that the department order the municipality to revise its official plan *if the resident . . . can show that the official plan is not being implemented or is inadequate to meet the resident's . . . sewage disposal needs.*" (Emphasis added). The request must include a list of reasons why the official plan is believed to be inadequate and contain evidence supporting assertions that a plan is not being implemented. 25 Pa. Code § 71.14.

The Appellants' private request dated July 31, 1995, alleges that the Township's Official Plan is "either not being implemented or is inadequate" because the Township "refuses to run sewer lines to [their] homes . . . unless [the Appellants] all agree to pay all of the costs associated with the construction of a sewer line from the nearest streets currently served by sewers . . . ." Therefore, the Appellants requested that the Department order the Township to revise or implement the official plan so that Appellants could hook up to the public sewer system "without prohibitive cost." (Ex. A-15)

By letter dated February 6, 1996, after considering the comments of the Township and the Montgomery County Health Department, the Department informed the Appellants that a revision to the plan was unnecessary because the Township was willing to permit their connection to the public sewer and the issue of the allocation of cost between the Township and the Appellants was outside the Department's authority. (Ex. A-18)

The relief requested by the Appellants in their private request is essentially comprised of two elements. First, the Appellants want to be connected to public sewers, and second, they want to be connected to public sewers "without prohibitive costs."

As to the first element, we cannot find that the Department abused its discretion in denying the Appellants' private request. In our prior opinion in this case we noted that

> Appellants cannot, however, prevail under section 5(b) if the official plan neither precludes nor expressly provides for their proposed course of conduct--for instance, where the official plan is silent. If the official plan does not preclude their proposed course of conduct, then residents or property owners cannot complain that the plan is inadequate to meet their sewage needs. If the official plan does not provide for their proposed course of conduct, then they cannot complain that the plan is not being implemented.

Force v. DEP, EHB Docket No. 96-054-MG (Opinion issued January 21, 1997). There is no dispute that the Township's official plan provides that the area which includes Sunrise Lane is designated for service by public sewers. The Appellants admit that their connection to public sewers is consistent with the Official Plan of the Township. There is significant evidence in the record that the Appellants' lots are unsuitable for on-lot sewage disposal. Yet there is nothing in the official plan which requires the Township to do more than make public sewage available in the Sunrise Lane area. The Plan does not specifically call for sewer lines on Sunrise Lane, but does provide for sewer

lines in the Sunrise Lane area through lines on nearby Buchert and Hilltop Roads. We can find no authority in the official plan, the Sewage Facilities Act, or the regulations which creates a duty on the part of the Township to construct sewage hook-ups specifically for the Appellants' residences. Since the Township will grant permission for the Appellants to connect to the public sewer, the Township is appropriately implementing the plan. Since the official plan provides for public sewers in the area of Sunrise Lane, it is adequate to meet the sewage disposal needs of the Appellants within the meaning of the Sewage Facilities Act. Therefore, the Appellants have failed in their burden of proving that the Department erred by not ordering the Township to revise or implement its official plan.

In addition, the critical issue for the Appellants is being relieved of bearing the cost of sewer connection. While we could order the Township to construct sewer lines on Sunrise Lane if the official plan explicitly required the Township to connect the residents of Sunrise Lane to the public sewers, we could not grant the second element of relief requested by the Appellants, namely that this connection be made without prohibitive costs to the Appellants.[2]

The question of the allocation of costs for the connection to the public sewer system is a local government issue over which the Department has no power under the Sewage Facilities Act. An official plan under the Sewage Facilities Act is first and foremost a planning document which effectuates the legislative goal of providing for a comprehensive program of water quality management in the Commonwealth. *Young v. DER*, 1993 EHB 380, *affirmed*, 1032 C.D. 1993 (Pa.

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[2] The Department argues that the Appellants have *waived* this argument by failing to cite legal authority for their position. Although the Appellants have not *supported* their argument with adequate legal authority, they have certainly raised the issue in their post-hearing brief. Accordingly, it is appropriate for the Board to address this issue.

Cmwlth. filed May 26, 1994); *see also Eckert v. Pierotti*, 553 A.2d 114 (Pa. Cmwlth. 1989). The role of the Department in evaluating official plans is to determine whether the method of sewage disposal designated by the plan is appropriate for present and future conditions in the municipality. *Lobolito, Inc. v. DER*, 1993 EHB 477(the Department's duty is to ensure that local governments fulfill their responsibility for planning for the sewage disposal needs within their jurisdictions, but this supervisory role is limited); *Young v. DER*, 1993 EHB 380, *affirmed*, 1032 C.D. 1993 (Pa. Cmwlth. filed May 26, 1994); *see Community College of Delaware County v. Fox*, 342 A.2d 468 (Pa. Cmwlth. 1975). The responsibility for applying the provisions of the plan is left largely to local government. Although the precise division of responsibility between the Department and local governments is often unclear, courts and this Board have held that certain issues such as land use, zoning, sewage system design and the permitting of specific sewage facilities are within the purview of local governments. *Swartwood v. Department of Environmental Resources*, 424 A.2d 993 (Pa. Cmwlth. 1981)(land use); *Community College of Delaware County v. Fox*, 342 A.2d 468 (Pa. Cmwlth. 1975); *Oley Township v. DEP*, 1996 EHB 1359 (land use); *Benco, Inc. of Pennsylvania v. DER*, 1994 EHB 168 (system design criteria and permitting). As the Commonwealth Court held in the *Fox* case, grievances which fall within the category of a "local government agency function" are not appropriate for indirect challenge through the Department. *Community College of Delaware County v. Fox*, 342 A.2d 468 (Pa. Cmwlth. 1975). Similarly, it has been held that planning issues relating to the Department's duties under the Sewage Facilities Act can not be collaterally attacked in local proceedings. *See Harford Twp. v. Bandurick*, 660 A.2d 189 (Pa. Cmwlth. 1995)(challenge to the merits of a public sewer plan approved in accordance with the Sewage Facilities Act could not form the basis of a preliminary objection to a declaration of taking pursuant to section 406 of the

Eminent Domain Code, Act of June 22, 1964, Special Sess., P.L. 84, *as amended*, 26 P.S. § 1-406). The Appellants' remedy, therefore, is not with the Board under the Sewage Facilities Act, but may exist in the courts of common pleas pursuant to the First Class Township Code. *See for example* Sections 2401, 2401.1, 2406 of the First Class Township Code, Act of June 24, 1931, P.L. 206, *as amended*, 53 P.S. §§ 57401, 57401.1, 57406; ***Brandywine Homes v. Caln Township Municipal Authority***, 339 A.2d 145 (Pa. Cmwlth. 1975) (landowner challenge to the validity of a sewer rental rate ordinance and the rates imposed thereunder).

The Appellants argue at great length that both the Township and the Department have statutory duties to abate the nuisance created by the malfunctioning septic systems on Sunrise Lane. This is undeniably true. However, it is not clear that the circumstances here would require the Department to abate the claimed nuisance by requiring the Township to bear more of the expense of connecting the Appellants to the public sewage system than it already has in its offers to the Appellants. (Finding of Fact Nos. 33-36)

The Appellants also argue that the Department has the authority under Section 10(7) of the Sewage Facilities Act to order the Township to connect the Appellants to the public sewers. This section provides that the Department has the authority to "order" a local agency to undertake actions deemed by the Department necessary to effectively administer this act. . . ." 35 P.S. § 750.10(7). While this is true, we do not think that the Department abused its discretion in reaching the conclusion that directing the Township to pay a significant part of connecting the Appellants to the public sewer system is not necessary to effectively administer the act.

In conclusion, while the Board is sympathetic to the plight of the Appellants, we simply do not have the authority to grant them the relief that they request.

CONCLUSIONS OF LAW

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

2. The Appellants have the burden of proof in this appeal.

3. To sustain the burden of proof the Appellants must show by a preponderance of the evidence that the Department acted unlawfully or abused its discretion in denying their private request for a revision of the Official Sewage Facilities Plan of Lower Pottsgrove Township.

4. The Appellants failed to show that the Department erred in concluding that the Township's Official Plan was appropriately implemented and was adequate to meet the Appellant's sewage disposal needs.

5. The Department does not have the authority to allocate the costs of connection of an individual residence between the Township and the Appellants.

6. The Department did not abuse its discretion in denying the Appellants' private request.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN and LISA FORCE and WANDA and BARRY YEAGER	:	
v.	:	**EHB Docket No. 96-054-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 13th day of March, 1998, it is ordered that the appeal of John and Lisa Force and Wanda and Barry Yeager in the above-captioned matter is hereby DISMISSED.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

Dated: March 13, 1998

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

For the Commonwealth, DEP:
Douglas White, Esquire
Southeast Region

For Appellants:
Bruce L. Baldwin, Esquire
WOLF BALDWIN & ASSOCIATES
Pottstown, PA

rk/bl

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PEOPLE UNITED TO SAVE HOMES	:	
	:	
v.	:	**EHB Docket No. 97-262-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and EIGHTY-FOUR	:	
MINING COMPANY	:	**Issued: March 13, 1998**

OPINION AND ORDER ON APPELLANT'S MOTION TO QUASH

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A Motion to Quash an Untimely Response is denied where the response to a motion for summary judgment is only one business day late, no prejudice is alleged nor does the Board find any prejudice, and the effect of granting the motion would also result in a judgment against the Department, which timely filed its response and brief. Parties should file their documents in a timely fashion and the Board has the discretion to enter appropriate sanctions both under its own rules and regulations and the Pennsylvania Rules of Civil Procedure. The striking of a slightly tardy filing and the entry of judgment against the tardy party is a drastic sanction that is unwarranted under the circumstances as set forth in Appellant's Motion to Quash. Appeals should be decided on their merits.

OPINION

Presently before the Board is the Appellant People United to Save Homes' (PUSH),

Motion to Quash Untimely Response (Motion). PUSH contends it served its Motion for Summary Judgment on February 2, 1998. PUSH argues in its Motion for Summary Judgment that it is entitled to summary judgment because the Permittee, Eighty-Four Mining Company, did not submit its application for its coal mine more than 180 days before the permit's expiration date. PUSH contends that Department of Environmental Protection (Department) mining regulations require coal companies to submit renewal applications at least 180 days before the expiration of their current permit. Both the Department and Eighty-Four Mining Company filed responses and briefs in opposition to PUSH's Motion.

The Department filed its response and brief in opposition to PUSH's Motion on Friday, February 27, 1998. Eighty-Four Mining Company filed its response and brief in opposition to PUSH's Motion on Monday, March 2, 1998. PUSH contends that the last date to timely file responses and briefs was Friday, February 27, 1998. Therefore, it argues that based on the Board's regulations requiring timely filings and our recent opinion in *Reading Anthracite Company v. Department of Environmental Protection,* EHB Docket No. 95-196-C (Opinion issued June 18, 1997) we should treat the mining company's untimely filing as a failure to respond and enter summary judgement in favor of PUSH on each and every issue raised in its Motion for Summary Judgment. PUSH further contends that since Eighty-Four Mining Company filed its response and brief on the next business day after they were due that Eighty-Four Mining Company has exhibited a cavalier attitude toward the Board's rules that should not be rewarded.

The date of service on a party is the date the document is deposited in the United States mails. 25 Pa. Code §1021.33 (a). The date of service on the Board, however, is the *actual date of receipt by the Board* and not the date of deposit in the mails. 25 Pa. Code §1021.11(a).

Section 1021.11(a) also requires that responses and briefs be timely filed with the Board. Responses and briefs in opposition to a motion for summary judgment should be filed within 25 days of the date of service of the motion. 25 Pa. Code §1021.73(d). If the date of service of PUSH's Motion was February 2,1998, then Friday, February 27, 1998 was the last date that Eighty-Four Mining Company's response and brief could be timely filed. Under 25 Pa. Code Section 1021.125, the Board may, in its discretion, impose sanctions for the failure to abide by a Board rule of practice and procedure including the striking of late responses and briefs.

PUSH is requesting that the Board impose the drastic penalty of granting summary judgment against Eighty-Four Mining Company because it was one business day late in filing its response. Moreover, if we entered an Order as drafted by PUSH we would also be entering summary judgment against the Department. The Department vigorously opposes PUSH's Motion for Summary Judgment and timely filed its response and brief in opposition.

PUSH's reliance on *Reading Anthracite* is misplaced. In that case, Judge Coleman struck the brief filed by Appellant because it was filed *four months* late. However, the Board still reviewed the underlying motion for summary judgment on its merits. The Board concluded that the law did not support the granting of the motion for summary judgment and it was denied.

Documents should be filed by a party in a timely fashion. If additional time is needed it should be requested. Although the Board certainly has the power to grant Appellant's Motion,[1]

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[1]The sanctions granted may depend on the severity of the violation. *See Kochems v. Department of Environmental Protection*, EHB Docket No. 96-187-C, (Opinion issued April 18, 1997), *aff'd*, 701 A.2d 281 (Pa. Cmwlth. 1997), where Judge Coleman precluded a party from introducing any evidence on matters subject to discovery requests to which the party never responded. The discovery period had concluded and Appellants not only did not respond to the Permittee's discovery requests, but never even attempted to explain their failure to respond.

to do so here strikes us as a drastic and punitive step not warranted by the facts. Indeed, PUSH alleges no prejudice and we find none. We agree with Judge Miller's analysis in *Weiss v. Department of Environmental Protection*, 1996 EHB 246, 248 where the Board denied a motion to dismiss for the failure to file a prehearing memorandum as a drastic sanction not justified by the circumstances. In addition, as pointed out in my concurring opinion in *Glenn O. Hawbaker, Inc. v. Department of Environmental Protection*, 1996 EHB 230, 237, to severely penalize a party for a single mistake such as a slightly late filing brutalizes the practice of law and turns the search for justice and truth into a game. Appellant's underlying Motion for Summary Judgment raises important issues that should be decided on their merits. We will, therefore, deny PUSH's Motion to Quash.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PEOPLE UNITED TO SAVE HOMES	:	
	:	
v.	:	**EHB Docket No. 97-262-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY	:	

ORDER

AND NOW, this 13th day of March, 1998, PUSH's Motion to Quash the Untimely Response of Eighty-Four Mining Company is **denied.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: March 13, 1998

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

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Southwestern Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BOROUGH OF BERWICK	:	
	:	
v.	:	**EHB Docket No. 97-098-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 17, 1998**

OPINION AND ORDER
ON PETITION FOR RECONSIDERATION

by Robert D. Myers, Administrative Law Judge

Synopsis:

A Petition for Reconsideration of the Board's ruling on a Motion in Limine is denied where the Petition fails to demonstrate extraordinary circumstances which would justify consideration of the matter by the Board, as required by 25 Pa. Code § 1021.123(a).

OPINION

On May 2, 1997, the Borough of Berwick filed a Notice of Appeal with the Board challenging the Department of Environmental Protection's (Department) April 4, 1997 letter to the Borough. In that letter, the Department prohibited any further connections to the Borough's sewer system due to a hydraulic overload condition. The letter also stated that any proposal to connect the Borough of Nescopeck to the Borough's system would require an updated Act 537 Official Sewage Facilities Plan. The Borough raised the following four objections in its Notice of Appeal:

(1) The existing condition can be easily remedied. Therefore, no building ban

should be implemented.

(2) The 537 Plan presented by the Borough of Berwick was approved with the knowledge of the Department that the Borough of Berwick intended to proceed as it has with connection of other municipalities to the plant. We believe that the 537 Plan presented is accurate, correct and adequate.

(3) The Department erred in stating that the Borough's official plan was not adequate and that it will be necessary to submit a formal update revision of the official sewage plan.

(4) The Department erred because the Department, with full knowledge of the Borough's intent in regard to Nescopeck, is or should be estopped from taking the present action because of the Department's own actions in approving the Borough's intention to connect other municipalities to the Berwick plant.

(Borough's Notice of Appeal.)

After a period for discovery and the filing of dispositive motions, the Board scheduled hearings on the matter. On January 23, 1998, the Borough filed its pre-hearing memorandum, which states, *inter alia*, that:

38. The building ban has halted the construction of a needed apartment complex in the Borough of Berwick and has otherwise hindered necessary construction within the Borough.

39. The continuation of the building ban will cause a severe economic hardship to the Borough of Berwick.

(Borough's Pre-hearing Memorandum, p. 9.) One of the Borough's arguments is that, in restricting connections to the Borough's sewer system, the Department failed to properly consider the economic hardship to the Borough. (Borough's Pre-hearing Memorandum, p. 11.)

On February 5, 1998, the Department filed a Motion in Limine asking that the Board strike Paragraphs 38 and 39 from the Borough's pre-hearing memorandum because those paragraphs are not relevant to any issue raised in the Notice of Appeal. The Department also requested that the

Board preclude any evidence relating to the Department's determination that the Borough's sewer system is hydraulically overloaded, except evidence as to whether the "condition can be easily remedied." The Board received no response to the Motion in Limine from the Borough and, on February 23, 1998, granted the Motion.

On March 4, 1998, the Borough filed the instant Petition for Reconsideration and an Answer to the Motion in Limine. In its Petition for Reconsideration, the Borough assumes that the Board granted the Department's Motion in Limine "based solely on Appellant's failure to answer." The Borough then explains that the Department's Motion in Limine was "inadvertently overlooked in the tickling process and never appeared on counsel's internal docket control system." (Borough's Petition for Reconsideration, para. 4.) Because of this oversight, the Borough asks that the Board review its Answer to the Motion in Limine and rule on the merits of the Motion. The Borough contends, without citing any legal authority, that: (1) the Borough did not have to "specifically state all objections in the Notice of Appeal;" (2) the Borough did not present new issues in its pre-hearing memorandum, but merely "expanded upon" the issues raised in the Notice of Appeal; and (3) all of the Borough's issues are "inextricably intertwined" because they all pertain to the Department's letter. (Borough's Petition for Reconsideration, paras. 5-6, 9.)

On March 11, 1998, the Department filed a Response to the Petition for Reconsideration and a Memorandum of Law. The Department asserts that the Board did *not* grant the Motion in Limine based *solely* on the Borough's failure to file an answer. The Department then argues that the Borough's failure to file a timely response due to a tickling oversight does not constitute extraordinary circumstances under 25 Pa. Code § 1021.123 to justify the Board's reconsideration of its ruling.

The Board's regulation at 25 Pa. Code § 1021.123, which governs reconsideration of an interlocutory order, provides that the "petition must demonstrate that extraordinary circumstances justify consideration of the matter by the Board." This standard for reconsideration of interlocutory orders is at least as high as the standard for reconsideration of final orders. *Associated Wholesalers, Inc. v. DEP*, EHB Docket No. 97-080-C (Opinion issued January 16, 1998). Before the Board will reconsider a final order, the petitioner must demonstrate "compelling and persuasive reasons" for doing so. 25 Pa. Code § 1021.124. An "oversight" by legal counsel does not constitute a compelling and persuasive reason for reconsideration of a final order. *Reitz Coal Company v. DER*, 1988 EHB 796.

Here, we agree with the Department that the Borough's petition has not demonstrated extraordinary circumstances which would justify reconsideration of the Board's ruling on the Department's Motion in Limine. The Borough's petition simply states that its legal counsel failed to respond to the Motion in Limine because of an administrative oversight. Under *Reitz Coal Company* and *Associated Wholesalers, Inc.*, such circumstances do not justify reconsideration of the Board's interlocutory order. Therefore, the Borough's petition is denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF BERWICK	:	
	:	
v.	:	**EHB Docket No. 97-098-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 17th day of March, 1998, Appellant's Petition for Reconsideration of the February 23, 1998 Order Granting Appellee's Motion in Limine is **denied**.

ENVIRONMENTAL HEARING BOARD

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: March 17, 1998

See next page for a service list.

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PENNSYLVANIA DEPARTMENT OF CORRECTIONS	:	
v.	:	**EHB Docket No. 97-270-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 17, 1998**

OPINION AND ORDER ON DEPARTMENT'S MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Environmental Hearing Board lacks subject matter jurisdiction over an appeal filed after the expiration of the 30 day appeal period. The doctrine of *nullum tempus* is not applicable to excuse the State Department of Corrections from complying with the time period for filing an appeal with the Board.

OPINION

Presently before the Board is the Department of Environmental Protection's (Department) Motion To Dismiss the Appeal filed by Appellant, the Pennsylvania Department of Corrections (Corrections). Corrections appealed the Department's denial of a Water Quality Management Part II Construction Permit Amendment. According to Paragraph 2(d) of Corrections' Notice of Appeal, Corrections received notice of the Department's action on November 12, 1997. Corrections filed its Appeal with the Board on December 15, 1997. Since Corrections filed its Notice of Appeal 33

days after it was notified of the Department's action, the Department contends that the Board lacks subject matter jurisdiction over the Appeal.

Jurisdiction does not attach to an appeal from an action of the Department unless the appeal is filed with the Board "within 30 days after the party appellant has received written notice of the action...." 25 Pa. Code §1021.52(a). The date of receipt of the appeal by the Board is the determinative date for ascertaining whether the appeal has been timely filed. 25 Pa. Code §1021.11(a). In order to be timely filed in this matter the Board would have had to receive Corrections' Notice of Appeal on or before December 12, 1997. Since the Board did not receive the Notice of Appeal until December 15, 1997, we are without subject matter jurisdiction over the Appeal. *M.G.S. General Contracting, Inc. v. DEP*, EHB Docket No. 97-030-MR (Opinion issued June 5, 1997); *Sweeny v. DER*, 1995 EHB 544.

The doctrine of *nullum tempus* can not be asserted to excuse Corrections from the thirty day filing requirement. This doctrine has been applied to excuse an agency or political subdivision of the Commonwealth from being bound by statutes of limitations. *Duquesne Light Company v. Woodlands Hills School District*, 700 A.2d 1038, 1051(Pa. Cmwlth 1997); *Commonwealth of Pennsylvania, Department of Public Welfare v. Maryland Casualty Company*, 643 A.2d 1994 (Pa. Cmwlth 1994). However, as pointed out by this Board in *Pennsylvania Fish Commission v. DER*, 1990 EHB 93, 95, the issue before us goes to our jurisdiction. Therefore, we elect to follow our earlier ruling in *Pennsylvania Fish Commission* where we held that "the Commission's failure to file its appeal within the mandatory 30 day appeal period cannot be excused by virtue of its status as an agency of the Commonwealth, and we must dismiss its appeal for lack of jurisdiction." 1990 EHB at 96.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PENNSYLVANIA DEPARTMENT OF CORRECTIONS	:	
	:	**EHB Docket No. 97-270-R**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 17th day of March, 1998, it is ordered that the Department of Environmental Protection's Motion to Dismiss is granted and the appeal of the Pennsylvania Department of Corrections is **dismissed**.

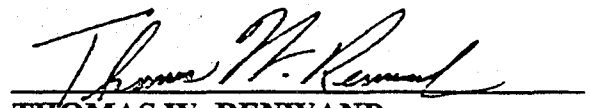
ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 17, 1998

c: **Bureau of Litigation:**
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WILLIAM T. PHILLIPY I
SECRETARY TO THE BOA

COOLSPRING STONE SUPPLY, INC, WILLIAM R. SNODDY, INDIVIDUALLY, and WILLIAM R. SNODDY, t/d/b/a MSH ENTERPRISES	:	
v.	:	**EHB Docket No. 96-171-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DAVISON SAND & GRAVEL COMPANY	:	**Issued: March 25, 1998**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

In this appeal of a noncoal surface mining permit, the Board sustains the permittee's motion for summary judgment. Where, during the course of a permit review, the Department is notified of a legal dispute regarding the applicant's right of access to the permit area, the Department has a duty to look beyond the permit application and to withhold issuance of the permit until the Department is satisfied that the applicant has demonstrated that it has a legitimate right to enter the permit area and conduct the activity governed by the permit. In this case, the Department fulfilled its duty by reviewing the appellant's and permittee's leases for the property in question, reviewing copies of the pleadings in the lawsuit filed by the appellant in the court of common pleas, and consulting with Department counsel regarding this matter.

OPINION

This appeal involves a challenge by Coolspring Stone Supply, Inc., William R. Snoddy, individually, and William R. Snoddy, t/d/b/a MSH Enterprises (collectively referred to herein as MSH) to the Department of Environmental Protection's (Department) issuance of a noncoal surface mining permit to Davison Sand & Gravel Company (Davison). The permit authorizes Davison to mine limestone on property in Bullskin Township, Fayette County, commonly known as the Connellsville II mine.

Davison submitted its application to mine the site in November 1995. During the permit review process, MSH informed the Department that a dispute existed concerning Davison's right to mine limestone on the property covered by the permit. In September 1995, MSH had initiated legal action against Davison in the Fayette County Court of Common Pleas, asserting that they, not Davison, had the right to mine the property. The Department directed Davison to provide additional information concerning its right to enter and conduct mining operations on the property and to provide information on the pending litigation. Davison responded by amending its application, providing copies of the lease which authorized Davison to conduct surface mining activities on the property covered by the permit, and submitting copies of the pleadings in the pending lawsuit. Based on the information supplied by Davison and MSH, the Department concluded that Davison had satisfied the right of entry requirements contained in 25 Pa. Code § 77.163, and it issued a noncoal surface mining permit to Davison. This appeal followed.

Currently before the Board are motions for summary judgment filed by both Davison and MSH, as well as responses to the motions by each of the parties. Summary judgment may be granted where there is no genuine issue of material fact and judgment is warranted as a matter of law. Pa.

R.C.P. 1035.1-1035.5; *Summerhill Borough v. Department of Environmental Resources*, 383 A.2d 1320 (Pa. Cmwlth. 1978). In addition, the parties have notified the Board of decisions reached by the Fayette County Court of Common Pleas and the Pennsylvania Superior Court with regard to MSH's lawsuit against Davison and the landowners of the disputed property. In reciting the following factual background of this appeal, we rely on the exhibits and affidavits submitted with the parties' motions and the findings of the trial court and Superior Court, of which we take judicial notice.

MSH entered into lease agreements for the property in question, which predated Davison's leases. According to the terms of the leases, if MSH had not succeeded in securing all necessary permits and approvals to operate a stone quarry within two years, MSH was required to make a monthly payment to continue the leases. Although MSH was unable to secure all the requisite approvals within the two-year period, no monthly payments were made. MSH does not dispute this, but contends that the monthly payment requirement was orally waived. Subsequently, Davison entered into lease agreements with the landowners in question and obtained the noncoal mining permit which is the subject of this appeal. It is MSH's contention that the Department erred in granting Davison's permit after learning of the property dispute involving the permit area.

Central to the argument presented by each motion is the following question: What is the Department's duty under the Noncoal Surface Mining Conservation and Reclamation Act (Noncoal Act)[1] and the underlying regulations when, during the course of a permit review, it is notified of a dispute concerning the applicant's right to enter or commence mining activities on the property

[1] Act of December 19, 1984, P.L. 1093, *as amended,* 52 P.S. §§ 3301-3326.

covered by the permit application?

Relying on years of precedent, we hold that it is well within the scope of the Department's and the Board's authority and *duty* to evaluate property-related issues and contracts for the purpose of determining compliance with regulations and statutes. *Empire Coal Mining and Development, Inc. v. Department of Environmental Resources*, 678 A.2d 1218, 1223 (Pa. Cmwlth. 1996); *Pond Reclamation, Inc. v. DEP*, EHB Docket No. 96-147-R (Opinion issued May 15, 1997), *slip op.* at 7; *Middleport Materials, Inc. v. DEP*, EHB Docket No. 96-004-MR (Opinion issued January 22, 1997), *slip op.* at 8-9; *Body v. DER*, 1992 EHB 758, 760-61.

This subject was also addressed in *Lucchino v. DER*, 1994 EHB 380, in which the appellant - landowner challenged the validity of landowner consent forms which authorized the Department and the permittee-mining company to enter onto the appellant's property in connection with an earlier mining permit. In sustaining the appeal, the Board held, "If, during the course of a permit review, the Department is informed that a dispute exists as to the validity of a landowner consent form or the underlying agreement between the applicant and the landowner which grants the applicant access to the property, the Department may not issue the permit, or may not issue it without condition, unless and until the dispute is resolved." *Id.* at 399.

Thus, during the course of a mining permit review, the Department may not simply wear blinders. When faced with a property dispute, the Department has a duty to insure that the permit applicant has a legitimate right to enter the permit site and conduct the activity covered by the permit.

We now address the second question presented by the parties' motions: Did the Department fulfill its duty in the present case? Based on the following, we find that the Department did fulfill

its duty and that it acted in accordance with the Board's holding in *Lucchino*.

Davison's permit application did not state that its right to enter and commence noncoal mining activities on the property in question was the subject of litigation in the Fayette County Court of Common Pleas, as required by 25 Pa. Code § 77.163(a). After learning of the litigation, the Department directed Davison to submit additional information concerning its right to enter and conduct mining operations on the property. The Department also requested Davison to provide it with information on the pending litigation. In response to the Department's request, Davison submitted information on the litigation; copies of the pleadings in the common pleas action, including pleadings filed by the landowners of the property in question; and a copy of Davison's lease. (Exhibits A and B to Davison's Motion) The Department reviewed the pleadings and the leases submitted by both Davison and MSH. In addition, the technical staff at the Department's Greensburg District Office consulted counsel on this matter. (Exhibit A to Davison's Motion) Based on its review, the Department concluded that Davison had satisfied the requirements of the noncoal regulations and that the documents submitted demonstrated that Davison had a legitimate right to enter and mine the subject property. (Exhibit A to Davison's Motion)

Based on the above, we find that the Department took appropriate steps, once it was notified of the property dispute, to determine whether Davison had a legitimate right to mine the permit area.

In reaching this conclusion, we emphasize that the Department is not required, indeed it is not *authorized*, to resolve contract disputes or questions of title. It is simply required, when confronted with a contractual or property dispute, to look beyond the permit application and to make an informed decision regarding the applicant's right of access to the property in question. MSH argues that the Department is required to withhold issuance of a permit until any and all litigation

surrounding the subject matter of the permit is final. This is an unrealistic demand to be placed on the Department and one which is required neither by the Noncoal Act nor the underlying regulations. Indeed, if this were to be required, anyone wishing to oppose a permit application could block the permit issuance for a period of years simply by bringing a legal action involving the permit area, without regard to the merits of the claim.

In conclusion, we hold that when the Department is notified of a dispute concerning a permit applicant's right to enter the permit site or engage in the activity covered by the permit, the Department is required to go beyond the face of the permit application to determine whether the dispute has any merit which in any way interferes with the permit applicant's ability to engage in the activity for which it is seeking approval. In the present case, the Department took appropriate steps to enable it to make an informed decision as to Davison's right to mine the property in question. We, therefore, conclude that the Department did not abuse its discretion by issuing the permit to Davison after being notified of MSH's litigation involving the permit area.[2]

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[2] Although this does not affect our decision in this matter, we note that the Superior Court recently affirmed the ruling of the trial court dismissing MSH's claim for specific performance against one of the lessors. *Coolspring Stone Supply, Inc. v. Farrell*, ___ A.2d ___ (Pa. Super. January 14, 1998). No ruling has yet been issued with regard to the other lessors.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COOLSPRING STONE SUPPLY, INC, WILLIAM R. SNODDY, INDIVIDUALLY, and WILLIAM R. SNODDY, t/d/b/a MSH ENTERPRISES	:	
v.	:	**EHB Docket No. 96-171-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DAVISON SAND & GRAVEL COMPANY	:	

ORDER

AND NOW, this 25th day of March, 1998, the Motion for Summary Judgment filed by Davison Sand & Gravel, Inc. is **granted**. The Motion for Summary Judgment filed by the Appellants is **denied**. The appeal filed at the above docket number is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 25, 1998

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

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Southwest Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CHESTNUT RIDGE CONSERVANCY	:	
	:	
v.	:	**EHB Docket No. 96-022-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TASMAN RESOURCES, LTD.	:	
	:	
HILLSIDE COMMUNITY ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 96-024-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TASMAN RESOURCES, LTD.	:	**Issued: March 26, 1998**

OPINION AND ORDER ON MOTION TO SUSTAIN APPEAL

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A motion to sustain appeal is granted. In ruling on such a motion, the Board must view the facts in the light most favorable to the Department and permittee. Where the permittee fails to demonstrate that it has a legal means of accessing its permit site from a township road, the Department erred in granting the permit.

OPINION

Appeals were filed by Chestnut Ridge Conservancy and Hillside Community Association (collectively, the Appellants) challenging the Department of Environmental Protection's (Department) issuance of a noncoal surface mining permit to Tasman Resources, Ltd. (Tasman), pursuant to the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301-3326 (Noncoal Act) and the regulations at 25 Pa. Code Chapter 77. The permit authorizes Tasman to mine limestone on the Chestnut Ridge in Derry and Fairfield Townships, Westmoreland County.

A hearing on this matter was held before Administrative Law Judge Thomas W. Renwand from January to April 1997. The hearing consisted of 31 days of testimony. In addition, three site views were conducted during the course of the appeal.

Among the many issues involved in this appeal is one concerning a roadway which Tasman intended to construct in order to connect its haul road, which runs to the border of the permit area, with Township Road 891 located in Derry Township. The proposed roadway is discussed in Module 9.1 of the permit application (Board Ex. 1)[1] and is the subject of a December 29, 1993 agreement entered into by Tasman and Derry Township, in which Tasman agreed to construct the roadway and Derry Township to dedicate it as a public road. (Hillside Ex. 1) It is the position of the Department and Tasman that the proposed public road, although it will serve as an extension to the haul road, is not covered by the permit since it is to be constructed outside the physical boundaries of the

[1] "Ex. __" designates an exhibit admitted at the hearing on the merits. "T. __" refers to a page of the transcript of the merits hearing.

permit.[2] It is the contention of the Appellants that Tasman, by treating the proposed township road as separate from the permitted haul road, sought to circumvent the setback requirements of the noncoal mining regulations. If the proposed township road were considered to be a part of the haul road, and thereby part of the permit area, it would be subject to 25 Pa. Code § 77.126(a)(4)(ii), which prohibits noncoal mining activity within 300 feet of an occupied dwelling house or commercial or industrial building unless a release is granted by the owner. Because the proposed road would be within 300 feet of an occupied dwelling, without the owner's consent, it would not meet the setback requirements of the regulations. (T. 3198-99)[3]

During the permit review period, a number of residents of the Hillside community voiced concerns about the validity of the Derry Township agreement. At the merits hearing, Hillside Community Association presented the testimony of a Derry Township supervisor who had taken

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[2] We note that in *Power Operating Co. v. DEP*, EHB Docket No. 97-212-C (Opinion on Motion to Dismiss and Petition for Supersedeas issued December 22, 1997), decided under the surface coal mining regulations of 25 Pa. Code Chapter 87, the Department took the position that an appellant's use of a pre-existing road "infrequently and for non-surface mining purposes" was subject to bonding and permitting requirements. In granting the appellant's petition for supersedeas, Judge Coleman noted that the road in question did not meet the definition of "haul road" contained in the coal mining regulations. Although the definition of "haul road" under the coal mining regulations differs somewhat from that of the noncoal mining regulations, the Department's very stringent view of what constitutes a "haul road" in the *Power Operating* case sharply constrasts with the rather loose approach taken by the Department in the present case.

[3] According to measurements taken by Margaret Rosborough, the occupant of the dwelling in question, the proposed roadway would be approximately 75 feet from her house. (T. 3200) If indeed Tasman proposed and the Department approved the construction of the proposed township road as a means of avoiding the 300 foot setback requirement for permitted haul roads, we would caution the Department against such action. Advocating that a permit applicant enter into a private agreement which deprives a third party of the benefits intended by the regulations governing that permit application may well constitute an abuse of discretion on the part of the Department.

office three days after the signing of the agreement with Tasman. The township supervisor testified that the agreement had not been signed at a regularly scheduled meeting of the supervisors, nor had the December 29, 1993 meeting been advertised. (T. 2168-69) He further testified that even with an agreement, a road may be not dedicated as a township road unless it meets the specifications of the township ordinance. (T. 2171)

On January 12, 1995, following an initial review of the permit application, the Department's lead permit reviewer sent a very detailed letter to Tasman's representative outlining areas of concern, questions, and inadequacies in the application. (Chestnut Ridge Ex. 45) The letter stated, "I, and the rest of the review staff have grave concerns as to the viability of this application as it currently stands. At present, this application cannot be issued without significant modifications. . . ." (*Id.* at p. 1). One area of concern was the validity of the proposed public road. With regard to this matter, the letter stated as follows:

> The applicant has indicated that the Derry Township Supervisors have agreed in writing to the construction of the "TR-891" extension proposed by Tasman Resources, Ltd. At the informal conference, numerous adjacent landowners alleged that they never received proper notification of the road construction plan nor were they contacted regarding condemnation of their properties. While this potential dispute lies mainly between the residents and the Township officials, it will have a direct effect on the viability of this application. In short, *the haul road/township road issue must be resolved by the time we complete our evaluation of this application.*

(Chestnut Ridge Ex. 45, p. 2; T. 3193) (emphasis added).

Notwithstanding the advice of its lead permit reviewer, the Department issued the surface mining permit to Tasman even though the status of the proposed roadway, connecting the permit site

to Township Road 891, was still in dispute.

In a separate action filed in the Court of Common Pleas of Westmoreland County, property owners Margaret and Jerry Rosborough and Martha Jones challenged Tasman's right to construct the proposed road. Rosborough and Jones asserted that Tasman did not have sufficient property rights entitling it to construct and use the proposed roadway.

Following the conclusion of the hearing before the Environmental Hearing Board but prior to submission of the parties' post-hearing briefs, the Westmoreland County Court of Common Pleas issued a ruling in the Rosborough - Jones action. The court found that the survey conducted by Tasman's engineering firm was in error and that the roadway proposed by Tasman would encroach upon the Rosborough and Jones property. The court enjoined Tasman from constructing the roadway as proposed. *Rosborough v. Tasman Resources, Ltd.*, No. 3080-1996 and No. 3655-1996 (Westmoreland Co. C.P. June 19, 1997).

Subsequent to the decision by the court of common pleas, the Appellants Chestnut Ridge Conservancy and Hillside Community Association filed a Motion to Sustain Appeal, arguing that the court's decision prevents Tasman from fulfilling the terms of its permit. That motion is the subject of this Opinion and Order.

In response to the motion, Tasman asserts, first, that the common pleas court's decision should be read more narrowly than the Appellants have argued and that the decision enjoins only one configuration of the proposed road, as opposed to the entire construction of the road. Second, Tasman contends that the court's decision is not relevant to the issue before the Board, i.e. whether the Department abused its discretion in granting the permit. Finally, Tasman argues that any action resulting from the court's decision should be taken by the Department, rather than the Board.

The Department also filed a response opposing the motion. The Department argues that it is impossible to know at this time how the Westmoreland County Court of Common Pleas decision affects the viability of the proposed township road or whether Tasman may be able to find an alternate access to the mine site.

In reviewing the Appellants' Motion to Sustain Appeal, we must view the evidence in a light most favorable to Tasman and the Department. *Wood v. DER*, 1994 EHB 347, 358-59; *County of Schuylkill v. DER*, 1991 EHB 1, 6.

On June 24, 1997, the Board held a conference with counsel for the parties to address the impact of the Westmoreland County Court of Common Pleas decision on this appeal. Following the conference, on June 30, 1997, the Board, at the request of the parties, issued an order staying the filing of post-hearing briefs in this matter, directing Tasman to submit a new proposal to the Department for ingress to and egress from the mine site, and scheduling a status conference for October 31, 1997.

By letter dated September 30, 1997, Tasman advised the Department that it was pursuing two possible avenues for resolving the access problem and that additional time was needed. At the October 31, 1997 status conference, Tasman had not submitted for Department approval an alternate proposal for access to and egress from the mine site.[4]

By letter dated February 12, 1998, the Board was notified of a ruling handed down by the Westmoreland County Court of Common Pleas in a declaratory judgment action brought by Tasman

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[4] Subsequent to this conference, the Appellants filed a Supplemental Submission in Support of Motion to Sustain Appeal. Both Tasman and the Department filed responses. Because the Supplemental Submission by the Appellants deals with matters outside the scope of this appeal, we have not considered it in ruling on the Appellants' motion.

against Derry Township. *Tasman Resources, Ltd. v. Derry Township*, No. 5929 of 1997 (Westmoreland Co. C.P. Feb. 5, 1998). That action centered on a reconfiguration of the proposed roadway which had been developed by Tasman's engineer. One of the conditions for dedication of the proposed road, pursuant to the agreement between Derry Township and Tasman, is that the road must comply with Derry Township Ordinance No. 50, which requires a minimum fifty-foot right-of-way. As reconfigured, most of the proposed road would allegedly have a fifty foot right-of-way, in accordance with Derry Township's ordinance. However, a small percentage of the roadway, at least ten feet in length, would have a right-of-way of only forty-five feet.

