Environmental Hearing Board

Adjudications and Opinions

2007
VOLUME I

COMMONWEALTH OF PENNSYLVANIA
Thomas W. Renwand, Acting Chairman

JUDGES

OF THE

ENVIRONMENTAL HEARING BOARD

2007

Chief Judge and Chairman (Resigned April 6, 2007)	Michael L. Krancer
Acting Chairman and Chief Judge (Effective April 7, 2007)	Thomas W. Renwand
Judge	George J. Miller
Judge	Michelle A. Coleman
Judge	Bernard A. Labuskes, Jr.
Secretary	William T. Phillipy [IV]

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2007.

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.

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BP PRODUCTS NORTH AMERICA, INC.	:	
	:	
v.	:	**EHB Docket No. 2005-032-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 11, 2007**

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis:

In the context of a motion for partial summary judgment, the Board refuses to hold as a matter of law that the Department must use the effluent limits contained in a general permit when it issues an individual NPDES permit for a petroleum marketing terminal.

OPINION

BP Products North America, Inc. ("BP") filed this appeal from an NPDES permit that the Department of Environmental Protection (the "Department") issued to BP Exploration & Oil, Inc. authorizing a discharge from a petroleum marketing terminal in Hempfield Township, Westmoreland County commonly known as the Greensburg Terminal. The discharge consists of contaminated runoff from the terminal's loadrack area, yard area, and storage tank farm.

Among other objections, BP objects to the permit because it establishes an effluent limitation for benzene. In its motion for partial summary judgment that is currently before us,

BP asks this Board to strike that benzene limit from the permit. BP argues that the Department acted unreasonably as a matter of law by imposing a benzene limit, or for that matter, any limit directly or indirectly applicable to benzene other than the limit for total recoverable petroleum hydrocarbons set forth in the Department's General Permit For Discharges Of Stormwater Associated With Industrial Activities ("PAG-03"). To be precise, BP concedes that the Department was authorized to issue an individual permit for the terminal; its point is that the individual permit *must*, regardless of any facts or circumstances specific to the Greensburg Terminal, be limited to the effluent limits in PAG-03. Any other limit is "inappropriate." Although BP asks us to strike the benzene limit in its entirety, it is particularly concerned with the fact that the limit imposed by the Department happens to be the same limit that is contained in the Department's General Permit For Discharges From Petroleum Product Contaminated Groundwater Remediation Systems ("PAG-05"). In a nutshell, BP's complaint is that the Department has effectively applied PAG-05 effluent limits in a situation where PAG-03 effluent limits should have been applied.

The Department, of course, defends its imposition of a benzene limit. It avers that the terminal's discharge has historically contained excessive levels of pollutants. It states that the discharge has historically demonstrated a potential to cause significant adverse environmental impacts. It disputes that the discharge is limited to mere stormwater runoff, contending instead that the discharge includes industrial wastewater. The Department argues that the PAG-03 limits would not be sufficiently protective of the receiving stream. It contends that the limits placed in BP's permit represent Best Available Technology (BAT). It states that it was reasonable for it to rely upon the extensive study that went into the development of the BAT limits in the PAG-05 permit for the same chemical constituents and the same treatment technology. The limits chosen

in fact reflect the degree of effluent reduction attainable by available technology, and it is appropriate to require that level of treatment given the circumstances presented at the Greensburg Terminal, according to the Department.

The Department retains a considerable amount of discretion in setting effluent limits in NPDES permits, *Shenango v. DEP*, EHB Docket No. 2002-259-L, (Adjudication, November 1, 2006), so long as its actions are consistent with applicable regulations and it has reasonable grounds for its decision, *Shenango; Union Township v. DEP*, 2002 EHB 50, 60. In other words, the Department's action must be supported by the facts, it must be lawful, and it must be reasonable. *O'Reilly v. DEP*, 2001 EHB 19, 32. The burden is on BP to prove to us that the Department acted unlawfully or unreasonably. *Id.*

At the outset, we reject BP's theory to the extent that it suggests that the Department is not required to issue General Permit PAG-03 to BP, but any decision to include effluent limits in an individual permit other than those set forth in PAG-03 is nevertheless arbitrary as a matter of law. BP's attempt to sever the general permit itself from the effluent limits that are set forth in the general permit is a distinction that only a lawyer could love. We reject it out of hand. If the Department has the discretion to deny coverage under a general permit, it also has the discretion to impose effluent limits different from those that are set forth in that general permit.

BP refines the point to suggest that it is not so much the permit, but the BAT analysis that went into formulating the general permit effluent limits, that must be applied to its facility. Again, however, the BAT analysis only applies if the permit applies. The limits are tied to a permit, not a regulatory, industry-wide standard. In other words, the source of the limits in this case is not a regulation that must be followed when designing a permit, *see, e.g., Shenango*, it is the permit itself. As goes the permit, so go the limits. Although general permits have some of

the characteristics of regulations, they are not in fact regulations. *ACE v. DEP*, EHB Docket No. 2005-036-L (Opinion and Order September 22, 2006).

PAG-03 is designed to cover a very wide spectrum of industrial activity in a relatively generic fashion, which suggests that the Department needs to retain considerable flexibility in applying that permit to individual circumstances. A great deal of flexibility is in fact written into the general permit itself. The Department has the express right to require any person authorized to be covered under the general permit to nevertheless obtain an individual permit. (BP Exhibit F at 19.) The permit does not apply to every industrial activity, even if the activity falls within a SIC Code that would normally be covered. For example, PAG-03 on its face provides that it may not be used to cover a discharge (1) "that contains toxic or hazardous pollutants...which...may...pose a substantial present or future hazard to...the environment when discharged into surface waters," (2) has "the potential to cause significant adverse environmental impact," or (3) "will not result in compliance with an applicable effluent limitation or water quality standard." (BP Exhibit F at 3.) The Department has promised to show that these exceptions to coverage apply in this case. If that turns out to be true, it would be incongruous, to say the least, for us to hold that the Department effectively lacks all discretion on this issue and that it *must* apply the effluent limitations derived from a permit even though that permit does not apply.

BP has not referred us to any statute, regulation, or case that would support its theory. In fact, the briefs in support of its motion are remarkably devoid of any legal authority. In the absence of clear authority to the contrary, we would be very reluctant to hold that the Department in effect has a nondiscretionary obligation to grant coverage under a general permit or to apply general permit effluent limits in an individual permit simply because a potentially

applicable general permit exists. *Cf. Shenango*, *supra* (Department has authority to include concentration limits in a permit even if the pertinent regulations only specify mass limits).[1]

The issue at hand is what, if any, effluent limits may lawfully and reasonably be included in BP's permit. Now that we have rejected BP's theory that certain limits *must* be imposed, it is immediately apparent that deciding which limits *may* be imposed will involve numerous issues of material fact, which means that summary judgment unavailable. Pa.R.C.P. 1035.2; *County of Adams v. DEP*, 687 A.2d 1222, 1224 (Pa. Cmwlth. 1997); *Zlomsowitch v. DEP*, 2003 EHB 636, 641. This point is illustrated by a few sentences in BP's Memorandum:

> The differences in the characteristics of stormwater and petroleum-contaminated groundwater drive differences in the particular technologies that are commonly employed, and that are practicable, for management of each.
>
> The Department has failed to articulate a contrary position that would justify applying standards pertaining to remediation of groundwater in the context of controlling stormwater discharge from the Greensburg Terminal. In the meantime, BP has proffered evidence to demonstrate that meeting the proposed limits would require BP to implement an untested, specially-designed activated carbon treatment technology, wholly unconventional in the petroleum marketing terminal industry, and not demonstrated to be capable of obtaining the proposed effluent limits for benzene at the Greensburg Terminal.

Memorandum at 9. These few brief sentences contain at least the following factual issues, which may or may not prove to be relevant:

- the differences in characteristics of stormwater and petroleum-contaminated groundwater
- how those differences, if any, "drive particular technologies"
- what those technologies are

[1] BP assumes that the analysis that went into the development of the limits in PAG-03 represents the Department's BPJ of what constitutes BAT for every petroleum marketing terminal in the state. BP at one point goes so far as to extrapolate from the PAG-03 limit for total recoverable hydrocarbons an "inferential" limit for benzene based upon a rather strained analysis using gasoline. There is little or no record to support some of the suppositions that underlie BP's theory.

- what technologies are "commonly employed"
- what technologies are "practicable"
- what standards are applied to groundwater
- whether those standards pertain to remediation only
- whether meeting whatever limits should be applied will require BP to implement "untested" technology
- whether that technology would need to be "specially-designed"
- whether activated carbon treatment technology is appropriate
- whether activated carbon technology is "wholly unconventional" for terminals
- whether such technology is capable of meeting whatever limits are proposed

The list of disputed factual and mixed factual and legal issues does not stop there. The parties dispute even the most basic question of whether the discharge is actually stormwater runoff. The Department contends that the discharge poses a threat to the environment. We may need to assess whether the Department exercised BPJ and did so properly in accordance with applicable regulations and procedures. We will need to evaluate the propriety of borrowing research developed in the context of formulating the PAG-05 permit in drafting BP's individual permit. These are highly technical issues that will most likely involve expert opinion.[2] In short, these are textbook examples of the type of issues that this Board will not resolve in the context of a summary judgment motion.

Accordingly, we issue the Order that follows.

[2] BP has filed a separate motion in limine based upon the Department's alleged discovery infractions. Although that motion may very well affect future proceedings including the hearing itself, we do not see it as impeding our resolution of BP's motion for partial summary judgment.

COMMONWELATH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BP PRODUCTS NORTH AMERICA, INC.	:	
	:	
v.	:	**EHB Docket No. 2005-032-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 11th day of January, 2007, it is hereby ordered that BP's motion for partial summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: January 11, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CROMWELL TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2006-058-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 19, 2007**
	:	

OPINION AND ORDER ON MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis

The Board dismisses an appeal from a Department approval of a township's Act 537 plan amendment. Subsequent to the approval, the Department issued a letter withdrawing approval of the amendment and reinstating the former Act 537 Plan. Therefore, there is no relief that the Board can provide and the township's appeal is moot.

OPINION

Before the Board is a motion by the Department of Environmental Protection to dismiss the appeal of Cromwell Township. That appeal challenges a January 12, 2006 approval of an amendment to the Township's Act 537 Plan. The Department later sent a letter which rescinded the January 12 approval and reinstated the prior version of the Township's plan. Therefore, in the Department's view, this appeal has become moot. As we explain in more detail below, we agree with the Department and grant the motion.

In its notice of appeal, the Township contends that the Board of Supervisors for the Township approved an amendment to the Township's Act 537 Plan on December 6,

2005. However, on January 3, 2006, the Supervisors reorganized without the two members who had approved the plan amendment. The new Board of Supervisors was presented with a plan amendment by the Township engineer which they believed had not yet been submitted to the Department.[1] On January 12, 2006, the Department sent a letter to the Township which approved an amendment to the Township's Act 537 Plan. The amendment provided for the regionalization of a public sewer collection, conveyance and treatment system to serve portions of the Township by a connection to the Orbisonia-Rockhill Joint Municipal Authority wastewater treatment plant. The Township filed an appeal on February 16, 2006, and objected to the approval because, among other things, it alleged that the amendment was never formally submitted to the Department by the Township for approval and that the Department's approval was prior to the completion of the Huntingdon County Planning Commission's sixty-day comment period. At some point thereafter, the Authority commenced a civil action against the Township contending that the Township had breached a sewer agreement related to the plan amendment.

On October 23, 2006, the Department sent a letter rescinding the January 12 amendment approval and reinstating the prior plan as the "official" Act 537 Plan in effect for the Township. The reason provided by the Department for the rescission was that the Department "ha[d] been informed that cooperation and negotiation between Cromwell Township and the Orbisonia-Rockhill Joint Municipal Authority have ceased and are not likely to resume."[2] The Department filed this motion on December 20, 2006, contending

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[1] Notice of Appeal, ¶¶ 2-4.
[2] Department Motion, Ex. 2.

that with the rescission of the January 12 approval, the Township has achieved its objective and the appeal is therefore moot.

The Township strenuously objects to the Department's motion. In the Township's view, the Department's rescission is merely an attempt to "undermine the Board's authority" and that without a factual determination by the Board relative to the procedures surrounding the Department's January 12 approval, the Township's litigation position in a civil action brought by the Authority before the Court of Common Pleas of Huntingdon County will be adversely affected. Specifically, misrepresentations and unfounded conclusions by the Department as expressed in the October 23d letter "will be given the weight and persuasion of a governmental agency and will have an unwarranted and significant impact on the Township's related litigation with [the Authority]."

The doctrine of mootness has been described by the Board many times. Most recently in *Morris Township v. DEP,* we stated that:

> It is axiomatic that if an event occurs during the appeal process which deprives the Board of the ability to provide effective relief or deprives an appellant of an actual stake in the outcome of a controversy, the appeal should be dismissed as moot. Generally speaking where the Department rescinds or supplants a permit condition or approval, the Board has found the appeal objecting to that condition moot. However, courts have established some narrow exceptions to the mootness doctrine, which include situations where the conduct complained of is capable of repetition but will evade review; where the case involves issues of great public importance; or where one party will suffer a detriment without the court's decision.[3]

---

[3] EHB Docket No. 2005-044-MG (Opinion issued January 19, 2006), slip op. at 2-3 (footnotes and citations omitted).

The Township has not described any relief that the Board may be able to offer concerning the rescinded approval by the Department, and in fact admits that its appeal is "technically moot."[4] Yet the Township takes the position that it has been denied a stake in the outcome of the appeal; it appears to seek a declaration by the Board concerning the rescinded approval which may put the Township in a more favorable position in its litigation with the Authority in the court of common pleas and seeks to challenge statements made by the Department in the rescission letter.

First, since the Township has achieved the result sought by its notice of appeal, any further ruling by this Board would be in the nature of an advisory opinion. The Department has already given the Township the relief that it sought: rescission of the approval. The dispute between the Township and the Authority is not directly relevant to proceedings at the Board.

Second, any "harm" that might result from the lack of a ruling by the Board concerning the approval process by the Department is speculative at best. The court of common pleas is not bound by the statements in the rescission letter which give the Department's reason for the rescission. Moreover, that court is certainly competent to resolve any factual issues that may arise concerning either the original approval or the subsequent rescission.[5] To the extent that the Department's characterization of the nature of the relationship between the Township and the Authority is relevant to the civil action,

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[4] Township Memorandum of Law at 3.

[5] The Township did not appeal the October 23d rescission letter, therefore the propriety of that letter is not properly before us. However, even if it had, the Board would not be bound by those statements. The Board has *de novo* review authority and makes its own findings of fact based on evidence adduced at a hearing, not based on facts found by the Department. *Warren Sand & Gravel v. Department of Environmental Resources,* 341 A.2d 556, 565 (Pa. Cmwlth. 1975).

that issue can be explored in the context of that dispute before the court. The concern that the court may attribute some superior level of credibility to the Department's letter is ephemeral, and that alleged potential does not rise to the level of a suffered detriment which may create an exception to the mootness doctrine.

In short, because the Department's letter which aggrieved that the Township has been withdrawn, there is no further relief that the Board can offer and the Township's appeal is moot. We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CROMWELL TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2006-058-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 19th day of January, 2007, the Department of Environmental Protection's motion to dismiss the appeal of Cromwell Township is hereby **GRANTED**. The appeal of Cromwell Township in the above-captioned matter is **DISMISSED**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

GEORGE J. MILLER
Judge

THOMAS W. RENWAND
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: January 19, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 2005-299-CP-L**
v.	:	**Issued: January 22, 2007**
VICTOR KENNEDY d/b/a KENNEDY'S MOBILE HOME PARK	:	

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board assesses a civil penalty against the operator of a mobile home park in the amount of $35,500 for 87 violations of the Clean Streams Law.

INTRODUCTION

The Department of Environmental Protection (the "Department") filed a complaint for civil penalties under the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, against Victor Kennedy, doing business as Kennedy's Mobile Home Park (hereinafter "Kennedy"). Kennedy operates a mobile home park in Marion Township, Butler County. The Department's complaint is based primarily on numerous exceedances of the effluent limits in Kennedy's National Pollutant Discharge Elimination System ("NPDES") permit over the course of several years, and Kennedy's failure to submit Discharge Monitoring Reports ("DMRs") on time as required by his permit, again, for several years.

The Department personally served the complaint on Kennedy and attached a notice to defend to the complaint. Kennedy never answered or otherwise responded to the complaint. The

Department filed a motion for default judgment. The Department served Kennedy with a copy of the motion. Kennedy did not respond to the Department's motion. We issued an Order and Opinion on May 18, 2006 granting the Department's motion and deeming all facts alleged in the Department's complaint to be admitted. *DEP v. Kennedy*, EHB Docket No. 2005-299-L (Opinion issued May 18, 2006).

We subsequently scheduled a hearing solely to hear evidence regarding the amount of civil penalties to be assessed. The Order setting the hearing date also established mandatory deadlines for the filing of pre-hearing memoranda by both parties. The Department timely filed its pre-hearing memorandum. Kennedy did not file a pre-hearing memorandum. The Board held a hearing on September 19, 2006. Kennedy appeared at the hearing *pro se*.

The Department filed its post-hearing brief on November 16, 2006. Kennedy did not file a post-hearing brief. Kennedy told Board staff in several telephone calls that he intended to file a brief, but consistent with his past course of conduct in this and his other appeals before this Board, he never followed through. The Department submitted a reply brief arguing that Kennedy has waived any defenses that he may have had.

FINDINGS OF FACT

A. Facts Deemed Admitted[1]

1. The Department is the agency with the duty and authority to administer and enforce the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§691.1-691.1001

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[1] As previously noted, on May 18, 2006, the Board issued an Opinion and Order providing that all facts in the Department's complaint for civil penalties were deemed admitted. *DEP v. Kennedy*, EHB Docket No. 2005-299-L (Opinion issued May 18, 2006).

("Clean Streams Law"); the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §§750.1-750.20a ("Sewage Facilities Act"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder ("Regulations").

2. Kennedy owns and operates a residential mobile home park, known as Kennedy Mobile Home Park ("Kennedy MHP"), located in Marion Township, Butler County. Kennedy purchased Kennedy MHP on October 19, 1995.

3. Since Kennedy became the owner Kennedy MHP he has owned and operated a sewage treatment plant ("STP") in conjunction with the ownership and operation of the Kennedy MHP.

4. The STP consists of, but is not limited to, the following treatment units: six septic tanks, two intermittent sand filters, a chlorine contact tank, an aluminum sulfate feed, and a chlorination unit.

5. The STP treats the sewage generated at the Kennedy MHP and then discharges the treated sewage effluent from the STP into an unnamed tributary to McMurray Run.

6. The STP was designed to treat an average daily sewage flow of 5,000 gallons per day.

7. On September 21, 2001, the Department transferred and issued to Kennedy Water Quality Permit No. 1072406 ("WQM Permit") for the ownership and operation of the STP.

8. On October 12, 2001, the Department transferred and reissued NPDES Permit No. PA0238490 ("NPDES Permit") to Kennedy for the ownership and operation of the STP.

9. The NPDES Permit authorizes Kennedy to discharge treated sewage effluent from the STP to an unnamed tributary to McMurray Run, according to the terms, conditions, and effluent limitations set forth in the NPDES Permit.

10. The NPDES Permit sets forth "interim effluent discharge limits" and "final effluent discharge limits."

11. The interim effluent discharge limits were applicable from October 12, 2001 through October 11, 2004 (three years after the NPDES Permit was issued).

12. The final effluent discharge limits became applicable on October 12, 2004 and remained in effect for the remaining life of the NPDES Permit.

13. The first month for which the final effluent discharge limits became applicable was November 2004.

14. The NPDES Permit set forth "interim instantaneous maximum effluent discharge limits" and "final instantaneous maximum effluent discharge limits" for various effluent constituents from the STP.

15. The interim instantaneous maximum limits were in effect from October 12, 2001 through October 11, 2004.

16. The final instantaneous maximum limits became applicable from October 12, 2004 and remain in effect for the life of the NPDES Permit.

17. The NPDES Permit required that the permittee submit to the Department DMRs for each month, signed and certified by a representative of the permittee, documenting compliance with the effluent discharge limitations set forth in the NPDES Permit.

18. The NPDES Permit required that the discharge monitoring reports be submitted to the Department within 28 days of the last day of the month for which the discharge monitoring report information pertains.

19. On April 7, 2004, Kennedy submitted to the Department, for the first time, discharge monitoring reports for the months from October 2001 through March 2004. There were 29 late

DMRs, 3 from 2001, 12 from 2002, 12 from 2003, and 2 from 2004. The October 2001 DMR was 861 days late, the November 2001 DMR was 831 days late, and so on through the February 2004 report, which was 10 days late.

20. On June 13, 2005, Kennedy submitted to the Department, for the first time, the discharge monitoring reports for the STP for the months of October 2004 through March 2005. There were 6 late DMRs. The October 2004 DMR was 197 days late, the November 2004 discharge monitoring report was 167 days late, and so on through March 2005 discharge monitoring report, which was 46 days late.

21. On August 18, 2005, Kennedy submitted to the Department, for the first time, discharge monitoring reports for the months of April and May 2005. The April 2005 discharge monitoring report 82 days late, and the May 2005 discharge monitoring report was 51 days late.

22. On August 23, 2005, Mr. Kennedy submitted to the Department, for the first time, a discharge monitoring report for the month of June 2005, which was submitted 26 days late.

23. Kennedy submitted DMRs for the following months certifying the following violations of the effluent limits in his permit:

Date	Permit Limit (mg/l)	Actual (mg/l)
October 2004	Fecal Coliform 2,000 (geo. mean)	54,005 (geo. mean)
December 2004	$CBOD_5$ 10	26.6
January 2005	$CBOD_5$ 10	17.3
	TSS 10	15.5
	TRC 1.4	2.29
February 2005	$CBOD_5$ 10	22.8
	TRC 1.4	1.425
March 2005	$CBOD_5$ 10	29.5
	TSS 10	13.0
April 2005	$CBOD_5$ 10	27.0
	TSS 10	14.5[2]

[2] Kennedy's DMR for April 2005 also reported a monthly average concentration of ammonia-nitrogen of 7.39 mg/l, in excess of the limit of 6.0 mg/l. Kennedy's DMR for the month of August 2005 certified a monthly average concentration

24. On the following dates, the Department sampled the effluent from the STP outfall and determined that the following violations of the effluent limits in Kennedy's permit occurred:

Sampling Date	Permit Limit (mg/l)	Actual (mg/l)
December 10, 2001	Ammonia-Nitrogen - 18	19.8
December 27, 2001	$CBOD_5$ - 40	62
	Ammonia-Nitrogen - 18	22.6
January 2, 2002	$CBOD_5$ - 40	161
	TSS - 50	54
	Ammonia-Nitrogen - 18	33.1
January 8, 2002	$CBOD_5$ - 40	161
	TSS - 50	194
	Ammonia-Nitrogen - 18	40.7
January 14, 2002	Ammonia-Nitrogen - 18	23.5
January 23, 2002	$CBOD_5$ - 40	69.11
	Ammonia-Nitrogen - 18	31.3
January 28, 2002	$CBOD_5$ - 40	61.53
	Ammonia-Nitrogen - 18	28.3
February 4, 2002	$CBOD_5$ - 40	63.97
	TSS - 50	58
February 11, 2002	TSS - 50	54
	Ammonia-Nitrogen - 18	19.2
February 20, 2002	$CBOD_5$ - 40	130.78
	Ammonia-Nitrogen - 18	30.8
March 11, 2002	$CBOD_5$ - 40	48.74
	Ammonia-Nitrogen - 18	21.8
March 19, 2002	$CBOD_5$ - 40	44
	Ammonia-Nitrogen - 18	21.9
April 2, 2002	$CBOD_5$ - 40	73
	Ammonia-Nitrogen - 18	21.1
April 22, 2002	TSS – 50	76
May 8, 2002	Ammonia-Nitrogen - 8	10.8
June 4, 2002	Ammonia-Nitrogen - 8	10.7
June 24, 2002	Ammonia-Nitrogen - 8	8.87
July 8, 2002	Ammonia-Nitrogen - 8	11.2
July 30, 2002	Ammonia-Nitrogen - 8	13.9
August 27, 2002	$CBOD_5$ - 40	140
	TSS - 50	88
	Ammonia-Nitrogen - 8	45.83

---

of ammonia-nitrogen of 7.20 mg/l. Probably as a result of oversight, the Department did not seek penalties for these violations.

August 5, 2003	$CBOD_5$ - 40	79
	TSS - 50	66
	Ammonia-Nitrogen - 8	24.6

25. Part C.II.3 of Kennedy's NPDES Permit required him to perform various tasks within certain specified time frames.

26. Kennedy has not completed any of the tasks required under the compliance schedule.

27. On October 16, 2002, the Department issued a Notice of Violation ("NOV") to Kennedy for failing to submit discharge monitoring reports to the Department.

28. On March 24, 2004, the Department hand delivered an NOV to Kennedy for his continuing violations of the NPDES Permit, including his failure to comply with effluent limits, failure to retain the services of a certified wastewater system operator to operate and maintain the sewage system and treatment plant, as required by Standard Condition 19 of the WQM Permit; failure to submit effluent sampling analyses or records of effluent sampling for 8-hour composite effluent samples to be collected twice per month for $CBOD_5$, TSS, and ammonia-nitrogen, fecal coliform grab samples, to be collected twice per month, and weekly grab samples to test for total residual chlorine, dissolved oxygen, and pH; failure to measure and record sewage flow from the STP discharge; failure to submit DMRs for the period when the NPDES permit was transferred to Kennedy on October 12, 2001 to March 24, 2004, the date of the NOV. (In that time period, Kennedy submitted only one DMR for the month of November 2001. That DMR was submitted 16 days late); failure to comply in any respect with the schedule of compliance as required by Part C.II.3 of the NPDES Permit; and failure to provide information to the Department, upon request, as required by PART B.1.c. of the NPDES Permit, regarding any records of cleaning the septic tank or removing the solids from the STP.

B. Additional Findings of Fact[3]

29. Kennedy eventually submitted to the Department all DMRs for the period from October 2001 through June 2005. (Findings of Fact 27-29; T. 40-42.)

30. Kennedy's failure to comply with the terms and conditions of his permit after receiving notices of violation and numerous written and verbal warnings constituted reckless behavior. (T. 26, 34, 35, 46.)

31. The number of mobile homes in Kennedy's mobile home park ranges from 12 to 15 at any one time. (T. 57-58.)

DISCUSSION

Kennedy's liability was established through default judgment on May 18, 2006. *DEP v. Kennedy*, EHB Docket No. 2005-299-L (May 18, 2006). The judgment established Kennedy's liability on six separate counts. First, Kennedy failed to submit timely DMRs to the Department for the months of October 2001 to February 2004 and again from October 2004 to June 2005 in violation of Part C.I. of his Permit. Second, based on the numbers self-reported in his DMRs, Kennedy violated monthly effluent discharge limitations on a number of occasions ranging from October 2004 to August 2005. Third, based on the Department's own sampling, Kennedy violated instantaneous maximum effluent discharge limitations on a number of occasions ranging from December 2001 to August 2003. Fourth, Kennedy violated the NPDES permit by failing to perform the tasks required by the compliance schedule listed in Part C.II.3 of the permit. Fifth, Kennedy failed to report the monthly average effluent concentration of ammonia-nitrogen on the November 2004 DMR, in violation of the NPDES permit. Finally, Kennedy failed to ever submit DMRs for the months of

[3] The Board makes these Findings based on the facts deemed to be admitted and the September 19, 2006 hearing.

October 2001, December 2001, March through December 2002, April 2003, July 2003, and July 2004.

The Department presented evidence during the hearing that Kennedy submitted the missing DMRs after the complaint was filed. (T. 35-36.) Accordingly, that count of the complaint is not considered in our calculation of civil penalties. The Department presented no evidence and does not appear to be seeking a civil penalty due specifically to Kennedy's failure to comply with the compliance schedule in his permit. The Department also did not explain what penalty, if any, it was seeking for Kennedy's failure to submit an ammonia result for November 2004. Again, we assess no penalty for that violation. That leaves us with the task of assigning civil penalties for the late (but eventually submitted) DMRs, Kennedy's self-reported exceedances of monthly limits, and Kennedy's exceedance of instantaneous limits.

We recently discussed the assessment of civil penalties under the Clean Streams Law in *DEP v. Breslin*, EHB Docket No. 2005-069-CP-L (Adjudication April 6, 2006):

> The Board may assess a penalty of up to $10,000 per day for each violation of the Clean Streams Law. 35 P.S. § 691.605. In determining the penalty amount, the Board is to consider the willfulness of the violations, damage or injury to the waters of the Commonwealth or their uses, costs of restoration, and other relevant factors. *Id.* The deterrent value of the penalty is a relevant factor. *Leeward*, 821 A.2d at 155; *Westinghouse v. DEP*, 745 A.2d 1277, 1280-81 (Pa. Cmwlth. 2000); *DEP v. Whitemarsh Disposal Corporation*, 2000 EHB at 346. We, of course, consider for advisory purposes the civil penalty recommended by the Department. *DEP v. Tessa*, 2000 EHB at 787; *DER v. Landis*, 1994 EHB 1781, 1787.
>
> We have defined the levels of culpability with regard to violations resulting in civil penalties as follows:
>
> > An intentional or deliberate violation of law constitutes the highest degree of willfulness 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.
Whitemarsh, 2000 EHB at 349 (citations omitted).

Breslin, slip op. at 9-10. As we explained in *DEP v. Leeward Construction, Inc.*, 2001 EHB 870, 885, *aff'd*, 821 A.2d 145 (Pa. Cmwlth.), *app. denied*, 827 A.2d 431 (Pa. 2003), our role where the Department has filed a complaint for penalties under the Clean Streams Law is slightly different than our review in an appeal from the Department's assessment of a civil penalty:

> In an appeal from a civil penalty assessment, we determine whether the underlying violations occurred, and then decide whether the amount assessed is lawful, reasonable, and appropriate. *Farmer v. DEP*, [2001 EHB 271, 283]. Although our review of an assessment is *de novo*, we do not start from scratch by selecting what penalty we might independently believe to be appropriate. Rather, we review the Department's predetermined amount for reasonableness. *Stine Farms and Recycling, Inc., v. DEP*, [2001 EHB 796, 812]; *202 Island Car Wash, L.P. v. DEP*, 2000 EHB 679, 690. In contrast to an appeal from an assessment, the Board must make an independent determination of the appropriate penalty amount in a complaint action. The Department suggests an amount in the complaint, but the suggestion is purely advisory. *Westinghouse v. DEP*, 705 A.2d 1349, 1353 (Pa. Cmwlth. 1998) ("*Westinghouse I*"); *DEP v. Whitemarsh Disposal Corporation*, 2000 EHB 300, 346 [*aff'd* 745 A.2d 1277 (Pa. Cmwlth. 2000)]; *DEP v. Silberstein*, 1996 EHB 619, 637; *DEP v. Landis*, 1994 EHB 1781, 1787.

Leeward Construction, 2001 EHB at 885.

The Department explained at the hearing that errors in performing its calculations resulted in a proposed penalty of $26,800. If those errors had been caught, the Department would have asked for a penalty of $30,267. (T. 25, 38; C.Ex. 4.) The Department opted, however, to stick with its $26,800 figure because that is what it asked for in its complaint.

The Department relied up an internal guidance document to calculate its proposed penalty for Kennedy's violations of his monthly limits. Although the document on its face seems to apply to any violations of effluent limits (C.Ex. 2), the Department did not use it in calculating a civil penalty for

Kennedy's violations of instantaneous-maximum limits. It is not clear why. The document does not appear to establish a method for calculating penalties for failing to submit DMRs.

The guidance document is a useful tool for use by the Department's compliance specialists. The document aims for statewide consistency, and it certainly adds a great deal of rationality to the process. The document encourages consideration of the various factors that the Clean Streams Law says must be considered. That said, the document is not binding on either the Department or this Board. *United Refining Company v. DEP*, EHB Docket No. 2006-007-L (Opinion November 16, 2006); *Dauphin Meadows v. DEP*, 2001 EHB 521. In fact, this Board must be wary of placing too much emphasis on the Department's internal guidance documents. We do not view it as our responsibility to evaluate whether the Department has followed its own guidance document in calculating a *suggested* penalty in a complaint action. Rather, our responsibility is to assess a penalty based upon applicable statutory maxima and criteria, regulatory criteria (if any), and Board precedent. *DEP v. Hostetler*, EHB Docket No. 2005-011-CP-K (Adjudication June 8, 2006); *Leeward*, 2001 EHB at 908, 913. Here, Section 605 of the Clean Streams Law, 35 P.S. § 691.605, establishes a maximum daily civil penalty of $10,000 per day for each of Kennedy's violations.

The Clean Stream Law directs consideration of cost savings enjoyed by the violator as a result of the violations. Indeed, this Board has now repeatedly stated that cost savings to the violator is one of the most important aspects of our calculation of civil penalties in complaint cases. *See, e.g., Hostetler*, slip op. at 9-10; *Breslin*, slip op. at 13 n. 6; *Leeward*, 2001 EHB at 918-19 (Krancer concurring).

To the Department's credit, it at least attempted to add a cost-savings component to its suggested penalty in this case. The Department included $5,400 in the suggested penalty to reflect its estimate of the savings Kennedy enjoyed by not having his samples tested by a laboratory so that

he could generate DMRs. The problem, however, is that Kennedy *did* prepare DMRs, and there is no record evidence that those DMRs were defective or fraudulent. Kennedy simply failed to send the DMRs in to the Department. The Department has not proven what, if any, cost savings were enjoyed by Kennedy as a result of submitting his DMRs late.

In contrast, Kennedy presumably has enjoyed cost savings by failing to operate his treatment system properly. Kennedy has chronically exceeded his permit limitations over many years. The Department, however, did not put on any evidence of cost savings associated with those exceedances.

We are left, then, to assess a penalty based upon the magnitude of the violations and Kennedy's willfulness.[4] The Department analyzed such factors as the cause of the violations and the permittee's compliance history in evaluating willfulness. Of course, the permittee's words and deeds also may serve as evidence of his culpability. *DEP v. Strubinger*, EHB Docket No. 2004-120-CP-C (Adjudication October 4, 2006). With respect to environmental harm, the Department evaluated the size of a permittee's facility, the classification of the receiving stream, any demonstrated stream impacts, and the degree to which the discharge exceeded permit limits. We believe that all of these factors are perfectly appropriate and helpful, and we adopt them as our own in our evaluation of Kennedy's culpability and environmental harm.

With respect to Kennedy's DMR violations, the Department has not argued that the violations have caused environmental harm. As to culpability, the Department has characterized Kennedy's conduct as reckless. We agree. Violations that are long-lasting or repeated, particularly in disregard of warnings and orders, evidence willfulness and generally merit a higher penalty.

[4] There was no evidence of any costs of restoration.

Leeward Construction, Inc. v. DEP, 821 A.2d 145, 153 (Pa. Cmwlth. 2003); *Hostetler*; *Breslin*, slip op. at 11. Failing to submit 38 DMRs after being repeatedly asked to do so evidences a conscious disregard of the fact that the conduct will result in a violation of the law, and that is the very definition of reckless behavior.

Our recent decision in *DEP v. Breslin*, EHB Docket No. 2005-069-CP-L (Adjudication April 6, 2006), is quite similar in many respects to the instant case. The defendant in *Breslin* also operated a modest mobile home park and he also failed to submit DMRs. In that case, Breslin *never* submitted the DMRs. In fact, Breslin never prepared the reports. Here, Kennedy eventually submitted all of the DMRs, albeit some were submitted years after the fact. A report submitted more than two years late borders on the useless as a compliance tool, but it at least shows that Kennedy was testing his plant's effluent. In *Breslin*, we found the defendant to have acted recklessly and assessed a penalty of $1,000 for each DMR violation, resulting in a total penalty of $25,000.

The Department has suggested a civil penalty of $100 per DMR. We do not believe that amount is consistent with *Breslin*. We consider $100 per report when viewed in light of the statutory maximum of $10,000 per day as something of an affront to all those members of the regulated community who strive to submit their reports on time. *See*, *Hostetler*, slip op. at 8-9 (Department's proposed penalty too inconsequential and would have no impact of deterring anyone from violations). As we have said before, self-reporting is a key component of the NPDES program. *DER v. East Penn Manufacturing Co.*, 1995 EHB 259, 271, *DER v. Wawa*, 1992 EHB 1095, 1202. In light of these considerations, we will assess a civil penalty of $500 for each of Kennedy's 38 DMR violations, for a subtotal of $19,000.

Kennedy's culpability extends to his effluent violations. He has had dozens of exceedances from December 2001 through April 2005. The monthly violations were reported in his DMRs.

Obviously, Kennedy was aware that his treatment facility was not working, yet he has not fixed the problem. His conduct in allowing this situation to continue is, at a minimum, reckless.

With regard to environmental harm, reporting requirements are very important, but not as important in our mind as preventing actual pollution. Kennedy's reckless behavior has resulted in actual pollution over the course of several years. On the other hand, we are cognizant of the relatively small flow of Kennedy's plant and the absence of any evidence of actual adverse impacts beyond the pollution itself. The pollutants involved are undoubtedly of concern, but they are not particularly exotic or toxic. The receiving stream is not classified as deserving of special-protection. And perhaps to some extent, not as to liability but as to calculating a penalty amount, the Department bears some responsibility for allowing the situation to go on as long as it did. With all of those considerations in mind, we assess a penalty of $1,000 for each of the six months in which he had one or more violations (there were 11 actual violations), and $500 for each of the 21 days that he had one or more violations of the instantaneous-maximum violations (there were 38 actual violations) for a subtotal of $16,500. This results in a total penalty for the DMR and effluent limit violations of $35,500.

We acknowledge that $35,500 is a large number for the operator of a small mobile home park, but our assessment is the inevitable result of the fact that Kennedy has had 87 violations. We could have penalized Kennedy for every day his DMRs were late and his multiple effluent violations in the same month or on the same day, but we did not. The average penalty per violation is actually only $408. Kennedy is not entitled to a discount because he has violated the law so many times, and compassion for the "little guy" (T. 61) only goes so far. Compassion cannot entirely excuse reckless behavior, and any lower penalty for reckless behavior would simply not be appropriate or fair to the many permittees who work hard to stay in compliance. *Hostetler*, slip op. at 10.

When we search the record for any reason why we might want to reduce the penalty, we find nothing. Kennedy has all but ignored our rules during the entire course of this appeal. Although he participated by telephone in a prehearing conference and made something of a surprise appearance at the hearing where he made a brief statement on the record, he never filed a single document with the Board in compliance with our rules. Pointedly, he did not file a post-hearing brief, which constitutes a waiver of any defenses that he may have had, 25 Pa. Code § 1021.131, not that there was much to be waived.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this complaint. *See* 35 P.S. § 691. 605; 35 P.S. § 7514.

2. Kennedy's failure to submit discharge monitoring reports on a timely basis to the Department from October 2001 to February 2004, and again from October 2004 to June 2005 as required by the NPDES permit was a violation of the Clean Streams Law. 35 P.S. §§ 691.202, 691.605, and 691.611.

3. Each day that Kennedy submitted late DMRs constituted a separate daily violation of his NPDES Permit.

4. Kennedy's failure to comply with the NPDES permit's monthly effluent discharge limitations was a violation of the Clean Streams Law. 35 P.S. §§ 691.202, 691.605, and 691.611.

5. Each exceedance of the NPDES Permit's discharge effluent limits constituted a separate violation of the NPDES Permit.

6. Kennedy's violations constituted unlawful conduct under Section 611 of the Clean Streams Law, 35 P.S. § 691.611.

7. Pursuant to Section 605 of the Clean Streams Law, 35 P.S. § 691.605, Kennedy's

violations subject him to the assessment of a separate civil penalty of up to $10,000 for each separate daily violation.

8. When assessing civil penalties, the Clean Streams Law directs the Board to consider the willfulness of the violation, damage or injury to the waters of the Commonwealth and their uses, the cost to the Department of enforcing the provisions of the Act, the costs of restoration, deterrence, and other relevant factors. 35 P.S. § 691.605.

9. The Board assesses a civil penalty in the amount of $35,500 against Kennedy for his 87 violations of the Clean Streams Law.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 2005-299-CP-L**
v.	:	
VICTOR KENNEDY d/b/a KENNEDY'S MOBILE HOME PARK	:	

ORDER

AND NOW, this 22nd day of January, 2007, it is ordered that civil penalties are assessed against Victor Kennedy d/b/a Kennedy's Mobile Home Park in the total amount of $35,500 for his violations of the Clean Streams Law.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

GEORGE J. MILLER
Judge

THOMAS W. RENWAND
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: January 22, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2006-114-CP-L**
JOHN P. PECORA, JAMES D. PECORA, ANN PECORA GREGO, ELIZABETH PECORA, JAY J. PECORA AND PHILIP A. PECORA, Defendants	:	**Issued: January 22, 2007**

OPINION AND ORDER ON
MOTION FOR PARTIAL SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board grants the Department's unopposed motion for partial summary judgment requesting a ruling on liability for civil penalties where the defendants failed to file a response to the Department's motion. A hearing will be scheduled to determine the amount of the penalty that should be assessed.

OPINION

Before the Board is a motion for partial summary judgment filed by the Department of Environmental Protection (the "Department") that seeks judgment on the issue of liability against the defendants, John P. Pecora, James D. Pecora, Ann Pecora Grego, Elizabeth Pecora, Jay J. Pecora, and Philip A. Pecora (the "Pecoras") for violations of the Clean Streams Law and the Dam Safety and Encroachments Act.

John, Jane, Ann, Elizabeth, and Jay Pecora own a parcel of land as joint tenants in Bradford Township, McKean County. Philip Pecora occupies a residence at the site. On February 3, 2005, the Department issued an order finding that earthmoving activities had taken place and encroachments had been installed on the property without the necessary plans and permits. The order directed the Pecoras to, *inter alia*, cease all earth disturbance activity on their property and design and implement a plan to stabilize and restore the site. The Pecoras neither complied with nor appealed the Department's order. On May 18, 2005, the Department filed a petition to enforce the order with the Commonwealth Court. On June 29, 2005, the Department and the Pecoras entered into a consent decree that resolved the Department's petition to enforce and provided a schedule for achieving compliance with the Department's order. In the consent decree, the Pecoras admitted that they did not comply with the Department's order.

The Department has now filed a complaint with this Board against the Pecoras seeking civil penalties for the Pecoras' failure to comply with the Department's February 3, 2005 order. The Department is seeking penalties for the failure to comply with the order, not the underlying violations that gave rise to the order in the first place.

On November 29, 2006, the Department filed a motion for partial summary judgment seeking a ruling on the issue of liability. The Department argues that the Pecoras are not in a position to deny liability because of the terms of the consent decree. Although a response to the Department's motion was due on or before December 29, 2006, the Pecoras never responded to the motion. The Board's rules provide authority to grant the Department's motion for that reason alone, and we see no reason not to do so in this case. *See* 25 Pa. Code § 1021.94a(h) ("Summary judgment may be entered against a party who fails to respond to a summary judgment motion."); *Martz v. DEP*, EHB Docket

No. 2004-241-MG, slip op. at 5 (December 6, 2006); *Lucas v. DEP*, 2005 EHB 913. We will take the Pecoras' failure to respond as a concession that the Department's motion should be granted.

Having reviewed the terms of the consent decree, it comes as no surprise to us that the Pecoras chose not to contest the Department's motion. The Pecoras made the following admissions in the consent decree:

> G. On February 3, 2005, the Department issued an administrative order ("Department's Order") to the Owners and Phillip A. Pecora directing them to, among other things, immediately cease all earth disturbance activity at the Property and restore disturbed areas at the Property....
>
> H. Philip A. Pecora received the Department's Order.
>
> J. Neither the Owners nor Philip A. Pecora appealed the Department's Order and the findings contained in the Department's Order are administratively final.
>
> K. To date, the Owners and Philip A. Pecora have not complied with the Department's Order.
>
> L. The Owners' and Philip A. Pecora's failure to comply with the Department's Order constitutes unlawful conduct under Section 18 of the Dam Safety Act, 32 P.S. §693.18, and Section 611 of the Clean Streams Law, 35 P.S. §691.611; and subjects the Owners and Philip A. Pecora to civil penalty liability under Section 21 of the Dam Safety Act, 32 P.S. §693.21, and Section 605 of the Clean Streams Law, 35 P.S. §691.605.

Thus, the Pecoras not only admitted in the consent decree entered into with the Department on June 29, 2005 that they failed to comply with the Department's February 3, 2005 order, they admitted that their failure to comply was unlawful and gives rise to liability for civil penalties. Failure to comply with a Department order from which no appeal was taken indeed constituted unlawful conduct under both the Clean Streams Law, 35 P.S. § 691.611, and the Dam Safety and

Encroachments Act, 32 P.S. § 693.18(2), that subjects them to civil penalty liability, 32 P.S. § 693.21; 35 P.S. § 691.605. Accordingly, the Department is entitled to judgment on liability. All that remains is for us to hold a hearing to determine the *amount* of the civil penalty.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2006-114-CP-L**
JOHN P. PECORA, JAMES D. PECORA, ANN PECORA GREGO, ELIZABETH PECORA, JAY J. PECORA AND PHILIP A. PECORA, Defendants	:	

ORDER

AND NOW, this 22nd day of January, 2007, the Department's unopposed motion for partial summary judgment is granted. A hearing will be scheduled to receive evidence regarding the amount of civil penalties to be assessed.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

GEORGE J. MILLER
Judge

THOMAS W. RENWAND
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: January 22, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

UPPER GWYNEDD TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-358-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 25, 2007**

OPINION AND ORDER
GRANTING AMENDMENT TO APPEAL

By George J. Miller, Judge

Synopsis

The Board grants an amendment to a notice of appeal where the requested amendment is closely related to an existing objection in the notice of appeal. The Department is unlikely to be unduly prejudiced by this amendment because the evidence relevant to both objections is likely to be the same or is peculiarly within the possession of the Department.

BACKGROUND

In this appeal Upper Gwynedd Township (UGT) challenges a number of the provisions of the NPDES permit issued to it by the Department on November 28, 2005. This motion to amend relates only to that portion of the permit that would require the Appellant to limit its phosphorus point source discharges to the Wissahickon Creek to an average monthly concentration of 2 mg/l.

The notice of appeal objects to this limit because it applies during both warm and cold weather months when the related limit for ortho-phosphate as phosphorus of 1.82 mg/l established by the Department's TMDL during warm months (and a substantially higher limit during cold months) is sufficient to assure that UGT's discharges would not contribute or threaten to impair existing or designated water quality uses. The 2 mg/l standard contained in the Department's regulations at 25 Pa.Code § 96.5 is required only if discharges of phosphorus would contribute or threaten to impair existing or designated water quality uses.

After discovery was completed, UGT filed a motion for summary judgment asserting, among other things, that the 2 mg/l standard contained in section 96.5 of the Department's regulations, if interpreted to require winter limits for phosphorus without a determination that the stream suffers use impairment during winter months, should be set aside as arbitrary and capricious or otherwise not in accordance with law. The Department's response to the motion for summary judgment is that this objection to the Department's action has been waived by virtue of UGT's failure to raise this contention in the notice of appeal.

UGT's motion to amend is filed as a protective measure. It argues that its contention as to the validity of the regulation should be allowed to stand whether it is deemed to be included in the broad language of the notice of appeal[1] or whether it is

---

1. The relevant language of the notice of appeal is as follows:

> 4. UGT objects to the permit because it imposes total Phosphorus standards, applicable after 36 months, which must be met in both warm weather periods and cold weather periods. These limits are arbitrary and capricious and otherwise not in accordance with applicable law for a number of reasons including the following:

viewed to be an independent issue not addressing an "action of the Department" that need not be included in the notice of appeal. However, if those arguments are not accepted, UGT seeks an amendment to the notice of appeal to include the objection that 25 Pa. Code § 96.5(c) should be set aside as arbitrary and capricious or otherwise not in accordance with law.

The Department opposes the requested amendment because it says that UGT has not shown that the Department will not suffer undue prejudice as a result of the amendment. In the alternative, it says it would request additional time for discovery if the amendment is granted.

OPINION

We grant the motion to amend without deciding whether such an amendment is necessary. Our rule on amendments provides as follows:

> (b) After the 20-day period for amendment as of right, the Board, upon motion by the appellant or complainant, may grant leave for further amendment of the appeal. This leave may be granted if no undue prejudice will result to the opposing parties. The burden of proving that no undue prejudice will result to the opposing parties is on the party requesting the amendment.

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a. The Wissahickon TMDL established a standard for ortho-phosphate as phosphorus (o-PO4-P) at 1.82 mg/l, applicable solely during the summer low flow period of April through October. The TMDL recommended substantially higher limits for the winter months, because there is significantly reduced potential for periphyton and planktonic algae growth from winter discharges.

b. Notwithstanding the findings of the TMDL, DEP has imposed a year-round effluent limit on total phosphorus, without any stated basis for concluding that the UGT effluent, in compliance with the o-P04-P seasonal standards contained in the permit, would contribute or threaten to impair existing or designated water quality uses, in accordance with 25 Pa. Code § 96.5.

We reject the Department's contention that the Department will suffer undue prejudice if the amendment is granted. The arguments and documents submitted to the Board in connection with the motion for summary judgment lead us to believe that the issue is one of law as UGT contends. Whether the Department's failure to permit a more liberal discharge of phosphorus during cold weather months is arbitrary and capricious or whether section 96.5(c) of the Department's regulations is invalid for failure to permit a more liberal discharge requirement during cold weather months because the regulation is arbitrary or capricious appears to us to be substantially the same legal issue that must be resolved on the same facts. In addition, it is likely that the evidence relevant to any determination of impairment to the stream and the validity of the regulation is peculiarly in the Department's possession.

This result is in accord with our previous decisions on amendments to notices of appeal. We previously have permitted amendments to the notice of appeal where it appeared that the requested amendments were related to an objection raised in the original notice of appeal and the parties would not suffer undue prejudice by allowance of the amendment.[2] We have denied those requests where it was clear that permitting the amendments would prejudice the Department by requiring significant discovery or by reason of the lateness of the request after the hearing had been scheduled.[3]

Nevertheless, if the Department really thinks it needs additional discovery to deal with the notice of appeal as amended, it should promptly submit a request for further discovery in accordance with our Rule on amendments at 25 Pa. Code § 1021.53(d).

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2. *Citizens for Pennsylvania's Future v. DEP*, EHB Docket No. 2005-106-R (Opinion issued September 28, 2006); Raven *Crest Homeowners Association v. DEP*, 1995 EHB 343.

3. *Tapler v. DEP*, EHB Docket No. 2006-078-C (Opinion issued July 19, 2006); *Achenbach v. DEP*, EHB Docket No. 2004-202-C (Opinion issued April 28, 2006).

Accordingly, we enter the following order:

UPPER GWYNEDD TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-358-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 25th day of January, 2007, IT IS HEREBY ORDERED that Upper Gwynedd Township's notice of appeal is hereby amended to contain the following objection:

> The Department's regulation at 25 Pa. Code § 96.5(c), if interpreted to require winter limits for phosphorus without a determination that the stream suffers the impairment during winter months, should be set aside as arbitrary and capricious or otherwise not in accordance with law.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Judge

DATED: January 25, 2007

c: **Department of Litigation:**
Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

FOUNDATION COAL RESOURCES CORPORATION and PENNSYLVANIA LAND HOLDINGS CORPORATION, PPL CORPORATION and REALTY COMPANY OF PENNSYLVANIA	:	
v.	:	**EHB Docket No. 2006-067-R (Consolidated w/2006-068-R; 2006-069-R: 2006-070-R; 2006-071-R and 2006-190-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNECO OIL COMPANY, INC., Permittee	:	**Issued:** January 29, 2007

OPINION AND ORDER
ON DISCOVERY MOTIONS

By Thomas W. Renwand, Judge

Synopsis:

Discovery before the Pennsylvania Environmental Hearing Board is governed by both the Board's Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure. Rule 4017(c) of the Pennsylvania Rules of Civil Procedure, which addresses the right of a witness to read, sign and make changes to the deposition transcript, provides that a witness may make changes to the "form or substance" of the deposition. In order to assure fairness and prevent unfair surprise at trial, the Board allows further examination of the witnesses. At the same time, the Board has a corresponding duty to limit discovery where required. The Board denies Permittee's Motion to Compel Discovery and For Sanctions and For Leave to Serve Document Subpoenas.

INTRODUCTION

Presently before the Pennsylvania Environmental Hearing Board are two motions. One is Appellants' Foundation Coal Resources Corporation and Pennsylvania Land Holdings Corporation (Foundation Coal Appellants) Objections To Corrections of the Deposition Transcripts of David Janco and Ronald Gilius (Foundation Coal Appellants' Objections). The second motion is Permittee Penneco Oil Company's (Permittee or Penneco) Motion to Compel Discovery and for Sanctions.

This consolidated appeal concerns objections filed by Appellants to certain oil and gas well drilling permits issued by the Pennsylvania Department of Environmental Protection. Discovery before the Pennsylvania Environmental Hearing Board is governed by the Board's Rules of Practice and Procedure in conjunction with the Pennsylvania Rules of Civil Procedure. See 25 Pa. Code § 1021.102(a). Full disclosure of a party's case underlies the discovery process. *Pennsylvania Trout et al. v. DEP & Orix-Woodmont*, 2003 EHB 652, 657. As we indicated in an earlier opinion issued in this case and in which we reiterate now: the main purposes of discovery before the Board are so all sides can gather information and evidence, plan trial strategy, and explore the strengths and weaknesses of their respective positions. *Foundation Coal Resources Corporation et al. v. DEP and Penneco Oil Company, Inc.*, (Slip. Op. issued October 17, 2006) at page 3; *Groce et al. v. DEP & Wellington* (Slip Op. issued April 28, 2006) at pages 2 & 3; *DEP v. Neville Chemical Company*, 2004 EHB 744, 746.

At the same time, and as we thought we clearly pointed out in our earlier decision in this case, the Board has a concurrent duty to limit discovery where required. See Pennsylvania Rule of Civil Procedure 4012; *Foundation Coal* at 4. This litigation has spawned numerous depositions and voluminous document requests.

Foundation Coal Appellants Objections

Two of the witnesses deposed in this consolidated appeal are Mr. David Janco and Mr. Ronald Gilius. Both of these gentlemen are employees of the Department. Mr. Gilius is the Director of the Bureau of Oil and Gas Management while Mr. Janco is the Southwest Regional Manager of the Bureau of Oil and Gas Management. Both individuals reserved inspection, reading and signing of their deposition transcripts pursuant to Rule 4017. In addition, they fully complied with the procedural requirements of noting their changes and returning their signed errata sheets within 30 days of their receipt. Mr. Janco made 22 corrections to his 221 page transcript, while Mr. Gilius noted 23 corrections to his 108 page transcript.

Foundation Coal Appellants cry foul. They object to 4 of the corrections made by Mr. Janco and 2 of the corrections made by Mr. Gilius. Foundation Coal Appellants raise a fairness argument and contend that the Board should strike the changes because they alter the original deposition testimony or fail to respond to questions posed by the examining attorney. They rely heavily on the Board's decision in *Jefferson County Commissioners et al. v. DEP et al.*, 1995 EHB 1173. In that case, Judge Ehmann was strongly critical of the Department's changes. The Department, in a very thoughtful and comprehensive brief, seeks to distinguish the Board's decision in *Jefferson County* on procedural grounds. For example, in *Jefferson County*, the Department was not only outside the thirty day limit in returning the errata sheets (albeit by four days) but they also evidently were not returned until after Jefferson County had filed a Motion for Summary Judgment. In addition, the Department balked at making the witness available for another deposition. Those facts, as stated in the Department's Brief "demonstrated a disregard for the requirements of Rule 4017(c) by the Department, and formed the basis for the Board's description of the conduct of the Department as

outrageous. 1995 EHB 1172, 1175-1176." Department's Brief at page 7.

We are not convinced that these procedural differences are such to distinguish our issue here from the one decided in *Jefferson County*. Nevertheless, although it is a close call, we believe the Department's position is the correct one. Our conclusion is also supported by various federal decisions interpreting the very similar Federal Rule. More importantly, Rule 4017 is very clear on its face. Witnesses may make changes to the "form or substance" of their deposition testimony. This plain and unambiguous language of the Rule places no restriction on the type of changes a deponent may make to the original deposition transcript.

We do empathize with Foundation Coal Appellants' contention that to allow a witness to make such wholesale changes has a feeling of unfairness to it. After all, if the witness says the light was red and then says it is green such a fundamental change makes it difficult to ascertain exactly what the true facts are. Moreover, such an answer given at a deposition would surely engender follow-up questions. Therefore, we will allow the Foundation Coal Appellants to further depose Mr. Janco and Mr. Gilius. Such depositions should not exceed one hour per deponent.

Penneco's Motion

We earlier expressed our reservations that much of the discovery Penneco seeks, especially from third parties involving other mines and non-parties, in some instances with little or minimal connection with the Appellants and no discernable connection with the oil and gas permitting decisions at issue, will lead to the discovery of admissible evidence. *Foundation Coal* at 7. According to the Foundation Coal Appellants they have produced over 1800 pages of documents including 400 separate, individual maps, figures and drawings including over 30 large-sized color maps of the Foundation Mine. Penneco renews its requests for voluminous materials without

explaining to us how this discovery is warranted under the Pennsylvania Rules of Civil Procedure. We hasten to add that just because the Foundation Coal Appellants have produced hundreds of pages of documents and various maps and drawings does not necessarily mean that they have adequately responded to Penneco's discovery. However, following a thorough review of Penneco's additional discovery requests and Foundation Coal's response, we believe that the additional discovery requests should be denied.

We fail to see how the additional information requested by Penneco from the Foundation Coal Appellants will have any continuing relevance to the issues involved in this case. For example, Penneco seeks to subpoena communications in the possession of a non-party, the Pennsylvania Coal Association. Penneco wants all communications with lobbyists, state legislators, and others "both sent and/or received and/or prepared by or on behalf of the Pennsylvania Coal Association prior and/ or subsequent to the passage" of two acts more than 20 years ago. While such documents might be interesting, the magnitude of the request constitutes a discovery "fishing expedition" of monumental proportions.[1]

We also conclude that Foundation Coal has adequately responded to Penneco's discovery requests. Our review nonetheless was complicated by counsel's practice of attaching as exhibits long single-spaced letters setting forth their respective positions. The problem with such a practice is that the letters often set forth extraneous materials and contain self-serving declarations that stray from the issues before the Board. The position of a party should be succinctly set forth in the motions and responses themselves rather than in attached correspondence.

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[1] Although "fishing expeditions" are frowned upon, where tolerated, we require counsel to fish with a hook and not a net. Our review of the discovery requests here leads us to conclude that counsel is proposing to dynamite the lake and scoop up any fish remaining.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

FOUNDATION COAL RESOURCES CORPORATION and PENNSYLVANIA LAND HOLDINGS CORPORATION, PPL CORPORATION and REALTY COMPANY OF PENNSYLVANIA	:	
v.	:	**EHB Docket No. 2006-067-R (Consolidated w/2006-068-R; 2006-069-R: 2006-070-R; 2006-071-R and 2006-190-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNECO OIL COMPANY, INC., Permittee	:	

O R D E R

AND NOW, this 29th day of January, 2007, IT IS ORDERED as follows:

1) Appellants' Objections to the Correctness of the Deposition Transcripts of David Janco and Ronald Gilius are **denied**.

2) Mr. Janco and Mr. Gilius may be further deposed with the direct examination of each witness not to exceed one hour in length.

3) Penneco's Motion is **denied**.

4) Foundation Coal Appellants' request for attorneys fees is **denied**.

ENVIRONMENTAL HEARING BOARD

Thomas W. Renwand

THOMAS W. RENWAND
Judge

DATED: January 29, 2007

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

HERCULES, INCORPORATED	:	
	:	
v.	:	**EHB Docket No. 2005-337-R**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 29, 2007**
	:	
	:	

OPINION AND ORDER ON MOTIONS IN LIMINE

By Thomas W. Renwand, Judge

Synopsis:

The Board denies a motion to preclude a party from introducing exhibits and expert testimony at trial as a sanction for failing to provide copies of the exhibits and a summary of expert testimony with the pre-hearing memorandum. Where copies of the exhibits have been subsequently provided to opposing counsel and the witness listed as an expert witness has been re-designated as a fact witness, we find that sanctions are not warranted.

OPINION

Before the Board is a motion in limine filed by the appellant, Hercules, Inc. (Hercules) seeking to exclude the introduction of exhibits and expert testimony by the Department of Environmental Protection (Department) in the trial in this matter, which is scheduled for February 6, 7 and 8, 2007. Hercules argues, first, that it was not provided with copies of the exhibits listed by the Department in its pre-hearing memorandum, filed on January 8, 2007, as

required by the Board's rule at 25 Pa. Code § 1021.104 (7). Second, it argues that no expert report or summary of expert testimony was provided for Samuel Harper whom the Department lists as an expert witness in its pre-hearing memorandum. Hercules argues that it has been prejudiced by the Department's non-compliance and seeks sanctions in accordance with 25 Pa. Code § 1021.104 (b), which states that the Board may impose sanctions on a party that does not comply with pre-hearing requirements.

In response, the Department admits that it did not provide copies of exhibits with its pre-hearing memorandum but that it hand-delivered some of the exhibits on January 19, 2007, the date Hercules filed its motion, and delivered the remaining exhibits at the time it filed its response, January 26, 2007. Therefore, Hercules now has in its possession copies of all of the exhibits listed in the Department's pre-hearing memorandum.

The Board's rule at 25 Pa. Code § 1021.104 (7) requires that copies of all exhibits listed in the pre-hearing memorandum shall be provided to opposing counsel. This means that exhibits should be delivered at the same time as service of the pre-hearing memorandum or as close to that time as practicable. We recognize that certain circumstances may make contemporaneous delivery difficult, if not impossible, such as the method of filing and serving one's pre-hearing memorandum[1] or the size and quantity of the exhibits.

Although we find that the Department should have provided copies of its exhibits to Hercules in a timely manner, we find that the sanction of precluding the Department from introducing its exhibits at trial is unduly harsh. Although Hercules did not receive copies of the exhibits at the time it received the Department's pre-hearing memorandum, this error has been

[1] For example, exhibits to an electronically filed pre-hearing memorandum may be either electronically filed or filed by hard copy. 25 Pa. Code § 1021.32(f).

corrected and it has all the exhibits in its possession at this time. Furthermore, according to the Department, most of the documents listed as exhibits are items that were in Hercules' possession prior to the filing of the pre-hearing memorandum. Since Hercules was aware of the substance of the documents, we do not find that it has been unfairly prejudiced by the Department's late delivery.

Hercules also seeks to exclude the testimony of Samuel Harper who was listed as an expert witness in the Department's pre-hearing memorandum, on the basis that no expert report or summary of testimony was provided for Mr. Harper as required by the Board's rule at 25 Pa. Code § 1021.104 (5). In response the Department states that Mr. Harper will provide only fact testimony, and it has filed an amended pre-hearing memorandum. Based on its statement that Mr. Harper will provide only fact testimony, and thereby not fall within the scope of § 1021.104 (5), the Department asserts that his testimony should not be excluded.

We agree with the Department, and Mr. Harper shall be permitted to testify as a fact witness. However, any expert testimony by Mr. Harper shall be precluded.

In conclusion, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HERCULES, INCORPORATED	:	
v.	:	**EHB Docket No. 2005-337-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 29th day of January, 2007, Hercules' Motions in Limine are **denied**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Judge

DATE: January 29, 2007

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

NANCY PARKS and WILLEM van den BERG (husband and wife) and MARCIA CASE	:	
v.	:	**EHB Docket No. 2006-199-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CON-STONE, INC., Permittee	:	**Issued: January 29, 2007**

OPINION AND ORDER ON APPELLANTS' MOTION TO COMPEL

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board grants a motion to compel the permittee to provide information regarding a previously permitted surface mine due to the fact that reclamation of the mine could be a relevant factor in evaluating the Department's issuance of the permit that covers the mine under appeal. Facts and circumstances concerning a mine that is immediately adjacent and geologically similar to the mine at issue are potentially relevant in evaluating contested issues in the appeal.

OPINION

Nancy Parks, Willem van den Berg, and Marcia Case (hereinafter "Parks") filed this appeal from the Department of Environmental Protection's (the "Department's") issuance of a noncoal surface mining permit to Con-Stone, Inc. for its Aaronsburg West operation in Centre County. Among other things, Parks argues that the Department did not give due consideration to Con-Stone's

existing Aaronsburg operation, which is adjacent to the Aaronsburg West site, when it issued the permit that is the subject of this appeal. Specifically, Parks asserts that Con-Stone is not current in its reclamation of the Aaronsburg quarry, making Con-Stone ineligible for the permit to mine the Aaronsburg West quarry. Accordingly, Parks has asked Con-Stone to produce information and documents which detail Con-Stone's reclamation of the Aaronsburg site. Con-Stone has objected to Parks' request. Con-Stone argues that the Aaronsburg site is not the subject of this appeal, and therefore is not relevant to the operation or permitting of the Aaronsburg West site. Further, in an attempt to neutralize Parks' assertion that Con-Stone's reclamation of the Aaronsburg site is not current, Con-Stone argues that the Department has never issued Con-Stone a notice of violation for its reclamation, or lack thereof, of the Aaronsburg site. In sum, Con-Stone objects to Parks' interrogatories and request to produce documents on the grounds of relevance. The Department has not weighed in on this particular dispute.

"Relevance" for discovery purposes is to be construed broadly. *Khodara v. DEP*, 2001 EHB 855, 857 ("[I]t is enough that the evidence sought *might* be relevant."); *Valley Creek Coalition v. DEP*, 2000 EHB 970, 972 ("For the purposes of discovery, it is not a ground for objection that the information sought would be inadmissible at the hearing, so long as it is reasonably likely that the information will lead to admissible evidence."). It is difficult to conceive how Parks' discovery requests could be considered overly broad or beyond the scope of discovery set out in the Pennsylvania Rules of Civil Procedure. *See* Pa. R. Civ. P. 4003.1 – 4003.6. The reclamation of the Aaronsburg site is undoubtedly of potential relevance in this appeal. The Noncoal Surface Mining Conservation and Reclamation Act, 52 P.S. §§ 3301 – 3326, provides that no permit shall be issued unless all requirements under the act have been complied with, which includes keeping the reclamation of other mining operations concurrent. 52 P.S. § 3308(a)(1); 25 Pa. Code § 77.595(a).

Although Con-Stone is correct in asserting that Parks is administratively precluded from challenging the Aaronsburg permit in this appeal, the facts and circumstances regarding the operation of the Aaronsburg site are certainly relevant to our determination of whether the immediately adjacent Aaronsburg West mine should have been permitted.

Further, the relevance of the Aaronsburg quarry is not limited to reclamation issues. For example, both parties agree that the same geologic strata that are present on the Aaronsburg West site are generally present at the Aaronsburg quarry. Given this, the best indicator of determining the impact mining the Aaronsburg West site might have on water resources could very well turn out to be the neighboring Aaronsburg quarry. *Cf. UMCO Energy, Inc. v. DEP*, EHB Docket No. 2004-245-L, slip op. at 58-59, 62 (September 5, 2006). We reject Con-Stone's argument that this information is not relevant and is outside the scope of this appeal. With regard to Parks' specific requests, we conclude as follows:

Interrogatories 4a – 4e. Parks seeks information related to Con-Stone's reclamation of the Aaronsburg quarry, including details on what reclamation has taken place and what remains to be done. This information is potentially relevant in determining whether the Department's issuance of the Aaronsburg West permit was appropriate. Accordingly, Con-Stone's objections to these interrogatories are dismissed, and Con-Stone is required to answer them.

Interrogatory 21. Parks is requesting information on whether Con-Stone has conducted any seismic or airblast measurements in Aaronsburg for blasting conducted in the Aaronsburg quarry. If so, Parks is requesting details on such measurements. Con-Stone argues that this information is irrelevant to the current appeal because Con-Stone would have to obtain a separate permit before conducting any blasting at the Aaronsburg West site, indicating that this appeal is not the proper avenue to challenge the potential blasting. Nevertheless, Con-Stone does indeed propose to blast at

the Aaronsburg West site, and it is certainly possible that discovery pertaining to prior blasting at the Aaronsburg site could lead to admissible evidence. Accordingly, Con-Stone's objections to this interrogatory are dismissed.

Interrogatory 22. Parks asks Con-Stone to identify each public or private water supply that Con-Stone has replaced, repaired, treated, or supplemented since mining operations began at the Aaronsburg quarry. Con-Stone objects to this interrogatory on the basis of relevance, arguing that blasting does not cause water wells to run dry, and that any assertion that Con-Stone has had to replace water supplies because of blasting at the Aaronsburg quarry is unfounded. Again, we find that this objection lacks merit. Given the geological similarities and adjacency of the two quarries, it is not hard to imagine that information regarding the alleged effects of mining at the Aaronsburg quarry could ultimately prove to be relevant in this appeal. Whether there is a connection between blasting and water losses is an issue for the hearing, not a basis for resisting discovery. Accordingly, Con-Stone's objection to this interrogatory is dismissed.

Request to Produce Documents No. 6. Parks requests that Con-Stone produce information pertaining to all communications between the Department and Con-Stone related to the concurrency of reclamation at the Aaronsburg quarry. Although Con-Stone is correct in asserting that Parks can obtain this information from the Department, we remind Con-Stone that Parks is entitled to this information through discovery from Con-Stone as well. For this, and the reasons discussed above, Con-Stone is required to produce this information.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NANCY PARKS and WILLEM van den BERG (husband and wife) and MARCIA CASE	:	
v.	:	**EHB Docket No. 2006-199-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CON-STONE, INC., Permittee	:	

ORDER

AND NOW, this 29th day of January, 2007, in consideration of the Appellants' motion to compel and the Permittee's opposition thereto, it is hereby ordered that the motion is granted, and that Con-Stone shall on or before **February 16, 2007** provide answers to Interrogatories 4a through 4e, Interrogatories 21 and 22, and Parks' Request to Produce Documents No. 6, in accordance with the foregoing opinion.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: **January 29, 2007**

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SNYDER BROTHERS, INC.	:	
	:	
v.	:	**EHB Docket No. 2006-002-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KENNETH W. HARPER, Intervenor	:	**Issued: January 30, 2007**

OPINION AND ORDER DENYING DEPARTMENT'S MOTION FOR PROTECTIVE ORDER

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board denies the Department's Motion for Protective Order because the Department's expert relied on the information requested when forming his expert opinion, and the information requested is relevant to the subject matter of this appeal.