Tasman's declaratory judgment action sought to have the proposed roadway dedicated as a township road. The court of common pleas dismissed the action on preliminary objections on the basis that the dedication of the roadway was within the jurisdiction of the Derry Township Board of Supervisors and Tasman had not first sought approval of the reconfigured roadway by the township supervisors. By letter dated February 18, 1998, Tasman notified the Board that it intended to seek a variance from Derry Township with regard to the proposed roadway. Should this avenue fail, which appears likely given Derry Township's opposition to the declaratory judgment action, Tasman may then file an appeal with the Westmoreland County Court of Common Pleas.

Nearly nine months have passed since the Board stayed this matter so that Tasman could submit to the Department a new proposal for access to and egress from its mine site. Nearly one year has passed since the conclusion of the hearing on this appeal. More than two years have passed since this permit was issued. Tasman has agreed not to commence its operation until the access issue is resolved. At present, the issue of access to and from the mine site appears no closer to resolution than it did nine months ago. As the situation currently stands, Tasman holds a permit for a mine site

which it cannot access or exit for the purpose of mining limestone.

At the hearing on the merits, the Department's lead permit reviewer was asked, "What happens if Tasman is unable to build [the proposed road]?" He responded that Tasman "will have no way to exit the mining operation with their material." (T. 2602) He further testified that there is no other access to the public highway authorized from the haul road in the permit. (T. 2606)

The Board has addressed other matters in which terms or conditions of a permit were not final when the permit was issued. In *New Hanover Township v. DEP*, 1996 EHB 668, the Board voided a solid waste permit where it was determined that the permit had been issued without adequate information as to the final design of the proposed landfill. In that case, a number of conditions had been placed in the permit which essentially authorized construction and operation of a landfill which had not yet been designed. Writing for the Board, Judge Myers agreed that DEP has the power "to place conditions in permits" and that such "[c]onditions in a permit . . . are generally appropriate exercises of DEP's discretion, addressing specific matters of interest concerning the permitted facility and its operation." *Id.* at 685. However, "where the effect of the conditions and the interpretations is to produce an illegal action . . . they cannot be sanctioned." *Id.* at 686 (citing *County of Schuylkill v. DER*, 1989 EHB 1241, 1267).

We recognize that, whereas in *New Hanover* the design of the very facility being permitted was in question, here the configuration of the proposed roadway is but one aspect of the mining operation. Nonetheless, it is a major aspect of the operation. Without a means of legal access to and from the permit area, Tasman is unable to conduct its mining operation.

In *Oley Township v. DEP*, 1996 EHB 1098, the Board remanded a public water supply permit to the Department for further consideration, after finding that the Department had not analyzed the

effect of the proposed project on adjacent wetlands. The Board concluded that the Department had properly made a determination that the project was not harmful to public health and complied with the Safe Drinking Water Act, but had not adequately determined whether the proposed water system would violate other applicable laws, as set forth in the Safe Drinking Water Act. Although the Department's hydrogeologist testified that his analysis would not change even after reviewing the evidence concerning the effect of the project on the wetlands, the Board held that it was impossible to conclude that the Department's failure to consider the effects of the project on the wetlands was environmentally inconsequential or that this information would make no difference in the Department's review of the permit application. *Id.* at 1121. Having reached this conclusion, the Board remanded the permit to the Department to gather information necessary to properly assess the effect the project would have on surrounding water resources.

Section 77.126(a) of the noncoal mining regulations sets forth the criteria for approval or denial of a noncoal mining permit. That section states that a permit will *not* be approved, unless the application affirmatively demonstrates to the Department, on the basis of the information in the application or from information otherwise available, that the following apply:

> (1) The permit application is accurate and complete and that the requirements of the act, the environmental acts and this chapter have been complied with.
>
> (2) The applicant has demonstrated that the noncoal mining activities can be reasonably accomplished as required by the act and this chapter under the operation and reclamation plan contained in the application.
>
> . . .

> (4) The proposed permit area . . . is . . .
>
> (ii) Not within 300 feet of an occupied dwelling house . . . unless released by the owner thereof . . .

25 Pa. Code § 77.126(a).

The term "surface mining activities" under the Noncoal Act includes all "surface activity connected with surface or underground mining" with certain limited exceptions set forth in the regulations. 25 Pa. Code § 77.1. Thus, it includes the construction of "haul roads," which are "[r]oads that are planned, designed, located, constructed, utilized and maintained for the life of the surface mine activities for the transportation of equipment, fuel, personnel, noncoal and other operating resources from a public highway or common use road to points within the surface mine or between principal operations on the mine site, or both . . ." *Id.*

Here, the Department approved a noncoal surface mining permit without a haul road connecting to a public highway or common use road. It relied on Tasman's proposal to build a roadway connecting its permit site to Township Road 891, against the recommendation of its lead permit reviewer and despite questions surrounding the validity of the Derry Township agreement and Tasman's legal right to build the road in the location specified.

In its response to the motion, Tasman argues that it is not the Department's function to sort out or evaluate conflicting property claims and that the Department does not abuse its discretion by granting a permit notwithstanding unsettled property boundaries. In support of its argument, Tasman cites the Board's opinion in *Pond Reclamation, Inc. v. DEP*, EHB Docket No. 96-147-R (Opinion issued May 15, 1997). In that case, Pond Reclamation, Inc. (Pond Reclamation) appealed the Department's amendment of a coal refuse permit held by Consolidation Coal Company (Consol).

The amendment authorized Consol to expand its slurry pond, which was alleged to contain coal fines owned by Pond Reclamation. Pond Reclamation asserted that the expansion of the pond would interfere with its access to the coal fines. Because Consol was the owner of the pond and the property on which it sat, and Pond Reclamation had not alleged that Consol did not have a legal right to conduct coal refuse activities at the location in question, the Board granted summary judgment to Consol and the Department on this issue.

However, Tasman is incorrect in its argument that *Pond Reclamation* stands for the proposition that the Department may properly issue a permit notwithstanding unsettled property disputes of which it has been notified. Although neither the Department nor the Board may make determinations of title, it is well within the scope of the Department's and the Board's authority and duty to evaluate property-related issues and contracts for the purpose of determining compliance with regulations and statutes. *Coolspring Stone Supply, Inc. v. DER*, EHB Docket No. 96-171-R (Opinion issued March 25, 1998), *slip op.* at 4; *Pond Reclamation, slip op.* at 7. *See also, Empire Coal Mining and Development, Inc. v. Department of Environmental Resources*, 678 A.2d 1218, 1223 (Pa. Cmwlth. 1996); *Middleport Materials, Inc. v. DEP*, EHB Docket No. 96-004-MR (Opinion issued January 22, 1997), *slip op.* at 8-9; *Body v. DER*, 1992 EHB 758, 760-61.

We recognize that not all statutes and regulations require the Department to make such an evaluation. In *Abod v. DEP*, EHB Docket No. 95-017-C (Adjudication issued September 22, 1997), the appellants asserted that the Department had abused its discretion by issuing a permit for the construction of a dock and boathouse without first requiring proof of a property interest in the permitted site. The Board dismissed this argument, finding that property ownership is not a factor which the Department must consider in issuing a "small project permit" under the Dam Safety and

Encroachments Act (Dam Safety Act)[5] and the regulations promulgated thereunder, at 25 Pa. Code Chapter 105. The Board based its determination on the language of the dam safety regulations, which do not require an applicant for a small project permit to produce proof of property interest.

In contrast, the noncoal mining regulations require an applicant to submit detailed information regarding the applicant's right to enter and commence mining activities within the permit area, 25 Pa. Code § 77.163(a), the legal or equitable owners of record of areas to be affected by surface operations, 25 Pa. Code § 77.162(a)(1)(ii), and owners of surface areas contiguous to any part of the proposed permit area, 25 Pa. Code § 77.162(a)(2). In addition, an applicant for a noncoal surface mining permit is required to obtain and submit the written consent of the landowner to entry upon land to be affected by the operation. 25 Pa. Code § 77.163 (b)(2). Where the ownership to said land is in dispute, it follows that the Department must require the applicant to provide sufficient information demonstrating its right to enter and affect the property in question.

The Department argues that any issues regarding the proposed township road, including Tasman's right to construct and use the road, are outside the scope of the Department's review since the proposed road is not on the permit site. Therefore, asserts the Department, questions concerning the validity of the proposed road are not a basis for denying the permit. We cannot agree with the Department's argument in this case. Had Tasman not proposed to construct this portion of the roadway as a public road, it would have necessarily been treated by the Department as part of the haul road and, therefore, part of the permit site. Whether Tasman has a legitimate right to build the proposed road and have it dedicated as a township road clearly affects the validity of its permit.

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[5] Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1 - 693.27.

The case of *Lucchino v. DER*, 1994 EHB 380, also dealt with the Department's duty when faced with a property dispute. In that case, the appellant-landowner challenged the validity of landowner consent forms which authorized the Department and the permittee-mining company to enter onto the appellant's property in connection with an earlier mining permit. There, the Board held, "If, during the course of a permit review, the Department is informed that a dispute exists as to the validity of a landowner consent form or the underlying agreement between the applicant and the landowner which grants the applicant access to the property, the Department *may not issue the permit, or may not issue it without condition, unless and until the dispute is resolved.*" *Id.* at 399 (emphasis added).

In holding that the Department has a duty to consider property disputes of which it is notified during the course of a permit review, we emphasize that the Department is not required, indeed it is not authorized, to *resolve* property disputes or questions of title before it may issue a permit. Simply, when confronted with a contractual or property dispute during the course of a mining permit review, the Department must look beyond the face of the permit application and make an informed decision that the permit applicant has adequately demonstrated its right to enter the property and conduct the activity in question. *Coolspring Stone Supply, slip op.* at 5 (emphasis added). In some cases, this may simply require the Department to request further information from the applicant demonstrating that it holds a valid right of entry to the property. The Department is not required to withhold issuance of a permit until any and all litigation surrounding the subject matter of the permit is final. This is an unrealistic demand to be placed on the Department and one which is required neither by the Noncoal Act or the underlying regulations. *Id.* at 5-6. Nor does the Department have a duty to look beyond each and every "facially valid surface mining permit application and

determine whether the person represented as the owner in the application is in fact the actual owner." *Reading Anthracite Co. v. DEP*, EHB Docket No. 95-196-C (Opinion issued February 17, 1998).

In the present case, the Department issued a permit for a limestone quarry that had no means of access to a public road. In approving the permit, the Department relied upon Tasman's proposal that it would build a roadway connecting the haul road to Township Road 891 and Derry Township's agreement to dedicate the road if it met the specifications of its ordinance. At the time it approved the permit, the Department was aware of a dispute concerning Tasman's easement and whether Tasman had a legitimate right to build the roadway as proposed. Nevertheless, the Department approved the permit without further consideration of this matter. The Department's failure to further examine this matter and to build a record insuring that the requirements of the Noncoal Mining Act and regulations were satisfied constitutes an abuse of discretion.

Normally, as in *Lucchino*, the Board would remand the permit to the Department to require the permittee to demonstrate that it has a legitimate right to take the action in question or that there is no merit to the property dispute. Here, however, Tasman has had more than three years to develop a means of access to the mine site. Two courses of action pursued by Tasman in the Westmoreland County Court of Common Pleas have been unsuccessful. Although Tasman intends to pursue further legal action, there does not appear to be a resolution to this matter in the very near future. In the meantime, Tasman holds a permit for a mine site it cannot access or exit, and the Appellants are given no finality to their appeal. Remanding the matter to the Department would not change this status; we, therefore, decline to do so. As noted by Chairman Miller in *Tinicum Township v. DEP*, EHB Docket No. 95-266-MG (Consolidated with 95-268-MG) (Adjudication issued December 8, 1997), "[r]emand is not always the most desirable course for the Board to take." *Id.* at 28 (citing

Lower Windsor Township v. DER, 1993 EHB 1761). This is particularly true where a significant amount of time has passed since submission of the permit application and where intervening events have changed the propriety of the applicant's proposed design. *New Hanover*, 1996 EHB 668.

In light of these considerations, we find it appropriate to grant the Appellants' Motion to Sustain Appeal. The following order is entered:

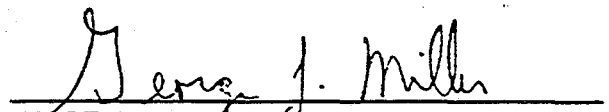
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHESTNUT RIDGE CONSERVANCY	:	
	:	
v.	:	**EHB Docket No. 96-022-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TASMAN RESOURCES, LTD.	:	
	:	
HILLSIDE COMMUNITY ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 96-024-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TASMAN RESOURCES, LTD.	:	

ORDER

AND NOW, this 26th day of March, 1998, the Motion to Sustain Appeal filed by the Appellants in this matter is granted. The permit which is the subject of this appeal is hereby revoked.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 26, 1998

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SVONAVEC, INC.	:	
	:	
v.	:	**EHB Docket No. 97-011-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 3, 1998**

OPINION AND ORDER
ON MOTION FOR SUMMARY JUDGMENT

by Robert D. Myers, Administrative Law Judge

Synopsis:

Summary judgment is entered in favor of a surface mining operator where: (1) the Department ordered the miner to restore or replace a private water supply under section 4.2(f) of SMCRA, 52 P.S. § 1396.4b(f) and 25 Pa. Code § 87.119; (2) the Department erroneously assumed that the miner contaminated the water supply; and (3) the Department erroneously concluded that a previous landowner's acceptance of the present water supply, by oral agreement with the miner, has no legal effect.

OPINION

On January 9, 1997, Svonavec, Inc. (Appellant) filed a Notice of Appeal seeking Board review of an Order issued by the Department of Environmental Protection (Department) on December 9, 1996. The Order charged Appellant with degrading the water quality of the well serving the Overton (formerly Fenslau) residence in Milford Township, Somerset County, and directed Appellant to provide a temporary and permanent replacement.

On December 5, 1997, Appellant filed a Motion for Summary Judgment with supporting affidavits and exhibits and accompanied by a brief. On January 20, 1998, the Department filed its Response with supporting exhibits and affidavit, accompanied by a legal memorandum. Appellant filed a Reply on February 26, 1998, beyond the time allowed by our rules,[1] and it will not be considered.

The facts in this case are complicated and have not been fully developed in the documents before us. The narrative that follows is our best attempt at discerning the truth.

Appellant conducted surface mining on the Kuhlman site to the south of the Fenslau residence under Mine Drainage Permit No. 4072SM18. The date of permit issuance is not given, but the mining apparently took place in the early 1980's. Sometime in 1983, Fenslau contacted Appellant and stated that he was experiencing a diminution in the quantity of water in the well used to service his agricultural operation (barn and livestock) and asked Appellant to deepen the well for him. There was no complaint, according to Appellant, that the problem was created by Appellant's mining operations.[2]

Appellant and Fenslau orally negotiated the deepening of the well, and, according to Appellant, Fenslau agreed to accept the deepened water supply even though its quantity and quality might be different from the existing supply. Appellant deepened the well to 151 feet in September

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[1] 25 Pa. Code § 1021.73(e) requires a reply to a response to a dispositive motion to be filed within 20 days of the date of service of the response. The service date was January 20, 1998, and the 20 days expired on February 9, 1998.

[2] A somewhat contrary indication is contained in a July 3, 1985 internal Department memorandum concerning a problem in another well (George Myers) in the vicinity. In the memorandum, Fenslau is reported to have said that his well went dry when Appellant was mining nearby, that he contacted Appellant, and that Appellant deepened the well.

1983 and connected it to Fenslau's agricultural facilities. Water tests on the deepened well showed a marked increase in iron, manganese, sulfates and specific conductance over the levels found in the shallow well from 1980 to 1983.

Fenslau continued to use the well until his death in 1989. In the meantime, Appellant completed coal removal on the Kuhlman site in April 1984 except for a refuse pit which still remains. The Fenslau property was mined by Coal Junction under Mine Drainage Permit No. 56810104 issued in 1981. J. Lloyd McClintock became a contract operator under the Coal Junction Permit in June 1985, took over the Permit in October 1985, and completed coal removal in November 1987. These operations apparently took place north of the Fenslau well.

In June 1985, water samples from the Fenslau well reflected abrupt increases in manganese, sulfate, and specific conductance. These higher levels have generally persisted into 1997.[3] Fenslau never complained to the Department about the quality or quantity of water in his well either before deepening or after. The Department took no action as a result of the sampling results reported to it on a regular basis.

After Fenslau's death, the property was conveyed in November 1989 to Irvin W. Engle and Mildred E. Engle, husband and wife. John and Sharon Overton acquired a one-half interest in the property (including the well) in 1993 and acquired the other one-half interest in 1996. The Engles made no complaint to Appellant or the Department about the water in the well. It is not known what use, if any, the Engles made of the well. The Overtons made no complaint to Appellant or the

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[3] There is a gap in the sampling data between June 1990 and February 1996, but there is still a remarkable number of water samples for this well because it was a monitoring point. Between November 4, 1980 and June 30, 1983 there were 9 samples; 55 samples between September 30, 1983 and June 18, 1990; 2 samples in 1996; and 1 in 1997.

Department about the water in the well between the time they moved onto the property in 1993 until February 20, 1996. On that date, they filed a telephone complaint about the quality of the water. Apparently, the Overtons were using the well for household purposes and had installed filtration systems, a potassium tank, and a water softener in 1993.

Upon receipt of the Overtons' complaint, the Department initiated a hydrogeological review. Water samples were taken on February 23, 1996 and May 21, 1996, and a field review was conducted on April 1, 1996. On July 12, 1996, the Department concluded that the Overtons' well had been affected by Appellant's mining operations on the Kuhlman site during the early 1980's. As a result, the Department issued the December 9, 1996 Order appealed from.

Upon receipt of the Order, without waiving its legal rights to contest it, Appellant began supplying bottled water to the Overtons and arranged to have a new well drilled on the Overtons' property to provide a permanent replacement of the water supply. This new well was drilled only to the depth of the Upper Freeport coal seam because Appellant was convinced that deeper aquifers were contaminated. Water samples of the new well taken on April 8 and April 15, 1997 reflected water quality similar to that in the original well before it was deepened in 1983, and the new supply was connected to the Overton residence on April 28, 1997. The Department accepted the new well as meeting the "pre-mining water quality of the original supply" and authorized Appellant to discontinue the supply of bottled water on May 28, 1997.

The Department claims to have no knowledge of many of the foregoing facts, especially as they relate to discussions and agreements between Appellant and Fenslau. But Appellant has supported them by affidavits or exhibits complying with the summary judgment provisions of Pa. R.C.P. Nos. 1935.1-1035.5. The Department has not presented opposing affidavits or exhibits

challenging these facts or explained why they cannot be produced. The Department simply denies knowledge of them and contends that they are immaterial. Accordingly, we accept the foregoing factual statement as accurate.

We may grant summary judgment as a matter of law (a) when the record shows that the material facts are undisputed, or (b) when the record contains insufficient evidence of facts to make out a *prima facie* cause of action or defense. Pa. R.C.P. Nos. 1035.1-1035.5. We must view the Motion in the light most favorable to the non-moving party. *Herr v. DEP*, EHB Docket No. 94-098-MR (Opinion issued June 16, 1997).

Appellant, the moving party, contends that there are no factual disputes and that, when the facts are considered, it is clear that the Department, which has the burden of proof, cannot make out a *prima facie* case. The Department, of course, argues that the facts do make out a *prima facie* case.

The basic legal authority for the Department's Order is section 4.2(f) of the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.4b(f), and the regulation at 25 Pa. Code § 87.119. While the regulation has remained unchanged since 1982, the statute was amended significantly by the Act of December 18, 1992, P.L. 1384, and the Act of May 22, 1996, P.L. 232, both effective 60 days after enactment. The 1992 Act changed the previous subsection (f) to subsection (f) clause (1) and added clauses (2) through (7). The 1996 Act further revised clause (2).

Clause (7), added in 1992, states that a surface miner operating under a permit issued before the "effective date of this act" shall be subject only to clause (1). Under the principles of statutory construction at 1 Pa.C.S. § 1953, "the effective date of this act" means the effective date of the 1992 amendatory act, February 16, 1993. Thus, Appellant's actions in the early 1980's under his mining

permit then in effect are subject only to clause (1) which reads as follows:

> Any surface mining operator or any person engaged in government-financed reclamation[4] who affects a public or private water supply by contamination or diminution shall restore or replace the affected supply with an alternate source of water adequate in quantity and quality for the purposes served by the supply. If an operator shall fail to comply with this provision, the secretary may issue such orders to the operator as are necessary to assure compliance.

The implementing regulation at 25 Pa. Code § 87.119 reads as follows:

> The operator of any mine which affects a water supply by contamination, pollution, diminution or interruption shall restore or replace the affected water supply with an alternate source, adequate in water quantity and water quality, for the purpose served by the supply. For the purpose of this section, the term "water supply" shall include any existing or currently designated or currently planned source of water or facility or system for the supply of water for human consumption or for agricultural, commercial, industrial or other uses.

The Board has construed these statutory and regulatory provisions in a number of decisions dating back to the early 1980's, and Commonwealth Court has issued at least two opinions on the subject. It is settled law that, when the Department issues an order such as that involved here, it bears the burden of proof. *Kerry Coal Company v. DER*, 1990 EHB 226; *Ambrosia Coal and Construction Co. v. DER*, 1986 EHB 333; and *W.P. Stahlman Coal Co., Inc. v. DER*, 1985 EHB 149. To carry the burden, the Department must show that the operator's mining activities affected the water source.[5] *Bearer v. DER*, 1993 EHB 1028, *aff'd*, No. 2019 C.D. 1993 (Pa. Cmwlth. filed March 24, 1995); *Kerry Coal; Ambrosia Coal.*

Once that has been established and the operator either proposes a new source or goes ahead

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[4] The words "or any person engaged in government-financed reclamation" also were added by the 1992 amendatory act. Since they have no significance to this case, they will be ignored.

[5] Certain presumptions of operator responsibility are now contained in the amended version of section 4.2(f). As noted earlier, these amendments do not apply to this case.

to provide one, the adequacy is measured not only by the quality and quantity of the new source but also by considerations of control, convenience and cost. *Carlson Mining v. DER*, 1992 EHB 1401, *aff'd*, 639 A.2d 1332 (Pa. Cmwlth. 1994); *Buffy and Landis v. DER*, 1990 EHB 1665; *Mackey v. DER*, 1988 EHB 170; and *Gioia Coal Company v. DER*, 1986 EHB 82. In affirming the Board's decision in *Carlson Mining*, Commonwealth Court stated as follows on page 1335:

> The Board in its construction of Section 4.2(f) of PaSMCRA correctly follows the rules of statutory construction. The Legislature's intent was to protect the public from the hardships caused by partial or complete loss of water supplies by requiring surface mine operators to replace water supplies affected by their mining. The Board's interpretation effectuates this intent. If cost and effort associated with a replacement water supply is not considered, a portion of the responsibility for and burden of abating the effects of surface mining shifts from the operator to the property owner who, through no fault of her own, happens to live next to a newly opened mine and suffers a permanent injury to her water supply. In imposing the water supply replacement provision, the Legislature balanced the need for protection of the environment and the need for coal.

Carlson Mining v. Department of Environmental Resources, 639 A.2d 1332, 1335 (Pa. Cmwlth. 1994) (footnote omitted).

Although the legislative intent and great public purpose are evident, the responsibility of the miner must first be established. There is no question about the proximity of Appellant's mining operations to the property now owned and occupied by the Overtons. It also is clear that the original Fenslau well, at a depth of 73 feet, penetrated the Upper Freeport coal seam, one of the seams mined by Appellant, and drew water from an aquifer that we will call the Upper Freeport aquifer. Moreover, the coal seam dips toward the northwest, suggesting that the Upper Freeport aquifer at the site of the Fenslau well is down-gradient from the area mined by Appellant. It is reasonable to conclude that Appellant's mining activities on the Upper Freeport coal seam *could* have affected the Fenslau well in 1983.

Fenslau made no such claim to the Department during that year or at any time thereafter, but did talk to Appellant about the diminished quantity. The July 1985 Department memorandum mentioned in footnote 2 suggests that Fenslau blamed his loss of water on Appellant; but again did not complain to the Department. Nothing in the record hints at any degradation of water quality in the Fenslau well while it was drawing from the Upper Freeport aquifer. The water was tested once in 1980, three times in 1981, three times in 1982, and twice in 1983 before the well was deepened. In these nine samples, iron concentrations ranged from 0.2 mg/l[6] to 0.7 mg/l and averaged 0.4 mg/l. Manganese ranged from zero to 0.5 mg/l and averaged 0.1 mg/l. Sulfates ranged from 6.5 mg/l to 20 mg/l and averaged 11.8 mg/l. Specific conductance ranged from 249 mhos/cm[7] to 300 mhos/cm and averaged 280 mhos/cm.

These concentrations were considered by the Department as the pre-mining water quality for the water source in a letter to Appellant dated March 4, 1997. The replacement well that Appellant was planning needed to satisfy these criteria. Tests on the water in the new well, drilled only to the depth of the Upper Freeport aquifer, sampled on April 8 and April 15, 1997, showed concentrations within the parameters of the Fenslau well before deepening. The Department specifically acknowledged on May 28, 1997 that the replacement source meets the pre-mining water quality of the original.

It is clear from all this that Appellant did not contaminate the Upper Freeport aquifer during the period prior to September 1983 and, as a consequence, did not contaminate the Fenslau well.

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[6] This is an abbreviation for milligrams per liter.

[7] This is an abbreviation for micromhos per centimeter.

Since the new well, on the same property only hundreds of feet away from the original, shows water quality consistent with the 1980-83 period, it is doubtful the Appellant contaminated the Upper Freeport aquifer on the Fenslau property even after September 1983.

Although documents in its files from 1985 disclose Department knowledge of the deepening of the well, the Department hydrogeologic study conducted in 1996 after the Overtons' complaint overlooked that knowledge. The report describes the well as being only 73 feet and as drawing from the Upper Freeport aquifer. The abrupt degradation of water quality that appeared in September 1983 and persisted to 1996 is, thus, thought to reflect the Upper Freeport aquifer at the time when Appellant was actively mining the coal seam, supporting a conclusion that Appellant was responsible. The same mindset is evidenced in the Department's February 24, 1997 response to Appellant's proposal to drill the replacement well only to the depth of the Upper Freeport aquifer. The Department warned that good quality water might not be present at that depth, necessitating a deeper well with casing and a grout seal (presumably to close off the Upper Freeport aquifer).

At some point, the Department became aware (or remembered) that the well was deepened in September 1983. In its Answers to Appellant's Second Set of Interrogatories, dated July 18, 1997, the Department acknowledges that the well was deepened in 1983. That did not prompt a change in its legal position, however, because the Department suggests that the well may still be drawing water, in part, from the Upper Freeport aquifer, an aquifer contaminated by Appellant's mining in the Department's thinking.

As we have discussed, the evidence shows that the Upper Freeport aquifer was not, and is not, contaminated. To the extent the deepened well still drew from that aquifer, the effect would have been to lessen the degradation in the deeper aquifers. There is no doubt that one or more of

these deeper aquifers was contaminated, but there is no evidence to lay the responsibility at Appellant's doorstep.

In addition to being based on erroneous assumptions, the Department's legal position is troublesome in another respect. In its Answers to Appellant's Second Set of Interrogatories, dated July 18, 1997, it asserts that any agreement Appellant might have had with Fenslau is not binding on the Department and does not relieve Appellant of its environmental duties. "The Department's exercise of its police powers is unfettered by private contractual agreements."

The argument is fully developed in the memorandum of law and proceeds as follows: (1) Appellant affected Fenslau's well; (2) Appellant deepened the well; (3) the deepened well was contaminated; (4) Fenslau did not care; (5) the Overtons do care; therefore, (6) Appellant must replace it. Since SMCRA is an exercise of the police power, any agreement between Appellant and Fenslau is immaterial.

SMCRA is an exercise of the police power, but it is an exercise channeled, as it must be, through the wording of its statutory sections. Where replacement of water sources is concerned, the police power is exercised through section 4.2(f) of SMCRA, 52 P.S. § 1396.4b(f). That section and the implementing regulation at 25 Pa. Code § 87.119 obligate the miner to restore or replace the affected water supply with an alternate source adequate in quantity and quality "for the purposes served by the supply."

The quoted language personalizes the requirement, focusing it on the affected water source, its particular quantity, quality and uses. It is inevitable that a requirement like this will bring the miner and the landowner into discussions, either directly or through the Department, in an effort to tailor a replacement source to fit the landowner's needs. It is also inevitable that, many times, these

discussions will take place without Department intervention and the miner will take some action voluntarily that is acceptable to the landowner.[8] Our decisions reflect this reality and the Department's awareness of it.

In *Ambrosia*, the miner voluntarily replaced the water supply without Department knowledge, but the landowner then complained to the Department that the replacement was of poorer quality. When the Department ordered the miner to take additional action, the appeal was filed. The Board held that the Department had to prove that the miner was responsible for the original contamination -- the voluntary replacement would not be construed as an admission of liability -- and that the replacement was not adequate in quality. In *Buffy and Landis*, we quoted a Department policy on water replacement that clearly authorized the miner and the landowner to reach an agreement on the replacement source -- an agreement that could involve a lesser quantity than before. We held that, since Buffy had not so agreed, the replacement was inadequate.

Further evidence of this Department policy appears in the discussion of proposed amendments to 25 Pa. Code § 87.119, adopted by the Environmental Quality Board (EQB) on February 18, 1997, and published for comment in the May 3, 1997 edition of the *Pennsylvania Bulletin*, Vol. 27,. No. 18. The discussion at page 2246 notes that the Department practice has been to allow the landowner to waive, in whole or in part, the miner's replacement obligation using a form provided by the Department. This comports with our observations.

The Department's own interpretation of 52 P.S. § 1396.4b(f) and 25 Pa. Code § 87.119, as reflected by its actions and policies, reinforces our own conclusion that the mine and the landowner

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[8] Bear in mind that the statutory section mandates the miner to take corrective action, then allows the Department to issue an order if the miner fails to act.

themselves can reach a private agreement on the replacement obligation. It is certainly preferable for the agreement to be in writing and filed with the Department, but such formality is not mandated either by the statute or the regulation. If the terms of an oral agreement can be established, there is no reason why it cannot be recognized.

An oral agreement is involved here, according to the affidavit of Michael M. Svonavec, who has been working for Appellant since 1978 and is now Secretary/Treasurer. He avers that Fenslau requested Appellant to increase his water quantity by deepening the well and agreed to accept the deepened water supply with full knowledge that the well might not be of the same quality or quantity. The well was deepened and revealed a degraded water quality. Fenslau apparently was satisfied, however, because the quantity improved and he was using the water for agricultural purposes. He lived on the property for another six years without complaint to Appellant or the Department.

All of this is admitted by the Department but the averment about Fenslau's willingness to accept the degraded quality and the averment about Fenslau's never complaining to Appellant thereafter. As noted, these are contained in the affidavit. Besides, Fenslau's use of the degraded water for six years without complaining to the Department certainly suggests that Fenslau was satisfied. The Engles, who succeeded Fenslau in ownership, also never complained to the Department, although the details of their occupancy of the property and use of the water is not in the record. Even the Overtons used the water for household purposes for three years before complaining to the Department.

Given the affidavit and the other evidence, we are convinced that Fenslau's concern was water of sufficient quantity to use for agricultural purposes. To satisfy this concern, he was willing

to accept some degradation in quality. Accordingly, he was willing to take the risk involved in deepening the well and, apparently, was satisfied with the result. Thirteen years later, another owner who wants to use the well for household use and drinking water -- a significantly different use -- urges the Department to take action. What Appellant did to satisfy Fenslau it is being ordered to undo to satisfy the Overtons.

We have never been presented with a similar factual situation and, thus, have never considered whether a miner who responds under section 4.2(f) of SMCRA to the satisfaction of the owner of the water source is required to respond at a later time to a new owner who wants to use the water for a different purpose. All of our prior decisions have involved what is necessary to satisfy the original owner. Even in *Ambrosia*, where we dealt peripherally with the miner's responsibility beyond his first response, we were still considering the original owner.

Both SMCRA and its regulations are silent on this subject. Because of the absence of familiar guideposts in this uncharted territory, we will tread carefully and limit our ruling to the precise facts before us. Based on these facts, we conclude that Appellant's initial response, which replaced the water source with an alternate that was adequate for the purposes for which Fenslau used the water, satisfied Appellant's responsibility under section 4.2(f) of SMCRA.

The degraded water quality that was a consequence of the deepening, but which Fenslau accepted as part of the agreement with Appellant, is a condition that Appellant cannot be ordered to correct under section 4.2(f) of SMCRA without proof that its mining activities subsequent to 1989 (when Fenslau died) produced a further degradation in some significant aspect. The water samples do not show that. While there are 53 samples reported for the period September 30, 1983 to August 28, 1989 and only 5 for the period June 18, 1990 to February 20, 1997, a comparison can still be

made. Iron, manganese and sulfates are all lower on the average during the later period than during the earlier.[9] We appreciate that this is raw, uninterpreted data, but it is the only data given to us. It strongly suggests that the water in the deepened well did not deteriorate any further after Fenslau's death.

Since the Department's Order is based on the erroneous factual assumption that Appellant contaminated the Upper Freeport aquifer and on the erroneous legal assumption that Appellant can be compelled to take additional action under section 4.2(f) of SMCRA, 52 P.S. § 1396.4b(f), and 25 Pa. Code § 87.119, it is clear that, even viewing the matter most favorably to the Department, the Department cannot make out a *prima facie* case. Accordingly, summary judgment is appropriate.

[9] Specific conductance cannot be compared because it was not tested during the later period.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SVONAVEC, INC.	:	
	:	
v.	:	**EHB Docket No. 97-011-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 3rd day of April, 1998, it is ordered that summary judgment is entered in favor of Appellant.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 3, 1998

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

For the Commonwealth, DEP:
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WILLIAM T. PHILLIPY
SECRETARY TO THE BC

PEOPLE UNITED TO SAVE HOMES	:	
	:	
v.	:	**EHB Docket No. 97-262-R**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and EIGHTY-FOUR	:	
MINING COMPANY, Permittee	:	**Issued: April 6, 1998**

OPINION AND ORDER ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Although 25 Pa. Code §86.55 of the Department's coal mining regulations states that a renewal permit application shall be filed at least 180 days prior to the permit's expiration, the regulations do not require the Department to refuse to process an application filed after this date. Since the regulations do not mandate any specific sanction we fail to find as a matter of law when reviewing Appellant's Motion for Summary Judgment that the Department has abused its discretion or acted contrary to law. This is an issue of material fact which will be decided at a hearing.

OPINION

Presently before the Board is the Motion for Summary Judgment (Motion) filed by Appellant People United to Save Homes (PUSH). PUSH contends it is entitled to summary judgment because the coal company did not submit its renewal application for its coal mine more

than 180 days before the permit's expiration date. Section 86.55(c) of the Department's mining regulations requires coal companies to submit renewal applications 180 days before the expiration of their current permit. 25 Pa. Code §86.55(c).

Eighty-Four Mining Company continued to operate its coal mine and its permit was renewed by the Department on November 4, 1997. PUSH filed a timely appeal to this Department approval.

On February 2, 1998 PUSH filed its Motion for Summary Judgment. The Department filed its response and brief in opposition to the Motion on February 27, 1998. Eighty-Four Mining Company filed its response and brief in opposition to the Motion on March 2, 1998. On March 11, 1998 PUSH filed a Motion to Quash [Eighty-Four Mining Company's] Untimely Response together with a Memorandum of Law. On March 13, 1998 PUSH filed its Reply to the Department's Response to PUSH's Motion for Summary Judgment together with a Memorandum of Law.

On March 13, 1998 the Board issued its Opinion and Order denying PUSH's Motion to Quash. We held that although parties should file documents in a timely fashion PUSH's request to strike Eighty-Four Mining Company's response and enter summary judgment against the coal company was a drastic step not warranted by the facts.

PUSH contends that the Department abused its discretion and acted contrary to law by accepting Eighty-Four Mining Company's renewal application rather than requiring them to seek a new permit because of their late filing. The Department disagrees. It contends that the Department has enforcement discretion in reviewing Eighty-Four's late filing. It further points out that the Department regulations do not specify any penalty or sanction for failing to submit

a timely renewal application. Moreover, since at least 1988 the Department has had a written policy to address this very situation. The policy sets forth a series of steps which become more onerous on the permittee the longer it delays in filing its renewal application.

Eighty-Four Mining Company opposes PUSH's Motion on several points. First, it argues that PUSH has raised this same contention pursuant to the Federal Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §1201, *et. seq.* before the federal Office of Surface Mining. Therefore, it argues the Board should decline to exercise jurisdiction over such an issue. *See Cooper v. Department of Environmental Resources,* 1982 EHB 250.

The coal company's second argument involves the Department's interpretation of its own regulations. It argues that the Department does not interpret the requisite language as mandatory and that its interpretation of the implementation of its own regulations is entitled to controlling weight unless it is plainly erroneous or inconsistent with the clear language of the regulations. *T.R.A.S.H., Ltd. v. Department of Environmental Resources,* 574 A.2d 721 (Pa. Cmwlth.1990). Eighty-Four Mining Company also contends that the resolution of these issues involves disputed questions of fact which require the Board to hold an evidentiary hearing. Finally, Eighty-Four Mining Company contends its actions in relying on guidance from the Department in submitting its renewal application raise questions of material fact involving the defense of "equitable estoppel."

In its Reply to the Department's Response, PUSH reiterates its contention that the regulations at issue are mandatory and were simply not followed by the mining company. PUSH further contends that these regulations are not "enforcement" regulations but permit regulations. Failure to submit a timely renewal application, in PUSH's view, simply means that the permit

expires and the applicant must cease operation until it submits a new application and gains Department approval.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions of record, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.2; *County of Adams v. Department of Environmental Protection,* 687 A.2d 1222 (Pa. Cmwlth. 1997). In reviewing a motion for summary judgment, the Board must examine the record in the light most favorable to the nonmoving party, and all doubts as to the existence of a material fact must be resolved against the moving party. *Ducjai v. Dennis,* 656 A.2d 102 (Pa. 1995). Summary judgment may be entered only in those cases where the right is clear and free from doubt. *Martin v. Sun Pipe Line Company,* 666 A.2d 637 (Pa. 1995).

We disagree with the Department's contention that the issue concerning whether or not the applicable Department regulations were violated and what impact that has on the Department's permitting decision involves prosecutorial discretion and is not even reviewable by this Board. Prosecutorial discretion is a Board-created exception to our statutorily mandated duty and obligation to review Department actions. *See generally,* Environmental Hearing Board Act, Act of July 31, 1988, P.L. 530, *as amended,* 35 P.S. §§7511-7516. Consequently, the exception should be narrowly construed and should be confined to the prosecution area. It does not shield Department actions that impact on permitting decisions from the Board's review.

We also disagree with Eighty-Four Mining Company's contention that we dismiss PUSH's Motion based on an allegedly similar motion filed with the federal Office of Surface Mining. The

Board decision cited by Eighty-Four Mining Company, *Cooper v. Department of Environmental Resources,* 1982 EHB 250, does not support such a contention. *Cooper* involved an appeal of a Department action regarding the construction of a private dock on a small lake. The Board decided the case even though the Department argued that it was necessary for the appellants to first file a quiet title action in the Court of Common Pleas. Although the Board acknowledged that it did not have jurisdiction to determine the rights of parties not before the Board in a quiet title action, it did give its opinion on the issue and rendered a decision. In the present appeal, the Board clearly has jurisdiction.