OPINION

Before the Environmental Hearing Board (EHB or Board) is a Motion for Protective Order (Motion) asking the Board to preclude the Department of Environmental Protection (Department or DEP) from producing information referenced by its expert, Fred Baldassare. The Department contends that this information being requested by Snyder Brothers, Inc. (Snyder or Appellant) is incomplete raw data that is not relevant or helpful and it should not be provided to the Appellant. The Board disagrees.

The facts of this case surround a fatal gas explosion at the Harper Residence caused by the migration of stray gas. The Department issued an investigative order on December 20, 2005 to Snyder to perform integrity testing on its well, known as Shields 9. Snyder filed an appeal of that order on January 4, 2006. This matter has been set for a hearing on March 20-23, 2007 and the parties are in the midst of filing their prehearing memoranda.

On January 17, 2007, just five days after the Appellant filed its prehearing memorandum, the Department filed its motion for a protective order. The motion presents the question of whether the Department must provide to Snyder a "database" that the Department's expert, Fred Baldassare, referenced at his deposition. Baldassare, a hydrogeologist, drafted an expert report dated August 11, 2006, which discusses his interpretation of the isotopic analysis of the methane detected at the Harper Property and his opinion as to the origin of the stray gas. Subsequently, Baldassare was deposed on August 24, 2006. He was questioned regarding his opinion that the stray gas has the isotopic qualities of the gas from Upper Devonian. The transcript of Baldassare's deposition provides:

> Q: Okay. The fourth paragraph down, page 2, references that the isotopic analyses demonstrated that the stray gas originated from Upper Devonian production gas. Is that a fair depiction?
>
> A: Uh-huh
>
> Q: How do you know it's Upper Devonian?
>
> A: Because we have a very large database for Upper Devonian production gas in Western Pennsylvania, and we see a range of signatures for the carbon and hydrogen isotope, and this falls right within that range. It doesn't look like anything else we sample. It looks like upper –an Upper Devonian production is, you know – includes a lot of –potentially a lot of different formations. So it falls very much in the range we see.
>
> Q: Does DEP maintain that database?

A: I maintain that database.

Q: Can I safely say yes?

A: Yes.

Q: Is that a database available to the public?

A: It's a work in progress, and I'm working with DCNR on the publishing of that data once we go through it, and, you know, compile it, and do all of that. Right now it's an un –it's an uncompiled database with hundreds of samples.

Department's Exhibit (DEP Ex.) 1.

On October 31, 2006, Snyder sent a letter to the Department requesting the production of the "database" that Baldassare had referred to in his deposition. After the Department's review, it responded to Snyder on November 13, 2006 that the "database" is a "work in progress" and would not be provided to Snyder since it was "incomplete and meaningless".

Discovery proceedings before the Board are generally governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). The scope of discovery under the Rules of Civil Procedure provide that " a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . ." Pa. R. Civ. P. 4003.1(a).

The Department's motion argues that the "database" is "unrefined, incomplete raw data" and "[t]he current partial compilation of data is not relevant and is not reasonabl[y] calculated to lead to the discovery of admissible evidence." Baldassare's affidavit provides that he "mistakenly made reference to a 'database' during [his] deposition because [he] hope[d] and intend[ed] to someday compile a complete collection of comprehensive information from all of the samples [he] obtained." Baldassare attests that the sampling information he has is in the

form of "notations". He further attests that his "compilation is unreliable and unusable in its present form . . . [and] [i]nterpretation of the isotope data from partial compilation is not possible . . . ." Snyder in its response, argues that the "Department cannot withhold evidence relied on by a testifying expert because the Department believes such information is either incomplete or meaningless." We agree with the Appellant.

It is of little importance whether or not the information by Baldassare, discussed during his deposition, is a completely compiled database or, as he referred, "notations" of information. Baldassare himself stated that he used this "database" in forming his opinion with respect to the origin of the stray gas.[1] Since the stray gas to the Harper Property is at the very heart of this appeal, the database is discoverable and should have been provided to Snyder. Further, the Department has not alleged any harm that will result from producing this database. Whether the information in the so-called "database" ultimately proves to be useful and/or admissible is beside the point of this opinion. Snyder was without a doubt entitled to receive the information in discovery. Thus, in light of the foregoing, the Board denies the Department's motion for protective order and orders the Department to produce the information in accordance with the following.

[1] Baldassare states, "stray gas originated from the Upper Devonian production gas . . . [and] we have a very large database for Upper Devonian production gas, [there is] a range of signatures for the carbon and hydrogen isotopes, and this falls right within that range."

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SNYDER BROTHERS, INC.	:	
	:	
v.	:	**EHB Docket No. 2006-002-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KENNETH W. HARPER, Intervenor	:	

ORDER

AND NOW, this 30th day of January, 2007, in consideration of the Department's Motion for a Protective Order and the Appellant's response thereto, it is hereby ordered that the Motion is denied. Unless the Department produces the database that Fred Baldassare referred to in his deposition, the Department will not be permitted to introduce his expert testimony in the hearing in this matter.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: January 30, 2007

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SECRETARY TO THE BOARD

UPPER GWYNEDD TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-358-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 30, 2007**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis

The Board denies a motion for summary judgment filed by a municipality in its appeal of certain provisions of its NPDES permit issued to the municipality. The municipality failed to show that there was no genuine issue of material fact related to the imposition of a 2 mg/l phosphorus discharge limit which applies both during the warm summer months and also during the colder winter months. It is not clear from the record that the Department failed to properly apply or interpret 25 Pa. Code § 96.5(c), which requires a 2 mg/l discharge limit for waters impaired by nutrient pollution.

Further, the record does not establish the municipality's entitlement to judgment in its favor concerning the imposition of toxicity limits and testing requirements for a fish species where the Department considered not only the toxicity testing submitted with the permit application, but other factors as well.

BACKGROUND

On November 28, 2005, the Department issued a National Pollutant Discharge Elimination System (NPDES) permit to Upper Gwynedd Township (UGT), which authorized a discharge from the Upper Gwynedd Township Wastewater Treatment Plant located in Upper Gwynedd Township, Montgomery County, to the Wissahickon Creek. On December 27, 2005, UGT filed a timely appeal of that permit which objected to several permit conditions. Included among these objections was the total phosphorus standard which must be met in both warm weather and cold weather periods, and a chronic whole effluent toxicity limit for *Pimephales promelas*, also known as the fathead minnow.

In its motion UGT seeks summary judgment on two issues. First, it argues that it was arbitrary for the Department to impose a *de facto* "winter limit"[1] of 2 mg/l for total phosphorus which is unreasonably more stringent than the 3.6 mg/l winter limit recommended by the 2003 Wissahickon TMDL. UGT also argues that it was unreasonable to impose whole effluent toxicity (WET) limit and testing requirements for the fathead minnow when testing data submitted with the permit application demonstrated no toxicity to that species from UGT's discharge.

OPINION

Standard for Summary Judgment

The Board will only grant summary judgment where the evidentiary materials which support the motion demonstrate that the moving party is entitled to judgment as a

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[1] Although the 2 mg/l phosphorus limit may apply year-round, during the summer months this general limit may be irrelevant in view of a more stringent 1.82 mg/l discharge limit for ortho-phosphate.

matter of law.[2] In considering the merits of a motion for summary judgment, we view the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Finally, the entry of judgment in the moving party's favor is only appropriate in cases where the right to judgment is clear and free of doubt.[3]

Generally speaking, we find the issues raised in UGT's motion are inappropriate for resolution by summary judgment and will deny the motion. As we explain in more detail below, the questions posed by the motion require the evaluation of conflicting expert testimony and the interpretation of deposition and interrogatory evidence. This Board has many times held that a "trial on papers" is disfavored. The Board will not make credibility determinations or choose competing interpretations of the testimony of witnesses or scientific and expert reports in response to a motion for summary judgment. Summary judgment is especially inappropriate where both UGT and the Department rely on the testimony of the same witness to support their positions.[4]

The Phosphorus Limit

Department Reliance on the Brezina Memo

UGT argues that the 2 mg/l phosphorus limit required year-round by the NPDES permit is the result of the application of a Department policy which has not been

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[2] *E.g., Global Ecological Services, Inc. v. Department of Environmental Protection,* 789 A.2d 789 (Pa. Cmwlth. 2001); *Barra v. DEP*, EHB Docket No. 2003-038-L (Opinion issued April 24, 2006).

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

[4] *E.g., Lower Salford Township Authority v. DEP*, EHB Docket No. 2005-100-K (Opinion issued September 19, 2006); *Lower Paxton Township v. DEP*, 2001 EHB 753; *DLA v. DEP*, 2001 EHB 337.

promulgated as a regulation in accordance with the Commonwealth Documents Law. Specifically, it is UGT's contention that the basis for the limit is a March 15, 2005, internal memorandum issued by Edward Brezina,[5] referred to as the Brezina Memo, which imposes new requirements beyond those which are found in the applicable regulation. The Department denies that the Brezina Memo constitutes a so-called "binding norm" and that its decision to impose the 2 mg/l limit was based upon the requirements of Section 96.5(c) of the regulations.

The "binding norm" test is the standard adopted by the courts of Pennsylvania to determine whether a so-called guidance document is truly for "guidance" or is really a proclamation that the agency treats as having the force of law. Announced by the Pennsylvania Supreme Court in *Pennsylvania Human Relations Commission v. Norristown Area School*,[6] the test focuses on the "practical effect" of the agency pronouncement:

> [A]n agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules or through adjudications which constitute binding precedents. A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent, but is *merely an announcement* to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. *A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications.*
>
> The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent

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[5] Chief of the Department's Division of Water Quality Assessments and Standards.

[6] 374 A.2d 671 (1977).

> administrative proceedings . . . A properly adopted substantive rule establishes a standard of conduct *which has the force of law* . . . The underlying policy embodied in the rule is not generally subject to challenge before the agency.
>
> A general statement of policy, on the other hand, *does not establish a 'binding norm'* . . . A policy statement announces the agency's *tentative intentions for the future*. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. (Emphasis added.)[7]

As applied at the Board, we have held that the Department does not create a binding norm by merely following policy guidelines consistently. Nor does a policy become a binding norm simply because an employee relies upon it to make a decision.[8]

The Brezina Memo, entitled "Seasonal Limits for Phosphorus in NPDES Permits," purports to provide more detailed guidance related to an earlier memo which terminated "blanket use of seasonal multipliers for phosphorus effluent limits for discharges to streams that are impacted by phosphorus."[9] The memo goes on to explain, among other things, that where a technology based limitation is applied, "there will be no application of seasonal limitations." The memo defines the 2 mg/l limit found in Section 96.5 for impaired streams as a technology-based standard. This paragraph references another guidance document for a more complete explanation concerning the development of technology-based effluent limits. The memo does provide for the application of seasonal limits for some water quality-based effluent limitations (WQBEL), "as long as this number does not exceed the maximum technology value contained in Chapter 96.5."

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[7] 591 A.2d at 1173-74.

[8] *Mountaintop Area Joint Sanitary Authority v. DEP*, EHB Docket No. 2004-088-MG (Opinion issued April 12, 2006).

[9] Motion, Ex. F.

According to UGT, this language of the memo leaves no room for the exercise of discretion by the Department, and establishes a new legal principle by providing that a technology-based limit can not be applied seasonally. The Department takes the position that the memo merely tracks the language of the regulation. Therefore, to the extent the language may be read as "mandatory" it is because the language of the regulation is "mandatory." Regardless of the content of the memo, in the Department's view, the 2 mg/l phosphorus limit was established in compliance with Section 96.5, and can be independently justified on that basis.[10]

Section 96.5(c) of the regulations provides that:

> (c) When it is determined that the discharge of phosphorus, alone or in combination with the discharge of other pollutants, contributes or threatens to impair existing or designated uses in a free flowing surface water, phosphorus discharges from point source discharges shall be limited to an average monthly concentration of 2 mg/l. More stringent controls on point source discharges may be imposed, or may be otherwise adjusted as a result of a TMDL which has been developed.[11]

As applied here, it does not appear that the Brezina Memo adds additional requirements beyond those which appear to be required by Section 96.5(c). The regulation is silent as to the application of seasonal relaxation of a phosphorus standard. To the extent that the memo requires that an effluent limit not exceed 2 mg/l in streams that are determined to be "impaired" by phosphorus, that requirement is clearly found in Section 96.5(c). Further, the regulation makes no distinction between technology-based standards and

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[10] *Mountaintop*, slip op. at 7.
[11] 25 Pa. Code § 96.5(c).

water-quality based standards. It simply refers to an "average monthly concentration." Therefore, even if we disregard the Brezina Memo, UGT would still be left with the apparent requirements of Section 96.5(c). A policy document which provides a roadmap for compliance with a statute or regulation does not necessarily create an improper binding norm.[12]

Further, the degree to which the Department relied exclusively on the Brezina Memo rather than on other additional sources is unclear. UGT cites interrogatory answers and deposition testimony of the Department's permitting chief, Jenifer Fields, as others. The Department also cites the testimony of Jenifer Fields indicating that the requirements of the regulation also formed the basis for the discharge limit. This alone creates an obvious issue of fact.

It may well be, as UGT contends, that the Department's decision to require a year-round phosphorus limit departs from prior practice and from other departmental guidance and policy documents that might be in effect. However, guidance and policy documents do not have the force of law.[13] The Department is not *required* to follow them. Our review of the Department's discharge standard for phosphorus is guided by the regulation, not policy or guidance documents. Therefore the fact that the Department followed a particular practice in the past, does not necessarily mean that a departure from

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[12] *Homebuilders Ass'n of Chester v. Department of Environmental Protection*, 828 A.2d 446 (Pa. Cmwlth. 2003), *affirmed,* 844 A.2d 122 (Pa. 2004)(although the Department's stormwater management policy listed specific requirements, including a permit requirement, it did not establish a "binding norm;" rather it was merely a description of the agency's "recommended approach for achieving compliance with existing requirements.")

[13] *United Refining v. DEP*, EHB Docket No. 2006-007-L (Opinion issued November 16, 2006).

that practice as described in the Brezina Memo is inappropriate now, particularly when there has apparently been a change in the regulations.[14] In fact, it appears that one purpose of the Brezina Memo may have been to bring Department practice in line with current regulatory language by ending the "blanket" application of seasonal limits for phosphorus discharges to nutrient impaired streams.

UGT also argues that the Brezina Memo establishes a new legal standard by defining the phosphorus limit in Section 96.5 as a technology-based limit, rather than a water quality-based limit. This could represent an incorrect interpretation of the regulation by the Department. Yet at this point, we are not convinced that the characterization of the 2 mg/l limit as technology-based or water quality-based is significant to the application of the regulation to UGT's discharge. To the extent that it is relevant, it appears that the answer to that question must be developed with testimony rather than decided on the record as it stands now.

Interpretation of Section 96.5(c)

UGT argues that there is nothing in Section 96.5(c), which requires the application of the 2 mg/l standard year-round, where there is no finding of use impairment year-round. According to UGT, such an interpretation is unreasonable and it was arbitrary for the Department to require such a stringent standard to this permit. Alternatively, UGT contends that if the regulation is read to require the 2 mg/l discharge standard year-round without a determination of year-round use impairment, then the regulation itself is unreasonable and should be set aside.

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[14] A former regulation of the Department, 25 Pa. Code § 95.9, did explicitly provide for seasonal relaxation of phosphorus discharge limits.

First, UGT takes issue with the Department's position that the 2 mg/l limit is a "technology based limit" which can not be applied seasonally. Second, by reviewing the regulatory history of phosphorus limitations, Section 96.5(c), according to UGT, was never intended to impose mandatory winter limits. Finally, UGT believes that it was improper for the Department to apply the 2 mg/l limit because it did not render a proper determination of "use impairment" during the cold months as required by that section.

The Department disagrees with UGT and takes the position that the language of the section is clear, and the regulation was interpreted and applied correctly. Further, in the Department's view, its determination of "impairment" was appropriate. Accordingly, it properly applied the requirements of Section 96.5(c).[15]

At the outset, we observe that Section 96.5(c) is silent on two points argued by UGT: The availability of seasonal application of a discharge standard, and whether the standard in the regulation is technology-based or water-quality based. Regarding the latter point, the regulation says only that once a determination that phosphorus pollution impairs or threatens to impair the use of the receiving stream "phosphorus discharges from point source discharges shall be limited to an average monthly concentration of 2 mg/l."[16] Even if we accept UGT's argument that the standard is a water quality-based standard, we fail to appreciate the importance of the issue. We do not see anything explicit in the regulation which says anything about either year-round or seasonal

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[15] The Department also argues that the argument that Section 96.5 is an unreasonable regulation was not properly raised by the notice of appeal. This argument is dealt with in detail in our opinion and order of UGT's motion to amend its appeal. *Upper Gwynedd Township v. DEP*, EHB Docket No. 2005-358-MG (Opinion issued January 25, 2007).

[16] 25 Pa. Code § 96.5(c).

application of that discharge limit, regardless of its characterization. Specifically, the language of the regulation does not appear to either forbid or require seasonal application of a phosphorus discharge standard, regardless of whether the limit is viewed as technology-based or water quality-based. Therefore, the fact that the Department required year-round application of the standard does not appear to explicitly contradict the language of the regulation.

This leads to UGT's most important arguments: that the Department's insistence of a year-round application of the 2 mg/l discharge limit for phosphorus is unreasonable because the Department made no determination that UGT's discharge would have any effect on the water quality of the Wissahickon during the winter months. Specifically, UGT argues that the Department failed to make a "determination" within the meaning of Section 96.5, because it did not "perform an evaluation of potential impairment, express the results of that evaluation in writing and then use the evaluation as documentation for the permitting decision." Yet UGT itself points to evidence in the record that Department employees who made the decision to apply the 2 mg/l standard relied on the Water Quality Protection Report, which is derived, in part, from the Department's "303(d) report" of impaired streams which is required by the federal Clean Water Act, and other research that the Department has been conducting relative to nutrient impairment. We know of no principle of Pennsylvania administrative law that enables us to hold, as a matter of law, that the Department failed to make a "determination" when it relied on these materials, simply because it did not reduce its findings to a single written report or assessment in a certain format. Yet, we also can not say that "impairment" for the purpose of the 303(d) list is the same as "impairment" for the purposes of Section 96.5.

Nor is it clear that the regulation requires the Department to make a determination of year-round impairment before it is reasonable for the Department to apply the 2 mg/l limit year-round. To the extent that there may be discrepancies in deposition testimony and written discovery, as suggested by UGT, those issues are more properly resolved at hearing rather than in the context of a summary judgment motion.

UGT also contends that there is no scientific basis to conclude that the Wissahickon is impaired during the winter months. To support this view, UGT cites its own expert report of Dr. Lial Tischler and the 2003 Wissahickon TMDL report. Dr. Tischler attacks assumptions made by the Department's competing expert opinions by Alan Everett and Lee McDonald, and the data from which those opinions were derived. Obviously, our role in the context of a motion for summary judgment is not to resolve which expert opinion is more credible and reliable. Even without the Department's response to UGT's motion, it appears that there is an important scientific question about the level and duration of nutrient impairment in the Wissahickon and the manner in which that impairment should be judged.

Finally, there does not seem to be any real dispute that a prior version of the regulations and prior guidance documents permitted the seasonal application of phosphorus limits. UGT argues that the Department erred by requiring year-round application of the limit because seasonal application was permitted by a 1997 guidance document that has not been withdrawn. However, as we explained above, guidance documents do not have the force of law. Accordingly, whether that guidance remains "in effect," is in the process of being rewritten, or seems to conflict with the Brezina Memo, is an insufficient basis upon which to vacate the Department's imposition of the 2 mg/l

limit on a year-round basis, particularly if the guidance is contrary to the requirements of the current regulation.

The significance of the prior version of the regulation which explicitly provided for seasonal application of phosphorus limits is not clear. It may be that explicit language concerning seasonal variation was left out deliberately. In this event, it may be reasonable to interpret Section 96.5 as mandating year-round application of the 2 mg/l. Conversely, it may also be reasonable to conclude that the regulation is silent on the matter because the reasonable interpretation is that the regulation requires a more thorough determination of nutrient impairment as advocated by UGT. This conflict in interpretation can not be resolved without the creation of a fully developed factual record.

In sum, we deny summary judgment on the Department's application and interpretation of Section 96.5(c). In our view, there are numerous issues of material fact which must be resolved. The exhibits to the motion and response demonstrate that there are competing expert opinions and competing interpretations of deposition testimony and interrogatory answers. We can not hold as a matter of law that the Department's imposition of a year-round 2 mg/l discharge limit for phosphorus was inappropriate. Similarly, without further factual development we can not hold that Section 96.5(c) is clearly unreasonable as written.

Whole Effluent Toxicity (WET) Testing Requirement.

UGT's NPDES permit requires Whole Effluent Toxicity (WET) effluent limitations and testing requirements related to the fathead minnow, *Pimephales promelas*, and an invertebrate species, *Ceriodaphnia dubia* (*C. dubia*), the water flea. UGT argues that it was inappropriate to impose WET limit and testing requirements of the fathead

minnow, because WET test data submitted with the permit application showed no toxicity to that species. UGT does not challenge the WET testing requirement for the water flea, because testing data did demonstrate a danger of toxicity to that species. Specifically, UGT argues that there is nothing in the regulation which requires WET testing for a vertebrate species simply because toxicity is demonstrated to an invertebrate species. Further, its test results show that there is no "reasonable potential" of toxicity to the minnow as a result of UGT's discharge.

In response, the Department states it considered other factors in addition to the WET testing results when it determined that it was appropriate to require WET limit and testing for the minnow as well as *C. dubia*. According to the Department it is required to consider not just current test results, but to also consider other data to determine whether the discharge has a reasonable potential to cause a violation of a toxicity limit. Therefore, in addition to the test data submitted by UGT, the Department also considered other factors, including the fact that UGT's discharge has historically shown toxicity for both the minnow and the water flea and the fact that much of UGT's wastewater originates from a number of significant industrial sources.

Clearly there is an issue of material fact which must be resolved on a complete record. Whether UGT's WET testing results included in its permit application sufficiently demonstrated a lack of need for toxicity testing for the minnow or whether the Department's broad approach is correct can not be resolved on a summary judgment record. Accordingly, we will deny summary judgment on this basis as well.

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UPPER GWYNEDD TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-358-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 30th day of January, 2007, it is hereby ordered that Upper Gwynedd Township's Motion for Summary Judgment in the above-captioned matter is **DENIED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Judge

DATED: January 30, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

HERCULES, INCORPORATED	:	
	:	
v.	:	**EHB Docket No. 2005-337-R**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 31, 2007**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Judge

Synopsis:

The appellant's motion for summary judgment on the question of whether the Department can require a party to proceed under the requirements of Act 2 in the remediation of an industrial site is denied. Although the parties agree that this is a purely legal issue, the Board feels that it would be greatly benefited from further development of the record at trial. Moreover, the appellant has not convinced us that it is entitled to judgment as a matter of law on this issue. We further find that simply because the appellant has taken steps to comply with the Department's order, that by itself does not render the order moot. Finally, there are issues of fact in dispute with regard to the reasonableness of the timeframes set forth in the Department's order which cannot be addressed in the context of a summary judgment motion.

OPINION

Presently before the Pennsylvania Environmental Hearing Board (Board) is a motion for

summary judgment filed by Appellant Hercules, Incorporated (Hercules). Hercules contends that the Board should overturn an order issued on November 2, 2005 by the Department of Environmental Protection (Department) directing Hercules to perform a site investigation and remediation at its property in Clairton, Pennsylvania (the property). It is Hercules' contention that the Department is ordering it to partake in a voluntary remediation program under the Land Recycling and Environmental Remediation Standards Act, Act of May 19, 1995, P.L. 4, 35 P.S. §§ 6026.101 et seq., also known as "Act 2," which Hercules contends the Department has no authority to do.

Background

The facts upon which the parties agree are as follows.[1] In early 1999, Hercules entered into an agreement with the City of Clairton (City) under which Hercules authorized the City to access the property for the purpose of obtaining information about its environmental condition. The intent was that the information was to be collected in connection with a possible sale of the property to the City. The City informed Hercules in late 1999 that it had access to federal funds to conduct environmental assessments and that it hoped to arrange and pay for a Phase I and Phase II environmental assessment of the property. The City worked with an organization by the name of West to West, comprised of representatives of various cities in the Monongahela River Valley. The City hired a consultant, KU Resources, to perform the environmental assessment on the property. In December 2001, the City filed a Notice of Intent to Remediate. The assessment work progressed through the summer of 2002 and KU Resources issued a report to the Department under the Act 2 program. The Department informed KU Resources that the assessment report would be denied due to a failure to define groundwater flow and characterize

[1] The facts are derived from Hercules' notice of appeal and motion and the Department's

the soil pile on the property. As a result, KU Resources withdrew the Act 2 submittals. On February 25, 2004, the Department sent a letter to Hercules to schedule a meeting regarding remediation of the property, and Hercules informed the Department that the City was taking the lead on the environmental assessment. In March 2004, Hercules was informed by KU Resources that additional investigation work was underway and that enough money had been allocated to move the project forward. Hercules communicated to the Department that it would be apprised of the results when KU Resources had completed its work. According to Hercules, during this time period it was approached by the City concerning transfer of the property and Hercules advised the City of the issues that would need to be addressed in order to transfer the property and have City accept responsibility for its remediation. Hercules states that it received no further communication from the City or West to West up to the time it received the November 2, 2005 order (the order) that is the subject of this appeal.

The order states that it is issued pursuant to Sections 5, 316, 402 and 610 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1 et seq, at §§ 691.5, 691.316, 691.402 and 691.610; Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17A; and the rules and regulations promulgated thereunder. The order requires Hercules to do the following: (1) submit a Notice of Intent to Remediate the property within 45 days of the order; (2) submit a Remedial Investigation Report within 45 days of the order; (3) submit a Risk Assessment Report within 30 days of the Department's written approval of the Remedial Investigation Report if selected to attain a site specific standard; (4) submit a Cleanup Plan and Schedule of Implementation within 30 days after the Department's written approval of either the Risk Assessment Report or Remedial

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response to the motion for summary judgment.

Investigation Report; (5) commence implementation of its Cleanup Plan within 30 days of the Department's written approval; (6) submit a Final Report demonstrating attainment of the selected standard in accordance with the Cleanup Plan, Act 2 and the Act 2 regulations; (7) submit quarterly written progress reports until the Department approves Hercules' Final Report under Act 2 for both soil and groundwater; and (8) submit any other additional information the Department may require. The submissions are to be made in accordance with the relevant provisions of Act 2 and the regulations at 25 Pa. Code Chapter 250.

Hercules argues that it is entitled to summary judgment on three grounds: first, that the Department is without authority to require submission to a voluntary program; second, that the timeframes imposed in the order are illegal and arbitrary; and, third, that any remaining issues regarding the property are moot.[2]

Oral argument on Hercules' motion was held on December 18, 2006.

Authority to Issue the Order

The initial task we face in addressing Hercules' first argument is simply defining the issue since the parties characterize it in two entirely different ways. The distinction may simply be one of semantics, but we do not think so. Rather, it appears that the parties are viewing the matter on different levels.

In its motion for summary judgment, Hercules defines the issue as follows: whether the Department has the "authority to require participation in a voluntary program." In short, Hercules argues that the Department cannot order it to proceed under Act 2 since it is a voluntary program.

---

[2] The Department also sought to file a motion for summary judgment on the question of whether it had the authority to require Hercules to take the action set forth in its order but was denied the opportunity to do so because the request was made after the deadline for the filing of dispositive

In its response, the Department asserts that it is not forcing Hercules to take part in a voluntary program; rather, it states the issue as follows: whether the Department has the authority to issue an order pursuant to the Clean Streams Law directing Hercules to characterize and remediate its property utilizing the provisions of Act 2. The Department points to numerous sections of Act 2 and the regulations which it contends support its argument that it does have the authority to require compliance with the characterization and remediation standards set forth in Act 2. In particular, the Department points us to the following provisions:

Section 106 of Act 2 (Scope), which states:

> Remediation standards. – The environmental remediation standards established under this act shall be used whenever site remediation is voluntarily conducted *or is required under the act of June 22, 1937 (P.L. 1987, No. 394), known as The Clean Streams Law. . . .*

35 P.S. § 6026.106(a) (emphasis added).

Section 301 of Act 2 (Remediation standards), which states:

> Standards. – Any person who proposes or *is required* to respond to the release of a regulated substance at a site and who wants to be eligible for the cleanup liability protection under Chapter 5 shall select and attain compliance with one or more of the following environmental standards when conducting remediation activities. . . .

35 P.S. § 6026.301(a) (emphasis added).

Section 250.2 of the regulations (Application of remediation standards), which states:

> (a) This chapter provides remediation standards which shall be used whenever site remediation is voluntarily conducted *or is required under environmental statutes in section 106 of the act (35 P.S. § 6026.106).*
>
> (b) *A person who is required to perform a site remediation under an enforcement action of the Department shall meet the*

---

motions and was vigorously opposed by Hercules.

following. . .

* * * * *

(2) Demonstrate compliance with the substantive, procedural and notice requirements of the act and this chapter.

25 Pa. Code § 250.2(a) and (b) (emphasis added).

In its reply, Hercules appears not to dispute the Department's authority to order a party to characterize and remediate a site pursuant to the Clean Streams Law utilizing the standards found in Act 2 and the Chapter 250 regulations. Rather, it appears to argue that the Department went beyond that authority by requiring Hercules to file a Notice of Intent to Remediate, thereby forcing it to be a participant in an otherwise voluntary program.

Both sides strongly believe that this is a purely legal issue. While that may be true, in ruling on this issue the Board believes it would greatly benefit from the testimony of witnesses, particularly with regard to the various components of the Department's order and the Act 2 program. We find this situation to be similar to that encountered by Judge Miller in *Defense Logistics Agency v. DEP*, 2001 EHB 337, 348-49, where he noted that certain issues involve "mixed questions of fact and law that will require further development at a hearing." We find this to be exactly one of those situations. Although the issue raised by the parties may be a purely legal one, without the development of further facts, which may or may not be in dispute, we find that we cannot rule on this issue given the limited record we now have before us.

As we have stated many times, the Board may not grant summary judgment unless the evidentiary materials that support the motion demonstrate there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Martz v. DEP*, EHB Docket No. 2004-241-MG (Opinion and Order issued December 6, 2006), *slip op.* at 2, n. 1; *Snyder Brothers, Inc. v. DEP*, EHB Docket No. 2006-002-K (Opinion and Order issued December 4,

2006), *slip op.* at 3. Hercules has not demonstrated to us that it is entitled to judgment as a matter of law. Nor, however, has the Department convinced us of the error of Hercules' position, and, therefore, we believe that further development of the record at trial will assist us in resolving this matter.

Mootness

Hercules states that despite its contention that the Department has no authority to require it to proceed under Act 2, it did submit a Notice of Intent to Remediate in what it states is an "on-going commitment to cooperate in resolving any outstanding issues associated with the Subject Property." (Reply, p. 7) Additionally, Hercules has done stormwater sampling and other activities required by the Department at the site. Hercules argues that because it has submitted the Notice of Intent to Remediate and commenced Act 2 activities, the Department's order is now moot. Hercules argues that because it has submitted itself to the Act 2 program the Department's order serves no purpose and should be vacated. It asserts that if in the future it withdraws from the Act 2 program, the Department can issue an order to require further action.

In response, the Department argues that Hercules' action of submitting a Notice of Intent to Remediate does not negate or void the Department's enforcement action. The Department points to Section 905 of Act 2 which states as follows:

> The Department is authorized to use the enforcement...provisions applicable to the environmental medium or activity of concern, as appropriate, established under the ...Clean Streams Law, ...to enforce the provisions of this act.

35 P.S. § 6026.905(a). The Department argues that once it "has exercised its discretion to order remediation pursuant to its authority under the Clean Streams Law and consistent with the substantive and procedural requirements of Act 2, a remediator does not become a 'voluntary' remediator thereby making the Department's order of no import or unenforceable." (Response,

p. 12)

We agree with the Department that simply because it issues an enforcement order and the recipient thereof takes steps to comply with the order, that by itself, does not render the order moot, and Hercules has pointed to no case law in support of its position.

We further note that the Department's order requires a number of activities, and there is no indication that all of these activities have been undertaken and completed. There is no basis for finding the order to be moot simply because Hercules has complied with one or more components of it.

Timeframes Set Forth in the Order

As noted earlier, Hercules also contends that the deadlines set forth in the Department's order are "illegal and arbitrary." The Department, on the other hand, believes that the deadlines are reasonable. Each party sets forth its reasons in support of its position. This issue clearly revolves around disputed facts and, therefore, is inappropriate for summary judgment.

We, therefore, enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HERCULES, INCORPORATED	:	
	:	
v.	:	**EHB Docket No. 2005-337-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 31st day of January 2007, appellant Hercules, Incorporated's motion for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Judge

DATE: January 31, 2007

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

BP PRODUCTS NORTH AMERICA, INC.	:	
	:	
v.	:	**EHB Docket No. 2005-032-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 6, 2007**

OPINION AND ORDER ON MOTION TO WITHDRAW DEEMED ADMISSIONS

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board grants the Department's motion to withdraw deemed admissions. The Board, pursuant to 25 Pa. Code 1021.122, orders the Department to assume the burden of proceeding with the evidence in an appeal where that burden would ordinarily lie with the appellant.

OPINION

Our saga begins almost seven years ago to the day. On February 21, 2000, BP Exploration & Oil Inc., apparently a predecessor to the appellant, BP Products North America, Inc. ("BP"), applied for renewal of its NPDES permit for its Greensburg Terminal in Hempfield Township, Westmoreland County. Five years later, on January 10, 2005, in more time than it took the United States to win World War II, the Department of Environmental Protection (the "Department") issued the permit. BP was not satisfied with all of the terms of the permit, so it filed this appeal on February 15, 2005. It is now, of course, February 2007 and we have yet to complete a process that may be said to have begun seven years ago.

We received our first joint request for an extension of prehearing deadlines in this appeal on April 5, 2005. The parties represented that they were engaged in settlement discussions. We granted the extension. Among other things, the deadline for filing dispositive motions was moved to December 14, 2005.

We received our second joint request for an extension on July 27, 2005. We pause for a moment to emphasize that this and every other request for an extension in this appeal (up until very recently) was a joint request. In the second request the parties represented that they were engaged in continuing settlement discussions. We granted the request, which extended the deadline for filing dispositive motions to February 15, 2006, which was about one year after the appeal was filed.

We received our third request on October 31, 2005. The parties represented to the Board that they were engaged in continuing settlement discussions. The parties noted that they exchanged discovery during the week of October 10 but preferred to focus their attention on their settlement efforts. We granted the request.

We received our fourth request on February 13, 2006. The parties referred to their continuing settlement discussions. They noted that they by mutual agreement had extended the time for answering each other's discovery. We granted the request, which extended the deadline for completing all non-expert discovery to May 15, 2006.

On May 15, 2006 we received our fifth request for an extension. The parties acknowledged that the discovery deadline expired that same day, but they represented to us that they had made significant progress toward settling the matter, and that they were in the process of reviewing drafts of settlement documents. We granted the request.

On September 11, 2006, we received our sixth request for an extension. The sole basis for the request was stated as follows:

> The press of work has interfered with completion of that task [finalizing settlement documents] since our last request, dated May 15, 2006.

In other words, the parties claimed to be too busy to "finalize" settlement documents in the four months that had passed from the previous extension request. We were less than captivated with this explanation and with the pace of the proceedings in general. Not wishing to be a willing party to what was beginning to look a lot like nonfeasance, we granted the extension request only in part. We issued an Order on September 12, 2006 directing that all discovery, including expert discovery, be completed by November 13, and that dispositive motions be filed by November 30. We added: "The parties should assume that no further extensions will be approved."

On September 28, BP wrote to request a case management conference. The Department filed a letter on September 29 concurring with that request. Board staff called the parties to arrange a conference call in response to their request. Those calls were not returned. The conference was never held.

On November 29, the day before dispositive motions were due, BP filed yet another motion for an extension of time. BP complained that the Department had not complied with its discovery obligations, which BP said prevented it from filing an informed motion for summary judgment. We denied the request on November 30 without prejudice to BP's right to make arguments it deemed appropriate in separate dispositive motions regarding the Department's alleged discovery abuses. BP managed to file a summary judgment motion the next day and on time.

On December 7, we received a motion from the Department for an extension of time to respond to BP's summary judgment motion. Counsel for the Department said that she planned to be on vacation during part of the 30 days that the Department had to respond. We, of course, denied the audacious request.

On January 4, 2007, as anticipated by our Order of November 30, BP filed a motion in limine to preclude the Department from presenting any evidence at the hearing on the merits. BP explained in some detail what had been going on outside of the view from our ivory tower. Although we will not get into all of the details here, all of which are largely undisputed by the Department, BP said that the parties had arrived at what BP believed to be an agreement in principle back on April 11, 2006. BP sent the Department a discussion draft of a settlement agreement on May 14. BP sent a redraft on May 22. BP received no response from the Department.

On the discovery front, in response to our above-referenced September 12 Order directing that discovery be completed in two months, BP wrote the Department with a proposed discovery schedule on that very day. The Department offered no substantive response. BP nevertheless provided its answers to the Department's written discovery on October 24, 2006. (Recall that discovery had been exchanged during the week of October 10, *2005*.)

On November 6, the Department sent BP a proposed settlement agreement. This was its first response to the settlement conference in April and BP's draft settlement agreement of May 14.

The Department did not respond to BP's discovery by the November 13 deadline set forth in our September 12 Order. The Department did not respond until 4:35 p.m. on November 29, the day before dispositive motions were due. (That is what prompted BP's motion for an

extension on November 29.) As of its November 29 response, the Department did not identify any experts. It did not produce any documents. BP did not actually receive any documents until December 11, and it did not receive the Department's expert report until December 26, which acknowledged on its face that it was incomplete. The missing materials were not supplied until January 17, 2007. It was in light of this behavior that BP filed its motion to preclude the Department from presenting any evidence at the hearing on the merits.

In response to BP's motion in limine, the Department noted that BP had never filed a motion to compel. It argued that BP's proposed sanction would interfere with the presentation of critical evidence, and that it would impede the Board's ability to decide the case on the merits. It acknowledged BP's frustration with the Department's slow responses, but said that "frustration" is not the same as "prejudice." As justification for its slow responses, the Department offered the excuse of an extremely heavy workload.

A heavy workload, even if true, does not justify a unilateral and unexcused decision to disregard the Board's rules and orders. In response to BP's motion in limine, we issued an Order granting BP extended discovery rights, but denying BP's request that we preclude the Department from presenting any evidence at the hearing on the merits. We did so, not out of sympathy for the Department's time management problems, but because we do not believe that important decisions regarding the environment that affect the citizens of this Commonwealth should turn on the Department's inability or unwillingness to respect the Board's orders and rules. Of course, at some point even consideration of the public interest in informed environmental decisionmaking may need to give way to deterring ongoing disregard for the Board, but we have not quite reached that point in this case.

BP has expressed outrage at the way the Department has handled this matter. We agree that some of that outrage is justified. It should be remembered, however, that *all* of the extension requests in this appeal were joint requests. BP acceded to the delay for many months. It could have prosecuted its appeal with greater vigor at any time. Instead, BP made a tactical decision to focus entirely on settlement until the eleventh hour, and now it must live with the consequences of that decision. One of those consequences is that we will grant the Department's motion to withdraw its deemed admissions and substitute its actual responses pursuant to Pa.R.C.P. 4014(d). To tell the truth, we are not entirely sure when the 30 days began to run given the way this case has been litigated. We remain interested in reaching an informed resolution on the merits. Toward that end, we believe that shifting the burden of production will aid in the orderly presentation of the evidence and assist us in understanding the complex issues that are presented in this appeal. We will, therefore, require the Department pursuant to 25 Pa. Code § 1021.122 to assume the burden of proceeding. The ultimate burden of proof does not change.[1]

Accordingly, we issue the following Order.

[1] BP's suggestion that we impose attorneys' fees if BP ultimately establishes facts it sought to have admitted pursuant to Pa.R.C.P. 4019(d) is interesting and we will take it up at the appropriate time if circumstances warrant.

COMMONWELATH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BP PRODUCTS NORTH AMERICA, INC.	:	
	:	
v.	:	**EHB Docket No. 2005-032-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 6th day of February, 2007, in further consideration of BP's motion in limine, the Department's motion to withdraw deemed admissions, and the responses thereto, it is hereby ordered as follows:

1. The Department's actual responses to BP's request for admissions are substituted for its admissions to the extent they may have been deemed to have been admitted.
2. Prehearing Order No. 2 is amended to provide that the Department's prehearing memorandum will be due on or before **April 25, 2007** and BP shall file its memorandum on or before **May 25, 2007**.
3. The Department shall bear the burden of proceeding at the hearing on the merits.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: February 6, 2007

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

CITIZEN ADVOCATES UNITED TO SAFEGUARD THE ENVIRONMENT, INC., SUFFER, DREW MAGILL AND ANDREW F. MAGILL	:	
v.	:	**EHB Docket No. 2006-005-L (Consolidated with 2005-327-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and HAZLETON REDEVELOPMENT AUTHORITY and HAZLETON CREEK PROPERTIES, Permittees	:	**2005-329-L, and 2005-363-L)**
	:	**Issued: February 6, 2007**

OPINION AND ORDER ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board denies three motions for partial summary judgment because there are disputed issues of material fact.

OPINION

This appeal involves a site in the City of Hazleton. The site was used for deep mining activity until the 1950s. Surface mining occurred at the site in the 1940s, 1950s and early 1960s. The site was also used for waste disposal by the City of Hazleton and possibly others until at least the 1970s.

Hazleton Creek Properties, LLC ("HCP") is a Pennsylvania Limited Liability Company created in May 2005. The Redevelopment Authority of the City of Hazleton, which is also known as the Hazleton Redevelopment Authority ("HRA"), is a Pennsylvania municipal authority formed pursuant to the Urban Redevelopment Authority Law. HRA was created in February 1960. HRA purchased the site in 2006. HRA wishes to facilitate the reuse of the site.

In 2002, Lehigh Coal & Navigation, a company that is not involved in this case, applied for a general permit for processing and beneficial use of brackish and marine dredge material, cement kiln dust, lime kiln dust, coal ash, and cogeneration ash in mine reclamation. DEP issued the general permit. Persons or municipalities that want to operate under the general permit may obtain a determination of applicability ("DOA") from the Department. HCP filed such a request, which the Department granted on October 5, 2005.

SUFFER, a citizens group, along with Drew Magill and Andrew Magill (collectively "SUFFER"), filed a notice of appeal challenging the general permit and the HCP DOA. Another group, Citizen Advocates United to Safeguard the Environment ("CAUSE"), has filed an appeal from the HCP DOA.

Entry into a consent order and agreement is required by law for each site-specific or Special Industrial Area clean-up under the Land Recycling and Environmental Remediation Standards Act, 35 P.S. § 6026 *et seq.* ("Act 2"). HRA and HCP entered into a CO&A with the Department for remediation and reuse of the site on December 6, 2005. SUFFER and CAUSE have both filed appeals regarding the CO&A. The Board has now consolidated all of the appeals. HCP, CAUSE, and the Department have each filed a motion for partial summary judgment.

HCP's Motion

HCP in its motion for partial summary judgment asks us to hold as a matter of undisputed fact and law that coal ash and coal ash mixed with other materials may be used for mine reclamation by virtue of Section 508(a) of the Solid Waste Management Act, 35 P.S. § 6018.508(a), and the regulations promulgated thereunder. We cannot imagine why we would want or need to depart from Chief Judge Krancer's scholarly treatment of this very issue in *ACE v. DEP*, EHB Docket No. 2005-036-K (Opinion, July 28, 2005). Judge Krancer concluded in that case that resolution of the question would benefit greatly from being aired at a hearing. We adopt that analysis and that conclusion in this case. We are not willing to hold in the context of a motion for summary judgment either that coal ash *may* be used or that it *may not* be used. We will resolve the question in our Adjudication.

HCP's next concern relates to Paragraph 46 in SUFFER's amended notice of appeal, which reads as follows:

> The testing protocols for coal ash and waste have not been submitted to the public for peer review and therefore important public notice requirements have been violated.

HCP complains and we must agree that this objection is confusing because we are not aware of any legal requirement to submit "testing protocols" to the "public" for "peer review." The objection intermixes two concepts that seem to be unrelated: peer review and public notice. SUFFER in its response to HCP's motion does not contest HCP's statement that the Department complied with all applicable requirements regarding public notice. Instead, SUFFER argues that such notice "is not peer review, where standards are submitted before those professionals who may subject a claim to rigorous proof." To the extent SUFFER contends that the testing protocols are somehow invalid because they were not subjected to peer review, the objection

stands for now. HCP motion for summary judgment, however, is focused on the public notice component of SUFFER's objection and SUFFER's response makes it clear that it does not contend in its Paragraph 46 that there was invalid public notice, at least with respect to testing protocols. Accordingly, it does not appear that there is any disagreement on that point and we will move forward on that basis.

The third of the three grounds for HCP's motion is that SUFFER and CAUSE have not presented sufficient evidence, in the form of expert testimony or otherwise, in support of their objections that (1) surface activities will adversely affect underground mine workings (SUFFER and CAUSE), (2) the activities will cause air pollution (SUFFER and CAUSE), (3) moving material already on the site will cause water and air pollution (SUFFER only), and (4) erosion and sedimentation controls are inadequate (SUFFER only). Our review of SUFFER and CAUSE's responses shows that they have pointed to enough evidence in the record on these points to overcome HCP's motion. HCP objects to the quality of the evidence in its reply brief, but we are not prepared to resolve these largely factual disputes involving expert opinion in this procedural context.

CAUSE's Motion

The basic theme that emerges from our reading of CAUSE's motion for partial summary judgment is that the Department is treating the subject site as if it is an abandoned mine when it in fact is more accurately characterized as a partially closed waste disposal facility. It claims that at least 70 acres on the property contain municipal, residual, and hazardous waste. The site apparently received a Hazardous Ranking Score of 27.52, one point below the threshold for placement on the National Priority List under the federal Superfund program. CAUSE contends

that it is wholly inappropriate to remediate what is essentially a Superfund site pursuant to *any* general permit, let alone one that is geared toward mine reclamation:

> If the only activity proposed for this land was reclamation of mining operations, then ostensibly a general permit for mine reclamation fill meeting all other requirements of law could be appropriate. That is far from the case in this instance. The particular site history and proposed project does not match the standard for the thousands of acres of un-reclaimed abandoned mine in the Commonwealth for which this general permit was intended. ...The irregular site history involving significant hazardous waste dumping and municipal landfilling for decades led to the current complex remediation needs for the site which are not properly or adequately addressed by issuance of a general permit. This project is precisely where a site-specific permit is appropriate to prevent general permit abuse by project developers.

Brief at 17. Perhaps as a result of the Department's allegedly improper use of the general permit, CAUSE goes on to contend for a number of reasons that, if the site is to be "remediated" (as contrasted with "reclaimed"), it has not been shown that disposing the coal ash mixture on the site is a proper and safe way to do it. HCP is said to have not demonstrated that the project will pose no threat of harm to the environment, and the coal ash mixture is less dangerous than the product or ingredient that the waste is replacing. Furthermore, CAUSE complains that the Department acted improperly by allowing HRA to remediate the site pursuant to Act 2 because HRA is said to be little more than a sham designed to operate as a cover for the City of Hazleton, which is the very party that operated the unpermitted landfill on the site. (Act 2 agreements are only available to persons who did not cause or contribute to contamination on the property that is being cleaned up. 35 P.S. § 6026.305(a).)

HCP and the Department respond that the admitted fact that much of the site contains old landfills does not prevent the use of the general permit. HCP argues that reclaiming mine sites and remediating landfills on old mine sites are "substantially similar activities," and therefore,

the general permit is a proper vehicle for regulating the activity proposed here. It notes that the Department must of been aware that many old pits are used for illegal dumping when it issued the general permit.

On CAUSE's technical challenges, HCP and the Department respond that CAUSE is essentially asking for more study and this site has already been studied to death. Adequate procedures and safeguards are in place to ensure protection of the public health and the environment both in the short and long term. They argue that, if this project does not go forward, instead of returning an unsightly and hazardous site to productive use, the site will remain as it is indefinitely, which is worse for the environment then allowing the project to go forward. The use of the coal ash mixture is safe and appropriate and within the contemplation of the beneficial-use and general-permit programs. Finally, HCP and the Department deny that there was anything illegal or improper about entering into an Act 2 agreement with HRA, which is an entirely separate legal entity from the City of Hazleton.

It is difficult to imagine issues less suited to resolution on summary judgment than these. All of these issues are at least as much factual as they are legal. Summary judgment makes sense when a limited set of material facts are truly undisputed and the appeal presents a clear question of law. *See, e.g., United Refining Co. v. DEP*, EHB Docket No. 2006-007-L (Opinion, November 16, 2006). This consolidated appeal presents quite the opposite scenario.

Department's Motion

The Department's motion presents the same issue regarding the Act 2 agreement as the CAUSE motion does from the opposite side. Where CAUSE argued that Act 2 prohibits the agreement as a matter of law because of the nature of the relationship between HRA and the City, the Department argues that Act 2 allows the agreement as a matter of law because "HRA

and HCP did not cause or contribute to contamination at the site."[1] Both parties are wrong. Whether it was appropriate to treat HRA as a separate legal entity for purposes of Act 2 presents a mixed question of fact and law. We are certainly not prepared to conclude as a matter of law that it would never be appropriate under any factual circumstances whatsoever to look behind the curtain. We are somewhat surprised that the Department would suggest otherwise.

The factual component of this issue is readily apparent in the parties' papers. For example, in the portion of its motion on the CO&A issue, CAUSE draws our attention to a letter from EPA that appeared to reject HRA's bid for a grant under the federal Brownfields Law, which is said not to allow grants to property owners who may be liable for contamination at a site. The letter stated:

> Based on the information you provided, we have determined that the Hazleton Redevelopment Authority is an arm or department of the City of Hazleton. The City of Hazleton is liable or potentially liable under CERCLA for the Landfill because the City held an ownership interest, as lessee, during the time of disposal of hazardous substances at the Landfill...[I]t appears that the City was an operator of the Landfill during that time."

HCP admits to the letter, but offered the following response:

> By way of further answer, the EPA Letter states that HRA may request reconsideration of the letter and may be eligible as a "bona fide prospective purchaser." For the reasons stated in this Brief, HRA satisfies the "bona fide prospective purchaser" standards for the Site.
>
> It is denied that the EPA Letter found that HRA was liable for Site contamination.
>
> By way of further answer, it should be noted that (a) the issue decided in the EPA Letter (eligibility for grant under Brownfields Law) is not identical to the issue decided by the Department under the Land Recycling Act (eligibility for use of SIA provisions); (b) the denial of a grant application by EPA is not a full adjudication on the merits of the issue of whether (or not)

[1] Interestingly, no party seems to dispute that the City would have been precluded from entering into the agreement in its own name.

> HRA and the City are one organization; (c) the denial of a grant application by EPA is not a full adjudication on the merits of the issue of whether (or not) HRA is liable for the prior actions of the City under CERCLA, HSCA or any other environmental law; (d) HRA did not have incentive to defend vigorously or challenge the statements in the EPA Letter because it was merely a grant application (as opposed to a proceeding explicitly holding HRA responsible for the actions of the City); (e) the statements in the EPA Letter conflict with the prior determinations of the Department that the both HRA and the Site were eligible for an SIA Agreement; (f) the statements in the EPA Letter conflict with Pennsylvania law on the treatment of separate municipal entities and on piercing the corporate veil; and, (g) this Board is only empowered to review the determinations of the Department (as opposed to the EPA). Any remaining allegations or inferences are denied. [Footnotes deleted.]

The significance, if any, of the EPA determination is only one example of the myriad of mixed issues of fact and law that permeate every aspect of this appeal. The Department's motion, which essentially asks us to disregard all of this information, must be denied.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITIZEN ADVOCATES UNITED TO SAFEGUARD THE ENVIRONMENT, INC., SUFFER, DREW MAGILL AND ANDREW F. MAGILL	:	
v.	:	**EHB Docket No. 2006-005-L (Consolidated with 2005-327-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and HAZLETON REDEVELOPMENT AUTHORITY and HAZLETON CREEK PROPERTIES, Permittees	:	**2005-329-L, and 2005-363-L)**

ORDER

AND NOW, this 6th day of February, 2007, it is hereby ordered that the motions for partial summary judgment filed by HCP, CAUSE, and the Department are denied.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: February 6, 2007

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ANGELA CRES TRUST OF JUNE 25, 1998	:	
	:	
v.	:	**EHB Docket No. 2006-086-R**
	:	**(Consolidated with 2006-006-R)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MILLCREEK TOWNSHIP, Permittee	:	**Issued: February 8, 2007**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Judge

Synopsis:

Where genuine issues of material fact exist, summary judgment may not be granted on the issue of whether a township's water obstruction and encroachment permit violates its stormwater ordinance. Likewise, where there are issues of material fact, we cannot determine at this time whether an appeal is barred by the doctrine of administrative finality.

OPINION

Before the Board is a motion for summary judgment filed by Angela Cres Trust of June 25, 1998 (Cres Trust) concerning a Water Obstruction and Encroachment Permit (the permit) issued by the Department of Environmental Protection (Department) to Millcreek Township. The permit authorizes Millcreek Township to realign a stream channel, replace two existing culverts and install and maintain a stream bank wall. According to Cres Trust, its property will be

impacted by the construction, and it contends that the activity authorized by the permit is prohibited by the Township's stormwater ordinance.

For purposes of clarity, we note that Cres Trust's initial filing was a Memorandum of Law in Support of Motion for Summary Judgment, which it filed on October 16, 2006 (the October 2006 memorandum). In response to the Department's and Millcreek Township's objections that the filing did not comport with the Board's rule on summary judgment motions, 25 Pa. Code § 1021.94a, Cres Trust made a second filing on December 11, 2006, which consisted of a motion for summary judgment, supporting memorandum and supporting evidentiary materials, which it labeled Supplement to Summary Judgment Motion and Brief in Reply to Responses to Summary Judgment Motion (the December 2006 motion). Both the Department and Millcreek Township filed responses to each of Cres Trust's filings on November 16, 2006 and January 22, 2007.

The facts on which the parties agree are brief. There is no dispute that the permit was originally issued on March 5, 2001 and that Cres Trust did not appeal the original permit issuance. The permit was extended at least twice by the Department by letters dated December 30, 2005 and February 28, 2006, and Cres Trust filed timely appeals of both extensions.[1]

It is the contention of Cres Trust that the deposition testimony of Millcreek Township's engineer acknowledges that the project will cause flooding and will not convey a 25-year storm event as required by the Township's ordinance.

It is the contention of both the Department and Millcreek Township that Cres Trust's appeals are barred by the doctrine of administrative finality since it did not appeal the original permit issuance. The doctrine of administrative finality prohibits an aggrieved party who fails to

[1] The appeals were docketed at EHB Docket No. 2006-006-R and 2006-086-R and were

appeal an action from challenging it at some indefinite time in the future. *DER 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); *ARMY for a Clean Environment v. DEP*, EHB Docket No. 2005-036-L (Opinion and Order issued September 22, 2006), *slip op.* at 5. The Department and Millcreek Township contend that the December 30, 2005 and February 28, 2006 extensions did not change the work authorized by the permit but merely extended the deadline for completion of the work. Cres Trust views the letters as not mere extensions of the permit but as renewals of an otherwise expired permit. Cres Trust admits that the extensions/renewals did not change the work to be performed under the permit but contends that two factors preclude the permit from being administratively final: first, that Cres Trust had no notification of the issuance of the original permit in 2001 and, second, that the Department opened up the permit for public comment in 2006.

Neither the Department nor Millcreek Township responds to the second of these arguments. As to the first, Millcreek Township states that Cres Trust should have been aware of the original permit issuance in 2001 since it was advertised in the *Pennsylvania Bulletin*. Both Millcreek Township and the Department also assert that the original permit never expired and, therefore, there could have been no "renewal."

While the limited facts laid out before us lead us to believe that the appeals are not barred by administrative finality, particularly if the permit was opened for public comment in 2006, we are reluctant to make a final ruling on this issue based on the very limited record before us. We will allow this matter to proceed to trial where the parties may introduce evidence in support of their respective positions.

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consolidated on April 25, 2006 at the latter docket number.

Likewise, we find that the inconclusive record before us makes a ruling on whether the permit violates the Township's stormwater ordinance inappropriate at this time. The Board may grant summary judgment only where the evidentiary materials that support the motion demonstrate there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Martz v. DEP*, EHB Docket No. 2004-241-MG (Opinion and Order issued December 6, 2006), *slip op.* at 2, n. 1; *Snyder Brothers, Inc. v. DEP*, EHB Docket No. 2006-002-K (Opinion and Order issued December 4, 2006), *slip op.* at 3. The record must be viewed in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Upper Gwynedd Township v. DEP*, EHB Docket No. 2005-358-MG (Opinion and Order on Motion for Summary Judgment issued January 30, 2007), *slip op.* at 3.

Here, the parties do not agree on even the most basic of facts, much less facts material to a decision in this matter. Ruling in favor of any of the parties' positions would require us to take leaps of faith in terms of what the facts are, and we are not prepared to do so, particularly in the context of a summary judgment motion. As we recently stated in *Hercules, Inc. v. DEP*, EHB Docket No. 2005-337-R (Opinion and Order issued January 31, 2007), and before that in *Defense Logistics Agency v. DEP*, 2001 EHB 337, 348-49, this is a situation where the Board would greatly benefit from the taking of testimony on the issues in dispute.

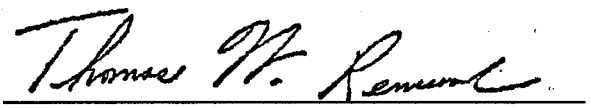
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANGELA CRES TRUST OF JUNE 25, 1998	:	
v.	:	**EHB Docket No. 2006-086-R**
	:	**(Consolidated with 2006-006-R)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and MILLCREEK	:	
TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 8th day of February 2007, the motion for summary judgment filed by Angela Cres Trust of June 25, 1998 is denied.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Judge

DATE: February 8, 2007

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SECRETARY TO THE BOARD

STEVEN WALKER, JAMES HOUSTOUN MARK & KRYSTAL KOSKI, ERIC A. SCHECHTER, JOANNE M. TOWNSEND and DAVID RIVERS	:	**EHB Docket No. 2005-274-K (Consolidated with 2005-275-K, 2005-276-K, 2005-293-K, 2005-295-K, and 2005-296-K)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MYERS & O'NEILL, II LP, Intervenor	:	**Issued:** February 8, 2007

ADJUDICATION

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Board dismisses a consolidated appeal challenging an exemption to revise Shrewsbury Township's Official 537 Plan for a new land development proposed by Myers & O'Neill, II LP. 25 Pa. Code § 71.51. The Appellants in this appeal challenge the exemption on grounds that the Department abused its discretion by allowing the exemption to stand after Myers & O'Neill increased the lot size within its subdivision without obtaining another certification by the Sewage Enforcement Officer (SEO). Appellants also challenge the lot size as proposed by Myers & O'Neill as posing a threat to groundwater. The Board finds that the Appellants have not established by a preponderance of the evidence that the Department acted contrary to law or committed error, or that the project would cause any harm to the environment or public health.

INTRODUCTION AND FACTUAL BACKGROUND

The Intervenor, Myers & O'Neill (M&O), has proposed a development of eight lots to be serviced by on-lot disposal systems. On June 9, 2005, the Intervenor requested an exemption from revising Shrewsbury Township's official 537 Plan under the Sewage Facilities Act, 35 P.S. § 750.7(b)(5) and 25 Pa. Code § 71.51(b). The Department reviewed the request and determined that the requirements of section 71.51(b) had been met and granted the exemption on June 15, 2005. Subsequently, the Appellants had a hydrogeologic test conducted and submitted it to the Department suggesting the proposed lot size of one acre was not large enough to meet state requirements of allowable nitrate concentration in groundwater. The Intervenor had its own study conducted and proposed a change in the lot size from one acre to 1.5 acres. The Department agreed with the change, but did not require additional information to be submitted or any additional certifications to be made.

The Appellants argue that the Department has abused its discretion by not having the SEO signoff on the increased lot size and that the increased lot size is still not sufficient to meet state standards. The Board determines that the Appellants fail to show by a preponderance of the evidence that the SEO must signoff for an increase in the lots when the regulation itself only requires the lots to be at least one acre or larger. Also, the Board finds that the Appellants fail to meet their burden of establishing that the lot size of 1.5 acres is detrimental to groundwater.

FINDINGS OF FACT

Parties

1. Appellants, Steven Walker, James Houstoun, Mark & Krystal Koski, Eric Schechter,

Joanne M. Townsend and David Rivers are adult individuals residing in Shrewsbury Township, York County, Pennsylvania. Stip. ¶ 1.

2. The 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. 1966, as amended, 35 P.S. § 750.1, *et. seq.* (Sewage Facilities Act); The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.1 *et seq.* (Clean Streams Law); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 (Administrative Code), and the rules and regulations promulgated thereunder. Stip. ¶ 2.

3. Intervenor, M&O is a limited partnership with a mailing address of 30 West Main Street, New Freedom, PA 17349. Stip. ¶ 3.

M&O Subdivision

4. M&O purchased a property known as the Yeager Property consisting of approximately 17.3 acres, located in Shrewsbury Township, York County. Stip. ¶ 4.

5. M&O proposes to subdivide the property into eight residential lots. Stip. ¶ 5.

6. The eight residential lots are to be served by on-lot septic systems. Stip. ¶ 6.

Exemption under Section 71.51(b)

7. On or about June 9, 2005, Intervenor submitted a package of information identified by the Department as "Sewage Facilities Planning Module Application Mailer," which essentially requested that the project be granted an exemption from the requirement to revise Shrewsbury Township's Official 537 Plan for Intervenor's new land development project. The June 9, 2005 submission will hereafter be referred to as the "Request for Waiver". Stip. ¶ 7; Appellant's Exhibit (App. Ex.), 1; Intervenor's Exhibit (Int. Ex.), 1.

8. The Request for Waiver was reviewed by Carrie Wilt, a Sewage Planning Specialist from

the Department's York office, who has been reviewing sewage planning waivers for approximately seven years. N.T. 182-83; 185.

9. An application for an exemption requires three certifications: one from a municipal officer that the area being developed is an on-lot disposal service area in the municipality's official sewage facilities plan; a second certification by the sewage enforcement officer certifying that the lot has been tested and is suitable for a primary and replacement sewage disposal system; and the last certification must be made by the project applicant or agent certifying that each lot is at least one acre in size. N.T. 184-85; *see also* 25 Pa. Code § 71.55(b); 25 Pa. Code § 71.51(b); App. Ex. 1; Int. Ex. 1.

10. Carrie Wilt reviewed the Request for Waiver and confirmed that it contained a signature from Jean M. Greene, a municipal officer of Shrewsbury Township, certifying that Shrewsbury Township's Official Act 537 Plan indicated the M&O Property was located in an on-lot disposal area. N.T. 186, App. Ex. 1.

11. The Request for Waiver, as reviewed by Wilt, also contained a certification by Stephen McKeon that each lot was suitable for primary and replacement sewage disposal systems. N.T. 186; App. Ex. 1.

12. Wilt also confirmed that each lot size was at least one acre in size through the certification by the project applicant, Jon Myers. N.T. 186, App. Ex. 1.

13. Wilt determined that the subdivision did not trigger any need to require a preliminary hydrogeologic evaluation under 25 Pa. Code § 71.62(c)(2). N.T. 186.

14. For an exemption to be granted, Section 71.51(b) also requires the area served by on-lot sewage disposal facilities not to be underlain by carbonate geology; not to drain into an exceptional value or high quality stream; and not located within 1/4 mile of a well tested at five milligrams per

liter or higher of nitrate nitrogen. N.T. 185; *see also* 25 Pa. Code § 71.55(b).

15. Wilt reviewed the United States Geological Survey (USGS) and confirmed that the M&O property is not underlain by carbonate geology. N.T. 187.

16. Wilt reviewed Shrewsbury Township's Official Plan and determined that the M&O subdivision is not within 1/4 mile of water supplies documented to exceed five parts per million nitrate-nitrogen. N.T. 188-89.

17. Wilt reviewed a topographical map and Chapter 93 of the Pennsylvania Code and determined that the M&O subdivision is outside any high quality or exceptional value watershed. N.T. 187.

18. Based on Wilt's review of the Request for Waiver, she determined that the M&O subdivision met the exemption from the requirement of revising Shrewsbury Township's Official 537 Plan for a new land development as set forth at 25 Pa. Code § 71.55(b). Stip. ¶ 8; N.T. 186-90; App. Ex. 1; Int. Ex. 2.

19. Consistent with the determination that the M&O subdivision met the exemption criteria and there was no need for a preliminary hydrogeologic evaluation, the Department issued a letter on June 15, 2005 indicating that the M&O subdivision project was exempt from the requirement to revise the official plan for new land development. Stip. ¶ 8; N.T. 186-90; App. Ex. 1; Int. Ex. 2.

20. The parties have stipulated at trial that the Department's June 15, 2005 exemption letter remains in effect. N.T. 221.

21. The Department's June 15, 2005 exemption letter is a final action of the Department.

22. The Department's letter of June 15, 2005 was not addressed to any of the Appellants, nor published in the *Pennsylvania Bulletin*. *See* App. Ex. 1; Int. Ex. 2; 9/19/06 Carrie Wilt, p. 190.

Appeals

23. Steven Walker's Notice of Appeal (NOA) was filed on September 19, 2005 and his NOA indicates that he received notice of the June 15, 2005 Letter on July 20, 2005. Int. Ex. 3.

24. James Houstoun filed his NOA on September 19, 2005 and his NOA indicates that he first had notice of the June 15, 2005 Letter on July 20, 2005. Int. Ex. 4.

25. Mark and Krystal Koski's NOA provides that they received notice of the June 15, 2005 Letter on July 20, 2005 and did not file the NOA with the Board until September 20, 2005. Int. Ex. 5; N.T. 78-79, 81.

26. Eric Schechter filed his NOA on October 11, 2005 which indicates that he first had notice of the June 15, 2005 Letter on September 7, 2005. Int. Ex. 6.

27. Joanne Townsend, an Appellant in this matter, is a member of the Open Space Coalition, a neighborhood group concerned with zoning and development in Shrewsbury Township. N.T. 26.

28. Townsend testified that she and the Appellants, Steven Walker, James Houstoun, Mark Koski, Eric Schechter and David Rivers, are all members of the Open Space Coalition. N.T. 27-33.

29. Townsend attended the entire Shrewsbury Township Zoning Hearing Board meeting on August 29, 2005. N.T. 37.

30. The June 15, 2005 exemption letter was read into the record by Mr. Griffiths. N.T. 38-39; App. Ex. 2.

31. Townsend testified that Mr. Griffiths is an attorney for the Open Space Coalition, but was unaware if he was acting on behalf of the Coalition at the Township meeting on August 29, 2005. N.T. 37-39; 42.

32. Townsend claims to have testified at the Township Zoning Hearing Board meeting on August 29, 2005 after hearing statements about the June 15, 2005 exemption letter. N.T. 45.

33. Townsend filed her NOA on October 12, 2005 and testified that she first heard of the Department's June 15, 2005 Letter on October 5, 2005 at a neighborhood meeting as reflected on her NOA. Int. Ex. 7; N.T. 24.

34. David Rivers filed his NOA on October 12, 2005 and had notice of the June 15, 2005 Letter on October 5, 2005. Int. Ex. 8.

35. Rivers did not testify at the hearing and the only evidence of record is his Notice of Appeal. Int. Ex. 8.

36. Rivers' NOA indicates that his address is 2714 Seitzland Road, Glen Rock, Pennsylvania. Int. Ex. 8.

37. There is no evidence presented that indicates that Rivers' address has remained the same since the filing of his NOA or has any property interest at that address.

38. Appellants' NOAs raise objections to the Department for granting the exemption because the proposed M&O subdivision will impact groundwater and cause the nitrate-nitrogen level to exceed the 10 mg/l allowable nitrogen level in drinking water; that "a full planning module should be mandated by a hydrogeologist" and that the Department should investigate the "Shrewsbury Township's zoning ordinance regarding transferable development rights onto lands that do not have public water and/or sewer," Int. Ex. 3-8.

39. Appellants' NOAs failed to contain any objection that the SEO did not certify the increase in the lot size at the M&O property increased from one acre as originally represented in the Request for Waiver to the 1.5 acres as represented in the January 12, 2006 letter to the Department. Int. Ex. 3-8; App. Ex. 1; Int. Ex. 1; App. Ex. 2.

40. Appellants did not file any amendments to their NOAs with respect to the failure to obtain the certification by the SEO that the lot size increased from one acre to 1.5 acres. Int. Ex. 3-8.

Hydrogeological Studies

41. Preliminary hydrogeologic studies are not required by 25 Pa. Code § 71.62 to be conducted for the M&O subdivision. App. Brf. p..29; N.T. 189; *see also* Finding of Fact 13.

42. Carlyle Westlund conducted a hydrological study on August 29, 2005 on behalf of the citizens living adjacent to the proposed subdivision. App. Ex. 3; Int. Ex. 4, *see also* N.T. 93.

43. At trial Westlund was qualified as an expert in hydrogeology specifically as it relates to the impact of nitrate-nitrogen on groundwater relative to sewage facilities. N.T. 93, 104.

44. Westlund testified that he used an average water usage figure of 262.5 gallons per day for on-lot disposal systems which is a standard figure accepted by the DEP and found at 25 Pa. Code § 71.62. N.T. 112, 143, 200; App. Ex. 3; Int. Ex. 4.

45. Westlund used a groundwater recharge figure of 475,000 gallons per day, a figure which he obtained from Mark Sigouin in a telephone conversation generally based on Mr. Sigouin's understanding of the general characteristics of the Wissahickon formation. N.T. 109, 143, 200, 203, 205; App. Ex. 3; Int. Ex. 4.

46. Westlund admitted that he could have done a more specific study with a more specific recharge figure for the nitrogen loading. N.T. 155.