We must decide if based on doctrines of comity or federalism we should defer ruling on this Motion. We conclude that we should decide this issue. First, Pennsylvania has been granted primacy over the mining of coal in the Commonwealth. *See* Federal Surface Mining Control and Reclamation Act (SMCRA) and specifically 30 U.S.C. §1253 and 30 C.F.R. Part 730. The issue here concerns an action of the Commonwealth's environmental protection agency. It is a violation of long-established principles of federalism, absent a federal constitutional argument or specific statutory authorization, for a federal agency to review the actions of a state agency. This Board is required by law, where timely appeals are filed, to review the actions of the Department of Environmental Protection. We see no need or reason to shirk this duty and obligation.

25 Pa. Code §86.55 (c) provides as follows:

> Complete application, for renewal of a permit ... shall be filed with the Department at least 180 days before the expiration date of the particular permit in question.

The rules of statutory construction apply to regulations as well as to statutes. *Fraternal Order of Police Lodge No. 5. v. City of Philadelphia,* 590 A.2d 384 (Pa. Cmwlth. 1991). It is

therefore presumed that every word, sentence, or provision of a statute is intended for some purpose and accordingly must be given effect. *Commonwealth v. Lobiondo,* 462 A.2d 662 (Pa. 1983). A regulation shall not be presumed to have an interpretation which is absurd or unreasonable. *Philadelphia Suburban Corp. v. Commonwealth,* 601 A.2d 893 (Pa. Cmwlth. 1992).

Critical to our decision is whether the word "shall" in this regulation is mandatory or merely directory. The construction given a statute or regulation 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,* 607 A.2d 321, 323 (Pa. Cmwlth. 1992). The Department contends that the 180-day requirement set forth in the regulation exists primarily for the convenience of the Department to assure that the Department has adequate time to review the application. Indeed, the federal regulation only requires that coal companies submit renewal applications within 120 days of the permit expiration date. 30 C.F.R. §774.15(b)(1).

The Department, at least since 1988, has had a written policy to address this very issue. Basically, the policy involves prodding the company to file its renewal application. The longer the delay, the harsher is the Department's action. An agency's interpretation of a statute it administers is controlling unless that interpretation is clearly inconsistent with the regulation or the regulation itself is inconsistent with the underlying legislative scheme. *Ferri Contracting Company, Inc. v. Department of Environmental Resources,* 506 A.2d 981, 985 (Pa. Cmwlth. 1986); *Cambria Cogen Company v. Department of Environmental Resources,* 1995 EHB 191.

In addition, the Commonwealth Court has held that "shall" is not always mandatory.

> The word "shall" may, however, be interpreted as either mandatory or directory. *Francis v. Corleto,* 211 A.2d 503 (Pa. 1965). When referring to the time of doing something, shall has usually been considered directory. *Kowell Motor Vehicle Registration* Case, 228 A.2d 50 (Pa. Super. 1967).

Delaware County v. Department of Public Welfare, 383 A.2d 240, 242 (Pa. Cmwlth. 1978).

Moreover, the regulation is silent as to a penalty for its violation. Appellant presents no authority in support of its draconian argument that the coal company's failure to file its renewal permit more than 180 days prior to the permit expiration date should result in the forfeiture of its right to mine coal pending the submittal and approval of an entirely new application. Such a harsh penalty is not conducive to the administration of justice. The law is not a minefield where one unwary step should result in disaster. Cases should be decided on the merits. To accept the Appellant's view would be to turn a regulation at least arguably enacted for the Department's convenience into a legal hand grenade that would be automatically tripped without any discretion on the Department's part. Appellant would have us place form over substance without giving us any authority for doing so.

25 Pa. Code §86.55(a) states that once a permit is issued there is a presumption that it will be renewed. Subsection (g) sets forth six broad reasons why a permit will not be renewed by the Department. The specific violation of the 180 day submittal rule is notably absent.

Appellant's reliance on the Board's recent decision in *Tinicum Township v. Department of Environmental Protection,* EHB Docket No. 95-266-MG (Adjudication issued December 8, 1997), is misplaced. This decision is based on vastly different facts and regulations.

Tinicum Township involved a waste transfer station that had been permitted in 1976 but had never processed any waste. Twelve years later, in 1988, the Department promulgated much

more comprehensive and rigorous waste regulations. These new regulations specifically adressed the continuing viability of the older permits. 25 Pa. Code §271.211(e), provided that if no waste was processed at a facility for a five year period then the permit would be void. Thus by the specific language of the regulation the transfer station lost its permit when it failed to submit its permit renewal application in a timely fashion.

This should be contrasted with the regulatory framework in this instance. The regulation in question, 25 Pa. Code §86.55(c), does not contain any specific sanction. Since the regulations do not require the Department to refuse to process a late application or mandate any specific sanction we fail to find as a matter of law that the Department has abused its discretion or acted contrary to law. Thus, we find that the Department has the discretion to act and we will only reverse the Department in this instance for an abuse of discretion or error of law. This is an issue of material fact which will be decided at a hearing.

In light of our holding, we need not decide at this time the additional issues raised by the mining company regarding equittable estoppel and industry practice. We will issue an Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PEOPLE UNITED TO SAVE HOMES	:	
	:	
v.	:	**EHB Docket No. 97-262-R**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY, Permittee	:	

ORDER

AND NOW, this 6th day of April, 1998, Appellant's Motion for Summary Judgment is **denied.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATE: April 6, 1998

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CNG TRANSMISSION CORPORATION, and PENN FUEL GAS, INC.	:	
v.	:	**EHB Docket No. 97-169-MR (Consolidated with 97-170-MR)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and N.E. HUB PARTNERS, L.P., Permittee	:	**Issued: April 7, 1998**

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

by Robert D. Myers, Administrative Law Judge

Synopsis:

Summary judgment is denied where there exists a genuine issue of material fact as to: (1) the extent of the Department of Environmental Protection's (Department) technical review prior to issuance of two salt cavern gas storage well permits; (2) whether there was mutual agreement between the well operator and the gas storage reservoir operator with regard to the gas well casing installation procedure; and (3) whether the Department made a final determination that noncoal mining permits would not be required for solution salt mining associated with creation of the two gas wells.

A motion to dismiss the noncoal mining permits issue is denied where there exists a genuine issue of material fact as to: (1) whether the gas well permittee actually applied for noncoal mining

permits for solution salt mining associated with construction of the wells; and (2) whether the issue before the Board is limited to the Department's failure to require noncoal mining permits *prior to, or in conjunction with, issuance of the gas well permits.*

OPINION

On August 19, 1997, CNG Transmission Corporation (CNG) and Penn Fuel Gas, Inc. (Penn Fuel) (collectively, Appellants) filed Notices of Appeal with the Board contesting the Department of Environmental Protection's (Department) issuance of Gas Well Permit Nos. 37-117-20168 and 37-117-20169 (Permits) to N.E. Hub Partners, L.P. (Permittee).[1] The Permits allow Permittee to drill two salt cavern gas storage wells in Farmington Township, Tioga County, Pennsylvania.

In their Notices of Appeal, Appellants assert that they own a gas storage reservoir in Tioga County, known as the Tioga Storage Pool, which is operated by CNG. According to Appellants, the Permits issued by the Department allow the drilling of two extremely large injection wells directly through the Tioga Storage Pool. Appellants claim that, in issuing the Permits: (1) the Department did not properly consider the risk of damage to the Tioga Storage Pool, the risk of contamination to sources of drinking water, and the risk of injury to people; and (2) the Department did not comply with 25 Pa. Code § 78.81(d)(2), which requires that the casing installation procedure be established by mutual agreement between the well operator and the gas storage reservoir operator and be approved by the Department.

The two appeals were consolidated on September 30, 1997 at EHB Docket No. 97-169-MR. Subsequently, Appellants were granted leave to amend their appeals to include an alternate or

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[1] CNG's appeal was docketed at EHB Docket No. 97-169-MR, and Penn Fuel's appeal was docketed at EHB Docket No. 97-170-MR.

supplemental legal issue.[2] In their amended appeals, Appellants assert that Permittee plans to engage in the solution mining of salt in connection with its drilling of the two salt cavern gas storage wells; therefore, the Department should have required that Permittee obtain a noncoal mining permit under section 315(a) of the Clean Streams Law[3] and a noncoal surface mining permit under section 7(a) of the Noncoal Surface Mining Conservation and Reclamation Act[4] and 25 Pa. Code § 77.101.

On January 27, 1998, Appellants filed a Joint Motion for Summary Judgment (Joint Motion), a Memorandum of Law, and numerous exhibits. In the Joint Motion, Appellants seek summary judgment with respect to each of the three issues raised in their amended appeals. First, Appellants maintain that, before issuance of the Permits, the Department reviewed only a three-page application form containing 29 basic questions about the project. (*See* Joint Motion, Exhibit 1.) According to Appellants, this cursory review violates provisions of the Oil and Gas Act,[5] and its regulations,[6] which mandate that the Department consider the risks to the health, safety, environment, and property of the citizens of Pennsylvania before issuing a gas well permit. (Joint Motion, paras. 16-22.) Second, Appellants argue that Permittee's casing installation procedure was not established by

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[2] CNG amended its appeal by Order of the Board dated January 7, 1998. Penn Fuel did the same by Order of the Board dated February 2, 1998.

[3] Act of June 22, 1937, P.L. 1987, *as amended*, 35 P. S. § 691.315(a).

[4] Act of December 19, 1984, P.L. 1093, 52 P. S. §3307(a).

[5] Act of December 19, 1984, P.L. 1140, 58 P. S. §§ 601.101-601.605. In their Joint Motion for Summary Judgment, Appellants refer specifically to sections 102, 201(e), 207(b), 208(a) and 209 of the Oil and Gas Act, 58 P. S. §§ 601.102, 601.201(e), 601.207(b), 601.208(a), and 601.209. (Joint Motion, paras. 17-18, 21.)

[6] Appellants cite the Department's regulations at 25 Pa. Code §§ 78.51(a), 78.71-78.73, 78.76(c), and 78.81-78.86. (Joint Motion, paras. 17-18, 21.)

mutual agreement between Permittee and CNG and was not approved by the Department, a violation of 25 Pa. Code § 78.81(d)(2). (Joint Motion, paras. 23-30.) Finally, Appellants assert that the Department failed to require noncoal mining permits for solution salt mining associated with creation of the two wells. (Joint Motion, paras. 31-45.)

On February 23, 1998, Permittee and the Department (collectively, Respondents) filed their Joint Response, a Joint Memorandum, and numerous exhibits. Addressing Appellants' first argument, Respondents insist that the Department's technical review in this case was more than sufficient; in fact, it was "the most thorough ... review ever performed" of proposed plans and procedures for drilling a natural gas well. (Joint Response, p. 2; paras. 16-22; *See* Exhibit A.) Second, Respondents claim that there *was* mutual agreement between Permittee and CNG as to the adequacy of Permittee's casing installation procedures. However, CNG refused to execute an agreement with Permittee because of CNG's animus toward Permittee. (*See* Joint Response, Exhibit C.) Respondents also suggest that the Department *did* approve Permittee's casing procedures, at least implicitly, by issuing the Permits after reviewing the procedures. (Joint Response, paras. 16-20, 24-26.) Finally, Respondents assert that, although the Department did not require that Permittee obtain noncoal mining permits prior to, or in conjunction with, issuance of the Permits, the Department advised Permittee to obtain noncoal mining permits in the future. Respondents note that, since the filing of these appeals, Permittee has applied for noncoal mining permits. (Joint Response, para. 41.)

Along with their Joint Response, Respondents filed a Joint Motion to Dismiss, a Joint Memorandum of Law, and several exhibits. In the Joint Motion to Dismiss, Respondents ask that the Board dismiss the noncoal mining permits issue. In support of this motion, Respondents

articulate two arguments. First, Respondents argue that the Department has not yet made a final determination on Permittee's application for noncoal mining permits; therefore, the Board lacks jurisdiction over the matter. In the alternative, Respondents argue that the Department's failure to require Permittee to secure noncoal mining permits prior to, or in conjunction with, issuance of the gas well Permits constitutes Department *inaction*, and the Board lacks jurisdiction over inaction by the Department. (Joint Motion to Dismiss, paras. 3-7.)

On March 16, 1998, Appellants filed a Joint Reply to the Joint Response and supplemental exhibits.[7] First, with respect to the Department's technical review of Permittee's gas well permit application, Appellants point out that Kenneth Young, Regional Oil and Gas Program Manager for the Department, whose signature appears on the Permits, testified at his deposition that the Department limited its substantive inquiry to the three-page permit application. (Joint Reply at 4-8.) Second, Appellants contend that they were *not* in agreement with regard to the gas well casing installation procedure, that they could give their reasons for opposing the procedure, but that those specific reasons are immaterial here. In addition, Appellants believe that 25 Pa. Code § 78.81(d)(2) requires more than implicit Department approval of the casing installation procedures. (Joint Reply at 14, n. 12.) Finally, on the noncoal mining permit issue, Appellants note that, according to the Affidavit of Thomas R. Siguaw, Permittee's Project Manager, the Department *never* intended to require noncoal mining permits. (Joint Reply at 20, n. 24; Exhibit 18, para. 10.)

On March 20, 1998, Appellants filed a Joint Reply to the Joint Motion to Dismiss and a Joint Memorandum of Law. In their Joint Reply to the Joint Motion to Dismiss, Appellants insist, based

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[7] On March 13, 1998, CNG filed its own Reply Memorandum of Law. However, on March 19, 1998, CNG filed a Motion for Leave to Withdraw this reply, which the Board granted.

on evidence in the record, that the Department made a final decision *not* to require noncoal mining permits in this case. Appellants also claim that the Department's final decision does *not* constitute inaction. Finally, Appellants do not believe that Respondents have presented sufficient evidence to show that Permittee has actually filed an application for noncoal mining permits.

Because the Permits are, in many ways, the first of a kind, there is a great deal of controversy about the Department's processing and approval actions. The extensive discovery and the disputes surrounding it have reflected this reality. It was our hope that our disposal of these motions would enable us to narrow the focus of the litigation and hasten its resolution. As will be seen, that has not been possible.

In the sections that follow, the Board will first address the issues raised in the Joint Motion for Summary Judgment. The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions of record, 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. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997). On a motion for summary judgment, the record must be viewed in the light most favorable to the nonmoving party, and all doubts as to the existence of a material fact must be resolved against the moving party. *Ducjai v. Dennis,* 656 A.2d 102 (Pa. 1995).

I.

The first issue presented in Appellants' Joint Motion for Summary Judgment is whether the Department performed a meaningful technical evaluation of Permittee's drilling, casing, and cementing programs before issuing the Permits. Appellants do not believe that the Department properly considered the risks to the health, safety, environment, and property of the citizens of

Pennsylvania in allowing Permittee to proceed with the proposed wells.[8] Appellants contend that consideration of a simple three-page application, the extent of the Department's review here, falls short of the Department's statutory and regulatory obligations.

In making their argument, Appellants acknowledge that Permittee submitted volumes of detailed technical information to the Department for consideration. However, Appellants do not believe that the Department actually considered that material. Contrary to this assertion, Respondents state that the Department *did* review the material submitted by Permittee; indeed, according to Respondents, it was the most thorough review ever done for a proposed gas well. Thus, Respondents dispute Appellants' contention that the Department failed to properly review Permittee's submissions and consider the risks posed by Permittee's project. In order to determine if this is a *genuine* dispute, we must examine the record before us.

At the heart of the matter is the deposition testimony of Kenneth Young, the person who signed the Permits for the Department. Young testified:

> [Permittee's application was] the first application we've ever received for the drilling of a cavern well.... [I]t required a large amount of time due to the various meetings.... In regards to the final determination, ... [the Department's technical evaluation involved] reviewing that three-page application to see that those answers were completed and they were correct....[9] Basically, that is all we needed to see in order

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[8] Section 201(e) of the Oil and Gas Act, 58 P. S. § 601.201(e), provides that the Department has "the authority to deny a permit to any person ... if issuance of such permit would result in a violation of [the Oil and Gas Act] or any other applicable environmental statute, rule or regulation." Section 102 of the Oil and Gas Act, 58 P. S. § 601.102, declares that one purpose of the statute is to "[p]ermit the optimal development of the oil and gas resources of Pennsylvania consistent with the protection of the health, safety, environment and property of the citizens of the Commonwealth."

[9] An examination of the record shows that the three-page application form normally guides the Department's technical review process for gas well permit applications. According to the Technical Services Manual which describes the process, if the well will penetrate or be within 3,000

> to make the determination on that permit. We were submitted volumes of materials. It was unsolicited. I mean, we tried to review all that was appropriate to the project from our standpoint. But in reality, the only thing that we needed was that three-page application ... in order to make a decision on the application.

(Joint Motion, para. 16; Exhibit 5 at 21-22, 24.) Young explained:

> When this first came about, I think the first general meeting was maybe in 1994, ... we were informed that we were going to play a part in review of this project, I guess it was unclear to us as to what our exact role would be.... Well, it was new, it was something that we had never done before. There was certainly a lot of information provided to us. I believe whenever we first began, we had an interest and received information about the project in its entirety. And as the process continued, we narrowed down the scope of what it was we had to look at in order to make a decision on the permit application.... So we were a part of discussions that dealt with a lot of things of which we weren't obligated to consider in order to make a final decision on the permit.

(Joint Motion, Exhibit 5 at 33.) Young testified that the person responsible for performing the technical review in this unique case was Robert Gleeson, Chief of the Technical Services Section. (Joint Motion, Exhibit 5 at 17-21.)

According to the Affidavit of Robert Gleeson, Young charged him with responsibility to review the technical merits of Permittee's applications and to determine whether Permittee had addressed therein the issues raised by Appellants with respect to Permittee's plans and procedures. (Joint Response, Exhibit A, paras. 4-5.) Gleeson states that he spent hundreds of hours performing his work. He reviewed the technical aspects of Permittee's applications; he reviewed all submissions to the Department pertaining to the applications; he reviewed documents submitted by Appellants; he reviewed reports submitted by consultants for both sides; and he attended various meetings. (Joint Response, Exhibit A, paras. 7-10.) Gleeson asserts that he considered everything in deciding

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feet of an active gas storage reservoir, the Department will notify the well operator of special drilling and completion requirements. (*See* Joint Motion, Exhibit 8, Instructions for Question 25.)

to recommend issuance of the Permits. (Joint Response, Exhibit A, para. 13.)

As noted above, on a motion for summary judgment, we must view the record in the light most favorable to the nonmoving party, and all doubts as to the existence of a material fact must be resolved against the moving party. Based on the record here, we conclude that a genuine issue of material fact exists as to the extent of the Department's technical review prior to issuance of the Permits. Therefore, summary judgment is denied.

II.

The second issued raised in Appellants' Joint Motion for Summary Judgment is whether the Department issued the Permits without complying with 25 Pa. Code § 78.81(d)(2). This regulation requires that a well drilled through a gas storage reservoir or a reservoir protective area be cased and cemented as follows:

> [The] operator shall run intermediate or production casing from a point located at least 100 feet below the gas storage horizon to the surface. The operator shall cement this casing by circulating cement to a point at least 200 feet above the gas storage reservoir or gas storage horizon. *This casing which is intended to protect the gas storage reservoir and the well shall be installed according to a procedure approved by the Department and established by mutual agreement between the well operator and the gas storage reservoir operator.*

25 Pa. Code § 78.81(d)(2). (Emphasis added.) Appellants allege that the casing installation procedure in this case was not established by mutual agreement between Permittee and CNG and was not approved by the Department. Respondents, however, maintain that there *was* mutual agreement with regard to the adequacy of Permittee's casing procedure, and that CNG refused to execute an agreement because of animus towards Permittee.

A threshold question here is whether there was mutual agreement between Permittee and CNG with regard to Permittee's casing installation procedure. Appellants claim that the procedure

is inadequate; however, they have not identified any particular problem with the procedure for the record here. Respondents, on the other hand, have submitted excerpts from various depositions to show that CNG employees and consultants have no data to support their criticism of Permittee's casing installation procedure. (*See* Joint Response, Exhibits F, G, J, K.) Respondents have also submitted the Affidavit of Thomas R. Siguaw, Permittee's Project Manager. Siguaw states in his affidavit that CNG and Permittee's predecessor corporation, Tejas Power Corporation, were going to develop a natural gas salt cavern storage facility at the Tioga Storage Complex. However, CNG and Tejas were unable to work out economic differences, and the two parties severed their business relationship. Permittee then proceeded with the project on its own. (Joint Response, Exhibit C, paras. 3, 7, 9, 11-12, 19-21.)

Such evidence suggests that CNG's failure to execute a mutual agreement with Permittee on the casing installation procedure is the result of CNG's animus towards Permittee over the failed business relationship. Thus, Respondents' evidence raises a genuine issue of material fact as to whether there was mutual agreement on Permittee's casing installation procedure. Accordingly, summary judgment is denied.

III.

The final issue raised in the Joint Motion for Summary Judgment is whether the Department should have required Permittee to obtain noncoal mining permits for solution salt mining related to creation of the two wells. Respondents allege that, although the Department did not require noncoal mining permits prior to, or in conjunction with, issuance of the Permits, Permittee has now filed the appropriate applications. Appellants contend that Permittee's filing of noncoal mining permit applications does not change the fact that the Department decided not to require such permits.

In order to prevail on this issue, Appellants must establish as a fact that the Department has decided *not* to require noncoal mining permits for the wells. We must determine from relevant portions of the record whether there is any genuine dispute in this regard. The Affidavit of Thomas R. Siguaw states:

> The Project was permitted by [the Department] by means of a coordinated permit review process, and all permits required by [the Department] were to be issued at one time. In connection with this process, I participated in discussions and meetings with representatives of [the Department] concerning *the permits [Permittee] must acquire in connection with the Project.*

(Joint Reply, Exhibit 18, para. 7.) (Emphasis added.)

> [William Parsons, the Department representative who was to oversee coordination and issuance of all required permits,] informed me that [the Department] would not require that [Permittee] obtain noncoal surface mining activities permits in connection with the Approved Wells. At the same time, Mr. Parsons informed me that [Permittee] should obtain mining permits *for future plans.*

(Joint Reply, Exhibit 18, paras. 8, 10.) (Emphasis added.) At his deposition, Parsons explained what the Department meant by the phrase "future plans." Parsons indicated that the Department decided *not* to require noncoal mining permits *for the construction of the wells* because the Department viewed the brine resulting therefrom as a waste product to be treated at the proposed evaporation plant. To the Department, converting the brine into salt, a useful commodity, was a much better alternative than brine injection or removal of the waste to another site. However, the Department learned that Permittee had "future plans" to generate brine at other locations and to transport that brine to the proposed evaporation plant for processing. With respect to those "future plans," the Department advised Permittee to obtain noncoal mining permits. (Joint Motion, Exhibit 3 at 74-76, 79-82.)

Given such evidence, without more, it would appear that Appellants are correct, that the

Department decided *not* to require noncoal mining permits for solution salt mining associated with construction of the wells. However, we also have evidence in the record which suggests that the Department *might* have changed its position on the matter. Specifically, the record contains a cover letter for noncoal mining permit applications submitted to the Department by Permittee. (*See* Joint Response, Exhibit C, Attachment F.) Unfortunately, this cover letter does not state clearly that the applications cover the two gas wells. However, the Affidavit of Thomas R. Siguaw states that Permittee informed the Department that it intended to file noncoal mining permit applications to encompass mining activities related to the two gas wells. (*See* Joint Reply, Exhibit 18, para. 11.) There is no evidence to suggest that the Department discouraged the submission of such applications. Viewing all of this in the light most favorable to Permittee, it seems that the Department *might* have changed its position and *might* now require noncoal mining permits for the wells.

Because we believe that there is a genuine factual dispute as to whether the Department has changed its position and is now requiring Permittee to obtain noncoal mining permits for the wells, summary judgment is denied.

IV.

We turn now to Respondents' Joint Motion to Dismiss. Respondents request that the Board dismiss the noncoal mining permits issue because Permittee has now applied for such permits and because the Department has not taken final action. Respondents contend that, without a final action, the Board lacks jurisdiction.

As with a motion for summary judgment, the Board must view a motion to dismiss in the light most favorable to the non-moving party. *Lehigh Township v. DEP*, 1995 EHB 1098.

Moreover, the Board will dismiss an appeal only where there are no material factual disputes and where the moving party is clearly entitled to judgment as a matter of law. *Id.*; *City of Scranton v. DER*, 1995 EHB 104.

In order to prevail on their Joint Motion to Dismiss, Respondents must establish as a fact that Permittee has applied for noncoal mining permits for solution salt mining associated with construction of the two gas wells. As noted above, it is not entirely clear that Permittee has applied for noncoal mining permits *related to the wells*. The cover letter does not give sufficient detail about the scope of the application, and Siguaw's affidavit refers only to permit applications that Permittee *intended* to file with the Department. Obviously, if the applications pertain only to Permittee's "future plans" to produce salt from brine generated at other locations, then the applications are irrelevant here. Because the scope of the noncoal mining permit applications is unclear, Respondents' Motion to Dismiss is denied.

In the alternative, Respondents ask for dismissal of the noncoal mining permits issue because the Department's decision *not* to require Permittee to obtain noncoal mining permits prior to, or in conjunction with, issuance of the Permits constitutes Department inaction. Respondents argue that the Board lacks jurisdiction over such Department inaction.

However, Appellants claim that they are *not* challenging the Department's failure to require noncoal mining permits *prior to, or in conjunction with, issuance of the Permits*. Rather, Appellants are challenging the Department's final decision to *not* require noncoal mining permits *at any time*. (Joint Reply to Joint Motion to Dismiss, para. 7.) We note that these are two different issues. As the matter is framed by Appellants, the Department could have inserted a special condition in the Permits requiring that Permittee obtain noncoal mining permits before constructing the wells. (*See*

CNG's Amended Notice of Appeal, paras. 6-7.) The Department did *not* have to require that Permittee acquire noncoal mining permits *prior to, or in conjunction with, issuance of the Permits*.

Because Respondents are asking the Board to dismiss an issue that is not presently before the Board, we cannot grant Respondents' Motion to Dismiss.

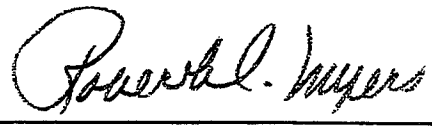
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CNG TRANSMISSION CORPORATION, and PENN FUEL GAS, INC.	:	
v.	:	**EHB Docket No. 97-169-MR (Consolidated with 97-170-MR)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and N.E. HUB PARTNERS, L.P., Permittee	:	

ORDER

AND NOW, this 7th day of April, 1998, it is ordered that Appellants' Motion for Summary Judgment is denied. It is further ordered that the Motion to Dismiss filed by Permittee and the Department of Environmental Protection is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: April 7, 1998

See next page for a service list.

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TELECOPIER 717-783-4738

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CONSOLIDATED RAIL CORPORATION	:	
	:	
v.	:	**EHB Docket No. 97-208-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 8, 1998**

OPINION AND ORDER
ON MOTION TO DISMISS AS MOOT

by Robert D. Myers, Administrative Law Judge

Synopsis:

A Motion to Dismiss as Moot is denied where the Department of Environmental Protection could use the subject matter of the appeal against the appellant in the future, and the Department has given no assurances that it will not do so. Under such circumstances, the appellant still has a stake in the outcome of the appeal, and, thus, the appeal is not moot.

OPINION

Consolidated Rail Corporation (Conrail) has filed a Notice of Appeal with the Board challenging the Department of Environmental Protection's (Department) September 5, 1997 issuance of Emergency Permit No. EP22-97-102 (Emergency Permit) and the Department's September 15, 1997 letter amending the permit. The circumstances surrounding the Department's issuance of the Emergency Permit and the letter are as follows.

Conrail owns and operates railroad lines within the Commonwealth of Pennsylvania,

including the railroad line that crosses the Susquehanna River on the Rockville Bridge in Susquehanna Township, Dauphin County. On August 20, 1997, a portion of the Rockville Bridge gave way and caused a Conrail train to derail. This derailment sent rail cars, 400 tons of coal, ballast, stone masonry, railroad ties, and other materials into the river. The derailment also ruptured a nearby petroleum pipeline.

On September 4, 1997, Conrail submitted to the Department a proposed plan for removal of the material from the Susquehanna River. Conrail proposed, *inter alia*, that the coal be removed from the river "by means of a clamshell equipped crane positioned on the bridge above the spill." (Notice of Appeal, Exhibit A.)

On September 5, 1997, the Department issued the Emergency Permit authorizing Conrail to "remove the remains of the Conrail train wreckage consisting of coal, ballast, stone masonry and railroad ties from the bed of the Susquehanna River just downstream of the Rockville Bridge." (Notice of Appeal, Exhibit A.) Special Condition 8 of the Emergency Permit stated that the authorization would expire on September 12, 1997 unless the Department issued a written extension. On September 9, 1997, the Department extended the expiration date for the Emergency Permit to September 16, 1997.

On September 15, 1997, one day before the Emergency Permit's expiration date, Conrail submitted a revised plan to the Department. Conrail submitted the new plan because an engineering study revealed that positioning a crane on the Rockville Bridge to retrieve materials from the river would pose unacceptable risks and difficulties. Under the revised plan, Conrail would remove the materials from the river using off-road heavy equipment operated from the riverbed.

The Department accepted the amended plan in a letter mailed and faxed to Conrail on

September 15, 1997. Despite the fact that Conrail had just received Department approval for the revised plan and even though the Emergency Permit was about to expire, the Department did *not* extend the permit's expiration date. Instead, the Department advised Conrail that "civil penalties will be assessed to Conrail for each day that completion of the clean-up exceeds [September 16, 1997]." (Notice of Appeal, Exhibit A.) Conrail completed the work on September 24, 1997.

On October 6, 1997, Conrail filed its Notice of Appeal with the Board. First, Conrail claims that the Department abused its discretion by requiring that the materials be removed from the river with a crane positioned on the Rockville Bridge. As Conrail eventually learned, this method of removal presented a safety hazard and forced Conrail to request an amendment to the Emergency Permit. Second, Conrail maintains that the September 16, 1997 expiration date was unreasonable because it was just *one day* after the Department approved the revised plan. Conrail also contends that the September 16, 1997 expiration date makes no sense because the Department did not issue a Pennsylvania State Programmatic General Permit to Conrail for the clean up until September 18, 1997. Finally, Conrail challenges the Department's decision to assess civil penalties for each day that Conrail's clean up exceeded the expiration date. (*See* Notice of Appeal.)

On January 26, 1998, the Department informed Conrail in a letter that it would not assess civil penalties for Conrail's failure to complete its work by September 16, 1997. The Department also represented to Conrail that it is satisfied with Conrail's work.

On February 9, 1998, the Department filed the instant Motion to Dismiss as Moot and a Memorandum of Law in support thereof. The Department argues therein that, because the Department is satisfied with Conrail's work and will not assess civil penalties against Conrail, the Board can grant no effective relief to Conrail. Therefore, the Board should dismiss the appeal as

moot.

On March 6, 1998, Conrail filed a Response to Motion to Dismiss as Moot and a supporting Memorandum of Law. In its Memorandum of Law, Conrail does not object to dismissal of the appeal as moot "provided that the Department's representations concerning its satisfaction with the completed work and its intentions not to seek civil penalties from Conrail are accurate and not subject to change, and provided that the Department does not use the alleged violations of the Emergency Permit in any other way to Conrail's detriment." (Conrail's Memorandum of Law at 3.) Conrail suggests that the Department might consider this incident in evaluating future permit applications or in determining Conrail's compliance history with regard to future civil penalty assessments. (Conrail's Memorandum of Law at 4.)

On March 25, 1998, the Department filed a Reply to Appellant's Response to the Department's Motion to Dismiss. The Department argues that the Board cannot rule on any hypothetical Department action or on some future Department action that is not yet ripe. The Department also contends that a Board ruling that prohibited the Department from considering Conrail's noncompliance in the future would constitute a declaratory judgment. The Department maintains that the Board lacks authority to issue an order in the nature of a declaratory judgment.[1]

The Board must view a motion to dismiss in the light most favorable to the non-moving party. *Lehigh Township v. DEP*, 1995 EHB 1098. The Board will dismiss a case as moot when a party has been deprived of the necessary stake in the outcome or when the Board is no longer able

[1] On March 30, 1998, Conrail filed a Motion Seeking Leave to File Sur Reply Memorandum of Law in Support of Response to Motion to Dismiss as Moot. On April 3, 1998, the Department filed a letter in opposition to this Motion. We have examined these filings; however, neither has been considered in disposing of the Department's Motion to Dismiss as Moot.

to grant effective relief. *Kerry Coal Company v. DER*, 1988 EHB 755. Here, the Department argues that the Board is no longer able to grant effective relief to Conrail. This argument is based on the Department's representation to Conrail, and to this Board, that it is satisfied with Conrail's work, and that it will not assess civil penalties for exceeding the expiration date.

However, the Department has *not* represented to Conrail, or to this Board, that the Department will not use Conrail's noncompliance against Conrail in the future. In fact, the Department suggests that *it might do so*, and that Conrail may challenge such action when it is ripe. (*See* Department's Reply at 2.) The Board has held that, where the Department *could* use an incident to the detriment of an appellant, and where the Department was unwilling to give assurances to the contrary, an appeal would not be dismissed as moot even though the appellant had satisfied the Department with respect to that incident. In such situations, the appellant still has a stake in the outcome of the appeal. *Kerry Coal Company*. Because the Department has given the Board no reason to believe that it will *not* use the Rockville Bridge incident against Conrail in the future, the Motion to Dismiss for Mootness is denied.

We point out to the Department that any Board ruling in this case would *not* be in the nature of a declaratory judgment. Indeed, the Board would *not* issue an order prohibiting the Department from using this incident against Conrail in the future. Any Board ruling in this matter would pertain only to the Department's action in the Rockville Bridge incident. Should the Board rule in favor of Conrail, the Department would simply have no basis for future action against Conrail with respect to the Rockville Bridge incident.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONSOLIDATED RAIL CORPORATION	:	
	:	
v.	:	**EHB Docket No. 97-208-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 8th day of April, 1998, the Department of Environmental Protection's Motion to Dismiss as Moot is denied.

ENVIRONMENTAL HEARING BOARD

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: April 8, 1998

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SCHUYLKILL TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 97-263-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERICAN INKS AND COATINGS CORP., Permittee	:	**Issued: April 8, 1998**

OPINION AND ORDER ON MOTION TO COMPEL

By George J. Miller, Administrative Law Judge

Synopsis:

A Motion to Compel Discovery is granted in part and denied in part where information sought may be relevant to the subject matter of the appeal. Part of the Motion is moot where the permittee has agreed to release confidential information in accordance with a confidentiality order entered by the Board. The Motion is granted to the extent it seeks internal guidance documents used by the Department but denied where it seeks regulations which are easily available in the public domain.

OPINION

Schuylkill Township has appealed from the November 5, 1997 issuance by the Department of Environmental Protection of an air quality plan approval to American Inks and Coatings Corp. (Permittee) for the construction of a source associated with a specialty clear coat manufacturing

process located in Schuylkill Township, Chester County. The Notice of Appeal charges, among other things, that the Department failed to provide the Township with appropriate notice concerning some details of the project as required by "Act 14," more commonly referenced as Section 1905-A of the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-5. The Township served the Permittee and the Department with interrogatories which sought to discover portions of the permit application which it was foreclosed from reviewing during the permitting process because the Department determined that such information was confidential pursuant to Section 13.2 of the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. § 4013.2, and sought information used by the Department relating to its compliance with Section 1905-A of the Administrative Code, 71 P.S. § 510-5. The Permittee objected to the discovery of confidential information, but proffered a proposed confidentiality order under which it would release the information sought by the Township. The Department objected to the interrogatory seeking information relating to its compliance with Section 1905-A of the Administrative Code, because it was overly broad. We will deal with the interrogatories relating to confidential information first.

The Township's interrogatory numbers 2, 3, and 6 seek information which describes materials which "might be produced through a malfunction of the operational process;" identification of "all materials which might be produced through contamination of the feed stock for the operation;" and which describes operational process proposed by the Permittee. The Permittee provided general answers but objected to answering the interrogatories in a more specific fashion because this information had been classified as confidential by the Department pursuant to Section 13.2 of the Air Pollution Control Act, 35 P.S. § 4013.2.

Section 13.2 of the Air Pollution Control Act provides that

> All records, reports or information obtained by the department . . . under provisions of this act shall be available to the public, except that upon cause shown by any person that the records, reports or information . . . would divulge production or sales figures or methods, processes or production unique to such person or would otherwise tend to affect adversely the competitive position of such person by revealing trade secrets . . . the department shall consider such record, report or information . . . confidential in the administration of this act.

35 P.S. § 4103.2. The Permittee requested that information contained on page 2 of the application form and Attachments 1 and 2 of the permit application be considered confidential pursuant to Section 13.2. By letter dated October 2, 1997, the Department informed the Permittee that it had provided adequate justification for the Department to consider these items confidential. (Response of Permittee to Motion to Compel, Ex. A) Accordingly, the Permittee declined to answer the interrogatories posed by the Township. However, in its response to the Township's Motion, the Permittee indicates that it is willing to answer these interrogatories and permit the Township to review the confidential material upon execution of a proposed confidentiality order attached as Exhibit 3 to its response. By letters dated March 16 and 18, 1998, the Township indicated that the proposed order is acceptable except for language which would limit the use of the confidential information to the present proceeding before the Board and any appeals of this proceeding.

We find the order proposed by the Permittee acceptable for the purpose of governing the disclosure of confidential material to the Township for use in the present matter. Accordingly, we will issue this order concurrently with this opinion and order. Should the Township desire to use the confidential information in some other governmental or administrative proceeding it may negotiate that matter at that time. We therefore grant the Township's motion to compel and order the Permittee to answer interrogatory numbers 2, 3 and 6 consistent with the confidentiality order

issued by this Board.

Next, the Township requested the Department to "identify and produce copies of all regulations and/or guidelines governing or relating to compliance by DEP with Act 14, which relate or refer to disclosure of confidential information to municipalities in connection with compliance with Act 14." In answer the Department objected to the request as overly broad and ambiguous and noted that the information was available to the Township in the public domain.

We agree that the regulations of the Department are easily available to the Township in the public domain in Title 25 of the Pennsylvania Code. Reference to the Pennsylvania Code is more appropriate than requiring the Department to produce copies of those regulations in interrogatories. Therefore, to the extent that the Township seeks to compel discovery of regulations, the motion is denied.

The Township also seeks guidance documents which related to the Department's compliance with Section 1905-A of the Administrative Code, 71 P.S. § 510-5, requires the Department to require applicants for air quality permits to "give written notice to each municipality in with the activities are located." 71 P.S. § 510-5(b)(1)(I). Therefore guidance documents used by the Department which relate to the disclosure of confidential information to municipalities in connection with the notice requirement Section 1905-A, 71 P.S. § 510-5, may be relevant to the issues raised in this appeal. Accordingly, the motion to compel an answer to Interrogatory No. 14 to the extent it requests guidance documents which may exist is granted.

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SCHUYLKILL TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 97-263-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERICAN INK AND COATING, Permittee	:	

ORDER

AND NOW, this 8th day of April 1998, it is ordered that the Motion to Compel of Schuylkill Township is granted in part and denied in part as follows:

1. The motion to compel American Inks and Coatings Corp. to answer the Township's interrogatories numbered 2, 3 and 6 is granted subject to the terms of the Confidentiality Order entered on April 8, 1998. The answers to these interrogatories shall be submitted to the Township within 20 days of entry of this order.

2. The motion to compel the Department of Environmental Protection to answer the Township's interrogatory number 14 is granted to the extent it requests information pertaining to internal guidance documents of the Department. The motion is denied to the extent it requests regulations in the public domain. The Department shall submit its answer to the Township within 20 days of entry of this order.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

EHB Docket No. 97-263-MG

DATED: April 8, 1998

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

For the Commonwealth, DEP:
Peter J. Yoon, Esquire
Southeast Region

For Appellant:
Robert J. Sugarman, Esquire
Philadelphia, PA

For Permittee:
William H. Bradbury, III, Esquire
Blue Bell, PA

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SCHUYLKILL TOWNSHIP :
:
v. : **EHB Docket No. 97-263-MG**
:
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERICAN INKS AND COATINGS CORP. :

CONFIDENTIALITY ORDER

AND NOW, this 8th day of April, 1998, IT IS HEREBY ORDERED that the following shall govern the production and disclosure of certain information:

1. The following terms are used in this Order:

(a) "Proceeding" means the instant appeal Proceeding before the Environmental Hearing Board and any subsequent appeals.

(b) "Application" means the Plan Approval Application to construct an Air Contamination Source and for a Permit to Operate submitted by American Inks and Coatings Corp. to the Bureau of Air Quality of the Pennsylvania Department of Environmental Protection.

(c) "Document" means all written, recorded, or graphic material (including matter stored in electronic or magnetic media) produced or created by a party or other person or business entity in this Proceeding, whether by agreement, subpoena or otherwise.

(d) "Confidential Material" means sensitive business or proprietary information, including protectible trade secrets, the disclosure of which would tend to adversely affect a party's competitive position or business operations. Without limiting the foregoing, Confidential Material shall include:

(i) Section B.1.D. (the rated capacities of the dissolver and condensate

receive) and Section B.2.A. (the annual production rates of the dissolver and condensate receiver) included on page 2 of 8 of the Application;

(ii) Attachment 1 (the process description) of the Application; and,

(iii) Attachment 2 (the emission summary) of the Application.

(e) "Producer means a party to this Proceeding or a non-party, that produces information, including documents, responses to interrogatories, requests for production of documents, and requests for admissions, and deposition testimony in these actions.

(f) "Designator" means a Producer that designates information as "Confidential Material."

(g) "EHB" means the Pennsylvania Environmental Hearing Board or any appellate court which has jurisdiction over an appeal therefrom.

2. Documents, or portions thereof, as well as written discovery responses, may be designated as Confidential Material by a Producer who in good faith believes that the Document qualifies as such by marking the following legend on the face of the relevant Document and on each page containing Confidential Material: "Confidential EHB 97-263-MG."

3. The following protocol will be followed with respect to designation of information as Confidential Material:

(a) The parties will use their best efforts to limit the amount of information designated as Confidential Material.

(b) In the case of responses to interrogatories, requests for production of documents, or requests for admissions and the information contained therein, designation shall be made by means of a statement at the conclusion of such responses specifying the responses or parts thereof which are designated as Confidential Material. An appropriate legend shall be placed on each page

of any set of responses to interrogatories, requests for production of documents, or requests for admissions which contain information designated as Confidential Material.

(c) In the case of depositions either of persons currently or previously associated with or employed by a Producer, or of persons who otherwise had or have access to Confidential Material, and the information contained in such depositions (including exhibits) designation of the portion of the transcript (including exhibits), which contains Confidential Material shall be made by a statement to such effect on the record in the course of the deposition, or within 30 days following receipt of the transcript by Producer's counsel or by the Designator's counsel whose Confidential Material was the subject of the depositions. Until such time, all parties shall treat the entire deposition as Confidential Material.

(d) A party may file deposition transcripts or portions of deposition transcripts in support of motions made in this action, so long as any portions designated as Confidential Material are filed under seal. At the time of trial, depositions to be used at trial will be filed with the court pursuant to the Pennsylvania Rules of Civil Procedure or Order of the EHB.

4. No Confidential Material shall be disclosed to any person except in accordance with the terms of this Order. Confidential Material subject to this Order shall be used solely for purposes of this Proceeding, including any appeals, and no person or entity shall use such information for any other purposes, including business, governmental, commercial, or administrative or judicial proceedings. Except to the extent disclosed at any stage of the action in court or by judicial decision, all Confidential Material subject to this Order shall be kept in a confidential manner and may be disclosed to and disseminated among the following persons only:

(a) Outside counsel for any party to this Proceeding and their associates, paralegals, clerical or service support staff;

(b) Experts, consultants or investigators (including their employees and/or support staff) retained by a party to this Proceeding who are not, have not previously been, and are not then presently anticipated to become employees, relatives, or business associates of any party to this action or an elected or appointed public official of Schuylkill Township;

(c) Deponents, trial or hearing witnesses in preparation for and/or during depositions or hearings in this Proceeding; and

(d) The EHB and its personnel, including court reporters.

Confidential Material shall not be disclosed to any person referred to in subparagraphs 4(b) and 4(c) above unless and until such person has read and agreed to be bound by the terms and conditions of this Order and has signed an affidavit that he or she has received and read this Order, understands this Order and agrees to comply with this Order. Copies of such affidavits shall be held in escrow by counsel who provides access to the Confidential Material until further order of the Court or agreement by said counsel. These restrictions relevant to Confidential Material do not apply to use by a Producer of Confidential Material which it produces.

5. In connection with this Proceeding, any party may use any Confidential Material covered by this Order in connection with motions or hearings and may introduce such Confidential Material at trial, provided that the Confidential Material legend remains on the Document. Prior to trial, any party who intends to use material designated as Confidential Material at trial shall so notify the Producer. Only those portions of pleadings, motions, briefs, affidavits, statements and responses to interrogatories, requests for production of documents or requests for admissions containing Confidential Material shall be considered as such, and such material shall be disclosed to persons only in accordance with the terms and conditions of this Order.

6. No Confidential Material shall be filed in the public record of this Proceeding. All

material so designated in accordance with the terms of this Order that is filed with the EHB, and any pleadings, motions, briefs or other papers filed disclosing any such material, shall be filed in a sealed envelope and kept under seal by the Secretary of the EHB until further order. Where possible, only confidential portions of filings shall be filed under seal.

To facilitate compliance with this Order by the Secretary's office, material filed under these designations shall be contained in a sealed envelope bearing the appropriate confidentiality legend on its front face, the caption of the case, and the title of the document contained therein, and shall state thereon that it is filed under the terms of this Order.

7. If any party to this Proceeding disputes the designation of any document as Confidential Material, the objecting party and the Producer and/or Designator shall attempt to resolve by agreement the question whether or on what terms the document is entitled to confidential treatment. If the objecting party and the Producer and/or Designator are unable to agree as to whether the document is property designated as Confidential Material, counsel for the objecting party may file an appropriate motion with the EHB seeking an order determining that the party seeking confidentiality is not entitled to treat the document as Confidential Material. The burden rests upon the Producer and/or Designator seeking confidentiality to demonstrate that such designation is proper. 8. A person or entity's compliance with the terms of this Confidentiality Order shall not operate as an admission that any particular document is or is not (a) confidential or highly confidential, (b) privileged or subject to attorney work product protection, or (c) admissible in evidence at trial.

9. Any person in possession of Confidential Material who receives a subpoena (or other process) from any person (including natural persons, corporations, partnerships, firms, governmental agencies, departments, or bodies, boards, or associations) who or which is not a party to this Order,

seeking production or other disclosure of such Confidential Material, shall promptly give telephonic notice and written notice by overnight delivery and/or facsimile to counsel for the Producer, identifying the materials sought and enclosing a copy of the subpoena or other process where possible at least ten (10) business days before production or other disclosure shall be given. Without limiting this paragraph, in no event shall production or other disclosure be made before the latest of (1) the day following the date on which notice is given, or (2) the return date of the subpoena.

10. In the event the EHB receives a request for Confidential Material in its possession under the provisions of Pennsylvania's Right-To-Know Act, Act of June 21, 1957, P.L. 390, *as amended*, 65 P.S. §§ 66.1-66.4, the EHB shall promptly give telephone notice and written notice by overnight delivery and/or facsimile to counsel for the Producer identifying the material sought and enclosing a copy of the request where possible at least ten (10) business days before production or other disclosure shall be given.

11. The provisions of this Order shall survive the termination of this Proceedings and continue in full force and effect thereafter. At the conclusion of this Proceeding, the parties shall either

(a) return all Confidential Material, including copies thereof, to the Producer; or,

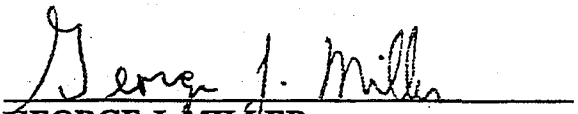
(b) destroy all such materials and copies thereof.

This provision shall not apply to Confidential Material included in the original Application which shall remain in PADEP's files subject to the protection of this Order and/or such other protocol as determined at the discretion of PADEP.

The Producer may, at its option, require any party hereto which has elected to destroy all such Confidential Material and copies thereof pursuant to subparagraph 10(b) above, to submit a certification attesting to the fact of such destruction.

12. For good cause shown, any Producer or party may seek a modification, supplementation or termination of the terms of this Order by attempting to obtain the consent of the Producer. Absent such consent, the Producer or party may make an appropriate application to the Court upon notice.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: April 8, 1998

c: **For the Commonwealth, DEP:**
Peter Yoon, Esquire
Southeast Region

For Appellant:
Robert J. Sugarman, Esquire
Philadelphia, PA

For Permittee:
William H. Bradbury, III, Esquire
Blue Bell, PA

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MICHAEL W. FARMER and M.W. FARMER CO.	:	
v.	:	**EHB Docket No. 98-050-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 9, 1998**

OPINION AND ORDER
ON PETITION FOR SUPERSEDEAS

by Robert D. Myers, Administrative Law Judge

Synopsis:

A Petition for Supersedeas is denied where the Appellants failed to demonstrate irreparable harm, a likelihood of success on the merits, or the likelihood of injury to the public.

OPINION

On March 11, 1998, Michael W. Farmer (Farmer) and M.W. Farmer Co. (collectively, Appellants) filed a Petition for Supersedeas with the Board by facsimile. The Petition for Supersedeas was filed in connection with a Notice of Appeal which Appellants filed with the Board on March 12, 1998. In their Notice of Appeal, Appellants challenge the Department's March 4, 1998 issuance of an Order revoking "the certification of Michael W. Farmer, certification ID No. 15, in all categories of installer and inspector, for all storage tank systems and storage tank facilities." (Notice of Appeal, Exhibit A.)

In their Petition for Supersedeas, Appellants claim that Farmer will suffer immediate and irreparable harm as a result of the Department's Order. Specifically, Appellants allege that they will sustain substantial financial loss because the company will lose customers and because it will be liable for large civil penalties due to its inability to fulfill contractual obligations. Indeed, Appellants assert that the Department's action threatens the viability of the business. Appellants also claim that they are likely to prevail on the merits of their appeal because the deficiencies cited by the Department for revocation of Farmer's certification are *de minimis* paperwork violations. Finally, Appellants aver that the public will likely be injured by the Department's action.

On March 26, 1998, the Board held a hearing on Appellants' Petition for Supersedeas. On April 2, 1998, transcripts of the hearing were filed with the Board. In addition, Appellants filed a brief in support of the Petition for Supersedeas, and the Department filed a Memorandum of Law in opposition thereto.

In granting or denying a supersedeas, the Board will be guided by relevant judicial precedent and the Board's own precedent. The Board will consider: (1) irreparable harm to the petitioner; (2) the likelihood of the petitioner prevailing on the merits; and (3) the likelihood of injury to the public. 25 Pa. Code § 1021.78(a). The Board's regulations state that a supersedeas will not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect. 25 Pa. Code § 1021.78(b).

I. Irreparable Harm

Appellants argue that the Department's revocation of Farmer's certification will cause Farmer and M.W. Farmer Co. to suffer a substantial financial loss. *See Empire Sanitary Landfill v. DER*, 1991 EHB 102 (holding that significant financial loss constitutes irreparable harm). We note

at the outset that, in making this argument, Appellants do not clearly distinguish between Farmer and the company. In addressing Appellants' argument, we must be careful to do so because, although M.W. Farmer Co. is a party in this appeal, the company's certification is not at issue here.

With respect to M.W. Farmer Co., Farmer testified that: (1) although he is President of the company, he is not present at each and every job; (2) at least five of the company's 16-20 employees are certified; (3) seventy percent of the company's business requires a certified individual on the site; (4) the company can do installations and removals of underground and above-ground storage tanks as long as the company has certification and a properly certified employee is on the site; and (5) he is the only person certified as an inspector. (N.T. at 12, 53, 80-81, 102-03.) It is apparent from this testimony that M.W. Farmer Co. will suffer some financial loss due to Farmer's inability to perform *inspections*. However, the company can continue to do storage tank installations and removals and can do the 30% of its business that does *not* require a certified individual on the site. Absent evidence regarding the amount of money that the company will lose from Farmer's inability to perform inspections, we cannot determine the extent of the company's financial loss. Thus, we cannot conclude that M.W. Farmer Co. will suffer irreparable harm due to the Department's revocation of Farmer's certification.

As to Farmer himself, when asked to describe the effect of the Department's action on him personally, Farmer testified that he will not be able to run the company, and that his income will "go down to nothing." (N.T. at 51-52.) However, Farmer does not clearly explain the sources of his income and how the Department's action will cause them to "go down to nothing." Farmer testified: "I'm not really employed by M.W. Farmer Company. I work for M.W. Farmer Company, but I'm employed by a management firm which Farmer Company pays a management fee to." (N.T. at 35.)

Farmer does not identify this management firm or describe in any detail his relationship with it. Thus, we cannot determine whether Farmer is paid a fixed salary, whether Farmer is paid a certain amount for each job that he oversees or performs for the company, or whether Farmer's income is based on the company's performance. Depending on the terms of employment, Farmer may or may not suffer a substantial financial loss.

Although we would expect Appellants to suffer some financial loss from the revocation of Farmer's certification, Appellants have not presented enough evidence to the Board to show that the financial loss would be significant. Thus, Appellants have not shown irreparable harm.

II. Likelihood of Success on the Merits

Appellants next argue that they are likely to prevail on the merits. The legal basis for the Department's revocation of Farmer's certification is 25 Pa. Code § 245.109, which provides in pertinent part as follows:

> (a) The Department may revoke the certification of a certified installer or certified inspector if the certified installer or certified inspector has done one or more of the following:
>
> ....
>
> (3) Committed an act requiring suspension under § 245.108 (relating to suspension of certification) after having certification suspended previously.

At the hearing, Farmer admitted that the Department previously suspended his certification under 25 Pa. Code § 245.108. (N.T. at 28-30.) Thus, the Department was legally justified in revoking Farmer's certification *if* Farmer committed another act requiring suspension under 25 Pa. Code § 245.108.

The Department's regulation at 25 Pa. Code § 245.108 provides that the Department may

suspend the certification of a certified inspector for a violation of the Department's regulations. Paragraph G of the Department's Order states that Farmer violated the Department's regulation at 25 Pa. Code § 245.106 when, on July 17, 1997, Farmer performed a facility inspection at the M.W. Farmer Company facility while employed as a certified inspector by M.W. Farmer Company, the underground storage tank owner. Such inspections are prohibited by 25 Pa. Code § 245.106 because of an obvious conflict of interest.

With respect to Paragraph G of the Order, Farmer testified that M.W. Farmer Company *does* own the storage tanks that he inspected on July 17, 1997.[1] However, Farmer explained that he is not actually an employee of M.W. Farmer Company; although Farmer works for the company, he is really employed by a management firm. (N.T. at 35.) Despite this testimony, Farmer indicated on his Installer and Inspector Certification Application Form that M.W. Farmer Company *is* his employer. Farmer swore to the accuracy of that information and signed the application before a notary on April 7, 1997, just a few months before the inspection. (Exhibit C-52.)

We believe that the evidence presently before the Board establishes that Farmer violated 25 Pa. Code § 245.106. We view this violation as serious, something that could not have been committed inadvertently, something more significant than a *de minimis* paperwork violation. Accordingly, the Department properly revoked Farmer's certification. We conclude, then, that Appellants are not likely to prevail on the merits of their appeal.[2]

---

[1] Farmer also testified that he and Jeanette Farmer own the property which contains the storage tanks.

[2] Although the Department's Order refers to other violations, the Department could revoke Farmer's certification for just one violation.

III.

Finally, Appellants maintain that the public is likely to be injured as a result of the Department's action. Appellants argue in their brief that Farmer's customers will not be able to comply with the December 1998 deadline for underground storage tank upgrades unless Farmer can fulfill his contractual obligations to them. (Appellants' brief at 4.) However, Farmer testified only that his customers will "have to find somebody else to do the work." (N.T. at 55.) If other persons perform the necessary storage tank upgrades, the public will not be harmed. Thus, Appellants have not shown the likelihood of harm to the public.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MICHAEL W. FARMER and M.W. FARMER CO.	:	
v.	:	**EHB Docket No. 98-050-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 9th day of April, 1998, the Petition for Supersedeas filed by Michael W. Farmer and M.W. Farmer Co. is **denied.**

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: April 9, 1998

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

For the Commonwealth, DEP:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MONTENAY MONTGOMERY LIMITED PARTNERSHIP	:	
v.	:	**EHB Docket No. 97-180-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** April 15, 1998

OPINION AND ORDER ON MOTION TO DISMISS PETITION FOR SUPERSEDEAS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion to dismiss a petition for supersedeas is granted. The Board will not supersede a provision in a plan approval that does not alter the status quo ante.

OPINION

Montenay Montgomery Limited Partnership (Appellant) appeals the Department of Environmental Protection's (Department) July 29, 1997, decision to approve plans for the modification of two mass-burn type incinerators and associated control equipment at a facility Appellant owns in Plymouth Township, Montgomery County. Appellant filed a Notice of Appeal on August 27, 1997, which challenged, among other things, condition 4(C)(1) of the plan approval. Later, on February 23, 1998, Appellant filed a Petition for Supersedeas, asking the Board to supersede condition 4(C)(1) in the plan approval "to the extent that it prohibits the exhaust gas temperature measured at the inlet to the particulate matter control device ... from exceeding 300

degrees F[ahrenheit]" (° F). (Appellant's Petition for Supersedeas, p.1.)

The Board conducted a partial supersedeas hearing on March 10, 11, and 12, 1998. After Appellant presented its case in chief, the Department made an oral motion that the Board deny Appellant's Petition for Supersedeas for failure to state facts sufficient to warrant a supersedeas, pursuant to section 1021.77(c) of the Board's Rules of Practice and Procedure, 25 Pa. Code § 1021.77(c).[1] (N.T. 755-60) Appellant objected. However, at the Board's suggestion, the parties agreed to brief their respective positions on the motion and that the Department would wait to present its case against a supersedeas until the Board had an opportunity to rule on the motion. Appellant and the Department filed their memoranda of law on March 27, 1998. We granted the Department's motion to dismiss on April 3, 1998, stating that we would explain our decision shortly thereafter in an opinion. This is that opinion.

The central issue involved in the Department's motion is whether the Board would return the parties to the status quo ante if we supersede condition 4(C) of the plan approval, as Appellant requests. The Department maintains that superseding the condition would change the status quo because condition 4(d) of Appellant's May 9, 1994, operating permit (operating permit) already prohibits Appellant from allowing its sources to emit exhaust gas at over 300° F (temperature limit).

---

[1] Section 1021.77(c) provides:

> A petition for supersedeas may be denied upon motion made before a supersedeas hearing or during the proceedings ...for one of the following reasons:
>
> (1) Lack of particularity in the facts pleaded.
> (2) Lack of particularity in the legal authority cited as the basis for the grant of supersedeas.
> (3) An inadequately explained failure to support factual allegations by affidavits.
> (4) A failure to state grounds sufficient for the granting of a supersedeas.

Appellant concedes that condition 4(d) of the operating permit imposes a similar temperature limit. (Appellant's Memorandum in Opposition to the Motion to Dismiss, p.2.) But Appellant argues that the temperature limit was not part of the lawful status quo ante because Edward Brown, an employee of the Department, granted Appellant an extension of time to comply with the temperature limit. According to Appellant, the extension remained in effect when the Department issued the plan approval, and, therefore, the temperature limit is not part of the lawful status quo ante. Alternatively, Appellant argues that the Department is equitably estopped from arguing that the temperature limit is part of the legal status quo ante.

As both Appellant and Department concede, the purpose of a supersedeas is to preserve the lawfulstatus quo ante pending final disposition of an appeal. *William Fiore v. DER,* 1985 EHB 412. The question is: What was the lawful status quo before the Department issued the plan approval?

For purposes of Appellant's Petition for Supersedeas, the temperature limits in the operating permit and plan approval are essentially the same. The temperature limit in the operating permit provides:

> The owner shall bring the facility into compliance with subpart Ca of the Standards of Performance for New Stationary Sources, 40 CFR § 60.30a-60.39a.... At a minimum the owner/operator shall comply with the following:
>
> ...
>
> d. Maximum inlet temperature to the control device(s) (baghouse) shall not exceed 300° F on a 4 hour block arithmetic average.

(Supersedeas Ex. A-15, Condition 4.) The operating permit does not expire until May 9, 1999. (Supersedeas Ex. A-15, p.1.) And Appellant never appealed it or applied to have it amended. (N.T. 205, 372)

The temperature limit in the plan approval is similar. It provides:

> The maximum exhaust gas temperature, measured at the inlet to the final particulate control device shall not exceed more than 30 degrees Fahrenheit above the maximum demonstrated particulate matter control device temperature measured during the most recent dioxins/furans compliance test or 300 degrees Fahrenheit, whichever is more stringent. The compliance shall be determined on a 4 hour block arithmetic average. The requirement that the exhaust gas temperature be maintained below 300 degree Fahrenheit may be waived by the Department if the owner has made a satisfactory demonstration that equivalent control of condensable heavy metals and organic matter ... can be achieved at a higher exhaust temperature through the use of Department approved alternative technologies.

(Plan approval, Condition 4(C)(1).)

Since the temperature limits in the operating permit and plan approval are essentially the same, the temperature limit was part of the lawful status quo immediately prior to the issuance of the plan approval unless the lawful status quo was affected by Brown's alleged statement that the Department would grant Appellant an extension to comply with the limit.

Brown's alleged statement extending the deadline for complying with the temperature limit

At the supersedeas hearing, John Lehr, Appellant's Facility Manager, testified about a December 21, 1994, meeting between himself; Yoon Chae, Appellant's Plant Manager; and Edward Brown, a Department employee. According to Lehr, Brown stated that the plant need not comply with the facility's compliance plan until six months after the Department approved it. (N.T. 225-228.) Lehr's testimony was ambiguous as to the scope of this alleged extension: in one portion of his testimony, he stated that the extension applies to "the Subpart Ca requirement" (N.T. 226); in another, he testified that the extension applies to "[a]ll of the conditions" in condition 4 of the operating permit. (N.T. 228.) Lehr also testified that, as of March 10, 1998, the Department had not approved the compliance plan. (N.T. 229.) Pointing to Lehr's testimony, Appellant argues that the temperature limit was not part of lawful status quo immediately before the issuance of the plan

approval.

When the Department moved to dismiss Appellant's Petition for Supersedeas, at hearing, counsel for the Department said he was "asking the Board to consider all the facts in the light most favorable to [Appellant]." (N.T. 755-756.) He went on to argue that, even assuming Brown told Appellant that it need not comply with the temperature limit until six months after the compliance plan was approved, the temperature limit was part of the lawful status quo immediately prior to the plan approval. The Department backs away from its initial position slightly in its Memorandum in Opposition to the Petition for Supersedeas. There, among other things, the Department argues that Appellant failed to prove that Brown told Appellant that it need not comply with the temperature limit. We need not resolve the discrepancy between the Department's positions, however. Even assuming Brown had told Appellant that it need not comply with the temperature limit until six months after the compliance plan was approved, the Department has established that the temperature limit was part of the lawful status quo at the time the plan approval was issued.

Parker Sand and Gravel

Appellant points to only one decision in support of the proposition that Brown's alleged statement changed the lawful status quo: our opinion in *Parker Sand and Gravel v. DER*, 1985 EHB 557. We have distinguished *Parker Sand and Gravel* in a number of the decisions which followed it. *See, e.g., Hepburnia Coal Company v. DER*, 1985 EHB 713, 719; *Valley Forge Plaza Associates v. DER*, 1989 EHB 967, 974; *Solomon v. DER*, 1996 EHB 989, 993-94. However, we have never expressly overruled the case. For the reasons that follow, we will distinguish it again.

In *Parker Sand and Gravel,* Parker Sand and Gravel (Parker) appealed the Department of Environmental Resources' (DER) denial of Parker's application for renewal of its surface mining

operator's license. DER denied the license based on Parker's alleged history of past and continuing violations of surface mining laws. Although Parker's previous license had expired more than six months before DER acted on its application for a license renewal, Parker continued surface mining operations and DER took no enforcement action against it. As part of its appeal of the license denial, Parker filed a petition for supersedeas. The Board granted Parker's petition for supersedeas, stating:

> In the instant appeal ... Parker has been refused a license *renewal*. The status quo before DER's actions involved Parker's active operations, which were suspended only ... when DER finally refused the renewal.... Surface mining operations without a valid license unquestionably are unlawful. (citation omitted.) Therefore it would be an abuse of *our* discretion to grant the supersedeas in the instant appeal if so doing meant ordering DER to allow Parker to operate without a permit. But DER itself allowed Parker to operate without its 1983 license until the renewal was refused ...; before that date, DER presumably regarded Parker as operating lawfully on an automatic extension of Parker's operation to a lawful *status quo ante*.

1985 EHB at 562.

Parker Sand and Gravel rests on the premise that the status quo was lawful because originally there was a valid permit, and by not taking action against Parker when it contined to operate after the permit expired, DER "presumably" regarded the continued operation as lawful. That finding does not consider the Department's prosecutorial discretion.

Whether an agency decides to take enforcement action against those it regulates falls squarely within the agency's prosecutorial discretion. *Downing v. Commonwealth of Pennsylvania Medical Education and Licensure Board*, 364 A.2d 748 (Pa. Cmwlth. 1976), *cert. den.* 436 U.S. 910.[2] The Department has the discretion to decide what type enforcement action is appropriate and even

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[2] The agency's exercise of its prosecutorial discretion is not subject to judicial review because the decision whether to take enforcement action is not adjudicatory in nature. *Downing v. Commonwealth of Pennsylvania Medical Education and Licensure Board*, 364 A.2d 748 (Pa. Cmwlth. 1976), *cert. den.* 436 U.S. 910.

whether it will take enforcement action at all. *Id.* Therefore, one cannot assume that an individual is operating lawfully simply because the Department took no enforcement action against him. Even where the Department concludes that an individual is acting unlawfully, it has the discretion to decide to take no enforcement action. In other words, for purposes of determining the lawful status quo, one must distinguish between what the Department *tolerates* and what it *authorizes*: The fact that the Department *tolerates* an activity (i.e. fails to take enforcement action) does not necessarily show that the activity is *authorized* as part of the lawful status quo.

In the matter currently before us, Appellant contends that, unlike the situation in *Parker Sand and Gravel*, the Department did act, and by that action, altered the lawful status quo. It is this alleged more recent status quo to which Appellant wishes to be restored.

Brown's alleged statement did not affect the lawful status quo ante.

Even assuming that Brown told Appellant that it need not comply with the temperature limit in the operating permit, Brown's statement would not have changed the lawful status quo. The Department issued the operating permit and plan approval under the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. §§ 4001- 4106 (the Air Pollution Control Act). Section 8 of the Air Pollution Control Act, 35 P.S. § 4008, provides, "It shall be unlawful to fail to comply with ... any ... permit or other requirement of the Department." Thus, Appellant's failure to comply with the temperature limit in the operating permit is unlawful unless Brown's statement amounted to a modification of the operating permit.

But Brown's alleged statement could not have modified the operating permit. 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., DER v. Butler County Mushroom Farm*, 454

A.2d 1 (Pa. 1982), and *Costanza v. DER*, 606 A.2d 645 (Pa. Cmwlth. 1992). When the legislature gave the Department the power to modify operating permits, it expressly limited that power, requiring that the modification be in writing. *See* 35 P.S. § 4006.1(e) ("Whenever the department shall ... modify ... a plan approval or permit already issued, such action shall be in the form of a written notice to the person affected....") Since Brown derives whatever authority he has through his position as an agent of the Department, he can have no greater power to modify an operating permit than the Department itself possesses. Therefore, even assuming Brown would otherwise have the authority to modify Appellant's permit, he could not do so orally, as Appellant alleges. "To decide otherwise would be tantamount to giving employee errors the effect of amending the substance of a statute." *Finnegan v. Public School Employes' Retirement Board*, 560 A.2d 848 (Pa.Cmwlth. 1989), *affirmed* 591 A.2d 1053 (1991).

The doctrine of equitable estoppel does not prevent the Department from arguing that the temperature limit applies.

Appellant argues that, if Brown made the statement alleged, the Department is equitably estopped from arguing that the temperature limit applies. We disagree. The Commonwealth Court succinctly summarized the doctrine of equitable estoppel in *Hauptman v. Department of Transportation*, 429 A.2d 1207, 1210 (Pa. Cmwlth. 1981), writing:

> The underlying premise of the estoppel cases is that the doctrine of estoppel *may* be applied to a Commonwealth agency, in cases in which it has intentionally or negligently misrepresented some material fact, knowing or having reason to know that another person will justifiably rely on that misrepresentation, and where that other person has been induced to act to his detriment because he did justifiably rely on that misrepresentation.

Even assuming Brown misrepresented some material fact, equitable estoppel would be inappropriate here because Appellant's reliance on the misrepresentation would not have been reasonable and

would not have harmed Appellant.

a. reliance on the misrepresentation was not reasonable

To the extent Appellant relied on Brown's alleged statement as a modification of the operating permit, Appellant's reliance was unreasonable. The Appellant should have known that an oral statement by Brown could not modify its operating permit. Even where a facility seeks only minor changes in an operating permit, section 127.462 of the Department's regulations, 25 Pa. Code § 127.462, requires that the permittee submit a written description of the modification sought; notify the host municipality, the EPA, and other states which may be affected or lie within 50 miles; and publish public notice of the changes in a newspaper of general circulation. *See* 25 Pa. Code § 127.462(b), (c), and(d). Furthermore, as noted above, section 6.1(e) of the Air Pollution Control Act, 35 P.S. § 4006.1(e), provides only for written modifications to operating permits. Given these provisions, and the fact that there was no public notice of Brown's alleged oral statement, Appellant was unreasonable to assume that the statement amounted to a permit modification. The most Appellant could reasonably have assumed was that the Department was agreeing *not to take enforcement action* against it during the "extension."

b. *reliance on the misrepresentation did not harm Appellant*

Appellant also failed to show that it relied on Brown's alleged statement to its detriment. This is not a situation where the Department *seeks penalties* from a person who committed violations while relying on a statement by a Department employee. The Department simply seeks to have Appellant comply with the temperature limit while the Board resolves Appellant's appeal. Nor is this a situation where a person *waived their right to appeal* a Department action because he relied on a statement by a Department employee. According to Lehr, Brown made the statement at a

meeting on December 21, 1994. (N.T. 225-228.) The Department had issued the operating permit on May 9, 1994. (Supersedeas Ex. A-15.) And Appellant had notice of the operating permit by at least August 1, 1994.[3] Therefore, if Appellant wanted to contest the provisions of the operating permit, it had to file a notice of appeal with the Board by August 31, 1994.[4] Since Appellant failed to file an appeal of the operating permit, the terms of that permit became final with respect to the Appellant by at least September 1, 1994, months before Brown's alleged statement.

While it may be difficult for Appellant to comply with temperature limit promptly, Appellant's situation is no worse now than it was at the time of Brown's alleged statement: Since the temperature limit was part of the lawful status quo, the Department could have required Appellant to comply with it immediately. Since Appellant fails even to allege that it is less able to comply with the temperature limit now than at the time of Brown's alleged statement, Appellant has not shown that it was harmed by the statement.

In light of the foregoing, the Department's motion to dismiss Appellant's Petition for Supersedeas is granted.

---

[3] On that date, Yoon Chae, Appellant's plant manager, sent a letter and compliance plan to Brown. The letter referred to Appellant's operating permit. (Supersedeas Ex. A-23.)

[4] Except in the case of third-party appeals and appeals *nunc pro tunc*, the Board has jurisdiction over appeals only if they are filed within 30 days of notice of the Department's action or publication in the *Pennsylvania Bulletin*--whichever comes first. *See, e.g., Ziccardi v.DEP,* EHB Docket No. 96-161-R (Opinion issued January 6, 1997).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MONTENAY MONTGOMERY LIMITED PARTNERSHIP	:	
v.	:	**EHB Docket No. 97-180-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW this 15th day of April, 1998, it is ordered that:

1. the Department's Motion to Dismiss Appellant's Petition for Supersedeas is granted; and,

2. Appellant's Petition for Supersedeas is dismissed.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 15, 1998

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library
For the Commonwealth, DEP:
Douglas G. White, Esquire
Southeast Region
For Appellant:
Hershel J. Richman, Esquire
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BOROUGH OF AMBLER	:	
	:	
v.	:	**EHB Docket No. 97-211-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 15, 1998**

OPINION AND ORDER ON DEPARTMENT'S MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis:

The Department's Motion to Dismiss an appeal from the Department's denial of a request for modification of an NPDES permit for failure of the Borough to meet a notice requirement contained in a "reservation of rights" provision in a prior Consent Order and Adjudication is denied because it is not clear that this provision barred the filing of the request for modification without such a notice, and the request for modification was based on significant events occurring after the time the permit was issued and the Consent Order and Adjudication was entered into.

OPINION

The Borough of Ambler (Borough) filed this appeal on October 9, 1997 from the Department of Environmental Protection's (Department) denial of a request to modify an NPDES Permit (Permit) issued to the Borough for discharge from its publicly owned sewage treatment facility

located in Upper Dublin Township, Montgomery County, Pennsylvania to the Wissahickon Creek. The permit was issued on September 9, 1993. The appeal states that the action of the Department for which review is sought is:

> "Authorization to discharge under the National Pollutant Discharge Elimination System Sewage Permit No. PA0026603" issued September 9, 1993, and attached hereto as Exhibit "A"; and, in particular, denial of request to continue fourth year effluent limitation for copper into fifth year, see Exhibit "B" attached.

Background

After the permit was originally issued in 1993, the Borough filed a timely appeal from the issuance of the permit and, among other things, specifically challenged the fifth year effluent limitation for copper. The first appeal was dismissed based on an agreement between the parties which culminated in a Consent Order and Adjudication approved by the Environmental Hearing Board (Board) on February 16, 1995. The recitals in the Consent Order and Adjudication state that the Department was then considering several options for changes in the Department's metals strategy which, if implemented, might result in less stringent limitations on the metals in the Borough's discharge. It also recited that the Department has made the Borough aware of options available to them to conduct site specific studies which might modify their fifth year effluent limitations. These options were stated to include the development of site specific chemical translators, recalculation procedure and Water Effects Ratios for Metals.

The Consent Order and Adjudication provided that the Department would propose modifications to the permit which, among other things, would change the fifth year effluent limitation for total copper from 18ppb to 33ppb. An amended permit embodying this changed effluent limitation was issued on May 24, 1995.

Paragraph 4 of the Consent Order and Adjudication provided that, with respect to the fifth year effluent limitation for copper, the Borough may not seek a permit amendment until after (1) the Department either implemented proposed changes in the Department's metal strategy, (2) the Department determined that any such proposed strategy changes will not be implemented or, (3) January 1, 1996, whichever is soonest. Thereafter, relief might be sought either without reference to, or in conjunction with, the site specific options set forth in the recitals to the Consent Order and Adjudication.

Paragraph 5 of the Consent Order and Adjudication provides as follows:

> Ambler specifically reserves the right to seek modification of the fifth year effluent limitation for copper no later than six (6) months prior to the effective date of that limit. Ambler further reserves the right to appeal for any reason, including those reasons set forth in Ambler's Notice of Appeal in this action, any Department decision on such request for modification. The Department agrees to make a prompt decision concerning the fifth year effluent limitation on copper prior to the effective date of that limit, provided that Ambler submits any such request for modification no later than six (6) months prior to the effective date of that limit. The parties agree that Ambler shall have the right to challenge, on any basis, including the reasons set forth in Ambler's Notice of Appeal in this action, the Department's decision on such request for modification of the effluent limitation for copper.

Paragraph 6 of the Consent Order and Adjudication also provides:

> . . . Ambler specifically reserves the right to seek modification of the metals limitations in Ambler's Permit. The Department agrees to make a prompt decision, and that its decision will be appealable by Ambler, concerning the metals limitations in Ambler's permit based upon the Department's metals strategy at the time the Department receives such a request for modification from Ambler.

In response to a request for information from the Board, the parties have represented that the Department implemented some changes in its metals policy in November, 1995 which were

published in the Pennsylvania Bulletin on November 18, 1995.

The Notice of Appeal

The Notice of Appeal states that throughout 1996-1997, the Borough has paid considerable sums of money to participate in the Pennsylvania Municipal Copper Coalition (Coalition), which has worked with the Department to obtain achievable proper effluent limitations. The appeal also states that the protocol for the Coalition's Water Effects Ratio Study has been submitted to the Department following months of dialogue with the Department to obtain achievable copper discharge limits. It further states that the Borough's appeal is timely because it is within 30 days of the Departmental letter denying the Borough's request to extend the fourth year permit limit pending the outcome of the Water Effects Ratio Study. The Notice of Appeal specifically states that the Borough appeals the fifth year copper effluent limitation because it is unattainable regardless of the level of technology utilized and because it is more stringent than the background concentration of copper in the public water supply. The Notice of Appeal also states that the fifth year limitation for copper is unnecessary to protect the integrity of the receiving waters, that it was calculated based upon inappropriate methodology and/or incomplete or erroneous factual data and because it is unreasonable, impracticable and contrary to the public welfare.

The Motion to Dismiss

The Department's Motion to Dismiss, filed on January 12, 1998, is based on its interpretation of Paragraph 5 of the Consent Order and Adjudication which it contends limits the Borough's rights to request modification of the copper limitation at a time after six months before its effective date, or on March 9, 1997. The Motion to Dismiss states that the Borough did not submit its request for modification until September 9, 1997. (Motion, Ex. D) That letter specifically requested that the

fourth year copper effluent limitation continue pending a completion of the work being done by the Coalition. The letter specifically said that EPA is still reviewing the Water Effects Ratio Protocol submitted by the Coalition with an anticipated response this week. The Notice of Appeal states that after EPA's anticipated approval, the Department will review the protocol and most likely accept it after which lab testing can begin which is expected to last approximately three weeks.

DISCUSSION

We must assess the Motion to Dismiss in a light most favorable to the non-moving party. *Florence Township v. DEP,* 1996 EHB 282, 288. The Board treats motions to dismiss the same way it treats motions for judgment on the pleadings; we will dismiss the appeal only where the moving party is entitled to judgment as a matter of law. *Lehigh Township v.DEP,* 1995 EHB 1098, 1113.

In our opinion, the Department has not shown clearly that it is entitled to relief as a matter of law. We agree with the Department that its knowledge of the Borough's activities in attempting to develop new effluent limitations is not notice within the meaning of the provisions of Paragraph 5 of the Consent Order and Adjudication reserving the Borough's rights. However, the Department's position that such a notice was required by the Consent Order and Adjudication is based solely on a "reservation of rights" contained in Paragraph 5 of the Consent Order and Adjudication. That reservation of rights may well have been intended merely to protect, not restrict, the rights of the Borough to request a modification. In addition, the Consent Order and Adjudication also contains a much broader reservation of rights in Paragraph 6 of the Consent Order and Adjudication concerning the Borough's right to request a modification of permit conditions. When the Consent Order and Adjudication is read as a whole, it is at least possible that the requirement of filing the request for a modification no later than six months prior to the effective date applied only

to the time frame prior to January 1, 1996 during which the Borough was barred from submitting a request for modification of the permit. Under the terms of Paragraph 4 of the Consent Order and Adjudication, the Borough may well have been free to make a request for a permit amendment after January 1, 1996 unrestricted by the notice provisions of the reservation of rights contained in Paragraph 5 of Consent Order and Adjudication. Ordinarily, a permittee may request a modification of permit terms based on new factual circumstances which developed after the issuance of the permit. *Bethlehem Steel Corp. v. DER,* 309 A.2d 1383 (Pa. Cmwlth. 1978). The request that was made by the Borough for a modification of the permit with respect to the fifth year requirement for copper was made on September 9, 1997 based on new factual circumstances referred to in that request.