47. Westlund used a nitrogen loading figure of 45 milligrams per liter. App. Ex. 3; Int. Ex. 4.

48. During his employment with the Department, Mr. Westlund never conducted a nitrogen loading analysis. N.T. 98.

49. Westlund used a background nitrate-nitrogen level of zero which is a standard figure accepted by the Department. App. Ex. 3; Int. Ex. 4.

50. Westlund calculated the nitrogen loading based on a one acre lot size, the size of the lot proposed by M&O in its Request for Waiver. N.T. 203; App. Ex. 3; Int. Ex. 4.

51. Westlund concludes that using the figures cited in his report the nitrogen loading rate would be 15.94 mg/l, which exceeds the Department's safe drinking water standard of 10 mg/l nitrate level. App. Ex. 3; Int. Ex. 4; 9/19/06 Westlund, p. 115.

52. Westlund proposes that a lot size of 1.6 acres would produce an allowable and safe nitrate level of 9.96 mg/l. App. Ex. 3; Int. Ex. 4; 9/19/06 Westlund, p. 115.

53. Westlund testified that he failed to sign or seal the hydrogeologic report that he conducted as a Registered Professional Geologist in violation of the Engineer Land Survey Area and Geologist Registration Law, 63 P.S. § 151, *et. seq.* N.T. 149-50.

54. After the Department received a copy of the Westlund report in September, 2005 a meeting was held between the Department and M&O on December 8, 2005. N.T. 195, 207; App. Ex. 3; Int. Ex. 4.

55. M&O agreed to have a hydrogeologic study conducted by Science Applications International Corporation (SAIC) and submitted to the Department. N.T. 208; Int. Ex. 10.

56. M&O hired Larry Smith, a Registered Professional Geologist with SAIC, to conduct a hydrogeologic study of the M&O property. N.T. 264-65; 268-69.

57. Smith conducted a groundwater recharge assessment on the M&O property. N.T. 269-71.

58. At trial Smith was qualified as an expert in geology and hydrogeology with respect to groundwater recharge with regard to wastewater disposal. N.T. 266, 268.

59. Smith testified that underlying the M&O property is the Wissahickon formation.

60. Smith referenced a stream gauge of .55 million gallons per day/per square mile of Muddy Creek, which is located within the Wissahickon geologic formation, gathered from the USGS. N.T. 271-75.

61. Smith referenced the .46 million gallons per day/per square mile recharge figure from the groundwater resources of the Lower Susquehanna River Basin report. N.T. 276; Int. Ex. 10.

62. Smith testified that an appropriate recharge figure to use in his analysis of nitrate-nitrogen loading at the M&O property would be .505 million gallons per day/per square foot which is an average of the two values. N.T. 278.

63. Bruce Willman is a Certified Professional Soil Scientist employed by SAIC who was retained by M&O to conduct the nitrate-nitrogen loading assessment for the M&O property. N.T. 287-88, 296; Int. Ex. 10.

64. Willman was qualified at trial as an expert in wastewater disposal and soil science as it relates to land disposal and nitrate-nitrogen loading assessments. N.T. 291, 295.

65. Willman testified that there are factors that may cause a loss of nitrogen which are not part of the Department's nitrate-nitrogen assessment calculation. N.T. 303-304.

66. Willman testified that one factor is bacterial activity which removes nitrogen from wastewater which occurs by bacteria in the soil utilizing the nitrogen discharged from a septic tank. N.T. 303.

67. Another factor Willman testified as to causing a reduction in the nitrogen level is the filtration of organic nitrogen; this occurs when organic material is discharged from a septic tank and filtered through the soil and the organic component that contains nitrogen is removed through filtration. N.T. 302-303.

68. Willman testified that another factor is that some of the nitrogen coming from the septic tank will be converted into ammonia-nitrogen which is discharged as a gas into the atmosphere. N.T. 303.

69. Willman testified that upgradient groundwater flow is a factor that may reduce nitrogen level. N.T. 304.

70. Westlund did not factor in bacterial activity, direct loss of ammonia-nitrogen or dilution from upgradient groundwater flow when assessing nitrate-nitrogen loading at the M&O property. N.T. 304.

71. Willman used a figure of 262.5 gallons per day as the volume of wastewater per residence which is contained in the Department's regulations. N.T. 310.

72. Willman's figure for the concentration of nitrate-nitrogen in wastewater is 45 milligrams per liter as found in the Department's regulations and policy. N.T. 312.

73. Willman used Smith's groundwater recharge rate of .505 million gallons per day/per square foot. N.T. 312-13.

74. Willman testified that when there is an on-lot system when determining the nitrate-nitrogen loading calculation the volume of groundwater recharge available for dilution is determined after subtracting the 262.5 gallons per day for the volume that's going to be used for water in the home. N.T. 313.

75. Westlund did not subtract the 262.5 volume of wastewater in his calculation. N.T. 313.

76. Willman used a background nitrate-nitrogen concentration of zero because there was no known nitrate-nitrogen impact. N.T. 314-15.

77. The SAIC report of December 30, 2005 had estimated the nitrate-nitrogen loading on the M&O subdivision would be 9.98 mg/l just below the 10 mg/l safe drinking water standard for a lot

size of 1.5 acres. N.T. 315-17; Int. Ex. 10.

78. On or about January 12, 2006, M&O informed the Department that based upon the hydrogeologic evaluation the lots will be increased to at least 1.5 acres. App. Ex. 2; N.T. 247.

79. Wilt testified that the Department would require new signoffs from the SEO that primary and replacement siting for the waste disposal system still satisfied the change in the lot size. N.T. 193.

80. Following the review of both the Westlund report and the SAIC report, the Department determined that the June 15, 2005 exemption remained in effect. N.T. 221.

81. The Department has not received any revised information relative to M&O's plan to increase the lot size. N.T. 192.

82. All regulatory prerequisites for an exemption under 25 Pa. Code § 71.51(b)(1)(i)-(v) are satisfied with respect to the M & O project.

DISCUSSION

Burden of Proof

The question presented is whether the Department abused its discretion when it granted the exemption to M&O from revising the Shrewsbury Township Official 537 Plan. The Rules of Practice and Procedure of the Environmental Hearing Board require that the party with the burden must establish its case by a preponderance of the evidence. 25 Pa. Code § 1021.122(a). Subsection (c) of that rule provides that a party who appeals a Department action has the burden when the party "is not the recipient of an action by the Department, protests the action." *Id.* at 1021.122(c). Here, Appellants are challenging the Department's grant of the exemption to M&O, which falls under subsection (c).

The Board finds, as discussed below, that the Appellants have failed to meet their burden

of proving by a preponderance of the evidence that the Department erred or otherwise acted contrary to the law when it allowed the exemption. Moreover, they have failed to show that the Department erred in allowing the exemption to remain in effect after receipt by it of the Westlund Report. In addition, they have failed to show that any change in the lot size proposed by M&O after the granting of the exemption undermines it such that it would need to be rescinded by the Board. Finally, the Appellants also failed to show by a preponderance of the evidence that a lot size of 1.5 acres would exceed the state allowable 10 milligrams per liter nitrate concentration in groundwater. Thus, there is no basis on which the Board can or should disturb the Department's action.

June 15, 2005 Exemption

Under Chapter 71 of the Pennsylvania Code a municipality is to revise its Official 537 Plan when a new development is proposed. 25 Pa. Code § 71.51. An exemption or waiver from this requirement however, can be granted under the following circumstances:

> (i)The official plan shows that those areas of the municipality are to be served by onlot sewage disposal facilities using a soil absorption area or a spray field as confirmed by signature of the municipal officials.
>
> (ii) The area proposed for the use of individual or community sewage systems is not underlain by carbonate geology nor is this area within 1/4 mile of water supplies documented to exceed 5 PPM nitrate-nitrogen as confirmed by the Department from a USGS geology map or sampling data.
>
> (iii) The area proposed for development is outside of high quality or exceptional value watersheds established under the regulations and policies promulgated under The Clean Streams Law as confirmed by the Department from the location of the new land development on a USGS topographic quadrangle map.
>
> (iv) Subdivided lots and the remaining portion of the original tract after subdivision are 1 acre or larger as confirmed by signature of the applicant.

> (v) Complete soils testing and site evaluation establish that separate sites are available for both a permittable primary soil absorption area or spray field and a replacement soil absorption area or spray field on each lot of the subdivision as confirmed by a signed report of the sewage enforcement officer serving the municipality in which the new land development is proposed. The local agency or municipality may require deed restrictions or take other actions it deems necessary to protect the replacement soil absorption area or spray field from damage which would make it unsuitable for future use.

25 Pa. Code § 71.51(b)(1)(i)-(v).

On June 9, 2005, M&O submitted its Request for Waiver. Int. Ex. 1; App. Ex. 1. It is undisputed by the parties that the M&O subdivision meets all of the above requirements as set forth in the June 9, 2005 request. *See* Appellants' Brief (App. Brf.), p. 19; Department Brief (DEP Brf.), p. 18; Intervenor Brief (Int. Brf.), p. 41. It is also undisputed by the parties that the Department properly reviewed and granted the exemption on June 15, 2005 because: (1) the subdivision is in an area to be served by on-lot systems as certified by Jean Greene, a township official; (2) the subdivision is not underlain by carbonate geology nor within 1/4 mile of water supplies to exceed five PPM nitrate-nitrogen as confirmed by Carrie Wilt after reviewing the USGS map; (3) the subdivision is outside of high quality or exceptional value watersheds as confirmed by Carrie Wilt after reviewing a USGS topographic map; (4) the subdivided lots are one acre or larger in size as certified by Jon Myers, the applicant; and (5) complete soil testing and site evaluation establishes that the sites are available for both primary and replacement soil absorption as confirmed by Stephen McKeon, the SEO. App. Ex. 1; Int. Ex. 1; N.T. 186-90.

Given that the parties agree the exemption meets the requirements under Chapter 71, the issue we are asked to decide is whether the exemption is rendered void or must be retracted or is required to go through another SEO signoff process because M&O changed the lot size projected

for the development from one acre to 1.5 acres after the paperwork for the exemption request was originally submitted and after certain hydrogeological studies were completed. It is disputed whether we even have that question properly before us as M&O claims that issue was waived by the Appellants because they did not raise it before trial. However, after hearing all the evidence, we conclude on the merits that the original exemption was granted properly, that there was no requirement that it be retracted or redone on the basis of subsequent events and that there is no credible evidence that the project will harm anyone or cause any deleterious effects in any respect.

The Department was unaware of any supposed or alleged question of any potential threats from use of the on-lot disposal system until it received the Westlund study. N.T. 195, 207. The Department met with M&O which agreed to conduct its own study through SAIC. N.T. 208. Both the Westlund and SAIC studies agree that the lots' size of one acre would not allow for adequate neutralization of the nitrate-nitrogen loading from the on-lot systems. App. Ex. 3, 9; Int. Ex. 10. By letter dated January 12, 2006, M&O agreed to increase the lots to 1.5 acres. App. Ex. 2. The Appellants contend that the change to 1.5 acres requires the SEO to again signoff on the change in lot size. The Appellants argue, "[i]n agreeing to increase the minimum lot size, M&O has created a situation where the original signoff by the SEO is no longer valid." App. Brf., p. 19. The Intervenor disagrees and makes a very compelling argument that "[t]he Department's June 15, 2005 exemption required the M&O property be subdivided into lots at least one acre in size. Thus, the Department's exemption did not limit the exemption to one acre, but rather each lot to be at least one acre in size." Int. Brf., p. 41.

The Intervenor's argument is faithful to the language of the regulation and is thus convincing. Section 71.51(b)(1) requires that the lots be at least one acre or larger. 25 Pa. Code § 71.51(b)(1)(i)-(v). Although the lot size has changed here, it does not require another signoff by

the SEO because the lots are still one acre or larger. The Appellants fail to establish by a preponderance of the evidence that the law requires another signoff by the SEO under those circumstances. The Appellants point to Wilt's testimony that she would require another signoff if the lot size were to change. But such a statement by Wilt does not trump the plain language of the law which simply requires the lots to be one acre or larger. N.T. 193. While the regulation may not prohibit DEP from asking for another signoff from the SEO, the regulation does not require that it do so. Put simply, another signoff is not required by the regulation. The plain language of the regulation simply requires the lots to be at least one acre in size and since that is still the case, the June 15, 2005 exemption remains as is with the lot sizes increased from one acre to 1.5 acres.

In any event, the Appellants have failed to establish by a preponderance of the evidence that the lot size change to 1.5 acres is problematic. Although Westlund had performed a hydrogeologic study on behalf of the Appellants and submitted it to the Department, there is no statutory or regulatory requirement that M&O do a preliminary study under the circumstance of this case.[1] As stated above, however, after the Department received the Westlund report, M&O agreed to conduct its own hydrogeologic assessment.

Westlund's report suggests that the lot size should be 1.6 acres, whereas the SAIC report suggests that 1.5 acre lots would be sufficient to protect groundwater. App. Ex. 3; Int. Ex. 9, 10. The Westlund report and the SAIC report use all the same figures, except for the recharge value. The groundwater recharge value used by Westlund was a "rule of thumb" figure he obtained from the Department in a telephone call with a DEP employee. Even if we were to grant that use of that

[1] Section 71.62(c)(2) requires a preliminary hydrogeologic assessment be performed only where a large volume of on-lot systems will be used; more than 50 equivalent dwelling units with more than one dwelling unit per acre; water supplies within 1/4 mile of the site are documented to exceed 5 PPM of nitrate-nitrogen; and the Department determines that there are known geologic conditions at the site that may contribute to groundwater pollution. 25 Pa. Code § 71.62(c)(2).

figure may be an acceptable practice, it is certainly not a preferable one. Westlund admitted that it is possible to obtain a more accurate figure by conducting a study to determine the recharge figure. N.T. 155. While Westlund did not do a study to obtain a specific groundwater recharge figure, SAIC did. It determined that .505 million gallons per day/per square foot was an accurate figure. Int. Ex. 10. The lot sizes proposed by Westlund and SAIC differ by 0.1 acre. Thus, we have no trouble concluding based on the specific deficiency of Mr. Westlund's report that the SAIC report is considerably more reliable than is Westlund's.

In addition to what we have already said about the specific "fatal flaw" deficiency in Mr. Westlund's approach as compared to SAIC's, there are a host of other aspects of Mr. Westlund and his report which counsel is against embracing. We note that it was not signed or sealed by him. We note that during his long employment with DEP, Mr. Westlund never conducted a nitrate-nitrogen loading analysis, only 5% of his professional duties with DEP involved sewage facilities matters, and from 1980 to 1990 none of his work involved the sewage facilities program. Since his retirement from DEP, Mr. Westlund has only been involved in five or six projects involving nitrate-nitrogen loading and a number of those did not involve residential uses. He has never written any papers on nitrate-nitrogen loading and he has not spoken or lectured on the topic.[2] We have no trouble crediting SAIC over Mr. Westlund in this particular case for the question presented. Thus, Appellants have not shown by a preponderance of the evidence that a 1.5 acre lot would be detrimental to groundwater.

Notices of Appeal and Standing

The Department's and Intervenor's challenges to timeliness of the various appeals will not be addressed in great detail since we have already concluded that the Appellants have not sustained their burden of proof with respect to the substantive issues in this appeal. We will

dismiss four appeals however, because they are untimely on their face. They are those of Mark and Krystal Koski, Eric Schechter, James Houstoun and Steven Walker.

The Environmental Hearing Board's Rules of Practice and Procedure state that the Board's jurisdiction will not attach to an appeal unless an appeal is filed in writing and in a timely manner. Specifically the rule provides that an appeal must be filed within "thirty days after actual notice of the action if a notice of action is not published in the *Pennsylvania Bulletin.*" 25 Pa. Code § 1021.52. Since the Department's granting of the exemption to M&O was not in the *Pennsylvania Bulletin*, the appeals are required to be filed within 30 days of receiving actual notice. In this matter there are six consolidated appeals and four are untimely on their face.

The Koski NOA provides that notice was given on July 20, 2005, but it was not filed until September 20, 2005. Schechter's NOA is untimely because it states he received notice on September 7, 2005 and his NOA was filed on October 11, 2005. Houstoun's NOA states that he received notice on July 20, 2005, but he filed his NOA on September 19, 2005. Lastly, Steven Walker's NOA states he had notice on July 20, 2005, but he did not file his NOA until September 19, 2005. It is clear from each of these NOAs that they were filed beyond 30 days from the date they received notice of the Department's action.

The Department and Intervenor challenge the Joanne Townsend appeal as untimely, although this fact is not evident on the face of the NOA. The Intervenor and Department argue that Townsend's appeal was filed 36 days after she received notice of the Department action. The Intervenor claims that Townsend had actual notice of the Department action by attending a Shrewsbury Township Zoning Hearing Board meeting on August 29, 2005 where the June 15, 2005 letter was read into the record at the hearing. Townsend testified that she first heard of the exemption being granted on October 5, 2005 at a neighborhood meeting, not at the township

[2] All of this background is taken from the examination of Mr. Westlund at N.T. 95-98.

meeting on August 29, 2005. N.T. 24. The Department and Intervenor have not offered any other evidence to show she had actual knowledge by attending a meeting where the exemption was read into evidence.

The Intervenor also contends that Townsend had received constructive notice of the Department's action through the attorney for the Open Space Coalition, Mr. Griffiths. Mr. Griffiths was at the Township's Zoning Hearing Board meeting on August 29, 2005 and read the letter into evidence. Townsend testified that she is a member of the Open Space Coalition and the she was present for the entire August 29, 2005 meeting. N.T. 27. She also testified that Mr. Griffiths is an attorney for the Open Space Coalition. N.T. 37-39. The Intervenor cites *Paradise Township Action Comm. v. DER*, 1992 EHB 668, which holds that members of an association have constructive notice through counsel for that association. Although Townsend has testified that Mr. Griffiths is an attorney for the Open Space Coalition, the record in this matter does not definitively show that Mr. Griffiths was acting as the attorney for or on behalf of the Open Space Coalition on August 29, 2005. N.T. 42.

We are not going to resolve this timeliness question as to the Townsend appeal since we have already found that the Appellants' claims on the merits have failed.

Finally, the David Rivers appeal is being challenged for lack of standing. The Department and Intervenor claim that there is no evidence establishing that Rivers meets the standing requirements since he has not testified at trial. Further, it is argued that his NOA cannot establish standing when there is no evidence presented suggesting whether or not Rivers is still located at the address provided in his NOA or even if that location would be affected by the M&O subdivision. Int. Brf., p. 36-38; DEP Brf., p. 13-14. We are not going to address the question of Rivers' standing in this matter for the same reason that we are not going to address the question of

Townsend's appeal's timeliness.

An order consistent with this opinion follows our conclusions of law

CONCLUSIONS OF LAW

1. All regulatory prerequisites for an exemption under 25 Pa. Code § 71.51(b)(1)(i)-(v) are satisfied with respect to the M&O project.

2. Appellants have failed to carry their burden of proof in this matter to show that the Department acted contrary to law or otherwise committed error in granting the exemption.

3. Appellants have failed to carry their burden of proof that the project would be deleterious to public health or the environment or would harm anyone in any manner.

4. The law did not require that the Department retract the exemption on the basis that the developer changed the size of the prospective lot configuration after the exemption was granted nor does the law require that we do so now as all prerequisites for the exemption are still extant. 25 Pa. Code § 71.51(b)(1)(i)-(v).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STEVEN WALKER, JAMES HOUSTOUN MARK & KRYSTAL KOSKI, ERIC A. SCHECHTER, JOANNE M. TOWNSEND and DAVID RIVERS	:	**EHB Docket No. 2005-274-K (Consolidated with 2005-275-K, 2005-276-K, 2005-293-K, 2005-295-K, and 2005-296-K)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MYERS & O'NEILL, II LP, Intervenor	:	

ORDER

AND NOW, this 8th day of February 2007, IT IS HEREBY ORDERD that the consolidated appeals in this matter are **dismissed**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

GEORGE J. MILLER
Judge

THOMAS W. RENWAND
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: February 8, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

TOWNSHIP OF ROBINSON	:	
	:	
v.	:	**EHB Docket No. 2006-243-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COVENTRY PARK, LLC, Permittee	:	

TOWNSHIP OF ROBINSON	:	
	:	
v.	:	**EHB Docket No. 2006-250-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COVENTRY PARK, LLC, Permittee	:	

TOWNSHIP OF ROBINSON	:	
	:	
v.	:	**EHB Docket No. 2006-251-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COVENTRY PARK, LLC, Permittee	:	**Issued: February 12, 2007**

OPINION AND ORDER
ON PERMITTEE'S MOTION TO DISMISS

By Michael L. Krancer, Chief Judge and Chairman

Synopsis

The Board does not have jurisdiction over the two appeals filed by the Township of Robinson because the appeals were untimely filed. The Township's request to allow the appeals to be granted *nunc pro tunc* relief is denied because there are no unique or compelling circumstances allowing such relief. Further, issues raised in a third appeal by the Township will be limited to those objections raised in a timely manner.

Factual and Procedural Background

We deal here with the question whether two of the three Notices of Appeal filed by Robinson Township against various approvals granted to Coventry Park LLC (Coventry Park or Permittee) with respect to Coventry Park's proposed 42 acre residential development located along Clever Road in Robinson Township, Allegheny County, Pennsylvania (Project Site) are timely or not. The Township filed its first appeal on November 3, 2006 objecting to the Department of Environmental Protection's (DEP or Department) October 5, 2006 issuance of a Government Financed Construction Contract (GFCC) to Coventry Park for purposes of reclaiming abandoned mining at the Project Site. This appeal was docketed at EHB Docket No. 2006-243-K. We will refer to this appeal as the GFCC Appeal. The Township later filed two other Notices of Appeal on November 16, 2006 and these are docketed at EHB Docket Nos. 2006-250-K and 2006-251-K. These appeals relate to actions taken in July 2006. The appeal at 2006-250-K objects to the Department's July 11, 2005 issuance of a GP-7 Minor Road Crossing Permit to Coventry Park. The appeal at EHB Docket No. 2006-251-K objects to the Department's July 28, 2006 issuance of a SPGP-2 Permit issued to Coventry Park. We will refer to these two later appeals as the GP-7 Appeal and the SPGP-2 Appeal. It is, of course, the GP-7 Appeal and the SPGP-2 Appeal which are problematic from a timeliness standpoint.

We issued a Rule to Show Cause on November 20, 2006 ordering the parties to show

cause why these appeals should not be consolidated. On December 1, 2006, both the Department and Appellant advised us by letter that they did not object to the consolidation. However, by Response to the Rule to Show Cause filed December 11, 2006, the Permittee objected to consolidation and at the same time filed the instant Motion to Dismiss (Motion) which is before us today. The Motion alleges that the GP-7 Appeal and the SPGP-2 Appeal are untimely and that we are, thus, without jurisdiction.

The Permittee's Motion and Brief set forth a methodical recitation of the relevant facts, many of which the Township admits. Permittee's Brief in Support of Motion to Dismiss (Perm. Brf.), pp. 3-7. Indeed, as will become clear, the Township does not seriously dispute that it did indeed have actual notice of both the GP-7 action and the SPGP-2 action well more than 30 days before it filed the GP-7 Appeal and the SPGP-2 Appeal. It claims that, in any event, the appeals should be allowed to proceed *nunc pro tunc*.

On February 23, 2005, the Township's Zoning Hearing Board (ZHB) found that Coventry Park must obtain a variance for its proposed subdivision. The ZHB held that the project violated the Township's zoning ordinance which prohibits disturbance of any land within 50 feet of a "perennial stream or intermittent stream." On that same date, Coventry Park attempted to obtain a variance, but the ZHB denied the variance to Coventry Park. Perm. Brf., p. 3. Coventry Park appealed that decision to the Court of Common Pleas of Allegheny County arguing that the unnamed tributary at the Project Site is, "at most, ephemeral and inadequate to support any form of aquatic life in the areas of the [Project Site] which would be disturbed as part of its proposed development plan, such that no variance is necessary." Perm. Brf., p. 3.

While that appeal was pending, Coventry Park presented the proposed subdivision for the Project Site to the Township's Board of Commissioners, which voted to deny the subdivision plan because Coventry Park had not obtained a variance. Coventry Park also appealed that

decision to the Court of Common Pleas of Allegheny County. Perm. Brf., p. 4. In both cases, the Court of Common Pleas agreed with Coventry Park and held that the stream was not intermittent or perennial, but was ephemeral. The Township subsequently filed an appeal of that decision with the Commonwealth Court.

On February 28, 2006, while the Township's appeals to the Commonwealth Court were pending, a meeting was held between representatives of Coventry Park and the Township. Mr. Garvin, counsel for the Township, was also in attendance. At the meeting Coventry Park representatives informed the Township that it had been issued the GP-7 and SPGP-2 Permits. Permittee Exhibit (Perm. Ex.) 3.

Meanwhile, the Commonwealth Court vacated the trial order of the Court of Common Pleas and remanded the matter to the ZHB to make specific findings of fact. Perm. Brf., p. 4. On August 23, 2006 the ZHB did not make any additional findings of fact, yet ruled that Coventry Park was required to get a variance because the stream was intermittent. Perm. Brf., p. 4. This decision was again appealed to the Court of Common Pleas and is currently awaiting a decision.

The Permittee submitted a revised subdivision plan to the Township on August 28, 2006 and sent a letter on September 11, 2006 to Mr. Kamin and Mr. Garvin, counsel for the Township, asking the Township to place Coventry Park's revised subdivision plan on its agenda. Attached to this September 11, 2006 letter were copies of the GP-7 and SPGP-2 Permits. Perm. Ex. 4. The Township does not dispute the fact that copies of the permits were indeed attached to the September 11, 2006 letter. Appellant's Response Brief (App. Brf.), p. 2.

At the September 11, 2006 meeting, Coventry Park attempted to present additional evidence to the ZHB, which refused to hear the evidence. Again, the Township voted to deny the subdivision. This denial was appealed by Coventry Park and the matter is still pending

before the Court of Common Pleas.

On September 21, 2006, Coventry Park filed a motion in the Common Pleas Court action asking it to admit additional evidence including evidence of the GP-7 and SPGP-2 Permits. The permits were attached as exhibits to the motion. This motion was served upon both Township's counsel, Mr. Kamin and Mr. Garvin. Perm. Ex. 6. The Township does not dispute the fact that the motion was made and that the permits were attached to the motion. App. Brf., p. 2. In addition, on October 4, 2006 copies of the GP-7 and SPGP-2 Permits were sent to Richard Churnovich of the Township, which copied Mr. Garvin. Perm. Ex. 7.

Subsequently, on October 11, 2006, Mr. Garvin requested that he review the public files of the permits, whereupon the files were provided to Mr. Garvin for review on October 13, 2006. Perm. Brf., p. 6; Perm. Ex. 8. The Notices of Appeal of the GP-7 and SPGP-2 Permits were filed on November 16, 2006.

As we have noted, the Township does not dispute the essential allegations of Conventry Park's presentation. Indeed, the Township states in its response to Coventry Park's Motion that,

> The Township does not dispute that copies of the [GP-7 permit and the SPGP-2 permit], as evidenced by the letters, were attached to a Motion to Admit Additional Evidence, which was submitted by Coventry Park in relation to a Zoning Appeal proceeding before the Court of Common Pleas of Allegheny County (See Exhibit 6 to Coventry Park's Motion). In addition the Township will not dispute the allegations set forth in Paragraphs 24-26 of Coventry Park's Motion, and therefore, the Township had actual notice of the existence of the [GP-7 permit and the SPGP-2 permit] more than 30 days prior to the filing of the Appeals.

Township's Response, ¶ 12.[1]

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[1] Paragraphs 24-26 of Coventry Park's Motion state as follows:

> 24. Notably, as part of the current land use appeals, Coventry Park also filed with the Court of Common Pleas a **Motion to Admit Additional Evidence, including specifically the SPGP-2 and the GP-7, on September 21, 2006.** A copy of this Motion, **which was duly served upon the Township's counsel, Mr. Kamin and Mr. Garvin,** is attached hereto as Exhibit 6.
>
> 25. Thereafter, On October 4, 2006, Mr. Victor sent a copy of the SPGP-2 and the GP-7, among other documents, to Richard Churnovich of the Township. A copy of Mr. Victor's

Also, as a corollary to its Motion to Dismiss the GP-7 Appeal and the SPGP-2 Appeal, Coventry Park asks us to limit the issues in the GFCC Appeal to exclude any challenges to the GP-7 and SPGP-2 Permits. Coventry Park asks us to dismiss any allegations regarding the GP-7 Permit and the SPGP-2 Permit from the GFCC Appeal on the theory that such issues would be untimely. Perm. Brf., pp. 6-7.

Discussion

The Township has admitted that it did not file the GP-7 or the SPGP-2 Appeals on time and there is no doubt we have no jurisdiction over these appeals because they are untimely. 25 Pa. Code § 1021.52.

The Township's argument that, despite its actual notice of the issuance of the permits, its 30-day clock did not start to run until it inspected the DEP's file in October 2006 and saw "the technical documentation that was submitted by Coventry Park which formed the basis for the reasons for the appeal" is completely specious and certainly not supported by any authority whatsoever. Its related or subsidiary argument that it was not aware of the need for an appeal until the Township was in receipt of the technical documentation of these permits is similarly unavailing. App. Brf., p. 3. Our rule is clear that an appeal must be filed within 30 days of actual notice and the parties are in agreement that the Township had actual notice of the GP-7

October 4, 2006 letter to the Township, which also notes that Mr. Garvin received a copy of the same, is attached hereto as Exhibit 7.

26. Thereafter, **on October 11, 2006 Mr. Garvin,** as counsel for the Township, personally requested, and on October 13, 2006, in fact reviewed the Department's public file for these general permits in Greensburg. A copy of Mr. Garvin's Request for Public Review of Files and related documents presented to the Department for the Public Review of Files is attached hereto as Exhibit 8.

Coventry Park Motion, ¶¶ 24-26 (emphasis in the original).

Permit and the SPGP-2 Permit by no later than September 11, 2006. The appeals were filed on November 16, 2006 and they are untimely without question.

In light of the untimely filing of the two appeals, the Township asks the Board to allow the appeals to proceed *nunc pro tunc*. Section 1021.53a of the Board's Rules of Practice and Procedure provides,

> The Board upon written request and for good cause shown may grant leave for the filing of an appeal *nunc pro tunc*; the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth.

25 Pa. Code § 1021.53a. It is well established that appeals *nunc pro tunc* will be allowed only under limited circumstances, such as fraud, breakdown in the administrative process of the Board's operation or unique and compelling factual circumstances establishing a non-negligent failure to file a timely appeal. *Falcon Oil Co. v. DER*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992); *see also Grimaud v. DER*, 638 A.2d 299 (Pa. Cmwlth. 1994); *Bass v. Commonwealth*, 401 A.2d 1133, 1135 (Pa. 1979); *Martz v. DEP*, 2005 EHB 349, 350; *American States Insurance Co. v. DER*, 1990 EHB 338.

The Township argues the untimely appeals were a result of unique and compelling circumstances creating a non-negligent untimely filing. The Township does not elucidate what these unique and compelling circumstances are other than rehearsing its argument that it was unaware of the need for an appeal until it received the technical data regarding the permits in October 2006. Moreover, the Township does not allege that there was any fraud or breakdown in the Board's operation. Being unaware of the need for an appeal is simply not a compelling circumstance that gives rise to an appeal *nunc pro tunc*. *Ziccardi v. DEP*, 1997 EHB 1, 7, citing *Paradise Township Citizens Committee, Inc. v. DER*, 1992 EHB 668 (appellants are only entitled to *nunc pro tunc* relief when there is some irregularity concerning the filing of their appeal, not

when they are unaware of a possible cause of action).

Based on the foregoing discussion, we will also grant Coventry Park's motion to strike objections in the Township's GFCC Appeal relating to the GP-7 and SPGP-2 Permits because those objections are untimely. As stated above, the Township was given actual notice of the GP-7 Permit and the SPGP-2 Permit by no later than September 11, 2006 which the Township admits to be true. Objections to the issuance of the GP-7 and SPGP-2 Permits must have been filed within 30 days and they were not. The GFCC Appeal cannot be allowed, then, to be the backdoor through which the GP-7 and SPGP-2 Permits are assailed. We are without jurisdiction to hear any objections relating to the GP-7 and SPGP-2 Permits, period.

Accordingly, we enter the following Order consistent with this opinion:

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

TOWNSHIP OF ROBINSON	:	
	:	
v.	:	**EHB Docket No. 2006-243-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COVENTRY PARK, LLC, Permittee	:	
TOWNSHIP OF ROBINSON	:	
	:	
v.	:	**EHB Docket No. 2006-250-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COVENTRY PARK, LLC, Permittee	:	
TOWNSHIP OF ROBINSON	:	
	:	
v.	:	**EHB Docket No. 2006-251-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COVENTRY PARK, LLC, Permittee	:	

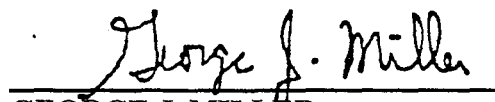
ORDER

AND NOW, this 12th day of February 2007, IT IS ORDERED that Coventry Park's Motion to Dismiss the GP-7 Appeal (EHB Docket No. 2006-250-K) and the SPGP-2 Appeal (EHB Docket No. 2006-251-K) is **granted**. IT IS FURTHER ORDERED that the issues in the GFCC Appeal (EHB Docket No. 2006-243-K) are limited such that any and all allegations therein which seek to challenge the GP-7 and/or the SPGP-2 Permits are dismissed and the issues in the

GFCC Appeal are limited to the GFCC action only.

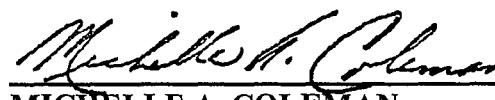
ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

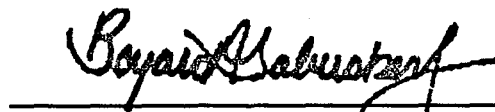


GEORGE J. MILLER
Judge

THOMAS W. RENWAND
Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

DATED: February 12, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CONCERNED CITIZENS OF LIGONIER, JOHN E. HUGHES AND TERRI A. HUGHES, Appellants	:	
v.	:	**EHB Docket No. 2005-314-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERIKOHL MINING, INC., Permittee	:	**Issued: February 13, 2007**

OPINION AND ORDER ON
MOTION TO DISMISS FOR MOOTNESS

By Bernard A. Labuskes, Jr., Judge

Synopsis:

A motion to dismiss an appeal as moot from the issuance of a surface mining permit based upon the fact that all of the coal has been removed at the site is denied to the extent that the Appellants are challenging the reclamation plan at the site because reclamation is not yet complete.

OPINION

Concerned Citizens of Ligonier, John E. Hughes, and Terri A. Hughes filed this appeal from the Department of Environmental Protection's issuance of a permit authorizing Amerikohl Mining, Inc. to surface mine coal at a site in Ligonier Township, Westmoreland County. The Department has filed a motion to dismiss the appeal as moot because Amerikohl has removed all

of the coal and has completed most of the backfilling at the site. Amerikohl joins in the Department's motion.

The Appellants contest the motion. Although they do not dispute the allegation that coal removal and backfilling have been completed, they argue that the permit is still in place and the site has not been fully reclaimed. They say they are seeking relief in the form of a "directive to the Department" that would require the Department to ensure that Amerikohl will protect the environment. They want the Department to require Amerikohl's "continued monitoring and responsibility for degradation of the water in the area." They note that their appeal includes a request for relief from the Department's failure to require an adequate restoration plan.

"It is axiomatic that a court should not address itself to moot questions and instead should only concern itself with real controversies, except in certain exceptional circumstances." *Tinicum Township v. DEP*, 2003 EHB 493, 495 (quoting *Goetz v. DEP*, 2001 EHB 1127, 1131) (quoting *In re Glancey*, 518 Pa. 276, 282 (1988)). A matter becomes moot when events occur that deprive the Board of the ability to provide any effective relief. *Rakoci v. DEP*, 2002 EHB 590, 591.

While we are not entirely sure what the Appellants hope to achieve at this point by pursuing this appeal, we are constrained to agree with them that the case is not necessarily moot in its entirety. The Appellants have challenged the reclamation plan in the permit. Reclamation is not yet complete. It is at least conceivable that the Board could, for example, require that the reclamation plan be modified if the Appellants are successful in showing that the approved plan is defective.

Motions to dismiss should only be granted when the matter is free from doubt. *Rakoci*, 2002 EHB at 591. Doubt lingers here. The Department relies upon *Alice Water Protection*

Association v. DEP, 1997 EHB 447, in support of its claim that this case is moot. *Alice Water*, like the instant case, involved an appeal from a permit where all of the coal had been removed and reclamation was underway. Unlike the instant case, however, we noted in *Alice Water* that none of the issues raised in that appeal concerned the reclamation of the site. 1997 EHB at 448. Here, some of the issues raised in the notice of appeal appear to relate to the reclamation of the site.

The Department also relies upon *Brumage v. DEP*, 2002 EHB 496, but that case involved pillar mining in the vicinity of a natural gas well. The Appellants asked us to require that a barrier remain in place around the well. By the time the motion to dismiss was filed, all of the coal within the proposed barrier area that could be removed had been removed. There was nothing left that we could do in the way of granting meaningful relief. Unlike the case now before us, there was no dispute in *Brumage* regarding ongoing reclamation obligations.

The Department argues that the Appellants may challenge any defects in reclamation if and when the Department releases the bond for the site. There are two defects in this reasoning. First, as a challenge to the permit issuance, the appeal that is now before us implicates the reclamation plan itself, not the implementation of the plan. In contrast, an appeal from a bond release implicates the implementation of the plan; it does not serve as a vehicle for challenging the plan itself. The Department would surely argue in any appeal from a bond release that the restoration plan itself is administratively final. Second, even if the Appellants could raise their challenges in a future appeal from a bond release, the fact that a party may *also* challenge the Department's action in a future case does not by itself render a pending challenge moot. Under the Department's reasoning, every appeal from an order would be "moot" because the Department can subsequently assess a civil penalty. That is obviously not the case.

The Department asserts that the Appellants have dropped all of their claims regarding reclamation in their prehearing memorandum. Again, this assertion is not free from doubt. Reclamation is specifically mentioned on page 5 of the Appellants' prehearing memorandum.

The Department argues that the Appellants' objections regarding reclamation are invalid. That argument is out of place because it goes to the merits, not the question of mootness.

Finally, the Department argues that reclamation is not a "surface mining activity." The relevance of Department's point is not clear, but to the extent it is suggesting that the reclamation portions of a permit cannot be challenged in an appeal from the permit, it is wrong. To the extent that the point is designed to assist us in interpreting the Appellants' notice of appeal, as we have already stated, we see the Appellants' objections as at least touching upon the reclamation plan that was approved as part of the permit that is being appealed.

Thus, it does not appear that this appeal is entirely moot and the Department's motion to dismiss must be denied. We would caution the Appellants, however, that any relief that we might order in this appeal from a permit issuance must relate to the permit itself. Our responsibility is to determine whether the Department violated the law or acted unreasonably *in issuing the permit*. If we find that the Department erred, we can have the permit revised; but we are not in a position to issue unrelated or generic "directives" to the Department to require Amerikohl to protect the environment. We are not an oversight agency. Furthermore, although this entire appeal may not be moot, many of the Appellants' objections now are. An obvious example is the Appellants' challenge to Amerikohl's blasting plan. We have no intention of delving into any issues where the time for effective relief has passed. Future proceedings will be limited accordingly.

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

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONCERNED CITIZENS OF LIGONIER, JOHN E. HUGHES AND TERRI A. HUGHES, Appellants	:	
v.	:	**EHB Docket No. 2005-314-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERIKOHL MINING, INC., Permittee	:	

ORDER

AND NOW, this 13th day of February, 2007, it is hereby ordered that the Department's motion to dismiss is denied. The hearing that was postponed at the Department's unopposed request pending resolution of the Department's motion will be rescheduled as soon as possible. The Department and Permittee shall file their prehearing memoranda on or before **March 9, 2007.**

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: February 13, 2007

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

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2006-114-CP-L**
JOHN P. PECORA, JAMES D. PECORA, ANN PECORA GREGO, ELIZABETH PECORA, JAY J. PECORA AND PHILIP A. PECORA, Defendants	:	**Issued: February 15, 2007**

OPINION AND ORDER ON MOTION FOR RECONSIDERATION

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board denies a petition for reconsideration of its prior order granting a motion for partial summary judgment on liability in a civil penalties case. The petition for reconsideration was filed late. The petition is particularly inappropriate because the Defendants did not file a response to the motion giving rise to our prior order. The petition does not meet the substantive criteria for granting a petition for reconsideration.

OPINION

We issued an Opinion and Order on January 22, 2007 granting the Department of Environmental Protection's (the "Department's") motion for partial summary judgment and finding John, James, Ann, Elizabeth, Jay, and Philip Pecora (the "Pecoras") liable for violations of the Clean Streams Law and the Dam Safety and Encroachments Act. We granted the motion because the

Pecoras did not file response to the motion. We may enter summary judgment against any party who fails to respond to a summary judgment motion. 25 Pa. Code § 1021.94a(h); *Lucas v. DEP*, 2005 EHB 913.

We went on to observe in our Opinion that we were not surprised that the Pecoras chose not to respond to the motion because they had previously entered into a consent decree with the Department in the context of Commonwealth Court litigation. The Pecoras not only admitted the facts giving rise to their violations in the consent decree, they admitted that their conduct constituted a violation of the law and gave rise to liability for civil penalties. Thus, it did not appear that the Pecoras were in a position to contest liability in our proceeding.

Either the Pecoras or Philip Pecora individually, it is not clear which, have now filed a motion for reconsideration of our ruling. The Pecoras allege that Philip Pecora only agreed to the consent decree because an unidentified agent of the Department told him if he "complied with everything that he was told to do" that "everything would be dropped." The motion alleges that "Phil Pecora never agreed or intended to agree to the statement that he was liable in view of the above."

The motion for reconsideration must be denied for several reasons. First, the motion was filed too late. Under 25 Pa. Code § 102.151(a), petitions for reconsideration of our interlocutory rulings must be filed within 10 days of our ruling. We issued our ruling on the motion for partial summary judgment on January 22. The Pecoras did not file their motion for reconsideration until February 5, which was 14 days after our ruling. Although four days might not ordinarily be a big deal, the filing deadlines for reconsideration petitions are tight in order to allow for a response and give us a reasonable period for deliberation before the short time available for filing an appeal to Commonwealth Court expires. 25 Pa. Code § 1021.152 (Comment). Absent some excuse for delay,

not present here, we must insist upon strict compliance with the filing deadlines for petitions for reconsideration.

Furthermore, petitions for reconsideration of interlocutory orders are unnecessary and disfavored in most cases. "Reconsideration is an extraordinary remedy and is inappropriate for the vast majority of the rulings of the Board." 25 Pa. Code § 1021.151 (Comment). Parties requesting reconsideration of an interlocutory order must satisfy the criteria for reconsideration of a final order *and* demonstrate that "extraordinary circumstances" justify reconsideration of the matter. 25 Pa. Code § 1021.151(a); *DEP v. Angino*, 2005 EHB 905, 907; *Earthmovers Unlimited, Inc. v. DEP*, 2003 EHB 577, 578-79. Petitions for reconsideration of final orders will only be granted for "compelling and persuasive reasons," which include the following:

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

25 Pa. Code § 1021.152(a).

The Pecoras' petition for reconsideration strikes us as particularly inappropriate because they never responded to the Department's original motion. We do not want to give anyone the false impression that it is acceptable to ignore a motion, wait for a ruling from the Board, and then pursue one's arguments in a petition for reconsideration if things do not go one's way. To the contrary, we have no tolerance for this approach to litigating an issue.

The Pecoras offered no explanation in their petition for reconsideration for their failure to respond to the Department's original motion. Even if they had, it is unlikely that it would have

resulted in reconsideration. We have previously held that a failure to respond to a motion due to counsel's oversight is not an extraordinary circumstance that justifies reconsideration of an interlocutory order. *Borough of Berwick v. DEP*, 1998 EHB 199, 202; *Reitz Coal Company v. DER*, 1988 EHB 796, 797.

Still further, it is clear that the Pecoras are not entitled to reconsideration based upon the actual substance of their petition. The sole ground presented for reconsideration is that Philip Pecora, one of the Defendants, signed the consent decree admitting the violations because an unidentified Departmental "agent" told him that if he complied with "everything that he was told to do" that "everything would be dropped." This is an averment of fact. It is not supported by affidavit or anything in the record. If it had been presented in response to the Department's original motion, it would have needed to be supported by an affidavit or something in the record. 25 Pa. Code § 1021.94a(f) (responses to summary judgment motions). The Pecoras cannot avoid that requirement by raising the factual issue for the first time in a petition for reconsideration.

If a party believes that a "crucial fact" justifies reconsideration, it must explain how that fact is inconsistent with our findings, is such that it would justify a reversal of the Board's decision, and why it could not have been presented earlier to the Board with the exercise of due diligence. 25 Pa. Code § 1021.152(a)(2). The Pecoras' factual averment is not obviously "crucial," but even if we assume that it is, it is not inconsistent with anything that we said in our Opinion, and it certainly could have been presented earlier with the exercise of due diligence. Our decision was based primarily upon the Pecoras' lack of a response, and the factual averment revealed for the first time in the reconsideration petition has nothing to do with the basis for our holding. The Pecoras' new averment is extremely vague, to say the least, and it relates at most to one of the several Defendants. The Pecoras have not explained how or why the alleged statement of the unidentified agent would

factor into the *legal* analysis regarding their liability.[1] In fact, it is painfully obvious that we have now pondered the Pecoras' petition for reconsideration in far greater depth than have the Pecoras themselves.

For all of the forgoing reasons, both procedural and substantive, we issue the Order that follows.

1 We express no opinion at this time regarding the admissibility or relevance of the Defendants' factual averment in the forthcoming hearing regarding the amount of the civil penalty to be assessed.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2006-114-CP-L**
JOHN P. PECORA, JAMES D. PECORA, ANN PECORA GREGO, ELIZABETH PECORA, JAY J. PECORA AND PHILIP A. PECORA, Defendants	:	

ORDER

AND NOW, this 15th day of February, 2007, the Defendants' motion for reconsideration is denied.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

GEORGE J. MILLER
Judge

THOMAS W. RENWAND
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: February 15, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

VEOLIA ES GREENTREE LANDFILL, LLC	:	
v.	:	**EHB Docket No. 2006-073-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 27, 2007**

OPINION AND ORDER ON DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Judge

Synopsis:

The Board denies a motion for summary judgment filed by the Department seeking to dismiss an appeal on the basis that it was untimely and barred by administrative finality. The Board cannot conclude with certainty that a letter refunding disposal fees for the period after March 14, 2005 unequivocally communicated the Department's denial of the appellant's petition for refund of fees prior to that date. Therefore, we cannot rule as a matter of law that the Department's letter was a final action.

OPINION

This matter involves an appeal by Veolia ES Greentree Landfill, LLC (Veolia), formerly known as Onyx Greentree Landfill, LLC, challenging the Department of Environmental Protection's (Department) procedure of refunding disposal fees found to be improperly collected under Act 90 of 2002, Act of June 29, 2002, P.L. 596, *as amended*, 27 Pa.C.S.A. §§ 6201 – 6305 (Act 90). The Board has consolidated a number of appeals by other landfills challenging the disposal fee refunds at EHB Docket No. 2006-012-R. Veolia was granted intervention in that

matter and has also maintained the present appeal.

Factual & Procedural Background

This matter was originally assigned to Chief Judge Michael L. Krancer and was reassigned to Judge Thomas Renwand on February 5, 2007. A comprehensive history of this litigation is set forth in an earlier opinion by Chief Judge Krancer ruling on a motion to dismiss filed by the Department. *See Onyx Greentree Landfill, LLC v. DEP*, EHB Docket No. 2006-073-K (Opinion and Order Denying Motion to Dismiss issued June 30, 2006) As noted in that opinion, this matter and a number of other similar appeals came about after the Commonwealth Court's decision in *Brunner v. DEP*, 2004 EHB 684, *rev'd,* 869 A.2d 1172 (Pa. Cmwlth. 2005), *petition for allowance of appeal denied*, 885 A.2d 44 (Pa. 2005), which addressed the application of paragraph (b)(1) of Section 6301 of Act 90. Section 6301 of Act 90 deals with the collection of disposal fees for municipal waste landfills. Subsection (a) imposes a disposal fee of $4.00 per ton for all solid waste disposed at a municipal waste landfill. Subsection (b) provides two exceptions. The exception addressed by the Commonwealth Court in *Brunner* states as follows:

> (b) Exceptions. – The fee established under this section [6301] shall not apply to the following:
>
> (1) Process residue and nonprocessible waste that is permitted for beneficial use or for use as alternate daily cover at a municipal waste landfill.
>
> * * * * *

27 Pa.C.S.A. § 6301(b)(1).

Prior to *Brunner*, the Department had applied Section 6301(b)(1) only to *resource recovery material* used as alternate daily cover at a landfill, but to no other type of material used as alternate daily cover. The *Brunner* court held that the limited reading of the statute applied by the Department was incorrect and that non-resource recovery material was also eligible for

the fee exception. After the holding in *Brunner*, a number of landfills and other parties filed petitions with the Department seeking a refund of the $4.00 per ton fees they had paid for non-resource recovery material used as alternate daily cover since the inception of the fee in 2002. Included in these petitions was one from Onyx Greentree Landfill, now Veolia, which was filed on November 21, 2005.

The Department granted refunds to the petitioners but only as far back as March 14, 2005, the date of the Commonwealth Court's decision in *Brunner*. At issue in both this appeal and the appeals consolidated at EHB Docket No. 2006-012-R is the question of the point in time from which the Department is required to calculate the refunds. That question is the subject of summary judgment motions before the Board and will be addressed in an oral argument on March 1, 2007.

The issue now before the Board is the question of whether Veolia's appeal is untimely and barred by the doctrine of administrative finality. This is the subject of a motion for summary judgment filed by the Department on January 4, 2007. Veolia filed a response on February 1, 2007, to which the Department replied on February 13, 2007. The following facts are not in dispute: Veolia filed its petition for refund on November 21, 2005 (the November petition). In its petition, Veolia requested a refund of $600,979.16, which it claimed represented the amount of disposal fees it had paid for solid waste used as alternate daily cover at its landfill, plus interest, since the third quarter of 2002, the inception of the disposal fee. All of the landfills that requested a refund received a letter sent by the Department on December 16, 2005 addressing the *Brunner* decision and stating that the Department was issuing a refund of fees collected for all solid waste used as alternate daily cover since March 14, 2005. Where a refund was due, the Department included a check in the refund amount. In the case of Veolia, the Department sent it

a refund in the amount of $94,798.94. Some of the letters referenced the petition for refund that the recipient had filed with the Department. Others, including the one received by Veolia, did not. The Department admitted that this was an administrative oversight and that Veolia should have been sent a letter that referenced its November petition. Nonetheless, asserts the Department, the December 16, 2005 letter that was sent to Veolia (the December 16 letter) was a final action. The letter contains the following language in relevant part:

> The Department is refunding all fees collected on solid wastes used as alternate daily cover since March 14, 2005. The quarterly reports that you submitted to us since March 14, 2005, indicate that you paid disposal fees on solid waste that was used as alternate daily cover in the total amount of $93,552.48. These fees are being returned to you with interest at a rate that has been set by the Secretary of the US Treasury for each calendar year, less 2%, for a total of $94,798.94.
>
> In view of the Court's decision, please do not continue to include payment of the $4 disposal fee on solid waste that is used as alternate daily cover with your quarterly reports.
>
> Any person aggrieved by this action may appeal. . .Appeals must be filed with the Environmental Hearing Board within 30 days of receipt of written notice of this action unless the appropriate statute provides a different time period. . .This paragraph does not, in and itself, create any right of appeal beyond that permitted by applicable statutes and decisional law.

(DEP Ex. E)

The letter was received by Veolia on December 19, 2005. According to answers to interrogatories provided by Veolia and the deposition of its general manager, which are relied upon by the Department in support of its motion for summary judgment, the following occurred on receipt of the letter: The $94,798.94 refund check and December 16 letter were received by Heidi Trichey, an employee of Veolia, who signed the certified mail receipt for the refund letter on December 19, 2005 and forwarded the documents to Trisha Boni, Veolia's office manager.

(DEP, Ex. D; F; H) Trisha Boni informed Donald Henrichs, area manager and general manager of Veolia, of the receipt of the check for fees paid on alternate daily cover. (DEP Ex. D; H)

Mr. Henrichs contacted Shari Onoratti, Veolia's staff accountant, to determine what should be done with the check. (DEP Ex. D) She told him to have the check deposited which was done on January 15, 2006 by Ms. Boni. (DEP Ex. D; I). Mr. Henrichs did not see the December 16 letter that accompanied the refund check and was not aware of its existence until he spoke to counsel for Veolia in this matter around the end of January 2006 or beginning of February 2006. (DEP Ex. D; H) After his conversation with Veolia counsel, Mr. Henrichs obtained a copy of the December 16 letter from Ms. Boni in late January 2006 or early February 2006. (DEP Ex. D)

In late January 2006, Veolia, through its counsel, contacted the Department to determine the status of its petition. (Veolia, Ex. A) By letter dated February 3, 2006 and received February 10, 2006, the Department notified Veolia, through its counsel, that the December 16 letter "resolved all outstanding issues related to the $4 disposal fee refund payments" and was the Department's response to Veolia's November petition for refund. (Veolia, Ex. B) Veolia filed the present appeal on March 2, 2006.

The Department sought dismissal of Veolia's appeal on the basis that it was untimely since it was filed more than 30 days after receipt of the December 16 letter. The Department also asserted that an appeal of the February 3, 2006 correspondence to Veolia's counsel was barred by administrative finality since Veolia could have, but did not, appeal the December 16 letter, which the Department considered to be the final action in this matter. Chief Judge Krancer denied the motion, finding that the December 16 letter was ambiguous since it did not specifically mention Veolia's November petition nor reference the time period prior to March 14, 2005. In denying the motion, he stated as follows:

> [T]he language does not unequivocally and unmistakably communicate that [Veolia's] November Petition is denied or that the subject of fees [Veolia] paid after July 2002 and before March 14, 2005 is being addressed at all." *Onyx Greentree, supra* at 9. Nor can it be said that there is no doubt that this was the intent of Mr. Reisinger's December Letter or that no other conclusion can be drawn from the December Letter with respect to whether it was a decision rejecting [Veolia's] pending November Petition. This is especially so in light of the other December letters from Mr. Reisinger to other parties with pending petitions which did specifically address each of those parties' pending petitions. Again, the Department knew how to and did use specific, direct, unambiguous and unmistakable language addressing pending petitions for refunds in letters to other petitioners. It did not do so with the December Letter to [Veolia].

Id. at 9-10.

In denying the motion, Chief Judge Krancer rejected the Department's argument that there was no affidavit from Veolia personnel verifying that Veolia did, in fact, read the letter as not dealing with the pending November petition since the burden was not on Veolia to prove that point in the context of a motion to dismiss. He noted, however, that in order to prevail ultimately, Veolia might be called upon to prove it at some later point and did not "close the door to the possibility that evidence may be uncovered later which might support a finding that [Veolia] did indeed consider the December Letter as dispositive with respect to its pending November Petition." *Onyx Greentree, supra* at 13.

Chief Judge Krancer further considered an argument of the Department that the absence of a specific reference to Veolia's November petition or the timeframe prior to March 14, 2005 in the December 16 letter actually works against Veolia since Veolia should have known, or should have been put on sufficient notice to make an inquiry, that the December 16 letter dispensed with the November petition. The Department argued that the omission should have given rise to a duty by Veolia to inquire at the time it received the December 16 letter and refund

as to the status of its petition. Chief Judge Krancer noted that the argument had merit but also pointed out that it was equally plausible that because the December letter contained no such reference to the November petition or pre-March 14, 2005 timeframe, no inquiry was warranted. He concluded, "This argument of the Department's will need further discovery, probably trial, and further briefing based thereon to flesh out." *Id.* at 14

The motion for summary judgment now before us is the Department's attempt to flesh out this argument further by relying on information obtained through discovery, including the deposition testimony of Veolia's general manager, Mr. Henrichs. It is the Department's contention that Mr. Henrichs' failure to read the letter until after the 30-day time period had expired is what resulted in its failure to file a timely appeal. In response, Veolia asserts that the ambiguous nature of the December letter is what prevents it from being a final action, regardless of when Mr. Henrichs read the letter or became aware of it.

Discussion

If the December 16 letter is a final action, then the present appeal is indeed untimely and barred by the doctrine of administrative finality. Mr. Henrichs' failure to read the letter at the time of its receipt by the company would not provide a basis for filing an appeal outside the 30-day appeal period set forth at 25 Pa. Code § 1021.52(a)(1). The Board's rules allow a *nunc pro tunc* filing only for good cause. 25 Pa. Code § 1021.53a. As Judge Coleman explained in *Achenbach v. DEP*, EHB Docket No. 2004-202-C (Opinion and Order issued April 28, 2006), "good cause" for allowing an appeal *nunc pro tunc* has been interpreted to mean cases where there has been fraud, a breakdown in the Board's operation or a non-negligent failure to file an appeal." *Slip op.* at 5 (quoting *Bass v. Commonwealth*, 401 A.2d 1133, 1135 (Pa. 1979)). This situation does not fall into any of those categories.

This brings us back to the question, then, of whether the December 16 letter is, in fact, a final action of the Department on Veolia's refund request. The Department argues in its reply brief that a reasonably prudent person would have read the letter that accompanied the check, particularly since the check was for an amount substantially less than the amount requested, and would have understood it to be the Department's final action on the November petition and all disposal fees paid on alternate daily cover. At the very least, argues the Department, a reasonably prudent person would have contacted the Department to question the discrepancy.

The Department further argues that we cannot find the content of the letter to have been confusing to Veolia since Veolia's general manager never read the letter; nor could Veolia have been confused by the content of the refund letters sent to other landfills who had filed petitions for refunds since those letters were not read either. The Department urges us to consider the letter's intent which, according to the affidavit of Kenneth Reisinger, Director of the Department's Bureau of Waste Management and the author of the refund letters, was that the December 16 letter was a final action on Veolia's November petition.

The Department makes a very strong argument that the letter should have, at the very least, put Veolia on notice to inquire as to whether this was the Department's action on its November petition. However, that by itself is not enough. Looking at the language of the December 16 letter on its face, we cannot say without a doubt that it was the Department's final action on Veolia's November petition. Reasonable minds could disagree on this matter and, indeed, do disagree. In the context of a dispositive motion, all doubts must be resolved in favor of the non-moving party. *Upper Gwynedd Township v. DEP*, EHB Docket No. 2005-358-MG (Opinion and Order issued January 30, 2007), p. 3.

We do acknowledge the affidavit of Mr. Reisinger stating that the December 16 letter

constituted the Department's final action on Veolia's petition. However, simply because the Department intended it to be its final action on Veolia's petition is not by itself determinative of whether, in fact, the letter was a final action as a matter of law. As Chief Judge Krancer noted in his earlier ruling, in addition to looking at the specific wording and intent of the communication in question, we also look to "the practical impact of the communication [and] its apparent finality" among other factors, in determining whether the communication is indeed a final action. *Onyx Greentree, supra* at 8 (citing *Borough of Kutztown v. DEP*, 2001 EHB at 1121-24.) We are reluctant to make a ruling on this critical issue without hearing testimony from the parties.[1] *Angela Cres Trust of June 25, 1998 v. DEP,* EHB Docket No. 2006-086-R (Opinion and Order issued February 8, 2007) (finding that the Board would greatly benefit from the taking of testimony on certain issues raised in a motion for summary judgment), p. 4.

We are not unsympathetic to the Department's plea that we not penalize them for what was an administrative error, i.e., sending Veolia a letter that did not reference its petition when other landfills received letters that did reference their pending refund requests. We do not see this as penalizing the Department. Our decision does not necessarily turn on the fact that Veolia was sent a different letter than that received by other waste disposal companies who had filed a petition with the Department. As the Department notes, Veolia's general manager did not read those letters and, therefore, their existence could not have led to any confusion on the part of

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[1] There is a difference of opinion on whether the Board may apply the rule in *Nanty-Glo v. American Surety Co.*, 163 A. 523 (Pa. 1932), which prevents the entry of summary judgment where the moving party relies solely on affidavits or deposition testimony to establish the absence of a genuine issue of material fact. The Commonwealth Court's decision in *Snyder v. Department of Environmental Resources*, 588 A.2d 1001 (Pa. Cmwlth. 1991), *appeal dismissed*, 632 A.2d 308 (Pa. 1993), has been interpreted as saying that the *Nanty-Glo* rule does not apply to proceedings before the Board. See, e.g., *Solomon v. DEP*, 2000 EHB 227, 272-73 (Coleman, J., dissenting); *Gambler v. DEP*, 1997 EHB 914, 918; *Envyrobale v. DER*, 1994 EHB 1842, 1845. *But see, Solomon v. DEP*, 2000 EHB 227 (Krancer, C.J., dissenting) (expressing the opinion that

Veolia. However, when ruling on a dispositive motion, we must look at all of the facts in the light most favorable to the non-moving party. *Upper Gwynedd Township, supra.* at 3. Doing so here requires us to deny the Department's motion. In denying this motion, however, we reiterate the earlier ruling of Chief Judge Krancer in *Onyx Greentree* and do not close the door to the possibility that evidence at trial may support a finding that the December letter is final as to Veolia's pending petition.

Snyder does not affirmatively prohibit the Board from applying *Nanty-Glo*.)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

VEOLIA ES GREENTREE LANDFILL	:	
	:	
v.	:	**EHB Docket No. 2006-073-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 27th day of February 2007, the Department's motion for summary judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

Thomas W. Renwand

THOMAS W. RENWAND
Judge

DATED: February 27, 2007

Service List next page.

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SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2003-004-CP-L**
RICHARD C. ANGINO, ESQUIRE, KING DRIVE CORPORATION, and SEBASTIANI BROTHERS	:	**Issued: March 13, 2007**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board assesses a civil penalty in the amount of $21,000 for violations of the Clean Streams Law. The defendants conducted earth disturbance activities without an NPDES permit, without approved erosion and sediment control plans, and without installing best management practices. The civil penalty is based largely on the defendants' repeated failure to install pollution controls and failure to obtain an NPDES permit for various earth disturbance activities.

Procedural History

On January 9, 2003, the Department of Environmental Protection ("Department") filed a complaint for assessment of civil penalties against Richard C. Angino, Esq., King Drive Corporation (together, "Angino"),[1] and Sebastiani Brothers[2] under the Clean Streams Law for

[1] Angino is the sole shareholder of King Drive Corporation. During the hearing, Angino actively defended against the complaint. King Drive was represented but did not put on a separate defense. The parties have treated Angino and King Drive Corporation as one in the same, and for purposes of this Adjudication we will do the same.

earth disturbance activities conducted at Angino's Felicita Resort in Middle Paxton Township, Dauphin County. The Department's complaint consisted of three counts. First, the Department asserted that Angino conducted earth disturbance activities without an NPDES permit. Second, the Department asserted that Angino conducted earth disturbance activities without an erosion and sediment control plan. Third, the Department asserted that Angino failed to install, implement, and maintain best management practices while conducting earth disturbance activities. On September 30, 2004, after we granted five consecutive joint requests to extend the discovery period in this case, the Department filed a motion for partial summary judgment on the issue of liability. On October 13, 2005, Judge Coleman granted in part and denied in part the Department's motion, ruling that Angino failed to develop an erosion and sediment control plan for earth disturbance activities that are alleged to have occurred at what the parties have referred to as the Boy Scout Tract. The remaining issues could not be disposed of until there was a hearing on the merits. On October 24, 2005, the Department filed a motion for reconsideration. Judge Coleman denied the Department's motion, ruling that the Department failed to demonstrate extraordinary circumstances warranting interlocutory reconsideration. On March 28, 2006, the case was reassigned for primary handling from Judge Coleman to Judge Labuskes. We held a four-day hearing on the merits beginning on June 26, 2006. The final post-hearing brief was filed on December 22, 2006.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce

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[2] Although the Department's complaint names Sebastiani Brothers as a defendant, Sebastiani Brothers was not represented at the hearing on the merits, and the Department did not articulate a case against it. The Department did not put on any evidence specific to the civil penalty it was seeking to have imposed against Sebastiani. Accordingly, no penalty will be imposed against it and this Adjudication will focus on Angino.

the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 *et seq.*; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17; and the rules and regulations promulgated thereunder.

2. Richard C. Angino is president and sole stockholder of King Drive Corporation. (Angino Exhibit ("Ex.") 12.)

3. King Drive Corporation is a Pennsylvania corporation that owns an approximately 750-acre resort, Felicita Golf, Garden, Spa Resort ("Felicita Resort"), at 550 Lakewood Drive, Harrisburg, Pennsylvania 17112. (Angino and King Drive Corporation are hereinafter collectively referred to as "Angino.") (Angino Ex. 12; N.T. 711.)

4. Richard Angino oversees construction projects at the Felicita Resort. Angino and King Drive used their employees and contractors to carry out the earth disturbance activities at issue in this case. (N.T. 819.)

5. Sebastiani Brothers is a contractor that has conducted earth disturbance activities on behalf of King Drive Corporation. (Commonwealth Exhibit ("C.Ex.") 19; N.T. 110.)

6. The Dauphin County Conservation District ("DCCD") implements and administers the National Pollutant Discharge Elimination System ("NPDES") permitting program and the Chapter 102 Erosion and Sediment Control Plan Program. (N.T. 19-20.)

7. The DCCD refers files to the Department when enforcement action is necessary. (N.T. 32, 448.)

Felicita Resort Property

8. Fishing Creek Valley Road, also known as Pennsylvania State Route 443, runs east to west, and roughly divides Angino's property in half. (Angino Ex. 12; C.Ex. 1; N.T. 39-40.)

9. The golf course is located in the southern half of the Felicita Resort, and makes up

about 357 acres of the Felicita Resort. (C.Ex. 1; N.T. 61.)

10. Lakewood Drive runs north to south from Fishing Creek Valley Road and roughly divides the southern portion of the Felicita Resort in half. (C.Ex. 1.)

11. The golf course clubhouse is located off of Lakewood Drive on the southwestern quadrant of the Felicita Resort property. (N.T. 43.)

12. Mockingbird Drive runs east to west along the southern portion of the Felicita Resort property, roughly parallel to Fishing Creek Valley Road. (C.Ex. 1.) Lakewood Drive runs perpendicular to Mockingbird Drive. (C.Ex. 1.)

13. A road referred to as Mockingbird Drive Extended connects Mockingbird Drive with Straw Hollow Road on the eastern portion of the Felicita Resort property. (C.Ex. 2; N.T. 70-71.)

14. Mehaffie Drive runs north to south from Fishing Creek Valley road to the west of the Felicita Resort property. (N.T. 56-57.)

15. Fishing Creek, a warm water fishes stream, runs roughly parallel to Fishing Creek Valley Road. (25 Pa. Code § 93.9o; C.Ex. 1.)

Straw Hollow Road

16. Straw Hollow Road intersects with Fishing Creek Valley Road on the eastern side of the Felicita Resort. (C.Ex. 1.)

17. Spruce Drive runs east to west and ends perpendicularly on the west side of Straw Hollow Road. (C.Ex. 1.)

18. An unnamed tributary ("UNT") that runs parallel to Straw Hollow Road on the east side of the road flows into Fishing Creek. (C.Ex. 1; N.T. 52.) The UNT is as little as ten feet from Straw Hollow Road. (N.T. 54, 76.)

19. The area between Straw Hollow Road and the UNT has a grade between 6 and 12

percent. (N.T. 54.)

Boy Scout Tract

20. There is an 83-acre tract of land in the southwestern area of Angino's property referred to as the "Boy Scout Tract." (N.T. 113.)

21. Approximately 24 acres of the Boy Scout Tract are included in the 357 acres of the Felicita Resort golf course property. This encompasses holes 1 and 2 of the golf course. (N.T. 808.) The remaining 59 acres encompass what was once a boy scout camp. (Angino Ex. 2; N.T. 55.)

22. There is an UNT in the Boy Scout Tract located to the west of the golf course clubhouse. (N.T. 55-56.) The UNT is 1-2 feet in width and flows south to north into Fishing Creek near the intersection of Fishing Creek Valley Road and Lakewood Drive. (C.Ex. 1; N.T. 56.)

23. There is a second UNT in the Boy Scout Tract located further west which flows south to north into Fishing Creek at Fishing Creek Valley Road and Mehaffie Drive. (N.T. 57.)

24. Both UNTs on the Boy Scout Tract are supplied by spring seeps and surface drainage. (N.T. 56-57.)

25. On August 20, 2000, Angino submitted an erosion and sediment control plan ("E&S plan") for a timber harvest on the southern portion of the Boy Scout Tract to begin on September 20, 2000 and end by December 20, 2000. (C.Ex. 23; N.T. 445.) The total area estimated to be disturbed by earth moving activities was 45,400 square feet, or 1.1 acres. (C.Ex. 23.)

26. On September 7, 2000, the DCCD determined that the submitted E&S plan was adequate. (C.Ex. 24; N.T. 445.) The letter did not authorize any other earth disturbance activities. (N.T. 445.)

April 1999 NPDES Permit

27. The Department issued Angino a general NPDES permit for discharges of stormwater associated with construction activities in April 1999 ("1999 NPDES permit"), which covered the 357-acre golf course property. (C.Ex. 4; N.T. 59, 61.)

28. Section 1 of the 1999 NPDES permit provides that "[p]ersons proposing to discharge stormwater associated with construction activities and eligible persons *proposing to expand the scope of previously authorized construction activity* which discharges stormwater who wish to be covered by this general permit must file an administratively complete and acceptable Notice of Intent (NOI) with the reviewing entity at least 30 days prior to commencing the construction activity." (C.Ex. 4 (emphasis added).)

29. Section 3 of the 1999 NPDES permit provides that "[t]he Department, and the local county conservation district when acting as the reviewing entity, may require by written notice any person authorized by this permit to apply for an individual NPDES permit." (C.Ex. 4.)

30. Part B, Section 2b of the 1999 NPDES permit states that "[t]he permittee and co-permittee may be subject to criminal and/or civil penalties for violations of the terms and conditions of this general permit under Sections 602 and 605 of the Clean Streams Law, 35 P.S. Sections 691.602 and 691.605 ...." (C.Ex. 4.)