The Department argues in its response to the Board's request for information that Paragraph 4(c) (relating to a request filed after January 1, 1996) was included to insure that Borough would have at least a year and three months (from January 1, 1996 to March 9, 1997) to request a permit modification even if the Department did nothing with regard to its metals policy. However, whether Borough agreed to such a restriction by its "reservation of rights" is not clear when the agreement itself contains no provision running in favor of the Department which would require that such notice be given. In addition, while the Department's regulations do not require that an application for a renewal permit be filed 180 days in advance of the terminal date of the permit, 25 Pa. Code § 92.13, no Department regulation requires that a request for modification of permit conditions be filed six months in advance of the terminal date of the permit. It is possible that the Borough did not intend that its "reservation of rights" would bar it forever from seeking a permit modification based on new factual circumstances if it failed to give the notice referred to in the "reservation of rights." Of

course, should it appear from the evidence that the provisions of Paragraph 5 of the Consent Order and Adjudication was intended by both the Borough and the Department not only to preserve the Borough's rights but also to limit its rights by a notice requirement, then the appeal should be dismissed for failure to give the required notice.

The Department also argues that this request for an amendment to the permit would not be a sufficient basis for an appeal because the doctrine of administrative finality would preclude an appeal from simply a request for a permit amendment. However, Paragraph 4 of the Consent Order and Adjudication looks forward to the possibility of an application for a permit modification after January 1, 1996 if certain other events have not occurred earlier with respect to the Department's reconsideration of its metals policy. In addition, the Borough's request for a permit modification is clearly based on events which have occurred with respect to the study of the copper limitation since the time the permits were issued to the Borough. As indicated above, the Borough based its request on the recent development of the Water Effects Ratio Protocol developed by the Coalition in its related study that the protocol may be approved by the EPA, and that the Department would then review the protocol and would most likely accept it after which lab testing can begin which is expected to last approximately three weeks. This procedure, according to the Notice of Appeal, would result in a more favorable effluent limitation and relieve the Borough from what the Notice of Appeal states is a requirement that cannot be met with existing technology. Accordingly, it is at least likely that under these circumstances, the normal rule of issue preclusion by reason of the doctrine of administrative finality would not apply. *See Bethlehem Steel Corp. v. DER,* 309 A.2d 1383 (Pa. Cmwlth. 1978).

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF AMBLER	:	
	:	
v.	:	**EHB Docket No. 97-211-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 15th day of April, 1998, the Department of Environmental Protection's Motion to Dismiss is hereby **DENIED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: April 15, 1998

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

For the Commonwealth, DEP:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

TRI-STATE CONCERNED CITIZENS	:	
	:	
v.	:	**EHB Docket No. 96-204-R**
	:	**(Consolidated with 96-202-R and**
COMMONWEALTH OF PENNSYLVANIA,	:	**96-201-R)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and ENVIROTROL, INC.,	:	
Permittee	:	**Issued: April 16, 1998**

OPINION AND ORDER ON PERMITTEE'S MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A Motion to Dismiss the Appeal of a citizens' group unrepresented by counsel for failure to prosecute is denied where the Motion is filed the day after appellant's pre-hearing memorandum is due and no facts are set forth detailing the alleged prejudice suffered by the Permittee. Parties should file documents in a timely fashion and the Board has the discretion to enter appropriate sanctions both under its own rules and regulations and the Pennsylvania Rules of Civil Procedure. The dismissal of an Appeal for the late filing of a pre-hearing memorandum is a drastic sanction that is unwarranted under the circumstances set forth in Permittee's Motion to Dismiss. Appeals should be decided on their merits.

OPINION

Presently before the Board is the Permittee's Motion to Dismiss the Appeal of Tri-State Concerned Citizens for Failure to Prosecute ("Motion to Dismiss"). The Permittee, Envirotrol, Inc. ("Envirotrol"), contends that because the Appellant citizens group, Tri-State Concerned Citizens,

who is not represented by counsel, did not file its pre-hearing memorandum on April 8, 1998 as required by the Pre-Hearing Scheduling Order coupled with Tri-State Concerned Citizens' "consistent propensity to stall...throughout this litigation," its Appeal should be dismissed.

Pursuant to 25 Pa. Code §1021.125, the Board may, in its discretion, impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include the dismissal of an appeal. In this case, Tri-State Concerned Citizens was required by Board Order of January 22, 1998 to file its pre-hearing memorandum by April 8, 1998. This date and the dates set for the filing of the Department's and Envirotrol's pre-hearing memorandum were mutually agreed to following a lengthy status conference with the Board. Indeed, the Board has made it abundantly clear that it expected compliance with the deadlines set at the January status conference. We have denied various motions to extend deadlines and postpone the hearing scheduled to commence on May 26, 1998.

Envirotrol's Motion to Dismiss was filed the day after Tri-State Concerned Citizens' pre-hearing memorandum was due. At that point, Envirotrol concluded that it was severely prejudiced in its ability to effectively prepare its case. However, it sets forth no facts supporting its contention. In addition, its Motion contains no affidavits or even a supporting memorandum of law.[1]

The parties have engaged in extensive discovery over the past 1½ years. Based on the sophistication of Envirotrol in this field, the extensive discovery it has taken, and the substantial legal abilities of its counsel, it is impossible for this Board to believe that the failure of a citizens group unrepresented by counsel to timely file its pre-hearing memorandum has already irreparably

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[1]25 Pa. Code §1021.73(c) requires that dispositive motions shall be accompanied by a supporting memorandum of law.

prejudiced Envirotrol to such an extent that dismissal of the case is the only sanction this Board can impose to ensure that justice is done in this appeal.

As we recently stated in *People United to Save Homes v. DEP*, EHB Docket No. 97-262-R (Opinion issued March 13, 1998), in denying a citizen group's request to quash the brief of a mining company that was one day late in filing its reply to a motion for summary judgment:

> Documents should be filed by a party in a timely fashion. If additional time is needed it should be requested. Although the Board certainly has the power to grant Appellant's Motion, to do so here strikes us as a drastic and punitive step not warranted by the facts.

We further agree with Judge Miller's analysis in *Weiss v. DEP*, 1996 EHB 246, 248, where the Board denied a motion to dismiss for the failure to file a pre-hearing memorandum as a drastic sanction not justified by the circumstances. Moreover, such a harsh penalty is not conducive to the administration of justice. The law is not a mine field where one unwary step should result in disaster. To severely penalize a party for such a mistake brutalizes the practice of law and turns the search for justice and truth into a game.

While we may empathize with the delays and difficulties Envirotrol has experienced in defending this case, Envirotrol has set forth nothing warranting such draconian action as the dismissal of Appellant's appeal for a one day delay in filing its pre-hearing memorandum.

The Board has kept a watchful eye on the pre-hearing proceedings as evidenced by two lengthy pre-hearing conferences, various telephone conferences, and prompt rulings on a myriad of procedural motions. A party might suffer a brief delay in receiving what it is legally required to receive. However, this Board will insure that such delay will not result in any prejudice to the

party's rights to a fair hearing in this matter.

COMMONWEALTH OF PENNSYLVANIA,
ENVIRONMENTAL HEARING BOARD

TRI-STATE CONCERNED CITIZENS	:	
	:	
v.	:	**EHB Docket No. 96-204-R**
	:	**(Consolidated with 96-202-R and**
COMMONWEALTH OF PENNSYLVANIA,	:	**96-201-R)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and ENVIROTROL, INC.,	:	
Permittee	:	

ORDER

AND NOW, this 16th day of April, 1998, our Order of April 10, 1998 denying Permittee's Motion to Dismiss is **affirmed.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: April 16, 1998

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

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Southwestern Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JOHN G. BERGDOLL	:	
	:	
v.	:	**EHB Docket No. 98-060-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** April 16, 1998

OPINION AND ORDER ON PETITION FOR TEMPORARY SUPERSEDEAS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

An appellant's petition for temporary supersedeas is denied. Where his appeal appears not to involve an appealable Department action, appellant has failed to establish that he is likely to prevail on the merits or that granting the relief he requests would return the parties to the status quo ante.

OPINION

On April 8, 1998, John Bergdoll (Appellant) filed a Notice of Appeal, Petition for Temporary Supersedeas, and Petition for Supersedeas. In his Notice of Appeal, Appellant asks that the Board: (1) prevent the land application of biosolids on a farm owned by Shirley and Lester Baney, Jr., (Baneys) next to Appellant's residence; and (2) declare various acts and regulations unconstitutional. Appellant's Petition for Temporary Supersedeas requests that the Board enjoin the Department of Environmental Protection, CDR MidAtlantic, the City of York Wastewater Treatment Plant, and

Baneys from applying biosolids to Baneys' farmland. We denied Appellant's Petition for Temporary Supersedeas on April 10, 1998, and stated that an opinion explaining the order would follow shortly. This is that opinion.

The purpose of a supersedeas is to preserve the lawful status quo ante pending the final disposition of an appeal. *William Fiore v. DER*, 1985 EHB 412. Under section 1021.79 of the Board's Rules of Practice and Procedure, 25 Pa. Code § 1021.79, an application for temporary supersedeas must be accompanied by a petition for supersedeas which comports with the requirements at section 1021.77 of the Board's rules, 25 Pa. Code § 1021.77. And, under section 1021.77(c)(4), a petition for supersedeas may be denied *sua sponte*, without a hearing, if it fails to state grounds sufficient for granting a supersedeas. When ruling on a petition for supersedeas, the Board will consider, among other things, the likelihood of petitioner prevailing on the merits. 25 Pa. Code § 1021.78(a)(2).

We have denied Appellant's Petition for Temporary Supersedeas because Appellant has failed to demonstrate that he is likely to prevail on the merits of his appeal or that granting the relief he requests would restore the parties to the status quo ante. Appellant states in his Notice of Appeal that he is appealing "the submission ... to the Department of Environmental Protection of ... documentation for approval for application of biosolids (sludge) to [Baneys'] land...." However, the Board does not have jurisdiction over appeals challenging the mere receipt of documentation by the Department.

It is a cardinal principle of administrative law that government agencies have only those powers expressly conferred, or necessarily implied, by statute. *See, e.g., DER v. Butler County Mushroom Farm*, 454 A.2d 1 (Pa. 1982), and *Costanza v. DER*, 606 A.2d 645 (Pa. Cmwlth. 1992).

Section 4(a) of the Environmental Hearing Board Act, 35 P.S. § 7514(a), provides that the Board "has the power and duty to hold hearings and issue adjudications ... on orders, permits, licenses or decisions of the department." The mere receipt of documentation by the Department does not fall within any of these categories. Nor does it fall within the definition of an "action" under the Board's rules. That term encompasses "[a]n order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person...." 25 Pa. Code § 1021.2. The mere receipt of documents by the Department did not affect Appellant's interests in this regard, and consequently, it is not a Department "action" within the meaning of our rules.

Appellant does refer to permits issued by the Department elsewhere in his notice of appeal, seemingly in an attempt to tie the appeal to an appealable Department action. He refers, for instance, to permits issued to the York City Wastewater Treatment Plant, the Joint Municipal Authority of Wyomissing Valley Wastewater Treatment Plant, the Valley Forge Sewer Authority Wastewater Treatment Plant, the Pennridge Wastewater Treatment Authority, and the Lehigh County Pretreatment Plant. But these permits are for the *generation* of the biosolids offsite, not the activity Appellant challenges here: the *application* of the biosolids on Baneys' farmland.

Because it presently appears that this appeal does not involve an appealable Department action, Appellant has failed to establish that he is likely to prevail on the merits of his appeal or that granting the relief he requests would return the parties to the status quo ante. Accordingly, Appellant's Petition for Temporary Supersedeas is denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN G. BERGDOLL	:	
	:	
v.	:	**EHB Docket No. 98-060-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW this 16th day of April, 1998, it is ordered that Appellant's Petition for Temporary Supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 16, 1998

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

For the Commonwealth, DEP:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

THROOP PROPERTY OWNER'S ASSOCIATION, et al.	:	
v.	:	**EHB Docket No. 97-164-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, Permittee	:	**Issued: April 17, 1998**

OPINION AND ORDER ON MOTION FOR ORDER COMPELLING DEPONENT TO ANSWER QUESTIONS

by Robert D. Myers, Administrative Law Judge

Synopsis:

Appellants' Motion for Order Compelling Deponent to Answer Questions is granted in part and denied in part. Where Appellants contend that the Department issued a landfill permit modification without properly considering a contractual agreement that pertains to the landfill, the Board will compel the deponent to answer questions about the agreement and a site closure plan mentioned therein. The Board will not compel the deponent to answer questions about communications between the deponent and Permittee's counsel to the extent that such communications are protected by the work product doctrine.

OPINION

Throop Property Owner's Association, et al., (Appellants) has filed a Notice of Appeal with

the Board challenging the Department of Environmental Protection's (Department) issuance of a permit modification to Keystone Sanitary Landfill (Permittee) for expansion of Permittee's landfill in Dunmore and Throop Boroughs, Lackawanna County, Pennsylvania. One of the issues raised in the Notice of Appeal is whether the Department properly considered an agreement between Permittee, the Borough of Throop, and Throop Property Owner's Association which requires closure of the site once it has reached its permitted capacity (1989 Agreement).

Presently before the Board is Appellants' Motion for Order Compelling Deponent to Answer Questions. The deponent in question is Albert Magnotta, P.E., a principal in the firm of CECO Associates, Inc., the firm primarily responsible for compiling, preparing, and submitting Permittee's application for the permit modification at issue in this proceeding. Magnotta is a potential fact witness and a potential expert witness. At his March 26, 1998 deposition, Permittee's counsel instructed Magnotta *not* to answer questions about the site closure plan mentioned in the 1989 Agreement. Permittee's counsel also advised Magnotta *not* to answer questions about communications which took place between Permittee's counsel and Magnotta on the day of the deposition. Appellants seek an Order reconvening the deposition and compelling Magnotta to answer questions on those matters.

With respect to the 1989 Agreement, Permittee asserts that Appellants asked many questions about the 1989 Agreement; however, Permittee objected when Appellants questioned Magnotta about the site closure plan mentioned in the 1989 Agreement. Permittee maintains that the 1989 Agreement and the site closure plan are irrelevant here. We disagree. The 1989 Agreement and the site closure plan are clearly relevant to the issue set forth above. Permittee also contends that the Board lacks jurisdiction to interpret and enforce the 1989 Agreement. However, Appellants are not

asking the Board to interpret and enforce the 1989 Agreement. Rather, Appellants are asking the Board to review the Department's action to determine whether the Department properly considered the 1989 Agreement in issuing the permit modification. The Board certainly has jurisdiction to review the Department's action. Therefore, Magnotta shall appear for a reconvened deposition and answer questions about the 1989 Agreement and the site closure plan.

As to the communications between Permittee's counsel and Magnotta which occurred on March 26, 1998, some of the content is protected by the attorney work product doctrine. The work product doctrine protects the mental impressions, conclusions, opinions, and legal theories of an attorney. *See* Pa. R.C.P. No. 4003.3. Although the doctrine is usually applied to documents, courts have held that advice given a witness in preparation for a deposition constitutes an attorney's work product.[1] *See Delco Wire & Cable, Inc. v. Weinberger*, 109 F.R.D. 680 (E.D. Pa. 1986). Thus, at the reconvened deposition, Magnotta will not be required to answer questions about his communications with Permittee's counsel to the extent that the questions seek the mental impressions, conclusions, opinions, or legal theories of Permittee's counsel.

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[1] The fact that Magnotta was not represented by Permittee's counsel at the deposition is irrelevant. Work product protection is not necessarily waived where the attorney discloses his mental impressions, etc., to a third party. *Republic of Philippines v. Westinghouse Elec. Corp.*, 132 F.R.D. 384 (D.N.J. 1990); *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THROOP PROPERTY OWNER'S ASSOCIATION, et al.	:	
v.	:	**EHB Docket No. 97-164-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KEYSTONE SANITARY LANDFILL, Permittee	:	

ORDER

AND NOW, this 17th day of April, 1998, after consideration of Appellants' Motion for Order Compelling Deponent to Answer Questions and Permittee's Answer thereto, it is ordered as follows:

1. Albert Magnotta shall appear for a reconvened deposition at such time and place as is agreeable to the parties but not later than **May 15, 1998**.

2. Albert Magnotta shall be required to answer such questions as are put to him during the reconvened deposition concerning the 1989 Agreement and concerning the site closure plan referenced in the Agreement, subject to the right of counsel to place objections on the record to preserve such objections.

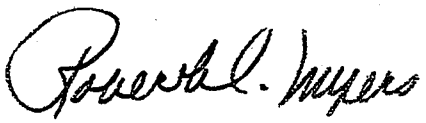
3. Albert Magnotta shall *not* be required to answer questions concerning the communications which he had with counsel for Permittee to the extent that the questions seek the mental impressions, conclusions, opinions, or legal theories of Permittee's counsel.

4. Appellant's request for the imposition of costs associated with the reconvened

deposition is **denied.**

5. Appellant's request for an extension of time for the filing of dispositive motions is **granted.** The parties shall file dispositive motions within 15 days of receipt of the transcript of the reconvened deposition of Albert Magnotta.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: April 17, 1998

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

F.R.& S., INC. d/b/a PIONEER CROSSING LANDFILL	:	
v.	:	**EHB Docket No. 97-247-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** April 17, 1998

OPINION AND ORDER ON MOTION TO LIMIT ISSUES

By George J. Miller, Administrative Law Judge

Synopsis:

The Department's motion to limit the issues raised in the appeal of a civil penalty assessment under the Air Pollution Control Act and the Solid Waste Management Act is granted in part and denied in part. Under the Air Pollution Control Act a permittee charged with a penalty may contest the amount of the penalty or the fact of the violation to the extent not already established. Since the permittee in this case admitted in an executed consent order and agreement that it failed to construct a gas extraction system to control odors by the deadline established by its permit, the permittee may not now challenge the fact of that violation because the violation was established by the consent order and agreement. Whether other statements of the permittee are actually admissions of violations binding on the permittee is an evidentiary issue to be resolved at the hearing on the merits.

A permittee who failed to contest the denial of a permit for a newly constructed cell at the

landfill based on its continuing violations of the Solid Waste Management Act may not in the subsequent penalty proceeding introduce evidence of economic loss as a result of the permit denial to mitigate the amount of the penalty for other violations charged in the Department's order because the economic loss was the result of the permittee's own misconduct.

OPINION

This motion arises from an appeal filed by F.R.& S. d/b/a Pioneer Crossing Landfill (Permittee) from an assessment of civil penalties by the Department of Environmental Protection. The civil penalties were assessed in the amount of $373,000 for violations of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003, and $3,000 for violations of the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. §§ 4001-4106, arising from the operation of the Pioneer Crossing Landfill, located in Exeter Township, Berks County. The notice of appeal, filed on November 13, 1997, challenged both the amount of the penalties assessed and the facts underlying the violations. In its motion to limit issues the Department argues that the Permittee is estopped from raising challenges to certain facts relating to specific violations of the statutes and regulations.

The Department assessed a civil penalty of $315,000 against the Permittee for failing to cap the so-called "old portion" of the landfill and install a gas management system by December 31, 1996, in accordance with a requirement of its permit. This work was not completed by the Permittee until May 11, 1997. (Notice of Appeal ¶ E) The Department argues that the Permittee should be precluded from challenging the fact of this violation because it admitted in a consent order and agreement dated March 21, 1997, that it was in violation of its permit because the capping and gas management installation had not been completed by December 31, 1996. In response to the

Department's motion the Permittee states that the March consent order is not relevant to this proceeding, but admits that it had not completed required work by December 31, 1996. (Response at ¶ 27) However, the Permittee contends that it should not be precluded from contesting the environmental impacts of the failure to meet the permit deadline.

We agree that the terms of a consent order and agreement are binding as to future litigation in accordance with the language of the agreement. *Wasson v. DEP*, EHB Docket No. 97-136-C (consolidated)(Opinion issued February 2, 1998); *Penoyer v. DER*, 1987 EHB 131. Specifically, the March consent order provides that " F.R. & S. . . . agree[s] that the findings in Paragraphs A through P are true and correct and, in any matter or proceeding involving [F.R. & S.] and the Department, [it] shall not challenge the accuracy or validity of these findings." (Consent Order and Agreement ¶ 2(a); Motion to Limit Issues Ex. A) Paragraphs K through O of the consent order provide that the Permittee was required to complete capping and gas management installation by December 31, 1996, as a condition of its permit, it failed to meet this deadline, and that this failure constitutes unlawful conduct. Therefore the Permittee can not contest (and evidently does not intend to contest) that capping and gas management installation work was not completed by December 31, 1996, in accordance with the terms of the permit.

However, the terms of the consent order do not preclude the Permittee from challenging facts that are relevant to the reasonableness of the amount of the civil penalty assessed for the violation of the permit deadline. In assessing the amount of a civil penalty under the Solid Waste Management Act the Department must consider "willfulness of the violation, damage to air, water, land or other natural resources of the Commonwealth or their uses, cost of restoration and abatement, savings resulting to the person in consequence of such violation, and other relevant factors." 35 P.S. §

6018.605. Therefore facts related to the Department's consideration of these factors, including the environmental impact of the violation, in assessing the penalty for failing to meet the capping deadline are not precluded by the terms of the consent agreement.

The Permittee also challenged a $3,000 civil penalty assessed by the Department because malodors were detected off-site in violation of the Air Pollution Control Act. The Department seeks to preclude the Permittee from challenging the fact of this violation because it failed to appeal three administrative orders and therefore its challenge is precluded by the doctrine of administrative finality. In response, the Permittee contends that under the Commonwealth Court's reasoning in *Kent Coal Mining Co. v. Department of Environmental Resources*, 550 A.2d 279 (Pa. Cmwlth. 1988), it may challenge both the fact of the violation and the amount of the civil penalty even though it did not appeal the administrative orders.

Section 4009.1(b) of the Air Pollution Control Act provides that "[t]he person charged with the penalty shall then have thirty (30) days to contest the amount of the penalty *or* the fact of the violation to the extent not already established . . . ." 35 P.S. § 4009.1(b)(emphasis added). The Department contends that the Permittee's failure to appeal the administrative orders "otherwise establishes" the fact of the violations of the Air Pollution Control Act and the Permittee is limited to contesting the amount of the civil penalty. The Department argues that the language of the Air Pollution Control Act is distinguishable from the language of the Section 18.4 of the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §1396.22, analyzed by the Commonwealth Court in *Kent Coal Mining*. We disagree.

The facts of *Kent Coal Mining* are similar to the facts in this case in that the appellant there also failed to appeal a compliance order of the Department, but appealed the fact of the violation

addressed in that order when the Department later assessed a civil penalty for the violation. The Commonwealth Court held that since Section 18.4 of SMCRA allowed an appeal from a civil penalty assessment to "contest either the amount of the penalty or the fact of the violation" the appellant could challenge the full order as issued, regardless of the failure of the appellant to appeal the earlier compliance order. The court noted that the framers of Section 18.4 recognized that

> where DER issues a compliance order charging a particular violation and then later assesses a civil penalty based on the same alleged violation, the two actions together constitute a single 'order' in terms of their effect on the alleged violator. Therefore, the statute permits the alleged violator to challenge 'the fact of the violation' when he or she challenges 'the amount of the penalty' -- that is, when the full order has been issued.

Kent Coal Mining, 550 A.2d at 281. Therefore the General Assembly, by considering bifurcated departmental actions as a single order deliberately exempted appeals of civil penalties under SMCRA from the principle of administrative finality. The reason for doing so is eminently practical:

> If a penalty were small, a company or other alleged violator might reasonably decide to pay it, rather than go to the time and expense of pursing a challenge to the charge of the violation, even if the company believed that it had not committed a violation. Of course, if the penalty were large, the company would have every motive to contest the fact of the violation if it believed that it had an adequate defense. However, because DER does not assess a civil penalty when it issues the compliance order, the alleged violator does not have this possibly crucial information when deciding whether to appeal. . . . .

Id. at 281. To require an appeal of a compliance order before a civil penalty assessment necessitates that an alleged violator make a decision whether or not to appeal without knowing the full extent to which the person is aggrieved. *Id.* at 282.

We believe that this interpretation applies equally to Section 4009.1 of the Air Pollution Control Act, which has language virtually identical to Section 18.4 of SMCRA explicitly allowing an alleged violator to challenge both the violation and the civil penalty in an appeal from the

assessment of the civil penalty. *See Booher v. DER*, 1990 EHB 285 and 1990 EHB 618 (applying *Kent Coal Mining* to Section 605 of the Solid Waste Management Act, 35 P.S. § 6018.605). The Department argues that the inclusion of the language "to the extent not already established" evidences an intent to *not* modify the doctrine of administrative finality. Yet the Commonwealth Court in *Kent Coal Mining* specifically noted that the language of the statute does not affect other preclusion doctrines that might apply. We believe that "to the extent not already established" refers to these other preclusion doctrines. For example, if a violator appealed an administrative order and received a judgment, it would be barred from relitigating those facts in an appeal from a civil penalty assessment resulting from the violations which were the subject of the order by the doctrine of res judicata. *See for example Shay v. DEP*, 1996 EHB 1583, *affirmed*, 175 C.D. 1997 (Pa. Cmwlth filed November 17, 1997). An alleged violator's failure to appeal from an administrative order which may or may not ultimately result in a civil penalty assessment does not establish the facts of the violation in this context. Rather, as with SMCRA, the Air Pollution Control Act envisions the issuance of the separate administrative order and civil penalty assessment as a single order, hence a single appeal of the final departmental action -- the civil penalty assessment -- is an appropriate way to challenge the facts of the alleged violations. Therefore the Permittee is not foreclosed from challenging both the facts and the civil penalty underlying the charged violation of the Air Pollution Control Act even though it failed to appeal the earlier administrative orders.

Next the Department contends that a gas migration study dated November 13, 1996, and a letter from the Permittee's engineer to the Department constitute admissions that the Permittee violated the solid waste regulations because of elevated combustible gas associated with the landfill.

Whether or not this documentation constitutes an admission by the Permittee is largely a

factual issue which we believe is better resolved later in the proceedings when the submission of these documents can be placed in context and their significance explained. *Cf. Pequa Township v. DER*, 1994 EHB 415 (a series of letters submitted by the appellant to the Department are not admissions that it had abandoned its position that its official plan was deemed approved by the Department, but rather indicate that the appellant was trying to work with the Department to resolve the situation). We are mindful that the Permittee failed to address this issue in its brief in response to the Department's motion. As the Department observes in its reply brief, the present motion is analogous to a motion for summary judgment where an "adverse party may not rest upon the mere allegations or denials of the pleadings . . . ." Pa. R.C.P. No. 1035.3(a). However, the Department as the moving party must also demonstrate that it is clearly entitled to judgment in its favor. *Martin v. Sun Pipe Line Company*, 666 A.2d 637 (Pa. 1995). Since we feel it is necessary to have further information before assessing the significance of the statements contained in the documents referenced by the Department, the Department's right to judgment is not clear and free from doubt. Accordingly we deny the Department's motion to limit the issues concerning combustible gas levels at the landfill.[1]

Finally, the Department seeks to preclude the Permittee from presenting evidence concerning the economic effects of the denial of a related permit in January 1997, from which the Permittee did not appeal. The permit application for use of a newly constructed cell at the landfill was denied because of continuing violations at the landfill under Section 503(d) of the Solid Waste Management

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[1] While we often admit into evidence documents submitted to the Department such admission does not establish the truth contained in those documents without the testimony of those who prepared them. *Muro v. DER*, 1990 EHB 1153.

Act, 35 P.S. § 6018.503(d). The Permittee contends that under the holding of *Kent Coal Mining* it may challenge that action of the Department because it believed it could absorb the cost associated with the permit denial until the Department assessed the present civil penalties. Therefore it did not know the full extent of its aggrievement when the permit was denied.

We soundly reject the argument of the Permittee. Section 503(d) of the Solid Waste Management Act, 35 P.S. § 6018.503(d), which requires the Department to deny applications for solid waste permits where the applicant is in violation of the Act, does not contain any language which even remotely suggests that the fact of those prior violations can be contested by any means other than by an appeal of that denial to this Board. Since the Permittee chose not to contest the fact of those prior violations by an appeal of the permit denial, it is plain that its economic loss is a result of its own misconduct and evidence of that loss may not be used to mitigate penalties charged here. Accordingly, the Departments motion is granted.

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

F.R.&S., INC. d/b/a PIONEER CROSSING LANDFILL	:	
v.	:	**EHB Docket No. 97-247-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

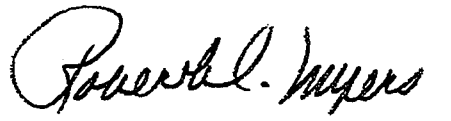
ORDER

AND NOW, this 17th day of April, 1998, the Department of Environmental Protection's motion to limit the issues related to F.R.&S.' failure to meet the permit deadline for capping and installation of the gas management system at the landfill and the issue related to the Department's denial of a related permit is GRANTED in accordance with the above opinion. The Department's motion is DENIED in all other respects.

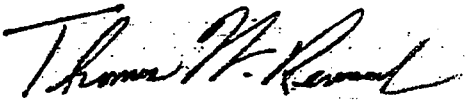
ENVIRONMENTAL HEARING BOARD

George J. Miller

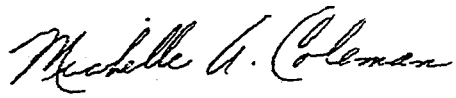
GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 17, 1998

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

SVONAVEC, INC.	:	
	:	
v.	:	**EHB Docket No. 97-011-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 23, 1998**

OPINION AND ORDER
ON PETITION FOR RECONSIDERATION

by Robert D. Myers, Administrative Law Judge

Synopsis:

A Petition for Reconsideration is denied where the petitioner failed to show compelling and persuasive reasons for reconsideration. In particular, the petitioner failed to establish that the Board's decision rested on legal grounds or factual findings which had not been proposed by any party.

OPINION

On April 3, 1998, the Board issued an Opinion and Order granting summary judgment to Appellant on its appeal of a Department of Environmental Protection (Department) Order dated December 9, 1996. The Order charged Appellant with degrading the water quality of the well serving the Overton (formerly Fenslau) residence in Milford Township, Somerset County, and directed Appellant to provide a temporary and permanent replacement.

We held that summary judgment was appropriate because the Department's Order was based

on the erroneous factual assumption that Appellant contaminated the Upper Freeport aquifer and on the erroneous legal assumption that Appellant can be compelled to take additional action under section 4.2(f) of the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, *as amended*, 52 P. S. § 1396.4b(f), and 25 Pa. Code § 87.119.

The Department has filed a timely[1] Petition for Reconsideration. Appellant filed its Response to the Petition on April 21, 1998.

We should reconsider, the Department contends, because our opinion rests on legal grounds and factual findings which the parties had stipulated were not to be issues. Technical matters regarding causation of the degraded water quality, according to the Department, were not to be considered by the Board, and the Motion for Summary Judgment was to be decided solely on the legality of the Department's Order in light of the alleged agreement between Appellant and Fenslau. If that was the stipulation, it was not made clear to the Board.

Appellant's Motion for Summary Judgment clearly raised the causation issue. In its Response, the Department contended that Appellant had gone too far but never represented that causation was not to be considered. On pages 1 and 2 of its Memorandum of Law, the Department said:

> The issue to be decided by the Board is whether the Overtons properly filed a complaint with the Department and subsequently whether the Department had authority to order Svonavec to replace the Overton water supply *based on the Department's investigation of the complaint.* (Emphasis added.)

That investigation produced the July 12, 1996 report which the Department relied on, at least

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[1] The Petition was filed on April 13, 1998, within 10 days of the date of our Opinion and Order, as required by our rules of procedure at 25 Pa. Code § 1021.124(a).

in part, when issuing the Order. This report was attached to Appellant's Motion as Exhibit "B" and used as a segment of its argument that the Department did not show Appellant's mining to be the cause of the degradation. The Department also cited it in the Response to the Motion as support for the Department's determination that Appellant did cause the degradation. The affidavit of Tim Kania, attached to the Response, attests to the fact that the hydrogeologic investigation determined that Appellant was culpable and formed the basis of the Order. This assertion of causation pervades the Department's Response and Memorandum of Law.

The Board was fully justified in considering whether the Department's investigation justified the Order. Relying to a great extent on the contents of the July 12, 1996 report, we concluded that it did not. The Department's belated attempt to reverse this conclusion by presenting another affidavit, attached to the Petition for Reconsideration, cannot be allowed. This evidence could have, and should have, been presented earlier.

Even if the contents of this new affidavit had been available to us at the time we prepared our Opinion and Order, it would not have changed the result. Our decision was two-pronged. We held that the Department did not show factually that Appellant degraded the water quality of the well and did not show legally that Appellant could be required to take additional action under section 4.2(f) of SMCRA, 52 P. S. § 1396.4b(f) and 25 Pa. Code § 87.119, beyond what it had done in 1983 to satisfy Fenslau.[2]

The second prong was not dependent on the first. Even if it had been shown that Appellant's mining activities had degraded the aquifer from which the deepened well drew, Fenslau's acceptance

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[2] The Department has not sought reconsideration of our interpretation of section 4.2(f) of SMCRA, 52 P. S. § 1396.4b(f) and 25 Pa. Code § 87.119.

of it still would have satisfied Appellant's replacement obligations and we would have granted summary judgment on that ground alone.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SVONAVEC, INC.	:	
	:	
v.	:	EHB Docket No. 97-011-MR
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 23rd day of April, 1998, it is ordered that the Department's Petition for Reconsideration is denied.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 23, 1998

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

PP&L, INC., PECO ENERGY CO. AND WEST PENN POWER COMPANY (d/b/a ALLEGHENY POWER)	:	
v.	:	**EHB Docket No. 97-258-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 23, 1998**

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Department of Environmental Protection's motion to dismiss is granted. The Board lacks jurisdiction over pre-enforcement challenges to Environmental Quality Board regulations.

OPINION

This matter was initiated with PP&L, Inc., PECO Energy Co. and West Penn Power Co.'s, (d/b/a "Allegheny Power") (Appellants) December 1, 1997 Notice of Appeal challenging the Environmental Quality Board's (EQB) final rule[1] to amend Chapters 121 and 123 of Title 25 of the Pennsylvania Code (entitled "Nitrogen Oxide Allowance Requirements"). The amendments were published in the November 1, 1997 *Pennsylvania Bulletin*, Vol. 27 No. 44.

[1] The Department refers to the basis of the appeal as an "Order of the EQB" promulgating the final regulations while Appellants refer to it as the EQB's "Final Rule." Although the *Pennsylvania Bulletin* states that the EQB amended the regulations by "this order," we will use "final rule" since the EQB oversees amendments to Department regulations .

In the notice of appeal, Appellants objected to the final rule because Appellants claim the EQB acted in a manner that is arbitrary and capricious and beyond its scope under the Pennsylvania Air Pollution Control Act and the Pennsylvania Constitution by: 1) failing to exclude from the definition of "NOx affected source" section 121.1 all small units that have a nameplate or actual capacity of 15 megawatts or less regardless of location on or near property containing larger sources; alternatively, the EQB failed to revise Appendix A to properly list, and allocate NOx allowances to all of the numerous small units in Pennsylvania that were not excluded from the definition of "NOx affected source;" 2) failing to exclude auxiliary boilers that are used solely to start up other steam generating units from the definition of "NOx affected source"; 3) establishing penalties for noncompliance that are unreasonable and in violation of due process; and 4) providing that "emissions reductions made through over control, curtailment or shutdown, for which allowances are banked are not surplus and may not be used to create emission reduction credits" because this provision precludes affected sources from creating the credits for permitting and non-ozone season purposes.

On December 23, 1997 the Department of Environmental Protection (Department) filed a motion to dismiss and supporting memorandum. The Department contends that the Board lacks jurisdiction over this appeal because Appellants have not challenged a Department action and have not identified any Department actions in their Notice of Appeal. The Department alleges that the Board lacks jurisdiction to consider an appeal from a pre-enforcement challenge to an EQB order promulgating regulations, that the EQB's decision is not reviewable by the Board under Section 4 of the Environmental Hearing Board Act because the Board only has jurisdiction over Department actions and that there is not a "final order" by an adjudicatory body.

On January 20, 1998 Appellants filed a response and supporting memorandum. Appellants

concede the Board does not have jurisdiction to review pre-enforcement challenges to EQB regulations. However, Appellants allege that the final rule presents a matter of first impression which warrants the Board's review. Appellants contend that the Board should have jurisdiction because 1) the allocation of NOx allowances is a new, never before used mechanism in Pennsylvania that alters the existing legal status of every NOx affected source in the Commonwealth; 2) that no further Department action is required or necessary before petitioners' legal rights and the value for their assets are immediately affected; 3) that the Department will take ministerial actions in furtherance of this rule; 4) some claims may look like pre-enforcement challenges to EQB regulations when they may in fact constitute appeals of Department actions over which the Board has legislatively-conferred jurisdiction under the EHB Act 9; and 5) Appellants would be required to risk not only civil penalties but potential criminal enforcement actions in order to challenge the legitimacy of certain aspects of the final rule.

We agree with the Department that the Board lacks jurisdiction. This Board has long held that it does not have jurisdiction to rule on the validity of EQB regulations as pre-enforcement challenges. Moreover, the Commonwealth Court has affirmed the Board's opinion that it has ancillary jurisdiction to rule on the validity of EQB regulations only after the Department has taken enforcement or other final action. *Plumstead Twnshp. Civic Assn. v. DEP*, 684 A.2d 667 (Pa. Cmwlth. 1996); *Machipongo Land and Coal Company, Inc. v. DER*, 648 A.2d 767, 770 (Pa. 1994); *Arsenal Coal Co. v. DER*, 477 A.2d 1333 (Pa. 1984).

Appellants cite *Gardner* (*See Gardner v. DER*, 658 A.2d 440 (Pa. Cmwlth. 1995)) to support their contention. We find this case to be distinguishable from *Gardner*. In *Gardner* the appeal to Commonwealth Court concerned two issues: 1) the Department's appeal of a finding by the Court of Common Pleas of Butler County that the case was ripe for adjudication and the appointing of a

Board of Viewers to determine damages, and 2) condemnees' petition for review of the order of the Environmental Hearing Board holding that the case was not (emphasize) ripe for determination because the condemnees had not exhausted their administrative remedies to determine whether a taking had occurred. Commonwealth Court, in its decision, stated that ripeness insists on a concrete context, such as, a final agency action, so that the courts can properly exercise their function. Moreover, the court noted that the doctrine of ripeness is described as a legal principle " instructing courts to review government actions only when the government's position has crystallized to the point at which a court can identify a relatively discreet dispute." citing Davis & Pierce, Administrative Law Treatise, vol. II, § 15.12 (3rd edition). The court went on to state that the doctrine of ripeness is essential to cases asserting that a statute or regulation effects a taking without just compensation because of the nature of a taking claim. Commonwealth Court concluded that because the department is the entity charged with implementing the statutory variance exception and the decision to grant or deny that exception is within its discretion, its decision to deny the variance is a final decision and makes a takings claim based on that denial ripe for adjudication citing *Machipongo Land and Coal Company, Inc. v. DER*, 648 A.2d 767, 770 (Pa. 1994); *Arsenal Coal Co. v. DER*, 477 A.2d 1333 (Pa.1984). The court stated that the Board had jurisdiction in *Gardner* because the claim involved was not (emphasize) a pre-enforcement challenge. Specifically, citing *Arsenal Coal*, "the EHB lacks the express statutory jurisdiction to hear pre-enforcement challenges to Environment Quality Board regulations" 658 A.2d at 447.

Clearly, therefore, *Gardner* is inapplicable here. The facts in the case before the Board are quite different. The challenge which is the basis of this case is strictly a pre-enforcement challenge. Consequently, the Board does not have jurisdiction over this matter.

Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PP&L, INC., PECO ENERGY CO. AND WEST PENN POWER CO., (d/b/a ALLEGHENY POWER)	:	
v.	:	**EHB Docket No. 97-258-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW this 23rd day of April, 1998, the Department's motion to dismiss is granted and the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 23, 1998

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

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WILLIAM T. PHILLIPY
SECRETARY TO THE BO

CHESTNUT RIDGE CONSERVANCY	:	
	:	
v.	:	**EHB Docket No. 96-022-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TASMAN RESOURCES, INC., Permittee	:	
HILLSIDE COMMUNITY ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 96-024-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TASMAN RESOURCES, INC., Permittee	:	**Issued: April 27, 1998**

OPINION AND ORDER ON PETITIONS FOR RECONSIDERATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Petitions for reconsideration filed by the Department and Permittee, seeking reconsideration of the Board's Opinion and Order revoking a noncoal surface mining permit, are denied. The petitions present no grounds which warrant reconsideration.

OPINION

Appeals were filed by Chestnut Ridge Conservancy and Hillside Community Association (collectively, the Appellants) challenging the Department of Environmental Protection's

(Department) issuance of a noncoal surface mining permit to Tasman Resources, Inc. (Tasman). The permit authorized Tasman to mine limestone on the Chestnut Ridge in Derry and Fairfield Townships, Westmoreland County.

On March 26, 1998, the Board issued an Opinion and Order granting the Appellants' Motion to Sustain Appeal and revoking Tasman's permit. *See Chestnut Ridge Conservancy v. DEP*, EHB Docket No. 96-022-R (Opinion issued March 26, 1998). Our decision was based on our finding that Tasman had failed to demonstrate that it had a legal means of access to the permit site and that the Department had erred in issuing the permit without adequately considering this matter. Both the Department and Tasman have filed petitions asking for reconsideration of our Opinion and Order.[1]

Reconsideration is within the discretion of the Board and will be granted only for compelling and persuasive reasons. 25 Pa. Code § 1021.124(a). These reasons may include the following:

> (1) The final order rests on a legal ground or a factual finding which has not been proposed by any party.
>
> (2) The crucial facts set forth in the petition
>
> (i) Are inconsistent with the findings of the Board.
>
> (ii) Are such as would justify a reversal of the Board's decision.
>
> (iii) Could not have been presented earlier to the Board with the exercise of due diligence.

Id.

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[1] The Department filed both a petition for reconsideration and an amended petition for reconsideration.

Neither Tasman nor the Department have set forth any grounds which would warrant reconsideration of our March 26, 1998 Opinion and Order. The issues set forth in the petitions are either untimely or have already been addressed in the Opinion itself. Therefore, reconsideration is denied. However, we feel it is important to address certain allegations and mischaracterizations contained in the petitions and supporting memoranda so that the record is clear.

First, both Tasman and the Department contend that the Board erred by considering events which occurred after the permit issuance. Specifically, Tasman and the Department refer to rulings by the Westmoreland County Court of Common Pleas regarding Tasman's property rights in land on which it intended to construct an extension to its haul road and its right to have this extension dedicated as a township road. The rulings were handed down after the permit issuance and subsequent to the conclusion of the hearing on this matter.

However, while the Board may clearly consider events which occurred after the permit issuance in ruling on whether the permit was properly granted, the Department and Tasman are incorrect in their assertion that the Board, in reaching its decision, relied solely on information which was not available to the Department at the time it conducted its review of Tasman's permit application.

Both Tasman and the Department in its original petition for reconsideration contend that the issue of whether the proposed roadway encroached on property owned by Margaret and Arthur Rosborough and Martha Jones was not raised until *after* the issuance of the permit and, therefore, the Department could not have considered this issue during its permit review. In its brief, Tasman states, "It is undisputed . . . that no one had raised any allegations about the property boundaries at the time the permit was issued. Thus, the Department was not even aware that there was a property

dispute when it issued the permit. It is difficult to comprehend how the Board found that the Department abused its discretion by failing to investigate a dispute that had not yet even arisen." (Tasman Brief, p. 8) The Department concurred with this argument in its memorandum filed in support of its original petition for reconsideration: "The Board incorrectly asserts that the Department should have 'investigated and built a record' concerning the property dispute between Arthur and Margaret Rosborough and Martha Jones, and Tasman. This assertion is based on a factual inaccuracy; the Department was not aware of any property dispute during the permit review." (Department Memorandum in Support of Petition for Reconsideration, p. 6)

On the contrary, the Department's and Tasman's argument is based on a factual inaccuracy. Both the Department and Tasman were notified of the property dispute during the permit review period. At the hearing, Margaret Rosborough testified as follows:

> Prior to the permit being issued -- when I first found out about the quarry, I called the Department and spoke to Scott Jones, was connected with Scott because he was the lead reviewer.
>
> I called Scott at least three times a week in the beginning. I told him about the property, that we had a property dispute, that I was having a survey done and that our surveyor doubted very much if their survey was correct because that's not what he was coming up initially with.

(Notes of Testimony, p. 2290) The issue of the property dispute clearly was brought to the attention of the Department during the review of Tasman's application.

To further demonstrate that the Department and Tasman are incorrect in their assertion that the Department had no knowledge of the property dispute during the permit review period, the Appellants have attached to their responses an affidavit signed by Mrs. Rosborough which states as

follows:[2]

> On numerous occasions prior to the issuance of the Permit, I talked to Mr. Scott Jones, often several times a week. In these conversations, I raised with Mr. Jones the fact that a portion of the proposed right-of-way that Tasman intended to dedicate to the Township would encroach on [the Rosborough property]."

(Exhibit B to Appellants' Reply to Department's Petition, para. 3 and 6; Exhibit C to Appellants' Response to Tasman's Petition, para. 3 and 6)

Attached to Mrs. Rosborough's affidavit is a copy of a letter from her attorney notifying Derry Township's solicitor "that there is no fifty (50) foot right-of-way between the Jones property and the current railroad right-of-way line and the township could not accept the proposed access road as a township road due to this defect." A copy of this letter was sent to the Department by telefax on November 14, 1995, prior to the issuance of the permit. (Exhibit B to Appellants' Reply to Department's Petition, para. 5 and 7, and Attachments A and B; Exhibit C to Appellants' Response to Tasman's Petition, para. 5 and 7, and Attachments A and B) The facsimile was discovered in the Department's permit review file by one of the Appellants' witnesses on April 10, 1998. (Exhibit D to Appellants' Reply to Department's Petition; Exhibit E to Appellants' Response to Tasman's Response) Mrs. Rosborough was questioned about the letter by counsel for Tasman at her deposition on April 15, 1996. (Exhibit E to Appellants' Reply to Department's Petition; Exhibit F to Appellants' Response to Department's Petition)

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[2] The affidavit is Exhibit B to the Appellants' Reply to the Department's Petition for Reconsideration and Exhibit C to the Appellants' Response to Tasman's Petition for Reconsideration.

Also attached to Mrs. Rosborough's affidavit is a copy of a November 30, 1995 letter from her attorney to Tasman regarding the boundary line of the Rosborough-Jones property. (Exhibit B to Appellants' Reply to Department's Petition, para. 9, Attachment C; Exhibit C to Appellants' Response to Tasman's Petition, para. 9, Attachment C) Thus, it appears that Tasman also was put on notice about the property dispute prior to the permit issuance.

Tasman's and the Department's petitions appear to allege that they were "blindsided" by the issue of the property dispute and never had an opportunity to address this matter either during the permit review or at the merits hearing. The testimony at the hearing and the exhibits submitted with the Appellants' responses to the petitions demonstrate that this certainly was not the case.[3]

After discovery of Mrs. Rosborough's November 14, 1995 telefax to the Department, the Department filed an Amended Petition for Reconsideration to correct its earlier incorrect assertion. The Department acknowledges existence of the November 14, 1995 telefax in its permit review file and states that it had been inadvertently overlooked. The Department argues, however, that the existence of a property dispute over Tasman's proposed roadway was not raised in a *meaningful* way during the permit review process. The Department notes that the November 14, 1995 telefax was only one of more than 900 letters commenting on the permit application.

We sympathize with the Department and recognize that it must sort through a substantial

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[3] In its reply to the Appellants' response, Tasman asserts that we should not consider the November 14, 1995 telefax since it is not part of the record. We agree with Tasman that because the telefax is not a part of the record of the merits hearing, we may not rely on it as a basis for concluding that the Department abused its discretion. However, we are not relying on the telefax to further buttress our March 26, 1998 Opinion, but simply to address the contention raised by Tasman and the Department that the property dispute was never brought to the Department's attention prior to issuance of the permit.

volume of information when conducting a permit review, especially when the application generates hundreds of complaints and comments. However, the fact that a large number of complaints are filed during the course of a permit review does not necessarily lessen the importance or impact of an individual complaint. This is especially true here where the individual letter raises a question as to whether the permit applicant has a sufficient legal interest in the property on which it intends to construct an extension to its haul road. Moreover, while Mrs. Rosborough's November 14, 1995 telefax may have been only one of over 900 letters received by the Department regarding the Tasman application, according to her testimony and affidavit her letter was sent in conjunction with numerous telephone calls made to the Department. In addition, Tasman also had notice of the property dispute during the permit review, as evidenced by the November 30, 1995 letter from Mrs. Rosborough's attorney to Tasman. We, therefore, reject the argument that the Department was never made aware of the property dispute over the location of the proposed township road during its review of Tasman's permit application.

The Department asserts, however, that even if the issue of the proposed township road was raised during the permit review, the *adequacy* of the Department's review of this issue was not raised in the Appellants' Motion to Sustain Appeal. Again, we must disagree with the Department. Paragraph 5 of the motion states, "In this appeal, the Appellants have argued, *inter alia*, that the permit should have been denied because a valid dispute existed as to Tasman's ownership or property rights in the land where the proposed Township road was to be located . . . Concerns regarding the status of the proposed Township road were raised to the Department prior to its first review letter, in which it, in turn, raised the issue to Tasman . . . ." Paragraph 12 of the motion goes on to say, "Since the Department interprets the Permit as requiring that the haul road exit onto a

public road, construction of which cannot be accomplished, the Permit as it currently stands should not have been issued, has no efficacy and cannot be used as it now exists. Therefore, the Conservancy and HCA are entitled to an Order sustaining this appeal and revoking Tasman's Permit." The motion clearly asks the Board to consider whether the Department properly issued the permit with knowledge of the property dispute. Ruling on this question necessarily requires the Board to consider whether the Department adequately reviewed the issue of the property dispute prior to issuing the permit.[4]

The Department and Tasman also attempt to claim that the Department did in fact conduct an investigation into the viability of the proposed roadway. The evidence indicates, however, that the Department considered only one aspect of the proposed roadway -- the agreement entered into by Tasman and the Derry Township supervisors regarding construction and dedication of the road. The Department did not consider the issue raised by the Rosboroughs -- whether the proposed roadway would encroach on the Rosborough - Jones property.

Tasman argues that our decision in this case is inconsistent with our decision in *Coolspring Stone Supply, Inc. v. DEP*, EHB Docket No. 96-171-R (Opinion issued March 25, 1998), issued one day prior to *Chestnut Ridge*. Because this is a misreading of our decisions, we will address Tasman's argument. Not only is our decision in *Chestnut Ridge* consistent with *Coolspring*, it relies heavily on the legal conclusions and analysis set forth in *Coolspring*.

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[4] In footnote 6 of its memorandum, the Department states that it "had reason to believe that the Board would not base any decision on whether the Department adequately investigated and addressed issues during the permit review." The portions of the transcript to which the Department cites, however, deal exclusively with the issue of whether the permit application was properly advertised in a newspaper of general circulation and do not apply generally to the question of whether the Department adequately addressed issues raised during the permit review.

Both *Coolspring* and *Chestnut Ridge* hold that it is well within the scope of the Department's authority and *duty* to evaluate property-related issues and contracts for the purpose of determining compliance with regulations and statutes. *Chestnut Ridge, slip op.* at 11; *Coolspring, slip op.* at 4. While the Department is not required to withhold the issuance of a permit until all property disputes or questions of title are resolved, it is required to look beyond the face of the permit application and make an *informed* decision that the permit applicant has adequately demonstrated its right to enter the property and conduct the activity in question. *Chestnut Ridge, slip op.* at 13; *Coolspring, slip op.* at 5. Upon learning of the property dispute in *Coolspring*, the Department requested further information from the applicant, including copies of leases for the property in question and copies of pleadings filed with the court of common pleas in litigation brought by the appellant, and consulted with legal counsel before making its decision to issue the permit. In contrast, in the present case, the Department did not consider the Rosborough property dispute, much less make an informed decision before issuing the permit.

Tasman argues that because the disputed property is outside the permit boundaries, this issue is outside the Department's jurisdiction and outside the scope of the Board's review. This argument was raised by Tasman and the Department during the hearing and in their post-hearing briefs, and was addressed and rejected in our Opinion. Therefore, this cannot form the basis for a request for reconsideration. Second, Tasman's argument begs the question. A simple declaration by the Department or permittee that a portion of a surface mining operation is "outside" the permit boundaries does not necessarily make it so. Here, the proposed roadway was an extension to the haul road, which both Tasman and the Department acknowledge is within the permit boundaries. Until such time as the haul road extension could be accepted by the township and dedicated as a

public road, it was subject to the Department's jurisdiction and thereby within the scope of the Board's review.

Finally, Tasman and the Department argue that the Board should not have revoked the permit but, instead, should have remanded the matter to the Department for further consideration. As noted in our Opinion, remand is not always the best course of action. Here, it would be fruitless since there is no meaningful course of action the Department can take. As the situation currently stands, Tasman holds a mining permit for a site which it cannot access for the purpose of conducting its mining operation.

Tasman asserts that the effects of the Westmoreland County Common Pleas Court's ruling are complicated and, therefore, the Board should remand this matter to the Department to allow it to study the legal effect of the ruling. The decision of the court of common pleas was well-analyzed and explicit in its ruling. That ruling requires no further analysis.

The Department asserts that we should remand this matter so that it may take further action, presumably to provide Tasman with an opportunity to review other options. However, the evidence presented at the hearing *by the Department* established that if Tasman could not build the proposed roadway, there was no other feasible means of access to the site. Indeed, the Board did not act on the Appellants' Motion to Sustain Appeal for several months to allow Tasman just such an opportunity to present other viable proposals. We are not required to stay this matter indefinitely to allow Tasman time to consider and develop other proposals. The appropriate time for considering various proposals and options is *prior* to the permit issuance. The Appellants have met their burden of proof, and they are entitled to finality with regard to their appeal.

Finally, the petitions for reconsideration appear to imply that, were it not for our finding that

the Department should have considered the property dispute issue, we would have upheld the permit. The issue of the property dispute was just one of many issues the Appellants raised in their appeal. Had we not granted the Appellants' Motion to Sustain Appeal, we would have continued with the briefing schedule which was stayed at the request of the parties following the ruling by the Westmoreland County Court of Common Pleas and we would have proceeded to adjudicate the other issues raised by the Appellants.

Because Tasman and the Department have not demonstrated any grounds for reconsideration, their petitions are denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHESTNUT RIDGE CONSERVANCY	:	
	:	
v.	:	**EHB Docket No. 96-022-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TASMAN RESOURCES, INC., Permittee	:	

HILLSIDE COMMUNITY ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 96-024-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TASMAN RESOURCES, INC., Permittee	:	

ORDER

AND NOW, this 27th day of April, 1998, the Petitions for Reconsideration filed by the Department of Environmental Protection and Tasman Resources, Inc. are **denied**.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 27, 1998

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HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

WHITE GLOVE, INC.	:	
	:	
v.	:	**EHB Docket No. 97-172-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** April 28, 1998

OPINION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

The withdrawal of an appeal from an Abatement Order under the Air Pollution Control Act[1] prior to the hearing on the merits bars the Appellant from challenging the fact of the violations described in the Order in an appeal from a later penalty assessment based on the same violations as the Abatement Order. The Air Pollution Control Act authorizes such a challenge under ordinary circumstances, but the fact of the violations in this case has been established by the Appellant's withdrawal of its prior appeal. Under the Board's Rules, that withdrawal was a withdrawal with prejudice which establishes the fact of the violations under principles of *res judicata*. The Department's motion for summary judgment is therefore granted.

The Appellant's motion to dismiss (treated as a motion for summary judgment) on the

[1] Act of January 8, 1960, P.L. (1959) 2119, *as amended,* 35 P.S. §§ 4001-4106.

ground that it neither owns nor operates some of the gasoline dispensing facilities which failed to install the required Stage II equipment is denied for the reasons stated above. In addition, the information presented by affidavit is not specific enough to determine which of the related corporate entities owned or operated the facilities in question during the time the alleged violations occurred.

This proceeding is not subject to the automatic stay under the Bankruptcy Code by reason of the Appellant's filing a petition in bankruptcy.

BACKGROUND

This appeal is from the Department of Environmental Protection's (Department) assessment of a civil penalty in the amount of $466,737 against White Glove, Inc. (Appellant) for its failure to install Stage II controls on its gasoline dispensing facilities in violation of 25 Pa. Code § 129.82 and Section 4006.7 of the Pennsylvania Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. § 4006.7 (APCA). On August 18, 1997, the Appellant appealed the assessment alleging, among other things, that it neither owned nor operated three of the five gasoline dispensing facilities identified in the Air Pollution Abatement Order during the relevant time period and the penalties should therefore be stricken for those facilities.[2] (Notice of Appeal, ¶ 2(c); Appellant's Response, Exhibit B, ¶ 2)

The background of the assessment is that the Department issued an Abatement Order to the Appellant on October 26, 1995. The Department's findings of fact in this Order stated that the Appellant owned or operated five car wash facilities which also included gasoline dispensing

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[2] The following are the three contested facilities: (1) ID No. 09-02720, located in Bensalem Township (Bensalem Facility); (2) ID No. 15-02718, located in Chester County (West Chester Facility); and (3) ID No. 46-02713, located in Montgomery County (Montgomery Facility).

facilities. (Order, ¶ 2) These facilities were located in a severe ozone nonattainment area of Pennsylvania. (Order, ¶ 3) As such, the Appellant was ordered to install Stage II vapor controls at the facilities as required by 25 Pa. Code § 129.82 and Section 4006.7 of APCA. 35 P.S. § 4006.7.

The Appellant appealed the Order on November 27, 1995, at EHB Docket No. 95-251-MG, alleging that it lacked the financial resources to install the required equipment. A hearing on the merits was scheduled to begin on February 26, 1997. By letter dated January 22, 1997, the Appellant withdrew its appeal and the Board issued an Order on January 27, 1997, closing the appeal.

Currently before the Board are the Department's motion and supporting memorandum of law for summary judgment on liability against the Appellant; the Appellant's response to the motion; the Department's reply; the Appellant's motion and supporting memorandum of law for summary judgment[3] on the assessed civil penalties against the Appellant for the three gasoline dispensing facilities which the Appellant contends were wrongfully included in the civil penalty assessment; and the Department's response to the motion.

On March 8, 1998, after these motions were filed, the Appellant's counsel notified the Board that the Appellant had filed a Petition in Bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U.S.C.A. §§ 101-1330 and suggested that these proceedings are now stayed by virtue of the automatic stay under the Bankruptcy Code.

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[3] Although the Appellant labeled its motion "motion to dismiss", we will consider it as a motion for summary judgment because the evidence presented in support of its motion is of such a nature that the motion should be considered as a motion for summary judgment under the applicable rules of procedure. Pa.R.C.P 1035.1; *Reading Anthracite Co. v. DEP*, EHB Docket No. 95-196-C (Opinion issued June 18, 1997).

DISCUSSION

The Board is empowered to grant summary judgment where the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits and expert reports, 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. 1035.1, 1035.2; *Township of Florence v. DEP*, 1996 EHB 1399. Summary judgment may be entered only where the right is clear and free from doubt. *Martin v. Sun Pipe Line Company*, 666 A.2d 637 (Pa. 1995). In its motion for summary judgment, the Department contends that the Appellant's withdrawal of the appeal of the Department's Order made that Order final and foreclosed any attack on its content or validity in a subsequent proceeding before the Board.

In its response to the Department's motion, the Appellant asserts that since it neither owned nor operated three of the five gasoline dispensing facilities included in the Order and because the issue of ownership and liability was not actually litigated, it should not be estopped from disputing some of the alleged violations. The Appellant contends that the Order upon which the Department relies is not part of the record in this case and therefore cannot be considered by the Board. Because the motions currently before the Board are based on a previous appeal before this Board, we may take official notice of the record in those matters. 25 Pa. Code § 1021.109(a); *Shoemaker v. State Employe's Retirement Board*, 688 A.2d 751 (Pa. Cmwlth. 1997); *Dunkard Creek Coal, Inc. v. DER*, 1993 EHB 536. Since the Order of October 26, 1995 is included in the record at EHB Docket No. 95-251-MG, the Board will take official notice of that document and of the proceedings taken in that appeal.

The Department argues that the failure to appeal a Department administrative order precludes

the Appellant from attacking its content or validity in a subsequent enforcement proceeding. The doctrine of administrative finality focuses upon the failure of a party aggrieved by an administrative action to pursue the statutory appeal remedy. *Kent Coal Mining Co. v. Department of Environmental Resources*, 550 A.2d 279, 282 (Pa. Cmwlth. 1988). However, the Appellant asserts that the APCA provides it with the right to independently appeal both the amount of the penalty and the fact of the violation. The APCA at 35 P.S. § 4009.1(b) states that a person charged with a civil penalty under the APCA may "contest the amount of the penalty *or* the fact of the violation *to the extent not already established* . . . ." (emphasis added) 35 P.S. § 4009.1(b).

The Commonwealth Court has held that where initial Department compliance orders are followed later by civil penalty assessments based on the same alleged violations, the alleged violator is not barred from challenging the fact of the violation when he or she challenges the amount of the penalty by reason of a failure to appeal the compliance order. *Kent Coal Mining Co. v. Department of Environmental Resources*, 550 A.2d 279 (Pa. Cmwlth. 1988). In that case, the Appellant failed to appeal the Department's compliance order but appealed the facts of the violation addressed in that order when the Department later assessed a civil penalty for the violation. The Court determined that the language of Section 18.4 of the Surface Mining Conservation and Reclamation Act (SMCRA)[4] and its corresponding regulation[5] permitted the Appellant to contest either the amount of the penalty or the fact of the violation in the appeal from the civil penalty assessment regardless

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[4] Section 18.4 of SMCRA, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.22, reads, in pertinent part, that a person may "contest either the amount of the penalty *or* the fact of the violation . . . ."

[5] 25 Pa. Code § 86.202 reads, in pertinent part, that "[t]he person charged with the violation may contest the penalty assessment *or* the fact of the violation . . . ." (emphasis added)

of whether the Appellant failed to appeal the earlier compliance order. The Court reasoned that this practice should be permitted since the Department "does not assess a civil penalty when it issues the compliance order, [and therefore] the alleged violator does not have this possibly crucial information when deciding whether to appeal." *Id.* at 281. We believe that this interpretation would also apply in this case were it not for the Appellant's withdrawal with prejudice of its prior appeal from the Abatement Order. Ordinarily, the APCA permits the alleged violator to challenge both the violation and the civil penalty in an appeal from the assessment of the civil penalty. 35 P.S. § 4009.1(b).

In this case, however, the issue of Appellant's liability under the APCA was conclusively established by its withdrawal of its prior appeal. Under the Board's rules at 25 Pa. Code § 1021.120(e), the withdrawal of an appeal prior to an adjudication is a withdrawal with prejudice unless otherwise provided by the Board. *Babich v. DER*, 1994 EHB 541, 548. Under principles of *res judicata*, a withdrawal with prejudice constitutes an adjudication of the merits as fully and completely as if the order had been entered after trial when the same claims are involved in both proceedings. *Gambocz v. Yelencsics*, 468 F.2d 837 (3d Cir. 1972). When the Appellant withdrew its appeal of the original Abatement Order, that withdrawal established the Appellant's ownership or operation of the gasoline dispensing facilities in question as alleged in the Abatement Order.

As for the Appellant's cross-motion for summary judgment, we need not address the substantive issues raised by the Appellant's motion since the relitigation of those issues is barred by principles of *res judicata*. In addition, the Appellant improperly attached its exhibits to its memorandum of law instead of attaching them to the motion and did not refer to or incorporate the exhibits by reference into the motion. The Board will not consider exhibits placed in the record only by attachment to legal memoranda because under the Board's rule, the responding party must take

a position with respect to the authenticity and accuracy of the statements made in those exhibits in correspondingly-numbered paragraphs. 25 Pa. Code § 1021.70(e); *Force v. DEP*, EHB Docket No. 96-054-MG (Opinion issued January 21, 1997); *County of Schuylkill v. DER*, 1990 EHB 1370. The exhibits must be either attached to the motion itself or incorporated by reference into the motion if they are already on file and part of the record.

Even if the Board were to consider the Appellant's exhibits, the information presented is not specific enough to determine which of the two apparently related corporate entities owned or operated the three facilities at the time installation of the Stage II vapor controls was required.

We reject the Appellant's suggestion that these proceedings are now stayed by virtue of the filing of bankruptcy proceedings. Proceedings brought by a governmental agency to enforce its police or regulatory power are not subject to the automatic stay under the Bankruptcy Code. 11 U.S.C. § 362(b). This proceeding to assess a penalty falls within that exception. *United States v. Nicolet,* 857 F.2d 202 (3d Cir. 1988); *Penn Terra Ltd. v. Department of Environmental Resources,* 773 F.2d 267, 275 (3d Cir. 1984). *See also, Department of Environmental Resources v. Peggs Run Coal Co.*, 423 A.2d 765 (Pa. Cmwlth. 1980).

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WHITE GLOVE, INC.	:	
	:	
v.	:	**EHB Docket No. 97-172-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 28th day of April, 1998, the Department's motion for summary judgment as to liability is **GRANTED**. The Appellant's motion to dismiss is **DENIED**. A hearing will be scheduled on the appropriateness of the penalty amount.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 28, 1998

c: **DEP Bureau of Litigation:**
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DUQUESNE LIGHT COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 97-259-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ANTHRACITE REGION INDEPENDENT POWER PRODUCERS ASSOCIATION, Intervenor, and INTER-POWER/AHLCON PARTNERS, L.P., Intervenor	:	**Issued: April 28, 1998**

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Department of Environmental Protection's motion to dismiss[1] is granted. The Board lacks jurisdiction over pre-enforcement challenges to Environmental Quality Board regulations.

OPINION

This matter was initiated with Duquesne Light Company, Inc.'s (Duquesne) December 1, 1997 Notice of Appeal challenging the Environmental Quality Board's (EQB) final rule to amend Chapters 121 and 123 of the Title 25 of the Pennsylvania Code (entitled "Nitrogen Oxide Allowance Requirements"). The amendments were published in the November 1, 1997 *Pennsylvania Bulletin*,

[1] The parties have also filed a Motion for Extension of Deadlines Established Under Pre-Hearing Order No.1. We will not address that motion since we are granting the motions to dismiss.

On December 1, 1997 Duquesne filed its Notice of Appeal in which it noted that the appeal was a skeleton appeal and Duquesne would supply any information requested by the Board. By a December 5, 1997 order the Board notified Duquesne that it should file its objections to the Department's action by December 22, 1997. On December 22, 1997 Duquesne filed the following objections, among others, to the issuance of the regulation: 1) the EQB and the Department violated Duquesne's rights to equal protection and due process when they refused to provide mandatory allocations to Duquesne's Philips and Brunot Island facilities which are cold reserve facilities in the regulation; 2) the Department and the EQB abused their discretion and acted in a manner contrary to law when they arbitrarily and capriciously provided Duquesne's facilities with fewer allocations than they are entitled to; 3) the Department and the EQB unlawfully allocated allowances to Independent Power Providers (IPPs) which provide the IPP facilities more allocations than will be required for them to operate in compliance with the relevant laws; and 4) the Department and the EQB lack statutory authority for the NOx emissions program because the Ozone Transport Commission (OTC) failed to comply with the mandatory requirements of the Clean Air Act and the Air Pollution Control Act.

On February 11, 1998 Anthracite Region Independent Power Producers Association filed a petition to intervene. The Board granted its petition by its March 6, 1998 order.

On February 19, 1998 the Department filed a motion to dismiss and supporting memorandum. The Department contends that the Board lacks jurisdiction over this appeal because Duquesne has not challenged a Department action and has not identified any Department actions in its Notice of Appeal. The Department alleges: 1) that the Board lacks jurisdiction to consider an

appeal from a pre-enforcement challenge to an EQB order promulgating regulations; 2) that the EQB's decisions are not reviewable by the Board under Section 4 of the Environmental Hearing Board Act since the Board has jurisdiction only over Department actions and here there is no "final order" by an adjudicatory body; 3) the Department's participation in the EQB's rulemaking process did not however involve appealable Department actions; and 4) the EQB regulations did not violate state and federal law governing OTC recommendations to the EQB and OTC's Memorandums of Understanding (MOU).

On February 25, 1998 Inter-Power/AHLCON Partners, L.P. filed a petition to intervene. By the Board's March 19, 1998 order we granted its petition to intervene. On that same day Inter-Power/AHLCON Partners, L.P. filed a motion to dismiss in which it asserted: 1) the Board lacked subject matter jurisdiction over this appeal; 2) the claims are not ripe for adjudication; 3) Duquesne failed to state a claim upon which relief may be based; 4) Duquesne lacks standing to appeal; 5) the appeal is in part untimely; 6) the requested relief is, in whole or in part, beyond the jurisdiction and authority of the Board.

We will not consider Duquesne's response for the purpose of ruling on the Department's and Inter-Power/AHLCON's motions. Under Board Rule 1021.73(d), 25 Pa. Code § 1021.73(d), a response to a dispositive motion shall be filed within 25 days of the date of service of the motion. Since the Department and Inter-Power/AHLCON served copies of their motions on Duquesne's counsel on February 19, 1998 and February 24, 1998, respectively, Duquesne had until March 16, 1998 and March 21, 1998[2] to file its response. Duquesne, however, did not file a response until

[2] March 21, 1998 was a Saturday. Under Board policy when a filing date occurs on a weekend or holiday the party has until the next working day to file its document(s). Thus, Duquesne

April 6, 1998, 22 days after it was due. Consequently, its response is untimely. We consider an untimely response as a failure to respond.[3]

We agree that the Board lacks jurisdiction. As we noted in *PP&L v. DEP*, EHB Docket No. 97-258-C (Issued April 23, 1998), this Board has long held that it does not have jurisdiction to rule on the validity of EQB regulations as pre-enforcement challenges and the Commonwealth Court has affirmed the Board's opinion that it has ancillary jurisdiction to rule on the validity of EQB regulations only after the Department has taken enforcement or other final action. *Plumstead Twnshp. Civic Assn.*, 684 A.2d 667 (Pa. Cmwlth. 1996); *Machipongo Land and Coal Company, Inc. v. DER*, 648 A.2d 767, 770 (Pa. 1994); *Arsenal Coal Co. v. DER*, 477 A.2d 1333 (Pa. 1984).

In *PP&L v. DEP*, we again distinguished the opinion in *Gardner v. DER*, 658 A.2d 440 (Pa. Cmwlth. 1995). The Commonwealth Court in its decision in *Gardner* stated that ripeness insists on a concrete context, such as a final agency action, so that the courts can properly exercise their function. Moreover, the court noted that the doctrine of ripeness is described as a legal principle "instructing courts to review government actions only when the government's position has crystallized to the point at which a court can identify a relatively discreet dispute." citing Davis & Pierce, Administrative Law Treatise, vol. II, § 15.12 (3rd edition). The court went on to state that the doctrine of ripeness is essential to cases asserting that a statute or regulation effects a taking without just compensation because of the nature of a taking claim.

Although Duquesne specifically is not asserting a takings claim here, they do claim that they

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had until Monday, March 23, 1998 to file its response.

[3] The Department filed its reply to the response on April 24, 1998.

have been refused mandatory allocations and imply that others have been granted additional allocations. However, this still does not create a situation in which the issue is ripe for adjudication. The challenge here is strictly a pre-enforcement challenge. Consequently, the Board does not have jurisdiction over this matter.

Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DUQUESNE LIGHT COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 97-259-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ANTHRACITE REGION INDEPENDENT POWER PRODUCERS ASSOCIATION, Intervenor, and INTER-POWER/AHLCON PARTNERS, L.P., Intervenor	:	

ORDER

AND NOW this 28th day of April, 1998 the Department's and Inter-Power/AHLCON's Motions to Dismiss are granted and the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 28, 1998

See following page for service list.

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CNG TRANSMISSION CORPORATION, and PENN FUEL GAS, INC.	:	
v.	:	**EHB Docket No. 97-169-MR (Consolidated with 97-170-MR)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and N.E. HUB PARTNERS, L.P., Permittee	:	**Issued: April 29, 1998**

OPINION AND ORDER
ON PETITION FOR RECONSIDERATION

by Robert D. Myers, Administrative Law Judge

Synopsis:

A Petition for Reconsideration of an interlocutory order with respect to a motion for summary judgment is denied where the petitioner failed to show extraordinary circumstances which would justify reconsideration of an issue involving 25 Pa. Code § 78.81(d)(2).

OPINION

On April 7, 1998, the Board issued an Opinion and Order denying summary judgment to CNG Transmission Corporation and Penn Fuel Gas, Inc. (collectively, Appellants) on their appeal of the Department of Environmental Protection's (Department) issuance of Gas Well Permit Nos. 37-117-20168 and 37-117-20169 (Permits) to N.E. Hub Partners, L.P. (Permittee). The Permits allow Permittee to drill two salt cavern gas storage wells in Farmington Township, Tioga County, Pennsylvania.

One of the questions addressed in the Board's decision was whether the Department issued the Permits without complying with 25 Pa. Code § 78.81(d)(2). This is a regulation which requires that casing for a well drilled through a gas storage reservoir or a reservoir protective area be installed according to a procedure approved by the Department and established by mutual agreement between the well operator and the gas storage reservoir operator. On this particular question, we held that Appellants were not entitled to summary judgment because the evidence before the Board raised a genuine issue of material fact as to whether there was mutual agreement between Permittee and CNG Transmission Corporation, the gas storage reservoir operator, with regard to the casing installation procedure.

Appellants have filed a timely[1] Petition for Reconsideration (Petition) asking the Board to reexamine whether the Department failed to comply with 25 Pa. Code § 78.81(d)(2). The Department and Permittee have filed a timely[2] Joint Answer to Appellants' Petition.

The Board will not grant reconsideration of an interlocutory order absent "extraordinary circumstances." 25 Pa. Code § 1021.123. To show that "extraordinary circumstances" exist, the petition must meet the criteria for reconsideration of final orders and, in addition, show that special circumstances are present which justify the Board taking the extraordinary step of reconsidering an interlocutory order. *Reading Anthracite Company v. DEP*, EHB Docket No. 95-196-C (Opinion issued March 11, 1998.) The Board will reconsider a final order for "compelling and persuasive

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[1] The Petition was filed on April 17, 1998, within 10 days of the date of our Opinion and Order, as required by our rules of procedure at 25 Pa. Code § 1021.123(a).

[2] The Joint Answer was filed on April 27, 1998, within 10 days of service of the Petition upon the Department and Permittee. 25 Pa. Code § 1021.123(b).

reasons." 25 Pa. Code § 1021.124(a). The Board will find "compelling and persuasive reasons" for reconsideration of a final order where the final order rests on a legal ground or a factual finding which has not been proposed by any party, or where the petitioner sets forth crucial facts which are inconsistent with the Board's findings. 25 Pa. Code § 1021.124(a).

Appellants assert here that, contrary to the Board's determination, it is *undisputed* that Permittee and CNG Transmission Corporation never reached mutual agreement on a casing installation procedure; therefore, the Department failed to comply with 25 Pa. Code § 78.81(d)(2), and Appellants are entitled to judgment as a matter of law. Appellants also assert that any evidence that CNG Transmission Corporation refused to agree on a casing installation procedure because of animus towards Permittee is irrelevant.

The truth of Appellants' assertions, and whether they set forth extraordinary circumstances to justify reconsideration, depends on the meaning of the phrase "shall be installed according to a procedure ... established by mutual agreement between the well operator and the gas storage reservoir operator" in 25 Pa. Code § 78.81(d)(2). The regulation clearly states that casing *shall be installed* according to a procedure *established by* the well and reservoir operators. 25 Pa. Code § 78.81(d)(2) (emphasis added). Such language imposes on both the well operator *and the reservoir operator* a duty to establish a casing installation procedure by mutual agreement. Evidence which suggests that a reservoir operator has refused to fulfill this legal obligation,[3] for whatever reason, is relevant to consideration of the Department's action pursuant to 25 Pa. Code § 78.81(d)(2). In this

[3] Because the evidence suggests that CNG Transmission Corporation did not fulfill its legal obligation under the regulation, Appellants cannot argue that their motive for doing a *lawful* act is immaterial.

case, then, evidence that CNG Transmission Corporation refused to establish a procedure by mutual agreement under 25 Pa. Code § 78.81(d)(2) because of animus towards Permittee is relevant.

As to whether the parties dispute the existence of a mutual agreement with respect to the casing installation procedure, the Department and Permittee presented evidence which suggests that CNG Transmission Corporation has no data to support its objections to Permittee's proposed casing installation procedure.[4] Based on this evidence, the Department and Permittee argue that, but for animus towards Permittee, CNG Transmission Corporation *would agree* with Permittee's casing installation procedure. Appellants, however, insist that "there was [n]ever any kind of agreement -- formal, informal, written, oral, executed, unexecuted, in principle, *or otherwise* -- regarding [Permittee's] casing [installation] procedure." (Petition at para. 5.) (Emphasis added.) Obviously, the Department and Permittee disagree. Therefore, we will not grant reconsideration here.

Appellants also ask the Board to reconsider its decision because it is *undisputed* that the Department never approved Permittee's casing installation procedure as required by 25 Pa.Code § 78.81(d)(2). The Board did not specifically address this question in its Opinion and Order because it was not necessary to do so. Having determined that there was a dispute with respect to the *existence* of a mutual agreement, it naturally follows that the parties dispute any alleged approval by the Department. Appellants believe there never was any agreement establishing an installation procedure; logically, there could not be approval of something that did not exist. The Department

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[4] We recognize that the record contains certain technical documents, cited by Appellants in their Petition, which are critical of Permittee's casing procedures; however, the record also contains evidence which supports the position of the Department and Permittee. On a motion for summary judgment, the record must be viewed in the light most favorable to the nonmoving party, and all doubts as to the existence of a disputed material fact must be resolved against the moving party. *Ducjai v. Dennis,* 656 A.2d 102 (Pa. 1995).

and Permittee, on the other hand, believe that there was some manner of agreement with respect to the procedure, and that the procedure was implicitly approved by the Department. Because it is self-evident that the parties dispute the Department's approval of an installation procedure established by mutual agreement, we will not grant reconsideration for failure to address that question.

Appellants have not set forth in their Petition extraordinary circumstances to justify the Board's reconsideration here; accordingly, Appellants' Petition is denied.

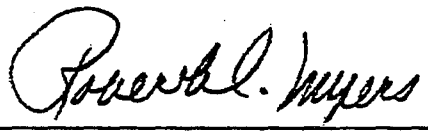
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CNG TRANSMISSION CORPORATION, and PENN FUEL GAS, INC.	:	
v.	:	**EHB Docket No. 97-169-MR**
	:	**(Consolidated with 97-170-MR)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and N.E. HUB PARTNERS, L.P., Permittee	:	

ORDER

AND NOW, this 29th day of April, 1998, it is ordered that Appellants' Petition for Reconsideration is **denied.**

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: April 29, 1998

See next page for a service list.

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UNIVERSITY AREA JOINT AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 96-109-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 5, 1998**

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

by Robert D. Myers, Administrative Law Judge

Synopsis:

The Department's Motion to Dismiss is denied and Appellant's Motion for Summary Judgment is granted where: (1) Appellant submitted an Act 339 application form to the Department and requested a subsidy for interest during construction based on the maximum allowable interest rate of 1.5%; (2) while Appellant's application was pending, the Board declared the Department's long-standing use of the 1.5% limit to be invalid; (3) the Department appealed the Board's decision to Commonwealth Court but did not inform those with pending applications of this change in the law; and (4) before Commonwealth Court decided the appeal, the Department rendered its final decision on Appellant's application, allowing only the 1.5% subsidy for interest during construction. The Board holds that: (1) the Department should have calculated Appellant's interest subsidy based on actual interest costs incurred; (2) Appellant's failure to amend its application before the Department's action is irrelevant given the short amount of time to do so and the pending appeal at

Commonwealth Court; and (3) the Department had some responsibility to inform interested parties about the change in the law governing Act 339 applications. Accordingly, the case is remanded to the Department for recalculation of Appellant's interest subsidy based on actual interest costs incurred.

OPINION

On May 22, 1996, University Area Joint Authority (Appellant) filed a Notice of Appeal with the Board challenging the Department of Environmental Protection's (Department) April 22, 1996 decision with respect to Appellant's 1994 application for a state subsidy under Act 339.[1] Under Act 339, the Commonwealth provides an annual operating subsidy based on the cost of acquisition and construction of publicly-owned sewage treatment plants which includes an amount for "interest during construction." 25 Pa. Code § 103.32. Appellant contends that the Department improperly calculated this interest allowance based on a 1.5% interest rate.