31. Part C, Section 2a of the 1999 NPDES permit states that "[a]n Erosion and Sediment Control Plan must be prepared, developed, and implemented for each activity covered by this permit in accordance with the Department's Chapter 102 Rules and Regulations, and Department guidance. Each plan must be submitted to the Department or local county conservation district when acting as the reviewing entity. E&S Control Plans, BMPs, and revisions thereto, which meet the requirements of Chapter 102, are conditions of this permit and incorporated by

reference." (C.Ex. 4.)

32. Part C, Condition 6 of the 1999 NPDES permit states "[t]he permittee or co-permittee shall contact the reviewing entity at least seven days before construction is to begin to determine if a pre-construction conference is required. The permittee, co-permittee and others undertaking the earth disturbance activity must attend a pre-construction conference if requested by the reviewing entity." (C.Ex. 4.)

33. Part C, Section 8 of the 1999 NPDES permit states "[p]rior to the commencement of earth disturbance activities for additional phases or portions of the project, the permittee or co-permittee shall submit an Erosion and Sediment Control Plan for each additional phase or portion of the project for review and authorization by the reviewing entity." (C.Ex. 4; N.T. 66.)

34. After the NPDES permit was issued, Angino submitted a notice of intent ("NOI") for coverage under the 1999 NPDES permit for discharges of stormwater associated with construction activities. The NOI contained a project description with two phases of construction. (C.Ex. 2; N.T. 61-63.)

35. Phase one proposed building seventeen lots on approximately 28 acres along Mockingbird Drive. (C.Ex. 2; N.T. 62.) This included building a temporary cul-de-sac to be constructed at the east end of Mockingbird Drive to accommodate future extension of Mockingbird Drive to Straw Hollow Road. (C.Ex. 1; C.Ex. 2.) The extension of Mockingbird Drive to Straw Hollow Road has been referred to by the parties as Mockingbird Drive Extended. (*See* N.T. 70-71.)

36. Phase two proposed building up to sixteen additional lots on approximately 27 acres along Mockingbird Drive Extended which would travel along the east side of the Felicita Resort golf course and connect to the existing Straw Hollow Road. (C.Ex. 2; N.T. 70.)

37. The April 1999 NOI request submitted under the 1999 NPDES permit only sought approval for phase one of the construction. (C.Ex. 2; N.T. 62.)

38. The NOI included E&S plans and best management practices ("BMPs") for phase one. (C.Ex. 2; N.T. 63.)

39. No E&S plans or BMPs were included in the April 1999 NOI for phase two of the construction. (N.T. 63.)

40. The April 1999 NOI did not seek approval for phase two of the construction. (N.T. 62.)

41. The phase two project description stated that "[i]mprovements to the existing sections of roadways will be proposed." (C.Ex. 2; N.T. 70.)

42. On July 9, 2001, Angino submitted an E&S plan for phase two of the construction under the 1999 NPDES permit, which included Straw Hollow Road and Mockingbird Drive Extended ("2001 E&S plan"). (C.Ex. 6; N.T. 66-67.)

43. William Swanick, an engineer for Hartman & Associates, prepared the 2001 E&S plan on Angino's behalf. (C.Ex. 6.)

44. The narrative portion of the 2001 E&S plan contains a heading entitled "Sequence of Construction" which lists BMPs for the Straw Hollow Road portion of phase two, extending north to south from Fishing Creek Valley Road to Spruce Drive. (C.Ex. 6; N.T. 68.) The BMPs included installing a silt fence downslope from the construction to prevent sediment from entering the UNT and performing temporary seeding and mulching operations to stabilize the area. (C.Ex. 6.)

45. On September 26, 2001, Stephen Frey, a resource conservationist for the DCCD sent Angino a technical deficiency letter identifying certain deficiencies with the July 2001 E&S plan.

(C.Ex. 9; N.T. 70-71.)

Straw Hollow Road – October 2, 2001 Earth Disturbance Activity

46. On October 4, 2001, after receiving complaints regarding activities at Straw Hollow Road, Frey conducted an investigation at Straw Hollow Road. (N.T. 74.)

47. On October 2, 2001, Angino conducted earth disturbance activities along Straw Hollow Road and did not install BMPs. (C.Ex. 11; N.T. 72, 75.) Angino did not have authorization to conduct earth disturbance activities at the Straw Hollow Road site. (N.T. 72.) Frey observed possible disturbance and fill in the adjacent stream floodway. (C.Ex. 11; N.T. 75.) The earth disturbance activity was conducted by Duane Nye, an employee of King Drive Corporation. (C.Ex. 8.)

48. The total earth disturbance observed along Straw Hollow Road at the October inspection was less than 5,000 square feet. (N.T. 784, 1024.)

49. Angino authorized and directed the earth disturbance activities to be conducted on Straw Hollow Road. (C.Ex. 8.)

50. Swanick advised Angino's employees to install proper BMPs even though the July 2001 E&S plan for Straw Hollow Road had not yet been approved. (N.T. 597.)

51. The DCCD had not been notified prior to the beginning of the earth disturbance activities as required by the 1999 NPDES permit. (C.Ex. 4; N.T. 75, 78.)

52. The earth disturbance activities were conducted on both the east and the west sides of Straw Hollow Road. (N.T. 74.)

53. On the west side of Straw Hollow Road, Angino cut into an embankment. (N.T. 75.) The embankment is approximately 25 feet from the UNT. (C.Ex. 15; N.T. 79-80.)

54. On the east side of Straw Hollow Road, between the road and the UNT, trees and

vegetation were cleared. (N.T. 75.) Earth was pushed up against the UNT. (N.T. 78, 81.)

55. Deposits of sediment were observed in the UNT. (N.T. 85, 188.)

56. Neither the DCCD nor the Department measured the turbidity of the water. (N.T. 204-05.)

57. The earth disturbance activities at Straw Hollow Road on October 2, 2001 had the potential to cause sediment pollution. (N.T. 75, 78, 87, 247-49.)

58. The earth disturbance activities on and along Straw Hollow Road between Fishing Creek and Spruce Drive were conducted outside the boundary of Angino's NPDES permit. (N.T. 74.)

59. On October 5, 2001, Frey called Swanick to go over his October 4 earth disturbance inspection report. (N.T. 88.) Swanick suggested a meeting with the DCCD. (N.T. 88.) Frey suggested that Angino should break the Straw Hollow Road project out as a separate project to allow it to move forward independent of the 1999 NPDES permit. (N.T. 96, 99, 922.) Angino did not adopt that suggestion. (N.T. 96, 99.)

60. On October 15, 2001, Frey met with Duane Nye, one of King Drive's employees, at the Straw Hollow Road site to go over the October 4 earth disturbance inspection report. (N.T. 89-91.) Frey and Nye discussed the appropriate BMPs to be installed at the site. (N.T. 90.) This included installing a silt fence. (N.T. 91.) Frey instructed Nye that no further earth disturbance activities were to occur until an E&S plan was approved. (N.T. 90.)

61. On October 25, 2001, Frey conducted a follow up inspection at the Straw Hollow Road site. (N.T. 96.) Angino's employees had installed the proper BMPs and there was no further evidence of earth disturbance activities. (N.T. 96, 259, 276.)

62. About four months later, on February 25, 2002, Angino submitted a revised E&S plan

("2002 E&S plan") for construction along Straw Hollow Road responding to the DCCD's September 26, 2001 technical deficiency letter. (N.T. 230.)

Straw Hollow Road – March 29, 2002 through April 8, 2002 Earth Disturbance Activity

63. On March 27, 2002, the DCCD sent letters to Angino and Swanick notifying them that deficiencies still remained under phase two of the project as set forth in the 2002 E&S plan. (C.Ex. 18; N.T. 99-100.) The March 27, 2002 letter requested more information from Angino. (C.Ex. 18; 99-100.)

64. On April 8, 2002, Frey conducted another inspection of Straw Hollow Road and discovered that Angino had engaged in additional earth disturbance activities along the Spruce Drive access area to Straw Hollow Road. (C.Ex. 16, 21; N.T. 102-04.) He found that the embankment had been cut back and unstabilized, and there was additional clearing, grading, and grubbing along Straw Hollow Road. (*See* C.Ex. 21; N.T. 104, 275.)

65. Angino conducted the earth disturbance activities on Straw Hollow Road from March 29, 2002 through April 8, 2002. (C.Ex. 19; N.T. 110-11.)

66. As of April 8, 2002, Angino had not installed the proper BMPs even though they were listed on the not-yet-approved, revised February 2002 E&S plan. (N.T. 105.) Specifically, a silt fence was not installed at the intersection of Spruce Drive and Straw Hollow Road, and the site was not stabilized. (N.T. 105, 275.) The silt fence along Straw Hollow Road that was installed in October 2001 was still in place. (N.T. 105.)

67. The disturbed area where the earth disturbance activities occurred drains toward the Straw Hollow Road UNT. (N.T. 109.) Angino's activity created a potential for sediment pollution of the UNT. (N.T. 105-06.)

68. The earth disturbance activities on and along Straw Hollow Road and Spruce Drive

were not conducted in accordance with the terms and conditions of Angino's NDPES permit. (N.T. 105.)

69. Swanick responded to the DCCD's March 27, 2002 technical deficiency letter on April 15, 2002. (C.Ex. 22; N.T. 112.) Swanick responded to and satisfied the deficiencies that the DCCD listed in the technical deficiency letter. (N.T. 112.)

70. Angino's April 1999 NOI did not mention any construction or earth disturbance activities in the Boy Scout Tract. (N.T. 62, 171-72, 174.)

Boy Scout Tract – March 12, 2002 through April 1, 2002 Earth Disturbance Activity

71. On April 26, 2002, Frey conducted another inspection of the Felicita Resort.

72. Between March 12, 2002 and April 1, 2002, Angino conducted earth disturbance activities including clearing, grubbing, and stockpiling on the Boy Scout Tract. A significant portion of the earth disturbance activity was located outside the approved phase one E&S plan granted under the 1999 NPDES permit. (C.Ex. 29; N.T. 116, 118-19.)

73. The slope of the Boy Scout Tract, both inside and outside the 1999 NPDES permit area, slopes toward the two UNTs on the Boy Scout Tract. (N.T. 452.)

Inside the 1999 NPDES Permit Area

74. Inside the 1999 NPDES permit area, although Angino had an approved E&S plan, he did not notify the DCCD before beginning the earth disturbance activities. (N.T. 126-27.)

75. Angino conducted earth disturbance activities inside the 1999 NPDES permit area including lengthening the yardage of Holes 1 and 2 of the golf course and stockpiling rocks and soil on the access road behind the golf course clubhouse. (N.T. 120, 121, 151-52.)

76. Inside the 1999 NPDES permit area, no BMPs were installed and the area where the earth disturbance activities were conducted was not stabilized as of the April 26 inspection. (N.T.

124, 131-32.)

Outside 1999 NPDES Permit Area

77. Outside the 1999 NPDES permit area, Angino conducted earth disturbance activities adjacent to Mehaffie Drive that extended back up to the Boy Scout Tract. (N.T. 122.) Angino had tree stumps removed from the ground, and cleared and grubbed and removed debris from the forested area on the Boy Scout Tract. (C.Ex. 29; N.T. 116, 118-19, 946-47.) No E&S plan was submitted for these earth disturbance activities. (N.T. 124, 131.)

78. Outside the 1999 NPDES permit area, no BMPs were installed and the area where the earth disturbance activities were conducted was not stabilized as of the April 26 inspection. (N.T. 124, 131-32.)

79. The total aerial extent of earth disturbance activities in the Boy Scout Tract between March 12, 2002 and April 1, 2002 was greater than five acres. (N.T. 123.)

80. The area disturbed in the Boy Scout Tract between March 12, 2002 and April 1, 2002 was substantially greater than the disturbance area described in the August 2000 timber harvest E&S plan. (C.Ex. 23.)

81. An E&S plan was required for the earth disturbance activities that took place in the Boy Scout Tract outside the 1999 NPDES permit area because the area involved was large enough to require a permit and, in any event, the earth disturbance activities were conducted in an area greater than 5,000 square feet. (N.T. 124.)

82. On April 26, 2002, Michael Hubler of the DCCD requested that the Department take enforcement action against Angino. (N.T. 448.) Hubler credibly testified that the Boy Scout Tract was in "pretty bad shape" with considerable earth disturbances and that there was an "escalating non-compliance issue" along with "no planning." (C.Ex. 34; N.T. 448, 450.)

83. Michael Hubler is the Assistant District Manager for the DCCD where he has worked for 17 years. (N.T. 436-437.)

84. On May 2, 2002, representatives from the Department and the DCCD met with Angino and Swanick to discuss the BMPs that should be installed within the Boy Scout Tract. (N.T. 138, 145-47.)

85. During the May 2, 2002 site visit, the parties had a collaborative discussion regarding the appropriate BMPs to be installed. (N.T. 148-49.)

86. On May 2, 2002, the Department issued Angino a compliance order. (C.Ex. 33; N.T. 149.) The compliance order required that Angino stop all earth disturbance activities. (C.Ex. 33; N.T. 850.) The compliance order also required Angino by May 12, 2002 to remove all debris from the Boy Scout Tract, install water bars along the cut roadways, seed and mulch the disturbed area, install silt fences in appropriate areas, and re-establish stream channels by removing all fill material from the UNTs. (C.Ex. 33; N.T. 150.) In addition, the compliance order required Angino by May 20, 2002 to submit a full E&S plan and NPDES NOI to the DCCD. (C.Ex. 33; 150.)

87. No appeal was filed from the May 2, 2002 compliance order. (N.T. 150.)

88. Angino gave Ryan Longenecker, the Felicita Resort golf course superintendent and employee of Angino, total discretion to get Angino into compliance. (N.T. 852.)

89. Following the May 2, 2002 site visit, Longenecker instructed Sebastiani Brothers what BMPs to implement within the Boy Scout Tract. (N.T. 853.)

90. Crews from Sebastiani Brothers worked straight through the weekend to install the appropriate BMPs by May 12, 2002. (N.T. 358, 857, 859.)

91. Longenecker contacted Black Landscaping to hydroseed the disturbed areas within the

Boy Scout Tract. (N.T. 871.) However, Black Landscaping could not hydroseed all the disturbed areas by May 12, 2002 because their machines could not gain access to all areas of the Boy Scout Tract due to the wet conditions on the property. (N.T. 861, 871.)

92. On May 13, 2002, Frey inspected the Boy Scout Tract. Swanick and Longenecker were present for the inspection. (C.Ex. 36; N.T. 155, 962.)

93. Not all of the required BMPs were installed by the time of the inspection. (C.Ex. 36; N.T. 155, 162.) Frey wrote in the May 13, 2002 inspection report that Angino still needed to "Install S.C.F. [at] access near clubhouse parking lot," "[c]reate stable lined (rock) channels [at] all 3 rock ford areas to convey clear water," "[i]nstall waterbars on slopes [and] roads where necessary," "[s]eed [and] mulch all exposed areas," and "install silt fences ... where needed." (C.Ex. 36.)

94. On May 20, 2002, Swanick submitted a new NPDES permit application on behalf of Angino to supplement and revise the 1999 NPDES permit. (C.Ex. 37; N.T. 156-57, 381-82.)

95. The May 20, 2002 NPDES permit application sought to add 33,600 square feet (.77 acres) of Straw Hollow Road and 59 acres of the Boy Scout Tract to the 1999 NPDES permit coverage. (C.Ex. 37; N.T. 381-82.)

96. The May 20, 2002 NPDES permit application states that "[a]fter stabilization of the disturbed areas noted in the [May 2, 2002] Order, there is no further construction proposed on the [Boy Scout] Tract. Furthermore, the area of Straw Hollow Road has already been completed and there is no further construction proposed in the area." (C.Ex. 37.)

97. The DCCD forwarded the May 20, 2002 NPDES permit application to the Department. Angino was eventually required to obtain, and he did in fact obtain, an individual NPDES permit covering his property. (N.T. 383, 637, 909, 1072.)

98. On July 10, 2002, Frey conducted another site inspection of the Boy Scout Tract. (C.Ex. 38; N.T. 157.)

99. Frey wrote on the July 10, 2002 inspection report that Angino "has complied with the remedial actions" requested on the May 2, 2002 inspection report. (C.Ex. 38.)

Hole 15 – July 9, 2002 Earth Disturbance Activity

100. On July 9, 2002, Angino conducted earth disturbance activities adjacent to a pond on hole 15 of the Felicita Resort golf course and also parallel to the hole 15 cart path on the north side of Fishing Creek. (C.Ex. 38; C.Ex. 41.) The total area of the new earth disturbance activity was approximately one acre, which is greater than 5,000 square feet. (C.Ex. 38.)

101. Hole 15 is within the scope of the original 1999 NPDES permit. (N.T. 61, 162.)

102. A silt fence was installed on one side of the earth disturbance activity on hole 15, but not the other. (N.T. 160.)

103. The silt fence that was in place was not installed properly in that it was not fully anchored to the ground, allowing for potential sediment pollution. (N.T. 160.)

104. On the other side of Hole 15, no silt fence was installed to prevent sediment from entering Fishing Creek. (N.T. 160.)

105. Angino did not develop an E&S plan for the earth disturbance activity on hole 15 of the Felicita Resort golf course. (N.T. 161.)

106. Angino properly fixed and installed the required silt fences around hole 15 on July 11, 2002. (N.T. 163, 747.)

107. The Department filed its complaint for civil penalties on January 9, 2003.

DISCUSSION

The Board's role in a civil penalty complaint case is to make an independent

determination of the appropriate penalty amount. The Department suggests an amount in the complaint, but the suggestion is purely advisory. *DEP v. Strubinger*, EHB Docket No. 2004-120-CP-C, slip op. at 8-9 (Adjudication October 4, 2006); *DEP v. Leeward Construction*, 2001 EHB 870, 885-86, *aff'd*, 821 A.2d 145 (Pa. Cmwlth. 2003). When the Department files a complaint for a civil penalty, it bears the burden of proof. 25 Pa. Code § 1021.122(b)(1). We begin our discussion with whether the Department met its burden of proving violations under the Clean Streams Law, 35 P.S. §§ 691.1 – 691.1001.

Count One

In count one of its complaint, the Department contends that Angino conducted earth disturbance activities without an NPDES permit on Straw Hollow Road and the Boy Scout Tract. An "earth disturbance activity" is defined by the regulations as:

> A construction or other human activity which disturbs the surface of the land, including, but not limited to, clearing and grubbing, grading, excavations, embankments, land development, agricultural plowing or tilling, timber harvesting activities, road maintenance activities, mineral extraction, and the moving, depositing, stockpiling, or storing of soil, rock or earth materials.

25 Pa. Code § 102.1. When earth disturbance activities reach a certain size, an NPDES permit is required. The pertinent regulation provides the following:

> [A] person proposing an earth disturbance activity that involves 5 acres (2 hectares) or more of earth disturbance, or an earth disturbance on any portion, part, or during any stage of, a larger common plan of development or sale that involves 5 acres (2 hectares) or more of earth disturbance over the life of the project, shall obtain a general or individual NPDES Permit for Stormwater Discharges Associated With Construction Activities prior to commencing the earth disturbance activity.

25 Pa. Code § 102.5(a). We specifically addressed NPDES permits for construction activities in *O'Rielly v. DEP*, 2001 EHB 19:

> The pollutant of primary concern for construction projects is sediment. *25 Pa. Code § 102.2*. On a large project, hundreds or even millions of cubic yards of earthen materials are disturbed. When they are disturbed, they are exposed to the elements. When disturbed earthen materials are exposed to the elements without the protection normally afforded by vegetative cover or pavement, they are prone to wash away, or erode, at a much greater rate than they would when protected. Unless precautions are taken, these eroded earthen materials can then end up as sediment in the waters of the Commonwealth. This excess sedimentation has a deleterious effect on Pennsylvania's streams.
>
> In order to control the discharge of sediment while earthen materials are exposed during construction projects, federal law requires that runoff from construction activity be treated as a point source requiring an NPDES permit. 40 C.F.R. § 122.26; *Valley Creek Coalition v. DEP*, 1999 EHB 935, 949. *See also* 35 P.S. § 691.402 (Department may require permits for activities that create a danger of water pollution). The permits are designed almost exclusively to control the discharge of sediment because that is what has proven to be the potential pollutant at construction sites. *See* 25 Pa. Code Chapter 102 (program is designed to minimize the potential for accelerated erosion and sedimentation).

2001 EHB at 33.

a. Earth Disturbance Activities at Straw Hollow Road

There is no question and there is no dispute that the activities conducted along Straw Hollow Road were earth disturbance activities. Angino cut into an embankment and cleared vegetation. *See* 25 Pa. Code § 102.1. Although the earth disturbance activities that occurred along Straw Hollow Road did not involve five acres or more of earth disturbance, the Department argues that an NPDES permit was required because the Straw Hollow Road earth disturbance activities were a part of a larger common plan of development that involved five acres or more of earth disturbance over the life of the project. The evidence presented at the hearing supports this conclusion.

On April 28, 1999, Angino submitted a notice of intent ("NOI") for coverage under the

1999 NPDES permit to construct a residential subdivision for single-family homes. A project description was attached to the NOI listing two phases of development. Phase one consisted of adding seventeen residential lots affecting approximately 28 acres located along Mockingbird Drive. Phase two consisted of extending Mockingbird Drive along the east side of the golf course property and connecting it to Straw Hollow Road. This included adding approximately sixteen additional lots for single-family homes, affecting approximately 27 acres. Although phase two involved making improvements to Straw Hollow Road, the road itself was outside the scope of the 1999 NPDES permit.

The DCCD approved phase one of Angino's project via a letter sent on July 23, 1999. In that letter, the DCCD wrote that "[p]rior to commencing earthmoving for remaining phases of the project, the permittee shall submit an erosion and sediment control plan for those phases to the Dauphin County Conservation District for review and approval." (C.Ex. 3.) On July 13, 2001, Angino submitted an E&S plan which included a narrative for the BMPs to be installed along Straw Hollow Road. Not only were the Straw Hollow Road earth disturbance activities related to the construction proposed under the 1999 NPDES permit, but Angino also submitted an E&S plan that highlighted the construction activities and BMPs to occur along the road.

Angino argued that the earth disturbance activities along Straw Hollow Road were required by a court order and were not part of any large scale project or common plan of development. First, a court order mandating construction activities does not excuse a person from complying with the Clean Streams Law and its regulations. Secondly, the argument does not hold much merit in light of phase two's inclusion of Straw Hollow Road in the project description. Angino also discussed Straw Hollow Road's relationship with the rest of the project in the E&S plan for phase two submitted in July 2001. This relationship, which was laid out in both 1999 and

2001, highlights the fact that Straw Hollow Road was very much a part of Angino's overall development plans for his property. The earth disturbance activities along Straw Hollow Road were clearly part of a common plan of development greater than 5 acres in size. Therefore, the area should not have been disturbed until it was properly incorporated into Angino's NPDES permit. *See Gastor v. DER*, 1990 EHB 1391, 1395, 1398, 1411, *aff'd* 620 A.2d 61 (Pa. Cmwlth. 1993) (E&S plan required for entire disturbed area when originally permitted 18-acre disturbance expanded to more than 25 acres).

b. Boy Scout Tract Earth Disturbance Activities

There has never been any dispute that the earth disturbance activities that occurred on the Boy Scout Tract involved five acres or more of earth disturbance, even without including areas previously covered by Angino's permit.[3] Therefore, an NPDES permit was obviously required. 25 Pa. Code § 102.5(a). Further, Angino's earth disturbance activities within the Boy Scout Tract do not fall within the timber harvesting exception to 25 Pa. Code § 102.5(a). The regulations provide that an NPDES permit is not required for a person proposing a timber harvesting activity. 25 Pa. Code § 102.5(a). Instead, an Erosion and Sediment Control Permit is required if the timber harvesting activity involves 25 acres or more of earth disturbance. 25 Pa. Code § 102.5(b). However, Angino's earth disturbance activities within the Boy Scout Tract in 2002 do not meet the definition of "timber harvesting activities," which the regulations define as "earth disturbance activities including the construction of skid trails, logging roads, landing areas and other similar logging or silvicultural practices." 25 Pa. Code § 102.1. Angino's earth disturbance activities within the Boy Scout Tract in 2002 were too far removed and much more extensive than the

[3] In light of our findings that Angino committed the violations alleged in the Department's complaint on the Boy Scout Tract, we need not address the Department's contention that Angino was precluded from challenging the fact of these violations because he did not appeal the Department's May 2, 2002 compliance order.

timbering activities defined in the regulations. Furthermore, Angino's earth disturbance activities within the Boy Scout Tract in 2002 were not part of the timbering which occurred on 1.1 acres within the Boy Scout Tract in 2000. (*See* Findings of Fact Nos. 25-26.)

Count Two

In this case, Angino was required by the 1999 NPDES permit to develop an E&S plan for any construction activity covered by his permit in accordance with the Chapter 102 regulations. 25 Pa. Code § 102.4(b)(2)(ii). (C.Ex. 4.)

An erosion and sediment control plan ("E&S plan") is also required for earth disturbance activities if one of the following criteria apply:[4]

> (i) The earth disturbance activity will result in a total earth disturbance of 5,000 square feet or more.
>
> (ii) The person proposing the earth disturbance activities is required to develop an Erosion and Sediment Control Plan pursuant to this chapter under Department regulations other than those contained in this chapter.
>
> (iii) The earth disturbance activity, because of its proximity to existing drainage features or patterns, has the potential to discharge to a water classified as a High Quality or Exceptional Value water pursuant to Chapter 93 (relating to water quality standards).

25 Pa. Code § 102.4(b)(2)(i)-(iii).

a. Straw Hollow Road

Angino did not have an approved E&S plan in place at the time he conducted the earth disturbance activities along Straw Hollow Road on October 2, 2001. As previously discussed, Angino should have obtained coverage under his preexisting NPDES permit for this work. Because the work should have been permitted, Angino should pursuant to the terms of the permit

[4] A different set of erosion and sediment control requirements apply for agricultural plowing or tilling activities. 25 Pa. Code § 102.4(b)(1)(a).

have had an *approved* E&S plan before he did the work. Angino violated the Clean Streams Law and its regulations by commencing the earth disturbance activities along Straw Hollow Road without an approved E&S plan. 35 P.S. § 691.611; 25 Pa. Code § 102.4(b).

The same holds true for the earth disturbance activities along Straw Hollow Road that occurred between March 29, 2002 and April 8, 2002. Some of those activities were within the originally permitted area and some were without. They all should have been permitted because they were all part of Angino's common plan of development. Indeed, these activities were even more closely associated with Angino's global plans than the work done in October. Angino had submitted a revised E&S plan on February 25, 2002 in response to the DCCD's September 26, 2001 deficiency letter. However, the revised plan contained deficiencies as well, as set forth in the March 27, 2002 letter from the DCCD. Instead of waiting for approval, Angino simply proceeded with the work. Accordingly, the earth disturbance activities that began on March 29, 2002 along Straw Hollow Road were commenced without an approved E&S plan in violation of the Clean Streams Law and its regulations. 35 P.S. § 691.611; 25 Pa. Code § 102.4(b).

b. Boy Scout Tract

i. Outside the 1999 NPDES Permit Area

On May 2, 2002, the Department issued Angino a compliance order requiring him to submit an E&S plan for earth disturbance activities within the Boy Scout Tract within twenty days. On May 20, 2002, Angino submitted an E&S plan for the Boy Scout Tract. In our October 13, 2005 order granting the Department's motion for summary judgment in part, we held that Angino violated the law by not having an approved E&S plan in place at the time he conducted the earth disturbance activities on the Boy Scout Tract between March 12, 2002 and April 1, 2002. Regardless of whether the earth disturbances fell within the 1999 NPDES permit, an E&S

plan was required because the earth disturbance activities exceeded 5,000 square feet. 25 Pa. Code § 102.4(b)(2)(i). Finally, if the area needed to be covered by a permit, which it did, a plan was also required.

ii. Inside the 1999 NPDES Permit Area

Angino did not have an approved E&S plan in place at the time he conducted the earth disturbance activities around Holes 1 and 2 of the golf course in March 2002, despite the fact that Angino's 1999 NPDES permit requires an E&S plan for all earth disturbance activities. (C.Ex. 4.) Accordingly, the earth disturbance activities that occurred in March 2002 around Holes 1 and 2 along Straw Hollow Road were commenced without an approved E&S plan in violation of the 1999 NPDES permit and the Clean Streams Law. 35 P.S. § 691.402; 35 P.S. § 691.611.

c. Hole 15

Angino did not have an approved E&S plan in place at the time he conducted earth disturbance activities in and around Hole 15 on the Felicita Resort golf course on July 9, 2002. An E&S plan was required for these earth disturbances because Hole 15 was located within the original 357-acre 1999 NPDES permit coverage area and the earth disturbances were greater than 5,000 square feet. 25 Pa. Code § 102.4(b)(2)(ii). Angino's failure to have an approved E&S plan in place at the time of the July 9, 2002 earth disturbance activities was a violation of the 1999 NPDES permit and the Clean Streams Law. 35 P.S. § 691.402; 35 P.S. § 691.611.

Count Three

The third and final count of the Department's complaint alleges a failure to install best management practices ("BMPs"). BMPs are required for any person conducting earth disturbance activities. 25 Pa. Code § 102.4(b)(1). BMPs are defined as "[a]ctivities, facilities, measures, or procedures used to minimize accelerated erosion and sedimentation to protect, maintain, reclaim

and restore the quality of waters and the existing and designated uses of waters within this Commonwealth." 25 Pa. Code § 102.1. Instead of imposing specific effluent limitations, the regulations under the Clean Streams Law (25 Pa. Code Chapter 102) rely upon BMPs to regulate the discharges associated with stormwater. *Blue Mountain Preservation Association v. DEP*, EHB Docket No. 2005-077-K, slip op. at 12 (Adjudication September 7, 2006); *O'Rielly v. DEP*, 2001 EHB 19, 33; *Valley Creek Coalition v. DEP*, 1999 EHB 935, 949. Specifically, Chapter 102 BMPs focus on control of accelerated erosion of sediment. *Blue Mountain Preservation Association v. DEP*, slip op. at 12. Essentially, BMPs are aimed at keeping the soil on the site and preventing sedimentation runoff pollution. *Id.* at 21. The regulations provide:

> (a) A person conducting or proposing to conduct an earth disturbance activity shall design, implement and maintain BMPs to minimize the potential for accelerated erosion and sedimentation in order to protect, maintain, reclaim and restore water quality and existing and designated uses. Various BMPs and their design standards are listed in the Erosion and Sediment Pollution Control Program Manual (Manual), Commonwealth of Pennsylvania, Department of Environmental Protection, No. 363-2134-008 (January 1996), as amended and updated.
>
> (b) BMPs and design standards other than those listed in the Manual may be used when a person conducting or proposing to conduct an earth disturbance activity demonstrates to the Department or a county conservation district that the alternate BMP or design standard minimizes accelerated erosion and sedimentation to achieve the regulatory standards in subsection (a).

25 Pa. Code § 102.11. Upon completion of an earth disturbance activity, the site must be permanently stabilized. The regulations provide:

> (a) Upon completion of an earth disturbance activity or any stage or phase of an activity, the site shall be immediately seeded, mulched or otherwise protected from accelerated erosion and sedimentation.
>
> (b) Erosion and sediment control BMPs shall be implemented and maintained until the permanent stabilization is

completed.

> (c) For an earth disturbance activity or any stage or phase of an activity to be considered permanently stabilized, the disturbed areas shall be covered with one of the following:
>
> > (1) A minimum uniform 70% perennial vegetative cover, with a density capable of resisting accelerated erosion and sedimentation.
> >
> > (2) An acceptable BMP which permanently minimizes accelerated erosion and sedimentation.

25 Pa. Code § 102.22. Owners and contractors are jointly adhered to these requirements. *DEP v. Strubinger*, EHB Docket No. 2004-120-CP-C, slip op. at 15 (Adjudication October 4, 2006); *Leeward Construction Co. v. DEP*, 821 A.2d 145 (Pa. Cmwlth. 2003). Erosion and sediment BMPs are required *regardless* of the size of the earth disturbance. 25 Pa. Code § 102.4(b)(1).

a. Straw Hollow Road

On October 2, 2001, Angino commenced earth disturbance activities along Straw Hollow Road which included cutting out an embankment and clearing vegetation and trees between the road and the UNT which parallels the road. Angino did not install any BMPs at the project site despite the fact that Swanick advised Angino's employees to install the proper BMPs even though the July 2001 E&S plan had not yet been approved. After a meeting with the DCCD, Angino successfully installed the BMPs along Straw Hollow Road on October 25, 2001.

Between March 29 and April 8, 2002, Angino conducted additional earth disturbance activities along Straw Hollow Road including grading the surface of the road. The silt fence that was previously installed along Straw Hollow Road in October 2001 was still in place. However, Angino did not install additional BMPs along Straw Hollow Road, including a silt fence at the intersection of Straw Hollow Road and Spruce Drive, despite the fact that the revised E&S plan Angino submitted on February 25, 2002 called for it and other BMPs. Swanick informed the

DCCD by letter on April 15, 2002 that impacts along Straw Hollow Road were completed.

Angino argues that a silt fence along Straw Hollow Road would not be a critical BMP if the roadway sloped away from the UNT and toward the stream. (N.T. 233, 763, 771, 788, 1020.) Although a portion of the roadway does slope towards the embankment, other portions of the road slope toward the stream. (N.T. 76, 79-82, 233-34, 939-40.) In any event, the DCCD was only insisting upon the BMPs in Angino's own plans. Angino's failure to install BMPs during the October 2001 and March/April 2002 earth disturbance activities along Straw Hollow Road was a violation of the Clean Streams Law. 35 P.S. § 691.611.

b. Boy Scout Tract

Between March 12, 2002 and April 1, 2002, Angino conducted earth disturbance activities within the Boy Scout Tract consisting of clearing, grubbing and stockpiling. No BMPs were installed. On May 2, 2002, Angino, Swanick, and Longenecker met with the DCCD and the Department to discuss the appropriate BMPs to install. That same day, the Department issued Angino a compliance order to install BMPs by May 13, 2002. By May 13, 2002, progress was made, but many BMPs had yet to be installed. By July 10, 2002, the BMPs had been installed and the Boy Scout Tract had been stabilized. Angino's failure to install BMPs during the March/April 2002 earth disturbance activities in the Boy Scout Tract was a violation of the Clean Streams Law. 35 P.S. § 691.611.

c. Hole 15

On July 9, 2002, Angino conducted earth disturbance activities on and around Hole 15 on the golf course. Although he installed one silt fence along one side of Hole 15, a second silt fence on the other side was required to prevent sediment from going into Fishing Creek. Further, the silt fence that was installed was not properly anchored, thus allowing for potential pollution. On

July 10, 2002, Angino fixed the improperly installed silt fence and installed a second silt fence on the other side of Hole 15. Angino's failure to install and maintain BMPs during the July 9, 2002 earth disturbance activities on and around Hole 15 was a violation of the Clean Streams Law. 35 P.S. § 691.611.