On June 28, 1996, the parties informed the Board that this appeal "may be substantially impacted" by cross appeals taken from the Board's February 13, 1996 decision in *City of Philadelphia v. DEP*, 1996 EHB 47. In that case, the Board held that the Department's "use of the 1.5% interest expense limitation is a violation of [the Department's regulation at 25 Pa. Code § 103.25(b)]." *Id.* at 87. The Board further held that the Department "must subsidize [interest during construction] based on the actual interest expense rate incurred." *Id.* at 111. The Board also noted: "If [the Department] used actual interest costs for Philadelphia it would have to use it as to *all other applicants*." *City of Philadelphia*, 1996 EHB at 83 (emphasis added). Thus, the parties requested

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[1] Act of August 20, 1953, P.L. 1217, *as amended*, 35 P. S. §§ 701-703.

that the Board stay the proceedings in this case pending disposition of the appeals in Commonwealth Court. The Board granted the request on July 2, 1996.

The Commonwealth Court issued its decision in *City of Philadelphia* on April 7, 1997. With respect to the Department's use of the 1.5% interest rate in calculating interest during construction, the Commonwealth Court held:

> We ... agree with the [Board] that [the Department] may not arbitrarily limit an Act 339 applicant's allowance for interest during construction to 1.5%. An applicant's actual interest costs must be utilized in calculating the amount of its subsidy.

Department of Environmental Protection v. City of Philadelphia, 692 A.2d 598, 605 (Pa. Cmwlth. 1997). The Commonwealth Court explained: "If the City, *or any applicant*, is arbitrarily limited to a 1.5% rate of interest, it will not be receiving the full subsidy to which it is entitled." *Id.* at 604 (emphasis added).

On July 14, 1997, the Board issued a Rule to Show Cause why the appeal should not be dismissed as moot in light of the Commonwealth Court's decision. On August 4, 1997, Appellant responded, in essence, that the matter was not moot because the Department had not altered its position with respect to Appellant's subsidy despite the Commonwealth Court's ruling. The Board discharged the Rule on August 11, 1997, and set a schedule for completion of discovery and filing of dispositive motions.

On February 6, 1998, Appellant filed the instant Motion for Summary Judgment and a supporting Memorandum of Law. Appellant argues that it is entitled to judgment as a matter of law under *City of Philadelphia*.

On February 9, 1998, the Department filed a Motion to Dismiss and a supporting

Memorandum of Law. In this motion, the Department asks the Board to dismiss the appeal for lack of standing. The Department contends that Appellant was not aggrieved by the Department's action in this case because Appellant's application form requested only a 1.5% subsidy for interest during construction and because the Department allowed the amount requested. The Department also argues that, because the Department gave Appellant the amount of interest requested on the application, the Department did not abuse its discretion.

On March 3, 1998, the Department filed a Response to Appellant's Motion for Summary Judgment and a Memorandum of Law. In its Response, the Department claims that the Commonwealth Court decision did not mandate that the Department "amend or recalculate pending Act 339 applications to use an interest factor other than that which was requested by the applicant." (Department's Response, para. 5.) The Department also believes it is significant that Appellant did not try to amend its pending application after the Board's February 13, 1996 decision.

On March 6, 1998, Appellant filed a Response to the Department's Motion to Dismiss and a Memorandum of Law. In the Response, Appellant points out that: (1) the Department created the Act 339 application form; (2) under 25 Pa. Code § 103.23(b), applicants *must* use the form to apply for the Act 339 subsidy; and (3) the form limits the interest allowance to 1.5%.

On March 23, 1998, Appellant filed a Reply Memorandum of Law in support of its Motion for Summary Judgment. Appellant argues therein that *City of Philadelphia* requires the use of actual interest costs, and that the Department is not excused from complying with the law because of Appellant's failure to amend its application.

On March 26, 1998, the Department filed a Reply to Appellant's Response to the Department's Motion to Dismiss and a Reply Memorandum of Law. In this filing, the Department

contends again that this case is distinguishable from *City of Philadelphia* because Appellant did not seek actual interest costs.

Stripped to its core, the controversy is whether Appellant is entitled to a subsidy, based on its actual interest cost instead of the 1.5%, when it did not claim it on its Act 339 application for the year 1994. Both parties agree that, at the time when the 1994 application was filed on or about January 30, 1995, and for every year prior to that going back to 1953, the first year of the subsidy program, the Department has limited the interest cost calculation to 1.5%, and the application form has contained a statement to that effect. In recognition of this policy, Appellant claimed only a 1.5% interest cost in its 1994 application.

While the application was pending before the Department, this Board issued an adjudication on February 13, 1996 in *City of Philadelphia v. DEP*, 1996 EHB 47. That adjudication dealt with a number of Act 339 issues, including interest during construction. We held on that issue, for the first time, that actual interest cost had to be worked into the subsidy calculation rather than the Department's arbitrary 1.5%. This decision was appealed by both parties to Commonwealth Court by mid-March, 30 days after the issuance.

About a month later, on April 22, 1996, the Department rendered a decision on Appellant's 1994 application, calculating interest cost by using a 1.5% rate. Aware by this time of the *City of Philadelphia* decision, Appellant filed the present appeal with the Board on May 22, 1996, challenging the use of the 1.5% rate. Recognizing the potential impact of Commonwealth Court's decision in *City of Philadelphia*, the parties jointly requested us to stay the appeal pending that decision. We granted the request, and, as already noted, Commonwealth Court affirmed us in that case.

The Department argues that Appellant cannot take advantage of *City of Philadelphia* because it did not claim the actual interest cost in its application. We disagree. Given the contents of the application form and the 40-year Department policy, Appellant had no reason to claim its actual interest cost when it filed the application in January 1995. A reason to do so did not arise until a year later when the Board decided *City of Philadelphia.* At that point, the Department contends, Appellant should have filed an amended application if it wanted to come within the scope of *City of Philadelphia.*

That certainly would have been the prudent thing to do, but there was only a 69-day window between the Board's decision and the Department's action on Appellant's 1994 application. Even a very diligent applicant might have had difficulty acting within this time period. When that fact is considered along with the Department's non-acceptance of the Board's ruling, evidenced by its appeal to Commonwealth Court, there is an additional reason why an applicant might decide to hold off until the legal issue was finally resolved.

Besides, we believe the Department has some responsibility here. When a long-standing Department policy, reflected in its forms, is changed, whether by Department edict or judicial decision, it has a duty to communicate that change to affected parties. There is no suggestion that the Department did that here;[2] and it would be unreasonable to expect such action while an appeal was pending in Commonwealth Court. But it is just as unreasonable, in our judgment, to expect

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[2] Indeed, there is no evidence here that the Department published its new position with respect to the 1.5% interest limit as a "statement of policy" or took steps to promulgate it a "regulation." *See* Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, *as amended*, 45 P. S. §§ 1102 and 1201; *Department of Environmental Resources v. Rushton Mining*, 591 A.2d 1168 (Pa. Cmwlth. 1991). Absent some kind of notice, affected parties could not have known the Department's policy of imposing the 1.5% interest limit unless an amended application is filed.

applicants to file amendments to their applications, especially here where there was such a short period of time in which to become aware of the opportunity and then take advantage of it.

Appellant preserved its rights by filing an appeal with the Board challenging the 1.5% rate, an appeal sensibly stayed while *City of Philadelphia* pended appellate court action. Now, it has provided its actual interest cost and is entitled to have its 1994 Act 339 subsidy recalculated on that basis. Accordingly, we will deny the Department's Motion to Dismiss, grant the Appellant's Motion for Summary Judgment,[3] and remand the case to the Department.

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[3] The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions of record, 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. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

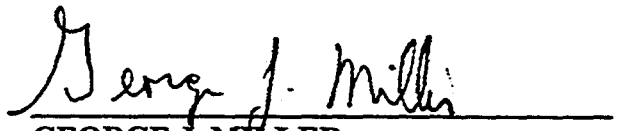
UNIVERSITY AREA JOINT AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 96-109-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 5th day of May, 1998, it is ordered that the Department of Environmental Protection's (Department) Motion to Dismiss is **denied**. It is further ordered that the Motion for Summary Judgment filed by Appellant University Area Joint Authority is **granted**. This case is remanded to the Department for recalculation of Appellant's 1994 Act 339 subsidy for interest during construction based on the actual interest incurred by Appellant.

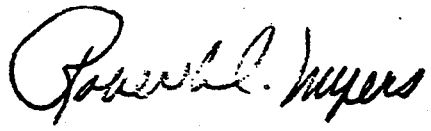
Jurisdiction relinquished.

ENVIRONMENTAL HEARING BOARD



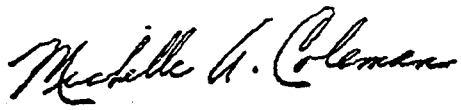
GEORGE J. MILLER
Administrative Law Judge
Chairman

EHB Docket No. 96-103-MR



ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 5, 1998

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M.W. FARMER CO.	:	
	:	
v.	:	**EHB Docket No. 98-055-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 5, 1998**

OPINION AND ORDER
ON PETITION FOR SUPERSEDEAS

by Robert D. Myers, Administrative Law Judge

Synopsis:

A Petition for Supersedeas is denied where Appellant failed to demonstrate irreparable harm, a likelihood of success on the merits, or the likelihood of injury to the public.

OPINION

On March 26, 1998, M.W. Farmer, Co. (Appellant) filed a Notice of Appeal, a Petition for Temporary Supersedeas, and a Petition for Supersedeas with the Board. In the Notice of Appeal, Appellant challenged the Department of Environmental Protection's (Department) March 24, 1998 Order suspending Appellant's Company Certification ID No. 19 for a period of 90 days pursuant to the Storage Tank and Spill Prevention Act.[1] The Order prohibits storage tank handling and inspection activities during the suspension period by Appellant and the certified inspectors and

[1] Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101-6021.2104.

installers employed by Appellant.

On April 8, 1998, after a conference call, the Board granted Appellant's Petition for Temporary Supersedeas. The Board then held a hearing with respect to Appellant's Petition for Supersedeas on April 22, 1998. The parties stipulated at the hearing that, in ruling on Appellant's Petition for Supersedeas, the Board may consider all evidence admitted at the March 26, 1998 supersedeas hearing in *Farmer v. DEP*, EHB Docket No. 98-050-MR. On April 29, 1998, the transcript of the April 22, 1998 hearing was filed with the Board. The Department filed a brief on the same date.

In granting or denying a supersedeas, the Board will be guided by relevant judicial precedent and the Board's own precedent. The Board will consider: (1) irreparable harm to the petitioner; (2) the likelihood of the petitioner prevailing on the merits; and (3) the likelihood of injury to the public. 25 Pa. Code § 1021.78(a). A supersedeas will not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect. 25 Pa. Code § 1021.78(b).

I. Irreparable Harm

Appellant argues that the Department's 90-day suspension of its company certification will cause the company to suffer a substantial financial loss. *See Empire Sanitary Landfill v. DER*, 1991 EHB 102 (holding that significant financial loss constitutes irreparable harm).

Michael W. Farmer (Farmer), president of the company, testified that the Department's action would affect about 20 contracts, including a $200,000 contract with Northeastern Petroleum to build a service station in Carbondale, a $309,000 contract with Pennfern Oil to do the same thing in Russell Hill, and a $250,000 contract with Williams Oil Company. Farmer testified that the

company would not be able to complete these contracts and would lose these amounts in income "if the company loses its certification." Indeed, according to Farmer, "if the [90-day] suspension goes through," the company cannot survive. (Hearing of April 22, 1998, N.T. at 27-31.)

We have difficulty accepting Farmer's bleak assessment. Farmer has testified that 30 per cent of the company's work does not require certification. (Hearing of March 26, 1998, N.T. at 80.) For example, the company is doing "a changeover on a canopy to the new Texaco image" and two environmental remediation projects which do not require certification. (Hearing of April 22, 1998, N.T. at 40.) Thus, the company would be able to function to some extent without certification for 90 days.

With respect to the 20 contracts, we cannot determine from the meager evidence before us whether the company would lose any money on those contracts because of the 90-day suspension. Unfortunately, none of the contracts has been offered into evidence here. Thus, except for Farmer's testimony on the total dollar amount of three contracts, we do not know any of the specific terms and conditions of the contracts. Farmer testified that each contract has a definite start date, but he did not state for the record *any* of the 20 start dates. Farmer also testified that, although the contracts do not have required completion dates, the work had to be done by December 1998 because of a legal deadline.[2] (Hearing of April 22, 1998, N.T. at 45-46.) However, Farmer did *not* indicate whether he could renegotiate the start dates, begin work after the 90-day suspension period, and still complete the work by December 1998.

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[2] Philip M. Zechman, witness for the Department, testified that *some* of the work is *probably* under a December 22, 1998 deadline for certain types of tank handling work. (Hearing of April 22, 1998, N.T. at 81.)

We have no doubt that Appellant will suffer some financial loss from the 90-day suspension of the company certification; however, there is simply not enough evidence in the record before us to show that the loss would be significant and, therefore, irreparable.[3]

II. Likelihood of Success on the Merits

Appellant next argues that it is likely to prevail on the merits in this case. The Department suspended Appellant's company certification pursuant to 25 Pa. Code § 245.123, which provides in pertinent part as follows:

> (a) The Department may suspend the certification of a certified company for good cause, which includes, but is not limited to:
>
> (1) A violation of the act or this chapter by the company or a certified installer or certified inspector employed by the company.

Under this provision, the Department was justified in suspending the Appellant's company certification if any certified installer or certified inspector employed by the company violated one of the Department's storage tank regulations.

In Paragraph F of the Department's Order, the Department alleges that Farmer violated the Department's regulation at 25 Pa. Code § 245.106 when, on July 17, 1997, Farmer performed an inspection of underground storage tanks at Appellant's facility while employed as a certified inspector by Appellant, the owner of the tanks. The inspection violated 25 Pa. Code § 245.106 because of the obvious conflict of interest.

---

[3] Some of Farmer's testimony suggests that *his reputation* has "gone downhill" because of his problems with the Department. (Hearing of April 22, 1998, N.T. at 31-32.) However, we are concerned here with the *company's* reputation. Farmer did not describe *any* occasion where a customer or a potential customer expressed doubts about the *company* because of its problems with the Department.

We discussed this incident in *Farmer v. DEP*, EHB Docket No. 98-050-MR (Opinion issued April 9, 1998), based on the evidence presented at the March 26, 1998 supersedeas hearing.[4] We reached the following conclusion: "We believe that the evidence presently before the Board establishes that Farmer violated 25 Pa. Code § 245.106." *Farmer*, slip op. at 5. Appellant did not present any additional evidence on this matter at the April 22, 1998 hearing. Therefore, we conclude once again that Farmer violated 25 Pa. Code § 245.106.

This single violation by Farmer is sufficient to justify the Department's suspension of Appellant's company certification under 25 Pa. Code § 245.123. Accordingly, Appellant is not likely to prevail on the merits of this appeal.

III. Likelihood of Injury to the Public

Finally, Appellant asserts that granting a supersedeas in this case will cause no harm to the public. The only evidence presented by Appellant in support of this assertion is Farmer's testimony that the company has never caused harm to the public health, safety, or welfare. (Hearing of April 22, 1998, N.T. at 31.)

We have serious problems with this testimony. Counsel for Appellant asked Department witness Philip M. Zechman whether the public would be harmed if Appellant's customers were unable to complete the tank handling work that had to be done by December 1998. The following exchange occurred:

A The facilities would certainly be in violation of State and Federal law.

Q So, would the public be harmed?

---

[4] As noted above, we may consider the March 26, 1998 evidence here.

A In that context, I would say that is true.

(Hearing of April 22, 1998, N.T. at 81.) From this line of questioning, Appellant certainly suggests, and the Department agrees, that the public is harmed whenever Department regulations are violated. We have determined from the evidence before us that Farmer has violated the Department's regulation at 25 Pa. Code § 245.106. Thus, contrary to Farmer's testimony, Appellant has harmed the public through the misconduct of its president.

Indeed, we are troubled by a pattern of behavior which has emerged from the record before us. The evidence reveals an individual who lacks regard for the law which governs his own work and the work of his company. The potential threat of environmental harm, therefore, is substantial.

For all of the reasons stated above, Appellant's Petition for Supersedeas is denied.

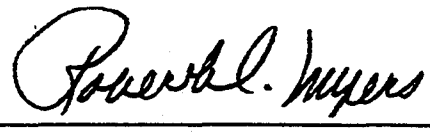
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

M.W. FARMER CO.	:	
	:	
v.	:	**EHB Docket No. 98-055-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 5th day of May, 1998, the Petition for Supersedeas filed by Appellant is **denied.**

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: May 5, 1998

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

For the Commonwealth, DEP:
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JAMES LEE AND LEE OIL COMPANY	:	
	:	**EHB Docket No. 98-035-C**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** May 6, 1998

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A Department of Environmental Protection's (Department) motion to dismiss an appeal of a declaration of bond forfeiture under the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, *as amended*, 58 P.S. §§ 601.101-601.605 (Oil and Gas Act), is denied. Where appellants are not named parties to a Department action, and their relationship to the named party is uncertain, the Board will dismiss their appeal as untimely only where it is clear that more than 30 days elapsed from publication of notice in the *Pennsylvania Bulletin*.

OPINION

This matter was initiated with the February 26, 1998, filing of a notice of appeal by James Lee and Lee Oil Company (collectively, "Appellants") of Frewsburg, NY. The notice of appeal challenged a declaration of bond forfeiture the Department issued to the Allegro Oil & Gas, Inc. (Allegro), of Jamestown, NY, on December 26, 1997. The Department declared the bonds forfeit

because Allegro allegedly failed to comply with a Department order directing it to plug certain wells it owned and operated in Sharon Township, Potter County, PA. In their notice of appeal, Appellants assert that the Department erred by declaring the bonds forfeit because it refused to plug the wells at issue and refused to allow Appellants to plug them. Appellants also ask that the Board return the bond money to them.

The Department filed a motion to dismiss and supporting memorandum of law on March 30, 1998. There, the Department contends that the Board lacks jurisdiction over the appeal because Appellants filed it more than thirty days after receiving notice of the Department's action. Appellants admit that they received the declaration of forfeiture on January 10, 1998. (Motion to dismiss, para. G; notice of appeal, para. 2(d).)

Section 1021.52(a) of the Board's rules of practice and procedure provides:

> Except as specifically provided in [25 Pa. Code] § 1021.53 (relating to appeal *nunc pro tunc*), jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of the action or within 30 days after notice of the action has been published in the *Pennsylvania Bulletin*. . . .

With the exception of third-party appeals and appeals *nunc pro tunc*, appellants before the Board must file their notice of appeal within 30 days of receiving written notice of the Department's action or publication in the *Pennsylvania Bulletin*--whichever comes first. *See, e.g., Ziccardi v. DEP*, 1997 EHB 1. However, for third-party appeals, the 30-day appeal period starts to run only upon publication of notice in the *Pennsylvania Bulletin*--even if the appellant had prior personal notice. *Lower Allen Citizens Action Group, Inc. v. DER*, 538 A.2d 130 (Pa. Cmwlth. 1988).

Appellants do not aver that they are entitled to appeal *nunc pro tunc*. Therefore, whether the

Department is entitled to dismissal of Appellants' appeal turns on two questions: When did Appellants' 30-day appeal period start to run? And, did the appeal period expire before Appellants filed their notice of appeal?

Appellants admit that they received written notice of the Department's action on January 10, 1998, but they did not file their notice of appeal until forty-seven days later. Since more than 30 days elapsed between the time Appellants' received personal notification and filed their notice of appeal, the Department would be entitled to dismissal if it were clear that Appellants were not third-party appellants. That is not the case here, however. Whether Allegro is a third-party appellant remains unclear. As the Department notes in its motion to dismiss, Appellants were *not* named parties to the declaration of forfeiture. Furthermore, according to Appellants' notice of appeal, Allegro and Appellants have different mailing addresses. Indeed, nothing in the record affirmatively shows that Appellants are related to Allegro. Yet, some averments in the notice of appeal do *suggest* that the two are related. For instance, Appellants refer to the Department preventing them from plugging and abandoning the wells, and to certified mail from the Department notifying them of the forfeiture. (Notice of Appeal, para. 2(d).) Appellants also request that the Department "return" all bonds and moneys to them. (Notice of appeal, para. 3.)

We cannot determine whether Appellants filed a timely notice of appeal because it is unclear whether their appeal period started to run when they received personal notice of the action or when the *Pennsylvania Bulletin* first published notice. If Appellants are Allegro's successors in interest, then their appeal would be untimely since they failed to file their notice of appeal within 30 days of receiving personal notice. However, if Appellants are *not* related to Allegro, then their notice of appeal would be timely so long as they filed it within 30 days of publication of notice in the

Pennsylvania Bulletin.

A moving party bears the burden of proving that it is entitled to the relief requested. *Green Thornbury Committee v. DER*, 1995 EHB 294. However, the Department has not proven that it is entitled to dismissal. It never addressed what relationship, if any, exists between Allegro and Appellants, or when, if ever, the *Pennsylvania Bulletin* published notice of the Department's action. Nor did the Department address whether Appellants would have standing to challenge a bond forfeiture issued to Allegro, even assuming they had filed a timely notice of appeal. We will not raise those issues ourselves.

Accordingly, the Department's motion to dismiss is denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES LEE AND LEE OIL COMPANY	:	
	:	**EHB Docket No. 98-035-C**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 6th day of May, 1998, the Department's motion to dismiss is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 6, 1998

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

For the Commonwealth, DEP:
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SVONAVEC, INC.	:	
	:	
v.	:	**EHB Docket No. 97-274-R**
	:	**(Consolidated with 98-019-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	**Issued: May 11, 1998**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A petition for supersedeas is denied where the Appellant has not sufficiently demonstrated a likelihood of success on the merits, irreparable harm, or that no pollution or injury will result from superseding the Department's compliance orders.

OPINION

Svonavec, Inc. (Svonavec) appeals two compliance orders issued by the Department of Environmental Protection (Department) on November 17, 1997 and December 29, 1997. The November 17, 1997 compliance order directed Svonavec to relocate two diversion ditches on its surface mine site and to remove valved dewatering pipes from its treatment ponds. The December 29, 1997 compliance order cited Svonavec for failing to comply with the earlier order. Svonavec filed a petition for supersedeas and the two appeals were consolidated at EHB Docket No. 97-274-R.

A hearing was held on the petition for supersedeas. We issue this Opinion and Order denying

Svonavec's petition based on the testimony elicited at the hearing, the parties' exhibits, and the briefs and memoranda filed by both parties.

Background

The following facts are based on the parties' pleadings and the testimony and exhibits presented at the supersedeas hearing. Svonavec is the permittee of a surface mine in Somerset County known as the Ohler Strip. On July 1, 1996, Svonavec, through its consultant Musser Engineering, Inc., requested a revision to its surface mining permit which would allow it to modify two existing erosion and sedimentation control ponds into a passive treatment system for mining discharges. (T. 409; Comm. Ex. 1)[1] A passive treatment system, as opposed to chemical treatment, utilizes a wetland with cattails and a limestone base for the treatment of mining discharges. (T. 23-24, 26) On September 23, 1996, the Department approved the passive treatment design submitted by Svonavec and issued a revision to Svonavec's surface mining permit reflecting this approval. (Comm. Ex. 1)

However, the passive treatment system approved by the Department was not implemented at the Ohler site. (T. 35) Svonavec does not dispute this. According to Svonavec's consulting engineer, Randall Musser, the plan was not implemented for several reasons. First, following the plan approval, there was a decrease in the amount of flow from that which had originally been anticipated for treatment. (T. 36) Second, Mr. Musser testified that the weather at the time of year when the plan was approved was too wet for construction to take place. (T. 36-37) Third, in 1997,

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[1] "T. __" is a reference to a page in the transcript of the supersedeas hearing. "Comm. Ex. __" refers to an exhibit of the Commonwealth, Department of Environmental Protection. "App. Ex. __" refers to an exhibit of the Appellant, Svonavec, Inc.

following the plan approval, additional seeps were discovered by the Department downslope of the initial seep area. These new seeps could not be directed through the passive system as it was designed. (T. 37-38) However, although the Department required Svonavec to capture the newly discovered seeps, it did not require Svonavec to direct the new seeps to the proposed passive treatment system. (T. 381-82)

Rather than implement the passive treatment system, Svonavec elected to engage in chemical treatment of its mining discharges. (T. 54) Svonavec does not dispute that a plan for chemical treatment was not submitted to nor approved by the Department. (T.54-55) Nor does the record demonstrate that Svonavec requested approval from the Department to forego the passive treatment system and replace it with chemical treatment.

The compliance orders which are the subject of this appeal were issued on November 17, 1997 and December 29, 1997. The November 17, 1997 compliance order states that Svonavec is not in compliance with its surface mining permit because of its failure to install diversion ditches and remove valved dewatering pipes as per the September 23, 1996 revision to its permit. The compliance order further directs Svonavec to construct the diversion ditches and remove the valved dewatering pipes in accordance with the September 23, 1996 permit revision. The December 29, 1997 compliance order cites Svonavec for failing to take the action set forth in the earlier order.

Standards for Obtaining Supersedeas

In order to obtain a supersedeas, Svonavec must prove by a preponderance of the evidence that (1) it is likely to prevail on the merits of its appeal; (2) there is little or no chance of injury to the public or other parties if the supersedeas is granted; and (3) it will suffer irreparable harm if the supersedeas is not granted. *Indian Lake Borough v. DEP*, 1996 EHB 1372; Section 4(d)(1) of the

Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.78(a).

The Board must balance these factors collectively to determine if a supersedeas should be issued. *Pennsylvania Mines Corporation v. DEP*, 1996 EHB 808. Supersedeas is an extraordinary remedy which will not be granted absent a clear demonstration of appropriate need. *Oley Township v. DEP*, 1996 EHB 1359. Thus, in order for Svonavec to prevail on its petition for supersedeas, it must satisfy the above three criteria. *Id.*

Svonavec does not contest that the diversion ditches on its site are not in the locations set forth in the September 23, 1996 revision. Nor does it contest that the valved dewatering pipes have not been removed. It is Svonavec's contention that it was not required to implement the passive treatment system and, therefore, construct the diversion ditches and remove the dewatering pipes as set forth in the plan. It further asserts that it will suffer irreparable financial harm if it is required to take the action set forth in the Department's compliance orders. Finally, it asserts that no injury will result if the orders are superseded and, further, environmental harm may result from complying with the Department's orders.

Likelihood of Success on the Merits

Based on the evidence presented at the supersedeas hearing, Svonavec has not demonstrated that it is likely to succeed on the merits of its appeal.

Svonavec asserts that it was not able to implement the passive treatment system for a variety of reasons. It asserts that the weather was too wet for construction of the system at the time the plan was approved. However, the passive treatment plan was approved on September 23, 1996; Svonavec had not even begun construction of the system more than one year later when the compliance orders

in question were issued. Svonavec also asserts that the system was not designed for the decreased flow which was experienced following the plan approval, nor was it designed to capture the new seeps discovered in 1997. We note, first of all, that Svonavec was not directed to collect and treat the new seeps until July 1997, ten months after the passive treatment plan was approved. (T. 83-84, 221-22) Moreover, the Department never required Svonavec to treat the newly discovered seeps with the proposed passive system. (T. 381) This was a decision made by Svonavec. Likewise, the decision that the passive treatment design was not appropriate for the lower flows experienced after the plan approval was also made by Svonavec, not the Department. The passive treatment plan was developed, designed, and submitted for approval by Svonavec. If, subsequently, Svonavec made a decision, based on engineering concerns or business reasons, that the passive treatment plan was not appropriate for its site, Svonavec should have sought to revise its plan through proper channels with the Department. It did not have the authority to make a decision, *sua sponte*, to forego construction of the passive treatment system in favor of chemical treatment.

As it currently stands, Svonavec's surface mining permit, as revised, requires implementation of a passive treatment system for the treatment of mining discharges. Until the permit is further revised or approval is received from the Department for chemical treatment of discharges, Svonavec is in violation of its surface mining permit. Based on the evidence in the record, Svonavec has not demonstrated a likelihood of success on the merits of its appeal.

Environmental Harm

Svonavec also has not demonstrated that environmental harm will not occur if the compliance orders are superseded. The testimony on environmental harm presented by both parties is conflicting. Svonavec's witnesses testified that no environmental harm will result from leaving

the ditches in their current location or leaving the dewatering pipes in place. The Department's witnesses, specifically Surface Mining Conservation Inspector Anthony Marich and engineer William Dadamo, testified about harm which could occur if the action required by the compliance orders is not taken.

The record indicates that on at least some occasions water being discharged at the site has not met the requisite effluent standards. (T. 60, 134-35, 184) The Department's mining engineer testified that the purpose of a diversion ditch is to divert surface runoff; it is not designed to capture and divert groundwater which does not meet effluent standards. (T. 290) It is the testimony of the Department's mining inspector who is responsible for the Ohler site that a potential exists at the site for the diversion ditches, as currently located, to transport water not meeting effluent limits off the site. (T. 191)

As for the valved dewatering devices, engineer William Dadamo testified that these devices were not depicted in the design plan submitted to and approved by the Department (T. 285) and serve no purpose in the treatment system currently being employed by Svonavec. (T.278-79, 285-89) The risk associated with having the pipes in place is that the valves could be unintentionally opened due to breakage caused by aging, freezing, or vandalism. (T. 283)

Mr. Dadamo further testified that the valved pipes did not need to be physically removed to comply with the Department's order. Another method of removing the risk associated with the pipes would be to seal the pipe with a cap or with bentonite clay. (T. 307-08)

The evidence indicates that there are potential risks associated with leaving the valved dewatering pipes and diversion ditches in place. While these risks do not appear to be imminent or life-threatening, nonetheless, it is the burden of Svonavec to demonstrate by a preponderance of the

evidence that no pollution or injury to the public health, safety, or welfare will result from the grant of a supersedeas. Because the evidence indicates that some pollution or injury could occur if the compliance orders are superseded, Svonavec has not met its burden of proof with respect to this issue.

Irreparable Harm

Svonavec asserts that it will be irreparably harmed if a supersedeas is not granted because compliance with the Department's orders will involve a substantial financial cost which cannot be recouped. With its petition for supersedeas, Svonavec produced an affidavit of its engineer, John Svonavec, stating that it would cost the company at least $5000 to take the action required by the compliance orders. At the hearing, Svonavec introduced evidence that it will be required to spend in excess of $61,000 to comply with the Department's orders. (T. 104-110; App. Ex. 7) The Department disputes both figures. The Department contends that in order to calculate the cost of complying with the orders, it is first necessary to subtract the cost for any work which Svonavec would also have been required to do in connection with constructing the passive treatment system or any costs which are also involved with its current treatment system. This results in a figure less than $1000, which the Department contends is the true cost of complying with its orders. (T. 305-17)

We agree with the Department that the cost of complying with its orders must take into account, first, that some of the work involved in complying with the orders would also have been required if the passive treatment system had been implemented and, second, some of the work required by the orders is also necessary with chemical treatment. Therefore, we do not agree with Svonavec's figure of $61,000 as being an accurate representation of the cost associated with

complying with the Department's orders.

Neither side presented sufficient evidence to calculate whether the actual cost of compliance is closer to Svonavec's original figure of $5000 or the Department's figure of less than $1000. In either case, there is insufficient evidence to show that either cost is so significant as to constitute irreparable harm. *See, M.W. Farmer Co. v. DEP*, EHB Docket No. 98-055-MR (Opinion issued May 5, 1998), *slip op.* at 2-4; *Empire Sanitary Landfill v. DER*, 1991 EHB 102 (Significant financial loss may constitute irreparable harm).

Moreover, because Svonavec has failed to demonstrate a likelihood of success on the merits, even a significant cost of complying with the orders would not entitle it to a supersedeas.

We, therefore, enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SVONAVEC, INC.	:	
	:	
v.	:	**EHB Docket No. 97-274-R**
	:	**(Consolidated with 98-019-R)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 11th day of May, 1998, the Appellant's Petition for Supersedeas is **denied.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: May 11, 1998

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

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CONRAIL, INC. and CONSOLIDATED RAIL CORPORATION	:	
v.	:	**EHB Docket No. 97-198-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
CONRAIL, INC. and CONSOLIDATED RAIL CORPORATION	:	
v.	:	**EHB Docket No. 97-205-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 12, 1998**

OPINION AND ORDER
ON MOTION TO DISMISS

by Robert D. Myers, Administrative Law Judge

Synopsis:

A Motion to Dismiss two appeals is granted where the Department letters which form the basis for the appeals are not final appealable actions. Rather, the letters simply identify omissions in plans submitted to the Department for review and then request submission of revised plans within 20 days. Such letters are part of the interplay which necessarily occurs between the Department and a person who has made a submission to the Department. They provide advance warning that the Department will not approve the plans when it takes final action unless a revised plan addressing the deficiencies is submitted within the designated time period. The Board cannot become involved in such matters without turning the Department's review process into a quagmire.

OPINION

On August 8, 1997, Conrail, Inc. and Consolidated Rail Corporation (collectively, Appellants) filed a Notice of Appeal at EHB Docket No. 97-166-MR, challenging a July 9, 1997 Administrative Order of the Department of Environmental Protection (Department). The Order charged Appellants with violations of the Clean Streams Law[1] and the Solid Waste Management Act[2] at the Hollidaysburg Car Shop and Reclamation Plant in Frankstown Township and Hollidaysburg Borough, Blair County (Site), and directed remedial action.

Paragraph 7 of the Department's Order required the submission of a plan for, among other things, the interim storage, characterization, treatment and disposal of containers and associated materials. Appellants submitted such a work plan on July 22, 1997, and on August 19, 1997, the Department sent a review letter to Appellants listing 17 deficiencies in the work plan and stating that a revised work plan "should be submitted within twenty (20) days ...."

Appellants filed a Notice of Appeal on September 18, 1997, at EHB Docket No. 97-198-MR, challenging the Department's August 19, 1997 review letter. Ten days earlier, they had submitted a revised work plan, which after further modification, was approved by the Department on November 14, 1997. No appeal was taken from the final approval.

Paragraph 9 of the Department's Order required the submission of a groundwater monitoring plan. Appellants submitted such a plan also on July 22, 1997. On August 26, 1997, the Department sent a review letter listing 8 deficiencies and stating that a revised plan "should be submitted within

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[1] Act of June 22, 1937, P.L. 1987, *as amended*, 35 P. S. §§ 691.1- 691.1001.

[2] Act of July 7, 1980, P.L. 380, *as amended*, 35 P. S. §§ 6018.101 - 6018.1003.

twenty (20) days ...."

Appellants filed a Notice of Appeal on September 25, 1997, at EHB Docket No. 97-205-MR, challenging the August 26, 1997 letter. Ten days earlier, they had submitted a revised groundwater monitoring plan which had received Department approval on September 24, 1997. No appeal was taken from the final approval.

On February 5, 1998, the Board issued a Rule to Show Cause why the appeals at EHB Docket Nos. 97-166-MR, 97-198-MR, and 97-205-MR should not be consolidated. On February 25, 1998, the Department filed a response in opposition to consolidation, asserting that the appeals at EHB Docket Nos. 97-198-MR and 97-205-MR are not properly before the Board. In support of this contention, the Department filed the instant Motion to Dismiss as Moot (Motion to Dismiss) and a supporting Memorandum of Law. In an Order dated February 27, 1998, the Board decided to defer action on consolidation until the Board had decided the Department's Motion to Dismiss.

In the Motion to Dismiss, the Department first addresses the appeal at EHB Docket No. 97-198-MR involving the work plan. The Department alleges that: (1) the August 19, 1997 letter did nothing more than note a number of deficiencies in Appellants' work plan and request a revised plan; (2) on September 8, 1997, Appellants submitted a revised plan; (3) on September 29, 1997, the Department requested modifications to the revised plan; (4) Appellants made the requested changes and submitted a second revised work plan; (5) by letter dated November 14, 1997, the Department approved the second revised work plan; (6) Appellants did not appeal the Department's approval; and (7) Appellants are currently implementing the approved work plan. (Motion to Dismiss at paras. 4, 6-9.)

The Department next addresses the appeal at EHB Docket No. 97-205-MR, which involves

the groundwater monitoring plan. The Department alleges that: (1) the August 26, 1997 letter merely noted a number of deficiencies in Appellants' groundwater monitoring plan and requested submission of a revised plan; (2) on September 15, 1997, Appellants submitted a revised plan; (3) by letter dated September 24, 1997, the Department approved the revised plan; (4) Appellants did not appeal the approval; and (5) Appellants are currently implementing the approved groundwater monitoring plan. (Motion to Dismiss at paras. 12, 14-16.)

Based on these allegations, the Department argues that the August 19, 1997 and August 26, 1997 letters are not final appealable actions; therefore, the Board lacks jurisdiction over the appeals therefrom. In the alternative, the Department maintains that there is no effective relief that the Board can grant to Appellants; therefore, the Board should dismiss the appeals as moot.

On March 23, 1998, Appellants filed a Response to Motion to Dismiss and a Memorandum of Law.[3] In their Response, Appellants admit the above allegations. Appellants contend, however, that the Department's letters are final actions and, thus, are properly before the Board. (Revised Memorandum of Law at 6-9.) Appellants also maintain that the appeals are not moot because the issues raised therein are capable of repetition yet evading review. (Revised Memorandum of Law at 11.)

On April 7, 1998, the Department filed a Reply Memorandum of Law in Support of its Motion to Dismiss. In this Reply, the Department restates its view that the letters are interlocutory in nature and are not final actions. The Department points out that it took final action when it ultimately approved the revised plans. The Department also refutes Appellants' contention that the

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[3] On March 27, 1998, Appellants filed a revised Memorandum of Law.

issues raised here are capable of repetition while escaping review.

Because it is a jurisdictional question, we shall first address whether the Department's August 19, 1997 and August 26, 1997 letters constitute final appealable actions. Section 4(a) of the Environmental Hearing Board Act[4] gives the Board jurisdiction over "orders, permits, licenses or decisions" of the Department. The Board's Rules of Practice and Procedure refer to these collectively as "actions" and define the term "action" as: "An order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations or a person." 25 Pa. Code § 1021.2(a). In *Phoenix Resources, Inc. v. DER*, 1991 EHB 1681, 1684 , the Board commented on this definition as follows:

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

In addition to these comments, the Board has pointed out that the Department's review process always involves a certain amount of interplay between the Department and the person who has made a submission to the Department. *New Hanover Corporation v. DER*, 1989 EHB 1075. Until the Department has approved or disapproved a submission, the Board will not intrude upon the review process. *Id.*; *see also Epstein v. DER*, 1994 EHB 1471; *Environmental Neighbors United Front v. DER*, 1992 EHB 1247, *aff'd*, 632 A.2d 1097 (Pa. Cmwlth. 1993); and *Plymouth Township v. DER*,

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[4] Act of July 13, 1988, P.L. 530, 35 P. S. § 7514(a).

1990 EHB 974. The appealability of a particular Department letter is dictated by the language of the letter itself. *Eagle Enterprises v. DER*, 1996 EHB 1048; *M.W. Farmer Co. v. DER*, 1995 EHB 29.

The two letters here are very similar in nature. In both instances, the letter enumerates certain omissions in the proposed plan and indicates that a revised plan should be submitted within 20 days. By themselves, such letters do not have any effect on the personal or property rights, privileges, immunities, duties, liabilities or obligations of Appellants. Indeed, these letters merely give Appellants 20 days advance warning that the submitted plans *will not be approved when the Department ultimately takes final action* unless certain revisions are made to them.

Such letters are part of the interplay which necessarily occurs between the Department and a person who has made a submission to the Department for review and approval. Where needed material has been omitted from a submission, the Department will identify the deficiency and provide a period of time for correction of the problem *before taking final action*. That is precisely what happened here.

With respect to the August 19, 1997 letter, the Department requested *further* modifications after Appellants submitted their revised plan. Although Appellants did not appeal the Department's second request for changes to the plan, Appellants would presumably argue that the Board has jurisdiction to review the Department's second list of deficiencies. The Board cannot become involved in every Department request for revision of a submission to the Department. As the Board stated in *Phoenix Resources*, such appeals would create a quagmire; they would bring inevitable delay to the system and involve the Board in piecemeal adjudication of complex and integrated issues.

Because the August 19, 1997 and August 26, 1997 letters do not constitute final appealable actions of the Department, the appeals at EHB Docket Nos. 97-198-MR and 97-205-MR are dismissed for lack of jurisdiction.[5]

[5] We note that, in the appeal at EHB Docket No. 97-166-MR, which is unaffected by this Opinion and Order, Appellants challenge many provisions of the Administrative Order, including Paragraphs 7 and 9.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONRAIL, INC. and CONSOLIDATED RAIL CORPORATION	:	
v.	:	**EHB Docket No. 97-198-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
CONRAIL, INC. and CONSOLIDATED RAIL CORPORATION	:	
v.	:	**EHB Docket No. 97-205-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 12th day of May, 1998, the Department of Environmental Protection's Motion to Dismiss the above-captioned appeals is **granted**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

EHB Docket No. 97-198-MR
and 97-205-MR

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 12, 1998

c: **DEP Bureau of Litigation**
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RJM MANUFACTURING, INC.	:	
	:	
v.	:	**EHB Docket No. 97-137-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 13, 1998**

OPINION AND ORDER
ON MOTION TO DISMISS FOR MOOTNESS

by Robert D. Myers, Administrative Law Judge

Synopsis:

A Motion to Dismiss for Mootness is denied where: (1) the Department's Order requires that Appellant submit two complete air quality plan approval applications; (2) Appellant submitted two plan approval applications; and (3) the parties dispute whether Appellant's applications are in full compliance with the Department's Order.

OPINION

On June 12, 1997, RJM Manufacturing, Inc. (Appellant) filed a Notice of Appeal[1] with the Board challenging the Department of Environmental Protection's (Department) May 12, 1997 Air Pollution Abatement Order (Order). The Department's Order makes the following allegations.

In 1995, Appellant moved its manufacturing facility to a new location in Falls Township,

[1] On July 2, 1997, Appellant filed a Restated Notice of Appeal.

Bucks County, within a severe ozone nonattainment area. Appellant installed and operated three paper coaters and a flexographic printing press without obtaining air quality plan approvals and permits. After inspecting the facility, the Department discussed relevant permitting requirements with Appellant and explained what information Appellant had to submit to the Department. Appellant then submitted application Nos. 09-318-072 and 09-320-048 for the coaters and printer. However, the Department determined that the applications were incomplete and requested additional information. When Appellant failed to provide the requested information, the Department notified Appellant of its intent to return the incomplete application packages. The next day, the Department received more material from Appellant, but the Department still could not complete its technical review of the applications. (Notice of Appeal, Order.)

As a result, the Department issued its Order requiring that Appellant submit "two complete air quality plan approval application packages in accordance with all of the items delineated in ... Appendix A." (Notice of Appeal; Order at para. A.) Appendix A requires, *inter alia*, that Appellant analyze and select the "best available technology" (BAT) for minimizing VOC emissions from Appellant's coating and printing operations. (Notice of Appeal; Order, Appendix A, para. 4.)

In appealing the Order, Appellant makes the following assertions. In 1992, Appellant submitted plan approval applications for its facility, which, at that time, was located in Bensalem, Bucks County, within an ozone nonattainment area. In 1994, the Department published its intent to approve those applications, held a public hearing on the applications, and forwarded them to the Environmental Protection Agency (EPA) for approval. In 1995, Appellant moved its Bensalem facility to a new location; the Department asked only that Appellant submit a new cover page showing the facility's new address. In 1996, the EPA audited the Department's Air Program and

castigated the Department for failing to enforce federal air requirements. The Department then informed Appellant that the 1992 applications for the relocated facility had "died at EPA," that Appellant had to file new applications, and that New Source Review requirements would apply. Appellant submitted additional material, but the Department returned the submissions and issued the Order. Appellant argues that the 1992 applications were properly submitted for the relocated facility, that new applications are not necessary, and that New Source Review requirements should not apply.[2]

On March 17, 1998, the Department filed the instant Motion to Dismiss for Mootness (Motion). The Department alleges that Appellant has now submitted all of the material required by the May 12, 1997 Order. In fact, at Appellant's request, the Department sent Appellant a letter stating that it had fully complied with the Order. Even so, Appellant has refused to discontinue its appeal as moot. (Motion at paras. 4-7.) The Department argues that Appellant's appeal is moot because the Board can no longer grant meaningful or effective relief.

On April 8, 1998, Appellant filed "Objections" to the Department's Motion. According to the "Objections," Appellant submitted new applications to the Department because the Department had indicated that it might accept a plan approval package having the same terms and conditions as Appellant's 1992 applications. Two months after submitting these applications, Appellant assumed that the Department had examined the applications and found them acceptable. Thus, Appellant requested a letter from the Department acknowledging Appellant's compliance with the Order. The Department sent such a letter. However, shortly thereafter, the Department issued a Technical

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[2] The New Source Review regulations apply to a facility submitting a complete plan approval application to the Department after January 15, 1994. 25 Pa. Code § 127.202.

Deficiency Letter stating that Appellant's BAT analysis was unacceptable because Appellant had not proposed a technically and economically feasible control device. (Objections at paras. 9-13; Exhibits A, B.)

Appellant asserts that, after receiving the Technical Deficiency Letter, it was apparent to Appellant that the appeal is *not* moot because Appellant had *not* submitted all of the information requested in the Order. (Objections at para. 20.) It was equally apparent to Appellant that the Department would not accept the 1992 terms and conditions for Appellant's relocated facility. (Objections at paras. 6, 21.) Thus, Appellant argues that the Board can grant meaningful and effective relief to Appellant in this appeal by ruling that the New Source Review requirements do not apply to Appellant's facility.[3] (Objections at para. 22.)

On April 27, 1998, the Department filed a Reply to Appellant's "Objections." In this Reply, the Department notes that Appellant's "Objections" are not set forth in numbered paragraphs which correspond to those in the Motion. Thus, the "Objections" are not a proper response to the Motion. *See* 25 Pa. Code § 1021.70(e). As a result, the Department argues, the Motion's well-pleaded facts are deemed admitted, and the appeal should be dismissed. *See* 25 Pa. Code § 1021.70(f). In the alternative, the Department argues that the Board cannot rule on the applicability of New Source Review requirements because the Department has not yet determined that Appellant's facility is subject to New Source Review requirements.

A matter before the Board becomes moot when an event occurs which deprives the Board

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[3] Appellant also argues that the Department's Motion has not been timely filed. (Objections at para. 23.) We disagree. On February 26, 1998, the Board ordered the Department to file a Motion to Dismiss for Mootness on or before March 13, 1998, and the Department did so.

of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome. *In re Gross*, 476 Pa. 203, 382 A.2d 1000 (1980); *New Hanover Corporation v. DER*, 1991 EHB 1127. We will dismiss an appeal only where there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law. *Kelly Run Sanitation, Inc. v. DER*, 1995 EHB 244. We view a motion to dismiss in the light most favorable to the non-moving party. *Id.*

As a preliminary matter, we shall address the Department's contention that, because Appellant's "Objections" do not comply with 25 Pa. Code § 1021.70(e), the Board should deem all well-pleaded facts in the Motion as admitted under 25 Pa. Code § 1021.70(f). To begin, we point out that, under 25 Pa. Code § 1021.70(f), the Board will deem a party's "failure to respond to a motion" as an admission of properly-pleaded facts contained in the motion. Here, Appellant *has responded* to the Motion. Therefore, 25 Pa. Code § 1021.70(f) does not apply.

Nevertheless, it is true that Appellant's "Objections" do not comply with 25 Pa. Code § 1021.70(e) because the "Objections" are not set forth in numbered paragraphs which correspond to those in the Motion. Where an appellant fails to comply with the Board's rules of practice and procedure, the Board can impose sanctions, including dismissal of the appeal. 25 Pa. Code § 1021.125. In deciding whether to impose sanctions here, we note that the purpose of 25 Pa. Code § 1021.70(e) is to enable the Board to identify any factual disputes pertaining to a particular motion and to ascertain the reason for opposition to the motion. *See* 25 Pa. Code § 1021.70(e). In this instance, it is not difficult for the Board to discern from Appellant's "Objections" the factual disputes between the parties and the reason for Appellant's opposition to the Motion. Therefore, we will not

impose sanctions against Appellant.[4]

Having disposed of that matter, we shall now address whether Appellant's appeal should be dismissed as moot because Appellant has complied with the Department's Order and because the Board cannot grant meaningful and effective relief. For the reasons that follow, we will *not* dismiss Appellant's appeal as moot.

First, there is a material factual dispute as to whether Appellant fully complied with the Department's Order by submitting two *complete* plan approval applications *in accordance with Appendix A*. We realize that the Department told Appellant in a letter that Appellant's applications complied with the requirements of the Order. However, Appendix A of the Order states that Appellant had to choose the "best available technology" for minimizing VOC emissions at Appellant's facility, and the Department's Technical Deficiency Letter indicates that Appellant did not do so.

Second, there is a material factual dispute as to whether the Department has decided to require compliance with New Source Review requirements. The Department contends that it has not yet made a final decision on the applicability of New Source Review to Appellant's facility. However, the Department's Technical Deficiency Letter states quite clearly that the New Source Review facility threshold levels at 25 Pa. Code § 127.203 *do* apply to Appellant's facility.

Because of these factual disputes, we are unable at this time to determine whether the appeal is moot. Resolving our doubts in Appellant's favor, we deny the Department's Motion.

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[4] We admonish practitioners that the Board will not always be lenient in the enforcement of its rules, and that litigants who choose not to comply with the Board's rules always risk the possibility of sanctions.

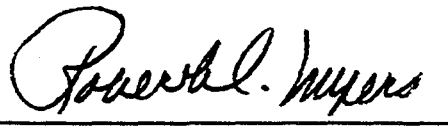
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RJM MANUFACTURING, INC.	:	
	:	
v.	:	**EHB Docket No. 97-137-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 13th day of May 1998, the Department of Environmental Protection's Motion to Dismiss for Mootness is **denied**.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: May 13, 1998

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202 ISLAND CAR WASH, L.P., EMCO CAR WASH, L.P. and CAR WASH OPERATING COMPANY, INC.	:	**EHB Docket No. 98-023-MG**
v.	:	
	:	**Issued: May 13, 1998**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By George J. Miller, Administrative Law Judge

Synopsis:

The provision of a Department Order requiring the Appellants to close the operation of gasoline dispensing facilities as a result of a past release of gasoline to the ground water is superseded based on evidence that there is no ongoing release from these facilities. The Board denies a petition for supersedeas of an order requiring that a site characterization and remedial action plan be developed and well water monitoring be performed by the Appellants based on evidence that gasoline components have been found in residential drinking water wells down gradient of the facility. While the order itself requires that a site characterization be performed in less than a month's time, Appellants had been under a duty to perform the site characterization pursuant to the Department's written request more than two months before the order was issued. The question of whether the Department may order the payment of an automatic penalty in advance of any violation of its order is reserved for final hearing, but the requirement that the penalty be paid currently as

required by the Department's Order is superseded.

OPINION

Background:

On February 11, 1998, 202 Island Car Wash, L.P., EMCO Car Wash, L.P. and Car Wash Operating Company, Inc. (Appellants) filed this appeal and Petition for a Supersedeas of the Order issued by the Department of Environmental Protection (Department) on February 5, 1998 (Department's Order) requiring Appellants and Mobil Oil Corporation (Mobil) to, among other things, conduct a prompt site assessment and remedial action relating to a suspected release of gasoline from the Facility into nearby drinking water wells. The Department's Order was entered pursuant to the Department's authority under the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended,* 35 P.S. §§ 6021.101-6021.2104 (the Storage Tank Act), the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.1-691.1001 (Clean Streams Law) and the Land Recycling and Environmental Remediation Standards Act (Act 2), Act of May 19, 1995, P.L. 4, 25 P.S. §§ 6026.101-6026.908.

By stipulation to limited facts set forth in the Department's Order, the parties have agreed that at various times before and after February 3, 1997, Appellants have owned or operated the 202 Island Car Wash (Facility) as a retail gasoline station and car wash located at 245 Wilmington Pike, Concord Township, Delaware County, Pennsylvania. The Facility sells Mobil petroleum products. Until February 3, 1997, the Facility was owned by 202 Island Car Wash, L.P., a Pennsylvania limited partnership. Since February 3, 1997, the Facility has been owned by EMCO Car Wash, L.P., a Pennsylvania limited partnership, located in Springfield, Pennsylvania. The current operator of the Facility is Car Wash Operating Company, Inc. with a business address in Chaddsford,

Pennsylvania. (Board Exhibit 1)

The Department's Order arose from the discovery of components of gasoline in a private drinking water well at 37 Ruby Road in the Conestoga Farms neighborhood in Concord Township, Delaware County in response to a complaint on March 3, 1997 of gasoline vapors in the drinking water well at that residence. (C-2)[1] Thereafter, on May 16, 1997, the Department conducted a site inspection at the Facility as part of the investigation of this ground water contamination. During this inspection, the Department determined that the Facility's three 10,000 gallon regulated gasoline underground storage tanks (the tanks) were not properly registered and that leak detection was not being conducted as required by the Department's rules and regulations. (Board Exhibit 1, ¶2; C-3A; C-5)

The Department, on July 10, 1997, asked Thomas V. Spano, the Chief Executive Officer of 202 Island Car Wash, by letter to conduct a site assessment investigation as required by 25 Pa. Code § 245.304(b)(6). The Department also requested that in the event a release was determined to have occurred that Appellants perform a site characterization as specified in 25 Pa. Code § 245.309 to determine the vertical and horizontal extent of soil and ground water contamination. (C-6) That request was not responded to by Appellants even though on August 21, 1997 Mr. Grether of 202 Island Car Wash was reminded that the requested investigation into the suspected release had not yet been conducted. Appellants had a preliminary sub-surface investigation conducted on October 6, 1997 by Waste Concepts, Inc. The laboratory results of this investigation were sent to the Appellants' consultant, Waste Concepts, on October 15, 1997. The subsequent report from

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[1] Department Exhibits are referred to as "C-__". Appellants' Exhibits are referred to as "A-__".

Waste Concepts to the Department indicated elevated levels of gasoline components in two of the three wells sampled consisting of benzene, toluene, ethylbenzene, total xylenes, naphthalene and MTBE. Ground water in one well exceeded the maximum contaminant level (MCL) for benzene, toluene, naphthalene and MTBE. The ground water sample from another well indicated contaminants exceeding the MCL for benzene and for TBE. (C-33)

As a result of these findings of a release, the Department by letter dated November 25, 1997 requested Mr. Spano to provide the Department with a work plan for a site characterization by December 24, 1997 and a site characterization report by February 27, 1998. (C-12)

The Department's Order

Because no action was taken in response to the request for a work plan and site assessment, the Department issued the Order on February 5, 1998 which is the subject of this appeal. Paragraph 1 of the Department's Order required Appellants to immediately cease operations and remove all product from the tanks at the Facility until the Department determined that all the requirements set forth in paragraph 7 of the Department's Order had been met. Paragraph 2 of the Department's Order directed the Appellants and Mobil to conduct jointly and severally a complete site characterization as require by 25 Pa. Code § 245.309 and submit a site characterization report by February 27, 1998 containing all of the information required by 25 Pa. Code § 245.310. Paragraph 3 of the Department's Order directed Appellants and Mobil to submit no later than April 17, 1998 a remedial action plan containing the information described in 25 Pa. Code § 245.311 and, upon approval of the plan by the Department, the Appellants and Mobil were directed by Paragraph 4 of the Department's Order to implement the remedial action plan according to the schedule contained in the plan.

Paragraph 5 of the Department's Order directed Appellants and Mobil to conduct interim remedial activities at 32 Ruby Road, 33 Ruby Road, 37 Ruby Road and 47 Ruby Road. This portion of the Department's Order required the maintenance of water treatment systems at these residences so that potable water is provided at all times. In addition, it required sampling and analysis of water samples at these residences. Reports of sampling are to be supplied to the Department with estimated times of possible breakthrough of contaminants to the wells at this site. In addition, Paragraph 6 of the Department's Order required the Appellants and Mobil to sample water supplies at 52 other locations located on Wilmington-West Chester Pike, Ruby Road, Bolling Circle and Molly Lane. All untreated well water at these locations is required to be sampled on a quarterly basis, the first round of quarterly sampling beginning no later than April 4, 1998. Where the well water exceeds the standards for drinking water at these residences, a potable alternate drinking water supply is to be provided to them within three days of the date that the Appellants and Mobil receive the laboratory analysis indicating such an exceedence.

Paragraphs 7 and 8 of the Department's Order requires the Appellants to submit certain information to demonstrate, among other things, that leak detection has been properly conducted at the Facility and arrange for third party inspections to be conducted at the Facility. Finally, Paragraph 10[2] of the Department's Order states that the failure to meet the terms of the Department's Order will result in a civil penalty in the amount of $1,500 a day per violation. Appellants claim that all of the actions taken by the Department pursuant to the Department's Order are unlawful, unreasonable and unsupported by a law or regulation. The appeal specifically objects to the Department's Order claiming that certain findings of fact contained in the Department's Order are

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[2] Paragraph 9 of the Department's Order applies only to Mobil Oil Corporation.

irrelevant or factually incorrect and that Paragraphs 1-8 and Paragraph 10 of the Department's Order are without factual or legal support and are unreasonable.

The Petition for Supersedeas

The Appellants' Second Petition for Supersedeas filed on February 23, 1998, accompanied by supporting affidavits and a Second Petition for a Temporary Supersedeas, claims that all of the actions taken by the Department pursuant to the Department's Order are unlawful and should be stayed pending disposition of the petitioners' appeal. With respect to Paragraph 1 of the Department's Order, the petition states that there is no adverse environmental impact from the continuing operations at the Facility based on documents provided to the Department indicating that the tank operations at the Facility have passed tightness tests. With respect to the remaining paragraphs of the Department's Order, the petition claims that there is no legal authority for the requirement that petitioners conduct a site characterization plan required by Paragraph 2 of the Department's Order or the remedial action plan required by Paragraph 3 of the Department's Order. The petition also claims that the requirements for conducting a site characterization and the remedial action plans are unreasonable, both as to the time frame required for performance and the necessity for performance. It also claims that the Department's Order requirements regarding tests, maintenance, installation and operation of drinking water systems is unreasonable and without legal authority.

Following the filing of the first Petition for Supersedeas and the Petition for Temporary Supersedeas, the Department itself issued a temporary stay of the requirements of Paragraph 1 of the Department's Order. After the time limit on that stay expired and the Appellants closed down

the Facility for a day, the Board issued an order on February 24, 1998 granting the Second Petition for a Temporary Supersedeas on finding that the Appellants may suffer immediate and irreparable injury before the Board could hold a hearing on the Second Petition for Supersedeas. This temporary supersedeas was also based on information submitted by the Department and the Appellants to the Board indicating that the tanks were then tight, that they and the related leak detection equipment have all appropriate certifications and there was no evidence of any leaking from the tanks at that time.

DISCUSSION

The Board is empowered to grant a supersedeas upon cause shown by section 4(d) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. § 7514(d). That provision directs that in granting or denying a supersedeas the Board is to be guided by relevant judicial precedent and the Board's own precedent. Among the factors to be considered are irreparable harm to the petitioner, the likelihood of the petitioner prevailing on the merits and the likelihood of injury to the public or other parties, such as the permittee in third party appeals. This Act also directs that no supersedeas is to be issued in cases where pollution or injury to the public health, safety or welfare exists or would be threatened during the period when the supersedeas would be in effect. The Board's regulations with respect to the issuance or denial of a Petition for Supersedeas are set forth at 25 Pa. Code §§ 1021.77 to 1021.79.

In exercising its power to issue a supersedeas the Board is guided in part by the standards set forth by the Supreme Court in *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 467 A.2d 805 (1983), in which the court held that a stay is proper if the petitioner makes a strong showing that he is likely to prevail on the merits, that he will suffer irreparable injury without

the requested relief, that the stay will not substantially harm other interested parties in the proceeding and the issuance of the stay will not adversely affect the public interest.

The Board has addressed the question of what constitutes irreparable harm in a number of decisions. Under these decisions the prospect that the petitioner may be subject to civil penalties does not constitute irreparable harm. *Empire Sanitary Landfill, Inc. v. DER*, 1991 EHB 102. However, substantial economic loss for which the Appellant has no recourse may constitute irreparable harm. *Consolidated Penn Labs v. DEP*, 1997 EHB 908; *Pennsylvania Mines Corporation v. DEP*, 1996 EHB 808. Finally, if the challenged action of the Department is without authority, the petitioner may be entitled to a supersedeas irrespective of proof of irreparable harm or the absence of harm to the public or other parties. *Wayne Drilling and Blasting, Inc. v. DER*, 1992 EHB 1; *Empire Sanitary Landfill, Inc. v. DER*, 1991 EHB 102.

Appellants' Evidence

A hearing on the Petition for Supersedeas commenced on March 2, 1998. The evidence at that time indicated that there is no ongoing release at the Facility. All required third party certification of the leak detection system was submitted to the Department and the Department at the time of the hearing had no information which would allow it to determine that there is an ongoing release. (Board Exhibit 1) The testimony of Appellants' Project Manager, Michael Grether, indicated that on February 6, 1998 the tanks and lines were tightness tested and certified as having passed. In addition, on February 12, 1998, a third-party certification attested to the proper operation of the tanks, lines and leak detection system at the car wash. Mr. Grether's testimony and the stipulation of the parties also established that water filtration systems were installed by the Appellants on residential drinking wells adjacent to the Facility at 32, 33, 37 and 42 Ruby Road.

Mr. Grether testified that he had been the Project Manager for the construction of the car wash facility which was completed in November, 1995. He also became involved in this matter in June, 1997 in responding to requests from Sarah Tubbs of the Department with respect to the location of the tank certification and inventory records. He testified that much of the information required by Paragraph 7 of the Department's Order had been supplied to the Department before the time of the hearing. The required registration form was sent to the Department on July 22, 1997 (A-2). He also testified that he sent information to Ms. Tubbs with respect to the materials used in the tanks and piping, the Department's proof of registration letter dated July 24, 1997 showing compliance with registration requirements, leak detection results performed by Crompco Corporation in July, 1997, information on the ATG system, monthly inventory records for the month of June and the name of the certified tank and piping installer. (A-3) The monthly inventory records were not original records but were reconstructed by him from cash register receipts and the ATG printout. He testified that he did an inventory reconciliation for June based on these records.

Mr. Grether acknowledged that there was an accident in April, 1997 in which one of the dispensers was knocked over by a car. The dispenser was repaired by Gateway Petroleum Technology whose service order stated "super & special line leaking at this time." (A-4) This facility was tested thereafter by Crompco and the dispensing facility failed the test. In addition, it was discovered that dispenser #8 had a drip of gasoline because of a faulty O-ring. This was prepared and a tightness test was done by Crompco after this repair passed the dispensing facility as being tight. Mr. Grether also testified to the installation of monitoring wells by consultants, Waste Concepts. He thinks the monitoring wells were installed in August or early September, 1997

and that Waste Concepts gave a copy of the report to the Department in October. When the Department then requested a site characterization, he consulted counsel.

Mr. Grether acknowledged that he was in charge of the construction of this station and that he had never been involved in the construction of a gasoline station before. He acknowledged that he did see a drip from the dispensing facility that had the faulty O-ring, but did not know whether that was a condition which had begun after the tanks were installed in July, 1995 or was a recent development.

Appellants also presented the testimony of Paul White, a professional geologist licensed to practice geology in the Commonwealth, who is employed as a Project Manager for Walter B. Satterthwaite Associates, Inc., an environmental consulting company located in West Chester, Pennsylvania. He testified that it was unreasonable to require Appellants to conduct a complete site characterization plan and submit a site characterization report by February 27, 1998 because such a study could not possibly be completed within the time limits imposed by the Department's Order of February 5, 1998. He also stated that 25 Pa. Code § 245.310 specifically grants a responsible party 180 days from reporting a release to prepare and submit a site characterization report.

Mr. White further testified that it would be unreasonable to require Appellants to prepare and submit a remedial action plan no later than April 17, 1998 as required by the Department's Order because such a plan cannot be prepared and submitted until after the site characterization study is performed. In addition, he testified at the first day of the hearing that it would be unreasonable for the Department to require Appellants to provide remedial and investigatory water sampling activities at great expense to these companies until such time as the site characterization report establishes that the contamination was caused by a leak occurring at the car wash.

Mr. White testified that he had been retained as a consultant by the Appellants in late January, 1998. He said that he had had an opportunity to review the order and the report by Waste Concepts, as well as a copy of the Phase I Environmental Assessment. He also had an opportunity to look at the Department's files by February 18 and the data created by the Department's four sampling events. He could have prepared a site characterization report by the deadline but it would not be a professional report.

Mr. White proposed through Appellant Exhibit 7 a schedule for the completion of a site characterization report and a remedial action plan if it is needed as a result of the initial investigation. He proposed that the initial investigation be completed by April 5, 1998 and that the site characterization report be prepared within the time frame of April 6 to May 29, 1998.

He testified that based on the data available, there was no indication of an ongoing release that would affect water supplies. He acknowledged that he had reviewed the Waste Concepts report, had seen the information indicating leaks at one of the dispensing facilities and had reviewed the Department's prior sampling results. He acknowledged that all of this information would be useful in preparing a site characterization report. He acknowledged that if he had been retained in November to do a site characterization report he would be further along on the study at this time.

Appellants also called Stephan Sinding, who is the Section Chief of the Storage Tank Program for the Department's Southeast Regional Office. He confirmed Paul White's testimony that the site characterization study could not be done in the three week period between February 5 and February 27, 1998. He also testified that there was adequate time for the Facility to perform a site characterization if they had started immediately after receiving the November 25, 1997 letter requesting the site characterization study.

After the Board denied the Department's motion to dismiss the petition for a supersedeas, the Department presented the testimony of Sarah Tubbs, a water quality specialist in the Storage Tank Section of the Department's Southeast Region. Her testimony generally confirmed the background facts set forth previously in this opinion. She specifically testified to a gasoline odor in the well water at 57 Ruby Road and that the laboratory results of sampling of this well indicated that benzene and MTBE were above safe drinking water standards.

She testified that her investigation indicated that the Facility was not performing any leak detection because the operator thought this was being done by Mobil. Ms. Tubbs testified to a failure of a tightness test on July 21, 1997 because of an O-ring failure and that on a September 8, 1997 inspection report to observe a tank tightness test, she learned from Mr. Grether that one of the gasoline dispensers had been knocked over by a car and that product had leaked out. The dispenser was repaired but it failed the tightness test after the repair because lines had been switched in the dispensers.

At the hearing held on May 7, 1998,[3] Ms. Tubbs testified to further sampling results in the Conestoga Farms area conducted in March, 1998 and presented the laboratory results of the findings of both that sampling event and of the earlier sampling in October, 1997. These laboratory results showed varying degrees of benzene and MTBE above drinking water standards. In the case of two residences, the levels of MTBE were in excess of the safe drinking water standard; the indicated

[3] The hearing was adjourned in the mid-afternoon of March 2, 1998 to permit the parties to resolve their dispute by a settlement agreement. The Board determined in a conference call held on April 23, 1998 that no settlement had been reached so additional hearings were scheduled to be held on May 7 and May 11, 1998.

levels of MTBE were in excess of 1ppb in the case of 10 residences in the Conestoga Farms area. The other residential wells were said to have levels of MTBE in parts per trillion.

William Payne, a Department hydrogeologist, testified that his review of the site and the information with respect to the geology of the underlying aquifer indicated that the requirement that the Appellants do well water sampling of the 52 homes specified in Paragraph 6 of the Department's Order was reasonable. He testified that the bedrock in this area is highly fractured so that the location of the flow of contamination through the fractures in the bedrock cannot be predicted. Accordingly, it is necessary to sample all of the homes in the area which might be under the influence of the southwest groundwater flow from the Facility to the Conestoga Farms area. In addition, he

referred to a storm water drain which would influence the flow of ground water from the Facility to the southwest. He further testified that the ground water gradient in the Waste Concepts report could not be relied upon because it does not indicate the ground water general flow and he could not tell from the report whether it referred to a surficial flow or flow at bedrock. He also testified that it was important that such sampling be done promptly after a release in part because of the rapidity with which MTBE dissolves in the ground water.

Kathy Nagle, a water quality specialist in the Department, testified that under the Department's regulations at 25 Pa. Code § 245.307, the Department could have required replacement of ground water supplies in all of the homes in the Conestoga Farms area because ground water monitoring showed some measurable increase of contamination of the background. She testified that the lesser requirement of doing ground water monitoring in the Conestoga Farms area was certainly reasonable from that point of view. She testified that the Department had

attempted to locate other sources of contamination in the Conestoga Farms area but were not able to do so.

The Department also called Michael Webb who testified in great detail to the performance of laboratory studies on the samples taken from the homes indicated on Commonwealth Exhibit 40 which generally supported the findings summarized in that exhibit. However, the Appellant called in rebuttal, James Smith, who cast substantial doubt on the validity of sampling results shown by that exhibit in the parts per trillion level by examination of some laboratory test reports which showed parts per trillion of MTBE in field and trip blanks. He said this may be because MTBE emissions from passing automobiles might have contaminated the samples at parts per trillion levels.

Appellants' Proposed Sampling Program

The Appellants called Paul White to testify to a more limited sampling program which he felt would be reasonable under the circumstances. These included two wells at residences which exceeded the statewide health standards as well as five residential wells where the Department's laboratory results indicated that the MTBE exceeded the Department's regulatory practical quantitation limit (PQL) under Act 2. It also included a limited number of homes located along the topographical drainage/storm area testified to by him and Mr. Payne as shown in Appellants' Exhibit 14.

On cross-examination Mr. White acknowledged that there had been a release from the Facility, that a site characterization is required and that well water sampling of some wells in the Conestoga Farms area is required. He offered no explanation for excluding from the sampling program residential wells where there were significant findings of MTBE, including 24, 34, 28 and

38 Bolling Circle and 21 Molly Lane. Some of these homes had laboratory results which were higher than others which he proposed sampling. He also testified to a USGS report which indicated that parts per trillion levels of MTBE are commonly found in urban soils.

Paragraph 1 of the Department's Order

The Board will supersede Paragraph 1 of the Department's Order which directed Appellants to immediately cease operations and remove all products from the regulated tanks at the facilities. The evidence presented at the hearing indicates that the tanks are tight and that there is no evidence of any ongoing release.[4] Accordingly, Appellants have made a strong showing that they are likely to succeed on the merits of their claim that that portion of the Department's Order is unreasonable and would subject them to irreparable harm in that they would have a substantial financial loss if they could not operate the gasoline pumps at the Facility.

The Site Assessment Report

The Board will not supersede the Department's Order with respect to the development of the site assessment report on or before February 27, 1998. The Appellants have been on notice since July, 1997 that the Department wanted a work plan to be submitted to it for a site assessment and a site characterization performed if the site characterization indicated a release. They also had been on notice since November 25, 1997 of the Department's request that a site characterization report be performed by February 27, 1998 as a result of the finding of a release by Waste Concepts in its site assessment report. Nothing in the evidence indicates that the time period from November 25,

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[4] At the hearing on May 7, 1998, Ms. Tubbs testified that inventory records submitted by Appellants might indicate an ongoing release. This was determined to result only from a recorded delivery of product which did not occur. In addition, a proper test through the automatic testing system prior to the hearing on May 11, 1998 demonstrated that there was no ongoing release.

1997 to the end of February, 1998 would not have been adequate to develop a work plan and site characterization report, and Mr. Sinding's testimony was that the required work could be done in this time period. The evidence demonstrates that the Appellants were advised by the Department based on the Waste Concepts report that a release had occurred to ground water to the area surrounding the car wash facility. Under the Department's regulations at 25 Pa. Code § 245.304, Appellants were then under an obligation to conduct the site characterization investigation as requested by the Department. Appellants chose not to do so even though the evidence shows that the Appellants had prior notification that a release had occurred by reason of a car accident to one of the gasoline dispensing facilities that resulted in a release, that one dispenser had failed a tightness test because of an O-ring failure and that a release was confirmed by Waste Concept's monitoring wells in October, 1997.

We conclude from this evidence that the Appellants have not made a strong showing that they are likely to succeed based on the contention that ample time has not been given to prepare a site characterization report prior to February 28, 1998. We view the Department's Order as a forceful reaffirmation of the Department's proper request in November, 1997 to which Appellants were obligated to respond. As indicated below, the question of whether penalties may be imposed for failure to meet the February 28, 1998 deadline under the automatic penalty clause contained in Paragraph 10 of the Department's Order will be reserved for final hearing.

The Remedial Action Plan

Paragraph 3 of the Department's Order requires the Appellants to prepare and submit to the Department no later than April 17, 1998 a remedial action plan complying with the requirements of 25 Pa. Code § 245.311. Appellants contend that this deadline is impossible to meet because the

remedial action plan can be developed only after the site assessment is complete.

Paragraph 3 of the Department's Order will not be superseded because Appellants have not made a strong showing that the time between February 27 and April 17, 1998 would not be adequate to prepare a remedial action plan had the site characterization study been submitted by February 27, 1998. We reserve for final hearing the question of whether penalties for missing this deadline may be imposed under the automatic penalty clause contained in Paragraph 10 of the Department's Order or otherwise in absence of an earlier directive from the Department to Appellants to prepare a remedial action plan in this time frame.

The Four Ruby Road Sites

Paragraph 5 of the Department's Order required the Appellants to maintain water treatment systems so that potable water is provided at all times to these residences. This has been accomplished now. The Department's Order also requires routine sampling and analysis for gasoline components as methods sufficiently sensitive to assure detection of those components. There is no evidence to indicate that this requirement of the Department's Order is unreasonable.

The Fifty-Two Other Drinking Water Wells

Paragraph 6 of the Department's Order requires the Appellants to monitor the drinking water wells at 52 other locations with addresses at the Wilmington, West Chester Pike, Ruby Road, Bolling Circle and Molly Lane locations. The untreated well water at these residences is to be tested on a quarterly basis beginning no later than April 4, 1998 and the samples are to be analyzed with methods sufficiently sensitive to assure detection of those components of gasoline.

Appellants contend that such an extensive water sampling program is totally unwarranted by available evidence of the extent of the contamination of the wells.

The testimony of Sarah Tubbs and William Payne indicate that MTBE has been found in many of the wells and that MTBE may be an indicator of the flow of a plume of other gasoline components from the Facility southwest into the Conestoga Farms area. Because of the fractured bedrock in the area and the absence of historical evidence of the details of construction of wells in the area, that there is a significant risk that any one of the wells designated by the Department for sampling may become contaminated by the release from the Appellants' Facility. The testimony of Dr. Smith and Mr. White casts some doubt as to whether or not the laboratory findings of MTBE in parts per trillion resulted from the release from the Appellants' Facility. However, the real proof as to whether MTBE exists in those wells will be in the subsequent rounds of sampling to be conducted by the Appellants. While Mr. White's testimony as to a more limited sampling program is impressive, we think the Department's more extensive sampling requirement, at least for the first one or two rounds of sampling, is a reasonable requirement to protect residents in the area which may be affected by the release. We note that the Department's Order would call for a reduction of the area to be sampled based on findings in earlier sampling results. We have no basis for believing that the Department will act unreasonably in not limiting the area to be sampled if the initial round of samplings show no contamination from the release from Appellants' Facility.

These considerations lead us to believe that Appellants have not made a strong showing that they are likely to prevail on the merits of their claim. In addition, Mr. White's testimony indicated that the difference between his proposed sampling program and that required by the Department is a difference of $20,000 per sampling event. We do not believe that this amount in the difference between the two proposed sampling programs is enough to subject the Appellants to irreparable harm. In superseding Paragraph 1 of the Department's Order, we have held that irreparable harm

results from an order which requires, without justification, that the Appellants cease their business activity. However, the mere expenditure of increased amounts for sampling at the indicated cost does not in our view amount to irreparable harm when weighed against the possible harm to the public in the event a full and complete study of the effects of the release at Appellants' Facility is not completed.

In sustaining the Department's requirement for sampling, we are also mindful that Section 1303 of the Storage Tank Act would authorize the Department to require the restoration or replacement of any water supply which is either affected or diminished by a release. The Department's decision not to require that but to require sampling is not unreasonable.

The Automatic Penalty Provision

Paragraph 10 of the Department's Order provides that the failure of Appellants to comply with the Department's Order will result in an automatic penalty of $1,500 a day per violation for failure to comply with the deadlines or requirements specified in the other paragraphs of the Department's Order. The penalty is said by the Department's Order to be automatic and is to be paid without notice. The Department's Order states that penalty payment shall be submitted to the Department by hand-delivery or certified mail. The Department's Order does not specify whether those payments are to be submitted on a daily, weekly, monthly or other basis.

The Department's Order purports to impose this penalty pursuant to the provisions of Section 1307 of the Storage Tank Act, 35 P.S. §§ 6021.1307. Section 1307 of the Storage Tank Act permits the Department to assess a penalty whether or not the violation is willful and limits the civil penalty to an amount not exceeding $10,000 per day for each violation. The Act further provides:

> In determining the amount of the penalty, the Department shall

> consider the wilfulness of the violation; damage to air, water, land or other natural resources of this Commonwealth or their uses; cost of restoration and abatement; savings resulting to the person in consequence of the violation; deterrence of future violation; and other relevant factors.

The Department claims that the $1,500 per day penalty is much lower than the $10,000 per day penalty that it might assess. Accordingly, the Department argues that it is unnecessary to consider all of these factors in advance of any violation of the Department's Order under the circumstances of this case. It also argues that its ability to assess such a penalty in advance is important to its enforcement efforts. Appellants point out, among other things, that such a penalty assessment made in advance of any violation of the Department's Order cannot account for the mandatory statutory factors, as well as other important considerations, such as the inability of the Appellants to sample many of the wells because of a lawyer's advice to residents not to permit sampling.

We note that subparagraph 1307(b) of the Storage Tank Act gives the person charged with the penalty 30 days to pay the proposed penalty in full or, if the person wishes to contest the amount of the penalty or the fact of the violation, forward the proposed amount of the penalty to the Department within the 30 day period for placement in an escrow account with the State Treasurer or any Pennsylvania bank or post an appeal bond to the Department. Contesting the payment would also require filing an appeal with the Board within 30 days of the claimed penalty. This requirement of filing multiple appeals to contest the amount of the penalty would impose a substantial burden on Appellants.

The overall validity of such an automatic penalty provision has never been considered by the full Board. The presiding judge believes that it would be inappropriate for him to pre-judge the

validity of such a provision in this proceeding where the Department is willing to waive the requirement that the penalty be paid currently. In addition, the prospect that penalties may be imposed does not constitute irreparable harm which would ordinarily entitle the Appellants to a supersedeas. *Empire Sanitary Landfill v. DER*, 1991 EHB 102.

Accordingly, so much of Paragraph 10 of the Department's Order as it may be interpreted to require current payment of the proposed penalty will be superseded. The question of the validity of such an automatic penalty under the circumstances of the Department's Order will be reserved for the final hearing and adjudication.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

202 ISLAND CAR WASH, L.P., EMCO CAR WASH, L.P. and CAR WASH OPERATING COMPANY, INC.	:	
v.	:	**EHB Docket No. 98-023-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 13th day of May, 1998, following the completion of the hearing on Appellants' Petition for a Supersedeas, IT IS HEREBY ORDERED as follows:

1. The Petition for a Supersedeas with respect to Paragraph 1 of the Department's Order dated February 5, 1998 is granted and that provision of the Department's Order is superseded.

2. The Petition for a Supersedeas of Paragraphs 2-6 of the Department's Order is denied.

3. The Petition for Supersedeas of Paragraph 10 of the Department's Order is granted only to the extent that current payment of the penalty will not be required. The petition with respect to the validity of the automatic penalty provision as contained in the Department's Order will be considered by the full Board after a final hearing on the merits.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: **May 13, 1998**

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

For the Commonwealth, DEP:
Stanley Sneath, Esquire
Southeast Region

For Appellant:
Philip L. Hinerman, Esquire
FOX, ROTHSCHILD, O'BRIEN & FRANKEL
Philadelphia, PA

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