Civil Penalties

Having determined that the Department met its burden of proof in establishing the violations listed in counts one through three of the complaint, we now turn to the civil penalty. The Board may assess a penalty up to $10,000 per day for each violation under the Clean Streams Law. 35 P.S. § 691.605; *DEP v. Kennedy*, EHB Docket No. 2005-299-CP-L, slip op. at 9 (Adjudication January 22, 2007); *DEP v. Breslin*, EHB Docket No. 2005-069-CP-L, slip op. at 9 (Adjudication April 6, 2006); *DEP v. Leeward Construction, Inc.*, 2001 EHB 870, 885-86. In determining the penalty amount, the Board is to consider the willfulness of the violations, damage or injury to the waters of the Commonwealth or their uses, costs of restoration, and other relevant factors. *DEP v. Strubinger*, EHB Docket No. 2004-120-CP-C, slip op. at 15-16 (Adjudication October 4, 2006). The deterrent value of the penalty is also a relevant factor. *Westinghouse v. DEP*, 745 A.2d 1277, 1280-81 (Pa. Cmwlth. 2000); *Leeward*, 2001 EHB at 886; *DEP v. Whitemarsh Disposal Corporation*, 2000 EHB 300, 346.

The Department, using its internal guidance documents, proposed a total civil penalty of $49,000. The Department's calculations, however, do not match up well with its complaint. Among other things, the calculations seem to include penalties for violations (e.g. pollution, potential pollution, failure to stabilize) that are not included in the complaint. The calculations are organized on an inspection-by-inspection basis and do not correspond well with the counts of the complaint. Although we have other concerns with the calculations, there is no need to dwell

on them. As we recently explained in *DEP v. Kennedy*, EHB Docket No. 2005-299-L, slip op. at 9-10 (Adjudication January 22, 2007):

> [O]ur role where the Department has filed a complaint for penalties under the Clean Streams Law is slightly different than our review in an appeal from the Department's assessment of a civil penalty:
>
> > In an appeal from a civil penalty assessment, we determine whether the underlying violations occurred, and then decided whether the amount assessed is lawful, reasonable, and appropriate. *Farmer v. DEP*, [2001 EHB 271, 283]. Although our review of an assessment is *de novo*, we do not start from scratch by selecting what penalty we might independently believe to be appropriate. Rather, we review the Department's predetermined amount for reasonableness. *Stine Farms and Recycling, Inc., v. DEP*, [2001 EHB 796, 812]; *202 Island Car Wash, L.P. v. DEP*, 2000 EHB 679, 690. In contrast to an appeal from an assessment, the Board must make an independent determination of the appropriate penalty amount in a complaint action. The Department suggests an amount in the complaint, but the suggestion is purely advisory. *Westinghouse v. DEP*, 705 A.2d 1349, 1353 (Pa. Cmwlth. 1998) ("*Westinghouse I*"); *DEP v. Whitemarsh Disposal Corporation*, 2000 EHB 300, 346 [aff'd 745 A.2d 1277 (Pa. Cmwlth. 2000)]; *DEP v. Silberstein*, 1996 EHB 619, 637; *DEP v. Landis*, 1994 EHB 1781, 1787.
>
> *Leeward Construction*, 2001 EHB at 885.

Slip op. at 9-10.

We had this to say regarding the Department's use of guidance documents to formulate a *suggested* penalty:

> The guidance document is a useful tool for use by the Department's compliance specialists. The document aims for statewide consistency, and it certainly adds a great deal of rationality to the process. The document encourages consideration of the various factors that the Clean Streams Law says must be considered. That said, the document is not binding on either the Department or this

> Board. *United Refining Company v. DEP*, EHB Docket No. 2006-007-L (Opinion November 16, 2006); *Dauphin Meadows v. DEP*, 2001 EHB 521. In fact, this Board must be wary of placing too much emphasis on the Department's internal guidance documents. We do not view it as our responsibility to evaluate whether the Department has followed its own guidance document in calculating a *suggested* penalty in a complaint action. Rather, our responsibility is to assess a penalty based upon applicable statutory maxima and criteria, regulatory criteria (if any), and Board precedent. *DEP v. Hostetler*, EHB Docket No. 2005-011-CP-K. (Adjudication June 8, 2006); *Leeward*, 2001 EHB at 908, 913. Here, Section 605 of the Clean Streams Law, 35 P.S. § 691.605, establishes a maximum daily civil penalty of $10,000 per day for each of Kennedy's violations.

Slip op. at 10-11.

BMPs

There was a tendency in this case on the part of the parties to make it seem more complicated than it really is. The Department's complaint, filed on January 2003, contains only three counts: failure to obtain a permit, failure to prepare E&S plans, and failure to install BMPs. We will take the counts in reverse order and deal with the BMPs first.

To quote again from *Kennedy*,

> [t]he Clean Streams Law directs consideration of cost savings enjoyed by the violator as a result of the violations. Indeed, this Board has now repeatedly stated that cost savings to the violator is one of the most important aspects of our calculation of civil penalties in complaint cases. *See, e.g., Hostetler*, slip op. at 9-10; *Breslin*, slip op. at 13 n.6; *Leeward*, 2001 EHB at 918-19 (Krancer concurring).

Slip op. at 11. Unfortunately, the Department has once again failed to show what, if any, cost savings were enjoyed in this case.

There also was no evidence or argument regarding costs of restoration of natural resources. From our review of the record, it does not appear that there were any such costs.

The Clean Streams Law directs our attention to any damage or injury to the waters of the

Commonwealth. We consider this an extremely important factor. In evaluating this criterion, we consider, *inter alia*, facts related to both actual and potential harm, the size of the discharging facility or disturbed area, the magnitude of the discharge, the classification of the receiving stream, and the degree to which the discharge exceeded permit limits. *Kennedy*, slip op. at 12.

While Angino's activities certainly caused a potential for pollution, the Department did not prove that significant pollution occurred as a result of Angino's activities. There may have been some very limited, isolated sedimentation in the area of a pipe in the UNT at Straw Hollow Road and at a road or trail crossing on the Boy Scout Tract. Beyond that, this case comes nowhere near the devastation caused in *Leeward*, for example. We do not find the Department's "opinion" evidence that pollution must have occurred as credible or convincing. This case is to be contrasted with the case put on by the Department in *DEP v. Silberstein*, 1996 EHB 619:

> Mr. Magargee testified he observed that sediment from the graded slope had discharged into the wetlands and into Lobbs Run. Alan Everett, a DEP Pollution Biologist also testified that he witnessed sediment entering the wetlands and creek. He concluded that the sedimentation was a result of Silberstein's earthmoving activity because there was no sedimentation outside the drainage area of the land disturbed by Silberstein, and based on the amount and color of the sediment which indicated that it had been deposited relatively recently. This sedimentation was two inches thick in some areas and extended all the way to Lobbs Run.

1996 EHB at 635.

Similarly, this case is to be contrasted with our recent Adjudication in *DEP v. Hostetler*, EHB Docket No. 2005-011-CP-K (June 8, 2006). We assessed a $20,500 civil penalty in that case regarding E&S violations associated with a logging operation. In *Hostetler*,

> [t]he violative conduct resulted in significant, measurable and tangible environmental harm. Some springs feeding Ulsh Gap Run were destroyed. About 2,000 feet of Ulsh Gap Run was polluted with sediment and suspended solids. That pollution caused conditions to be ripe for excessive mortality of fish. As explained

to the Board by a Department witness:

> The important thing about a wild trout stream and a high quality cold water fishery is that you have clean substrate, clean gravel. The wild trout are very dependent on clean water passing through the interstitial spaces between the gravel and rocks.
>
> They need well oxygenated water to be passing through this substrate. If you have silt deposition in the gravel, in the spaces between the gravel, that cuts down on the passage of well oxygenated water and the fish are no longer able to reproduce.
>
> The eggs have excessive mortality. Not only that, most of the organisms that these fish are dependent on to eat, the immature aquatic insects and larvae and other organisms that live in this space are also dependent on clean, well oxygenated water flowing in the interstitial space and, of course, the silt diminish that capability. So basically, the gravel becomes clogged and the critters can't live there anymore.

N.T. 45-46.

Slip op. at 8.

Although the Department's case of actual pollution is limited, it has shown that Angino's pattern of engaging in earth disturbance activities without first installing BMPs has caused a threat of pollution. We are particularly concerned with the activity that took place in close proximity to Hole 15 immediately adjacent to Fishing Creek. Angino's property sits in the Fishing Creek Valley. The valley is a classic example of the narrow, bucolic valleys that make central Pennsylvania such a beautiful place. Angino's spectacular gardens have only enhanced what was already a remarkable setting. The beauty of the valley, however, is not just a function of the topography and fauna. In no small measure the valley is defined by the waters that flow within it. Indeed, the valley takes its name from the major stream that drains it. These waters are

a vital resource that must be preserved and protected, not only because it is the right thing to do, but incidentally, because they contribute to the beauty of Angino's properties.

As to the magnitude of the violation, the October 2001 Straw Hollow activity was a relatively small area, but some of it was very close to the stream. The later Straw Hollow work was also of limited scope and duration, but it was troubling because Angino went forward with that work without BMPs even after everything that had transpired in the same vicinity in October. The earth disturbance activities on the Boy Scout Tract were spread over a large area and cumulatively amounted to a substantial amount of disturbance. However, their potential to cause damage was somewhat reduced by the fact that the activities were not highly concentrated, and much of the activity was somewhat distant from perennial waters. The Hole 15 work was potentially problematic because it was more concentrated and it took place in close proximity to Fishing Creek. On the other hand, it is the one instance where some effort was made to install BMPs, albeit not entirely correctly.

We next consider the willfulness of the violations in calculating a civil penalty. We defined the levels of culpability with regard to violations resulting in civil penalties in *Whitemarsh*:

> An intentional or deliberate violation of law constitutes the highest degree of willfulness 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.

Whitemarsh, 2000 EHB at 349 (citations omitted).

Angino's conduct with respect to all of the violations falls somewhere between simple negligence and intentional misconduct. It is clear that he was generally aware of his

responsibility to engage BMPs. He applied for permits and submitted E&S plans. He started new areas of work even after receiving inspection reports and orders for previous areas of work. "Violations that are long-lasting or repeated, particularly in disregard of warnings and orders, evidence willfulness and generally merit a higher penalty." *Kennedy*, slip op. at 12. *See also Leeward Construction, Inc. v. DEP*, 821 A.2d 145, 153 (Pa. Cmwlth. 2003); *Hostetler*; *Breslin*, slip op. at 11. We believe that Angino exhibited a conscious disregard of the fact that his conduct could result in violations. We see Angino's deliberately careless approach as a major force in driving the civil penalty in this case, and, not incidentally, explaining in large part the damaged relationship between Angino and the DCCD and the Department.

We note in Angino's favor that the Department only issued one compliance order. We take it very seriously when an owner or operator fails without excuse to comply with a Department *order*. *See, e.g., Leeward*, 2001 EHB 870 ($10,000 per day for violations of cease order). Here, however, most of the violations were only documented in informal, nonappealable inspection reports. Unlike many of our cases where violators simply ignored Department orders for extended periods of time, *see Leeward*, *Silberstein*, *Hostetler*, Angino actually installed BMPs relatively quickly after the inspections.[5] This is not to say that the initial failure to install BMPs was excusable; we are simply noting that Angino's response to the Department and DCCD's enforcement actions is duly noted and factors into our assessment.

Deterrence is an important reason for assessing civil penalties. We discussed the value of deterrence in *Leeward*:

> We consider the deterrence value of the penalty to be very important in this matter. Leeward continues to be engaged in large earthmoving projects, but more generally, all such contractors must

[5] Angino could have proceeded with somewhat greater dispatch following the May 2, 2002 compliance order, but there is no question Angino worked toward immediate compliance.

> understand the importance of not only installing but maintaining adequate controls. It is only natural to discount the importance of controls. They seem collateral to the primary mission of a project, which is to prepare a site for new buildings, roads, or other development. They do not advance the primary objective, and in fact, can be something of a distraction. Owners will be quick to complain if a building pad is not ready on time, but perhaps not so concerned if a settling basin does not work. A construction project is necessarily a muddy affair. The effects of the construction activity itself appear to be relatively short-lived. Despite these considerations, E&S controls are not a nuisance item to be installed as an appeasement to the regulators and then forgotten. They are critically important in preventing pollution of the waters of the Commonwealth. They must command the utmost attention and care for the life of the project or the streams of the Commonwealth are bound to continue to suffer where there is development. The penalty assessed must be large enough to counteract the natural tendency to minimize their importance, and it must be reflective of the economics of large projects.

Leeward, 2001 EHB at 870, 890. *See also Hostetler*, slip op. at 8-9 (Board assessing civil penalty to deter defendant from acting in the same manner again in the future); *DEP v. Breslin,* EHB Docket No. 2005-069-CP-L, slip op. at 13 (Adjudication April 6, 2006) (deterrence appropriate in light of defendant's checkered compliance history).

Angino has extensive plans for his property. He will be engaged in earth disturbance activities for some time to come. Although he has now obtained an individual NPDES permit, we are somewhat concerned that he still does not fully appreciate the importance of E&S controls. No such appreciation was expressed at the hearing. Angino makes much of the fact that the Department and the DCCD "have no problem with Angino's finished product." However, that misses the point entirely. E&S controls *only* relate to the period when earth disturbance activities are taking place. *O'Reilly v. DEP*, 2001 EHB 19, 34. Once the job is done and a site is stabilized, there may be stormwater management concerns, but the E&S program is no longer involved. To paraphrase *Leeward*, we must assess a penalty against Angino that is large enough, not to punish,

but to counteract the demonstrated tendency to minimize the importance of E&S controls in the future.

Angino has described a rocky relationship with the DCCD and the Department. He has complained, with merit, that the regulators sometimes act too slowly in reviewing permits. He has asserted, without merit, that the Department has discriminated against him in filing its complaint.[6] The parties have argued about the lengthy paper trail of permitting issues. Angino has complained that the Department's BMPs on the Boy Scout Tract were excessive, and he has pointed out that he has already spent a lot of money installing BMPs.[7] *None* of these facts, however, excuse, explain, or justify the undisputed truth that Angino should have installed reasonable pollution controls before moving dirt but repeatedly failed to do so.

With all of these factors in mind, we assess the following civil penalties for the failure to install BMPs as described in Count 3 of the Department's complaint:

Straw Hollow – October	$1,000
Straw Hollow – April	$2,000
Boy Scout Tract	$5,000
Hole 15	$3,000
	$11,000

NPDES Permit & E&S Plans

Much of our discussion regarding BMPs applies to Angino's failure to ensure that his work was authorized by a permit and E&S plans as described in Counts 1 and 2 of the Complaint. Angino knew or reasonably should have known that his work needed to be permitted and approved because he obtained the necessary paperwork in the past. Angino's failure to obtain the

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[6] We see no evidence in the record of events leading up to the filing of the complaint in 2003 that the DCCD or the Department selectively prosecuted Angino for any improper reason, with invidious intent, or based on any irrational classification.

[7] Angino is not entitled to a discount for merely doing what the regulations required in the first place, and costs that a violator expended cannot be used to offset penalties which are assessed. *Leeward Construction, Inc. v. DEP*, 821 A.2d 145, 155 (Pa. Cmwlth. 2003); *Westinghouse Electric Corp. v. DEP*, 745 A.2d 1277 (Pa. Cmwlth. 2000).

necessary regulatory approvals, combined with his failure to install any controls (or in the case of Hole 15 only partial controls) provides further proof of his disregard or at least lack of respect for the E&S program. Without the appropriate permits and plans, the regulators have no way of ensuring that activities are properly designed by qualified persons, and carried out in a manner that minimizes harm to the environment. The magnitude of the work on the Boy Scout Tract without any permitting is of concern. Although Angino now has an individual permit, the need to engage in proper planning before work starts remains. With all of these factors in mind, we assess the following civil penalties for Angino's violations as described in Counts 1 and 2 of the Complaint:

Straw Hollow (October)	
No permit	$1,000
No approved plan	$500
Straw Hollow (April)	
No permit for some	$1,500
No approved plan	$1,000
Boy Scout Tract	
No permit for most	$4,000
No plan for any	$1,000
Hole 15	
No plan	$1,000
	$10,000

Together with the $11,000 civil penalty assessed for Count 3, this results in a total penalty of $21,000.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this complaint. 35 P.S. § 691.605; 35 P.S. § 7514.

Angino also complains that the Department is overly obsessed with rip rap, rye grass, and silt fence. We are quite sure that the Department and the DCCD would consider other controls if proposed and justified.

2. The earth disturbance activities conducted along Straw Hollow Road in October 2001 and March/April 2002 were a violation of the Clean Streams Law because they were conducted without an NPDES permit, an erosion and sediment control plan was not approved, and best management practices were not installed. 35 P.S. § 691.402(b); 35 P.S. § 691.611; 25 Pa. Code § 102.4; 25 Pa. Code § 102.5.

3. The earth disturbance activities on the Boy Scout Tract inside the 1999 NPDES permit area were a violation of the Clean Streams Law because no best management practices were installed and no erosion and sediment control plan was in place. 35 P.S. § 691.402(b); 35 P.S. § 691.611; 25 Pa. Code § 102.4.

4. The earth disturbance activities outside the 1999 NPDES permit area were a violation of the Clean Streams Law because they were conducted without an NPDES permit, no erosion and sediment control plan was approved, and no best management practices were installed. 35 P.S. § 691.402(b); 35 P.S. § 691.611; 25 Pa. Code § 102.4; 25 Pa. Code § 102.5.

5. The 2002 earth disturbance activities outside the 1999 NPDES permit area were not "timber harvesting activities" as defined by the regulations under the Clean Streams Law. 25 Pa. Code § 102.1.

6. The earth disturbance activities around Hole 15 and the cart path were a violation of the Clean Streams Law because they were conducted without an approved erosion and sediment control plan and best management practices were not properly installed. 35 P.S. § 691.402(b); 35 P.S. § 691.611; 25 Pa. Code § 102.4.

7. Angino's violations constituted unlawful conduct under Section 611 of the Clean Streams Law, 35 P.S. § 691.611.

8. Pursuant to Section 605 of the Clean Streams Law, 35 P.S. § 691.605, Angino's

violations subject him to the assessment of a separate civil penalty of up to $10,000 per day for each separate violation.

9. When assessing civil penalties, the Clean Streams Law directs the Board to consider the willfulness of the violation, damage or injury to the waters of the Commonwealth and their uses, the cost to the Department of enforcing the provisions of the Act, the costs of restoration, deterrence, and other relevant factors. 35 P.S. § 691.605.

10. The Board assesses a civil penalty in the amount of $21,000 against Angino for his violations of the Clean Streams Law.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2003-004-CP-L**
RICHARD C. ANGINO, ESQUIRE, KING DRIVE CORPORATION, and SEBASTIANI BROTHERS	:	

ORDER

AND NOW, this 13th day of March, 2007, it is ordered that civil penalties are assessed against Richard C. Angino and King Drive Corporation in the total amount of $21,000 for violations of the Clean Streams Law.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

GEORGE J. MILLER
Judge

THOMAS W. RENWAND
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: March 13, 2007

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

For the Commonwealth, DEP:
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For Defendants:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

UMCO ENERGY, INC.	:	
	:	
v.	:	**EHB Docket No. 2004-245-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CITIZENS FOR PENNSYLVANIA'S FUTURE, Intervenor	:	**Issued: March 19, 2007**

AMENDED ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis:

After considering previously excluded evidence proffered by an underground coal mine operator, the Board finds that the operator was not deprived of the equal protection of the laws vis-à-vis shopping malls and highway builders. Among other things, the operator failed to demonstrate that underground coal miners and developers of surface projects are similarly situated.

Background

We issued our Adjudication in this appeal on September 5, 2006. We rejected all but one of UMCO Energy, Inc.'s ("UMCO's) challenges to the Department of Environmental Protection's (the "Department's") Order restricting UMCO to room-and-pillar mining under the 6E Stream at one panel of its High Quality Mine in Fallowfield Township, Washington County. At the original hearing on the merits, UMCO proffered evidence in support of its claim that it had been deprived of the equal protection of the law vis-à-vis shopping malls and highway

projects. Judge Labuskes granted the Department's and Citizens for Pennsylvania's Future's ("PennFuture's") objections and excluded that evidence, ruling as a matter of law that shopping malls, highway projects, and underground coal mines are not similarly situated. Upon review of the parties' post-hearing briefs, we decided that UMCO should be allowed to put the evidence on the record. We explained that ruling as follows:

> UMCO argues that Judge Labuskes erred by excluding evidence showing that UMCO has been improperly discriminated against vis-à-vis surface developers whose activities "were known to destroy streams." UMCO has contended that the Department treats large retail developments and highway construction projects quite differently than underground coal mines when it comes to regulating impacts on streams. We ruled at the hearing that shopping malls and underground coal mines are not similarly situated parties as a matter of law and we excluded the evidence. UMCO made a proper offer of proof and has otherwise properly preserved the issue. Upon reflection, we have decided to allow UMCO to present the evidence that was offered at the hearing to support its claim. We have scheduled a hearing in the near future for that purpose. We will address this aspect of UMCO's equal protection argument following that hearing. We express no opinion here regarding the merits of the claim. There is no overlap between the elements of this claim and UMCO's other objections to the Department's Order, so there was no reason to delay issuance of this Adjudication.

UMCO v. DEP, slip op. at 94-95.[1]

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[1] We went on to reject UMCO's claim that it had been discriminated against vis-à-vis other underground mines. After noting that UMCO waived the objection in its post-hearing brief, we held that UMCO would not in any event have prevailed on the claim:

> We will note for the record that there was no evidence in UMCO's case of any fact pattern where the Department allowed a deep mine operator to mine under a perennial stream knowing in advance that the stream would be permanently dewatered, the only possible exception being UMCO's mining of Panel 5E. The equal protection clause generally prohibits differences in treatment of similarly situated parties based upon a constitutionally suspect standard (not applicable here) or other classification lacking in rational justification. *F.R.&S. Inc. v. DEP*, 1998 EHB 947, 949. There are no similarly situated persons evident here. If there is any party who has been given an unfair advantage vis-à-vis other members of the regulated community, it is UMCO. UMCO was permitted to mine at the shallowest cover longwall mine in the state on a expedited schedule pursuant to "informal permit revisions" issued without public notice of any kind

We held a hearing on UMCO's remaining equal protection claim on September 26, 2006. The last post-hearing brief--UMCO's reply brief--was filed on March 5, 2007. Accordingly, we are now in a position to rule on UMCO's final objection on its merits. The text of our September 5, 2006 Adjudication is incorporated herein by reference. For ease of citation, we will begin numbering the Findings of Fact and the Conclusions of Law at the points where they ended in the original Adjudication.

FINDINGS OF FACT

329. The Department issues Chapter 105 permits to surface developers whose projects will encroach into the waters of the Commonwealth after a review of an application that includes, *inter alia*, an alternatives analysis and a comparison of the harms and benefits of the project. (T. 1889-92.)

330. The Department has issued Chapter 105 permits for projects that have resulted in culverting streams, relocating streams, and/or filling wetlands. (T. 1847-50, 1868-83.)

331. The Department has never issued a Chapter 105 permit for a project that authorized the permanent elimination of an entire perennial stream and all of the springs, seeps, wetlands, and groundwater hydrology associated with that stream. (T. 1990.) The Chapter 105 permits relied upon by UMCO in support of its claim did not authorize such an event. (FOF 331.).

332. The Department issued UMCO a Chapter 105 permit to eliminate wetlands in

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> on the basis of poorly developed baseline data. Other operators have been required to submit extensive premining data. (T. 1549.) The Department's witnesses testified convincingly that the Department has not and will not permit any mine where, as here, it is known that a stream will be permanently taken. (T. 970, 983.) UMCO has failed to make a case that the Department has treated similarly situated coal companies dissimilarly and its equal protection claim vis-à-vis other deep mine operators must fail.

Id., slip op. at 95-96.

order to install a mine shaft on its property in exchange for a monetary contribution to the National Fish and Wildlife Foundation. (N.T. 1902-03.)

333. UMCO received a Chapter 105 permit to perform remedial work in a stream that resulted from unanticipated subsidence damage. (N.T. 1906, 1910-13.)

334. The Department did not treat UMCO differently than any other similarly situated party.

335. There is no record evidence that the Department purposely discriminated against UMCO, acted in bad faith, acted maliciously or invidiously, or created arbitrary or irrational classifications.

DISCUSSION

All persons are entitled to equal protection of the laws. U.S. CONST. Am. 14; PA. CONST., art. I, Section 26. The equal protection clauses of the United States and Pennsylvania Constitutions direct that "all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985); *Commonwealth v. Albert*, 758 A.2d 1149, 1151 (Pa. 2000); *Curtis v. Kline*, 666 A.2d 265, 267 (Pa. 1995).

There are two types of claims available under the equal protection clause. The first claim is available when a statute or regulation on its face creates an impermissible classification. *See Probst v. Department of Transportation*, 849 A.2d 1135, 1142 (Pa. 2004). Here, UMCO has not alleged that a statute or regulation creates an impermissible classification. The second type of claim is available when a statute or regulation, neutral on its face, is enforced in a discriminatory manner. *Barsky v. Department of Public Welfare*, 464 A.2d 590, 594 (Pa. Cmwlth. 1983), *aff'd*, 475 A.2d 742 (Pa. 1984). The government deprives a person of his or her constitutional right to equal protection of the laws if it applies and administers a facially neutral law, "with an evil eye

and an unequal hand, so as to make unjust and illegal discrimination between persons in similar circumstances, material to their rights." *Yick Wo v. Hopkins*, 6 S.Ct. 1064 (1886). Discriminatory enforcement is constitutionally prohibited if it is shown that similarly situated parties receive disparate treatment, the discrimination is purposeful and intentional, and the government's action is based upon impermissible considerations such as race or religion or an arbitrary classification. *Commonwealth* v. *Parker White Metal Co.*, 515 A.2d 1358, 1363 (Pa. 1986); *Commonwealth v. Lewis*, 279 A.2d 26, 29 (Pa.), *cert. denied*, 92 S.Ct. 571 (1971); *Medussa Corporation v. DER*, 415 A.2d 105, 110 (Pa. Cmwlth. 1980); *F.R.&S., Inc. v. DEP*, 1998 EHB 947, 949-51, *aff'd*, 761 A.2d 634 (Pa. Cmwlth. 2000). UMCO argues that the Department has applied the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, which is neutral on its face, in a discriminatory manner.

UMCO's specific claim is that it has been discriminated against vis-à-vis developers of shopping malls and builders of highways "whose activities were known to destroy streams." UMCO first posits that developers of shopping malls, highways, and underground coal mines are similarly situated because they all can affect the waters of the Commonwealth and they are all subject to regulations promulgated pursuant to Clean Streams Law. UMCO goes on to claim that these allegedly similarly situated parties have been treated dissimilarly because shopping mall developers and highway builders can obtain permits under 25 Pa. Code Chapter 105 to "destroy streams," but UMCO must comply with the rules and regulations applicable to underground coal mines, and those regulations as "misinterpreted" by the Department do not allow UMCO to "destroy streams." UMCO's claim must suffer the same fate as its claim that it was discriminated against vis-à-vis other mining companies. As correctly argued by the Department and PennFuture, UMCO has failed to establish any of the elements of a meritorious equal

protection claim.

Preliminarily, as we explained in our Adjudication, the Department has not "misinterpreted" the Clean Streams Law or the underground coal mining regulations promulgated thereunder. The Department's interpretations are eminently reasonable and we have upheld them in all respects. *See Tire Jockey Service, Inc. v. DEP*, No. 178 MAP 2004, 2007 Pa. Lexis 362 (Pa. February 20, 2007) (Department's interpretations to be upheld if Board finds them to be reasonable).

More to the point, UMCO has not convinced us that shopping malls, highway projects, and underground coal mines are similarly situated parties. It is true that all of those projects can adversely affect waters of the Commonwealth, but it is there that any similarity ends. The fact that all of the projects can affect water is too tenuous of a connection, too limited of a commonality, to make them "similarly situated" for purposes of an equal protection analysis.

If having an effect on waters is enough to render parties similar situated, why stop at shopping malls and highway projects? There is a rather long list of activities that are regulated pursuant to the Clean Streams Law, including, for example, the following:

Submission of official sewage facilities plans. 25 Pa. Code § 71.21.
Noncoal exploration activities. 25 Pa. Code § 77.109.
Discharge requirements for oil and gas wells. 25 Pa. Code § 78.60.
Underground coal mining. 25 Pa. Code § 86.6.
Surface mining of coal. 25 Pa. Code § 87.102.
Surface mining of anthracite coal. 25 Pa. Code § 88.92.
Underground mining of coal. 25 Pa. Code § 89.52.
Disposal of coal refuse. 25 Pa. Code § 90.102.
Underground disposal of wastes. 25 Pa. Code § 91.52.
Concentrated animal feeding operations. 25 Pa. Code § 92.5a.
Municipal wasteload management. 25 Pa. Code § 94.1.
Erosion and sediment control permits and plans. 25 Pa. Code §102.1.
Siting of underground and aboveground storage tanks. 25 Pa. Code § 245.234.
Land recycling activities. 25 Pa. Code § 250.1.
Permitting for beneficial use of municipal waste. 25 Pa. Code § 271.821.
Construction of waste landfills. 25 Pa. Code § 277.202.

Operation of waste transfer facilities. 25 Pa. Code § 279.213.
Operation of composting facilities. 25 Pa. Code § 281.202.
Use of coal ash as a soil substitute or soil additive. 25 Pa. Code § 287.662.
Storage and transportation of residual waste. 25 Pa. Code § 299.142.

UMCO uses shopping malls and highway projects as examples, but if the class is defined as UMCO has defined it to include all activities having an impact on streams, and therefore, all activities that are regulated under the Clean Streams Law, the class should include landfills, sewage plants, industrial dischargers, construction projects, surface coal mines, quarries, railroads, concentrated animal feeding operations, gasoline stations, etc. In fact, the purported class includes virtually every commercial or development activity in which man can engage. UMCO has not pointed to anything unique about underground mines, shopping malls, and highways that separates them from this broader class.

UMCO's proposed definition of similarly situated parties creates an inappropriate and unmanageable construct. If the Department is required to defend its action involving a deep mine by explaining its actions regarding shopping malls, the next case may require the Department to justify its action against a gasoline station by explaining and comparing it to actions it has taken against sewage plants, or concentrated animal feeding operations. Such strained, far-flung comparisons might form the basis of an interesting philosophical discussion or hold some interest at a visceral level, but they should not be the appropriate subject of Board proceedings. These are not the sort of comparisons envisioned by the equal protection clause, and this is why UMCO's evidence regarding shopping mall projects was initially excluded in this proceeding. Other underground coal mines are at least arguably similarly situated; shopping malls and underground coal mines are not.

UMCO has not explained how or why it would be entitled to the same sort of permits that apply to surface developers. In order to be entitled to a Chapter 105 permit, there must be an

"encroachment." Pointedly, UMCO has carefully avoided an allegation that its subsidence impacts on surface waters and shallow groundwater constitute an "encroachment." It has not so much as mentioned our holding in *Consol Pennsylvania Coal Co. v. DEP*, 2002 EHB 792, wherein another underground coal mine company strenuously argued, and we agreed, that subsidence impacts do *not* in and of themselves constitute an "encroachment."[2] If the subsidence impacts of UMCO's mining will not cause an "encroachment," as UMCO seems to concede, but shopping malls and highway projects do result in "encroachments," it is difficult to understand how these two groups can be considered to be similarly situated parties.

Assuming for purposes of further discussion that UMCO and surface developers are similarly situated, UMCO has not shown that these two supposedly similar groups have received disparate treatment. UMCO's claim of unfair disparate treatment is that shopping mall developers are entitled to destroy or at least impair streams and UMCO is not. It argues that the Department has a "zero tolerance policy" when it comes to its mining even though the "opposite" is true when it comes to shopping malls and highway developers. (Brief at 20.) UMCO is wrong in both respects. Actually, the Department allowed UMCO to continue mining multiple panels even after the first panels were observed to cause more damage than expected. (FOF 30, 36-37.) As a result of the Department's permitting decisions, UMCO's mining resulted in the systematic elimination of every spring, seep, and stream above its mining. (FOF 38, 223.)[3] Among other things, flow in the formerly perennial 4E/5E Stream has been lost. (FOF 38, 40-41.) It is not clear whether any of these surface and shallow groundwater features will ever be

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[2] The closest that UMCO comes to the subject is a concession in its initial brief that "UMCO recognizes that underground mining is not subject to an encroachment permit to dredge and fill." (Brief at 20.) This statement seems to directly contradict its claim that it is entitled to pursue a Chapter 105 permit and is emblematic of the rather imprecise formulation of its equal protection claim in general.

[3] UMCO continues to attempt to limit our focus and our analysis to the 6E Stream as if that is the only relevant factor. We reject that approach with respect to the equal protection objection just as we did when we examined the

restored. (FOF 40, 284, 298, 309, 316.) Eventually, when UMCO proposed to longwall mine under a new stream, the 6E Stream, the Department allowed it to mine, but only if it used room-and-pillar mining. The Department did not prohibit UMCO from mining under the 6E Stream. Indeed, UMCO is entitled to mine under the 6E Stream to this day. Still further, UMCO was given permission to move forward with longwall mining in other areas of the mine. (FOF 84.) The Department's Order only related to one method of mining in one of UMCO's eleven mining panels. To suggest that the Department's modest effort to protect what was left of the watershed feeding the second-order tributary to Maple Creek was a "zero tolerance policy" is inaccurate and in no small amount ironic.[4]

It is equally untrue to suggest that the Department has applied "the opposite" of a zero tolerance policy to surface developments. UMCO's theory has no support in the record because UMCO has failed to demonstrate as a matter of fact that any surface developments have been permitted to, in UMCO's words, "destroy streams." UMCO pointed to two projects in the Pittsburgh area, but neither project involved the destruction of any streams. There was some vague reference to a third project that apparently is currently under review (T. 1885, 1887, 1896), but not enough to credibly draw any conclusions and certainly not enough to surmise that any streams are being "destroyed."

UMCO has not drawn our attention to *any* surface development where the Department allowed the developer to irreversibly dewater not only every surface water feature but the entire shallow hydrologic regime in the area of its project. (T. 1890.) UMCO refers to the culverting of streams, but culverting is not unlike the bentonite grouting that UMCO was permitted to try

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technical aspects of this case. UMCO's approach has as much merit as the proverbial blind man reaching a conclusion regarding the identity of the beast by feeling nothing but the elephant's tail.

[4] Along the same lines, UMCO's contention that the Department has "denied" it "the right to commercially develop its real property interests" falls far from the mark.

on the 4E/5E Stream. Culverting maintains flow; the bentonite grouting did not. UMCO points to the relocation of streams at surface projects. After relocation, however, there is still a stream; UMCO's mining would have eliminated, not moved, the stream, springs, seeps, wetlands, and shallow groundwater acquifers. There is simply no comparison between UMCO's examples of surface development and what UMCO proposed to do and has done at its High Quality Mine.

When the Department evaluates a surface project that will encroach upon waters of the Commonwealth, it generally works with the developers to seek a reasonable accommodation, which is not unlike its determination that UMCO could longwall the vast majority of its High Quality Mine but limit its mining to the room-and-pillar method in one panel due to the unprecedented shallow cover between the mining and the shallow groundwater system.

Thus, it appears that the Department did not treat UMCO all that differently than any surface developers. If anything, UMCO may have been treated better. It has not been required to restore or replace lost habitat. It is being permitted to mine under the 6E Stream using traditional methods, even though there is less than 300 feet of cover. UMCO has been permitted to move forward with longwall mining at other parts of the site notwithstanding the presence of numerous additional streams and other surface water features.

In order to show that there has been constitutionally infirm selective enforcement, it is not enough to point out that similarly situated parties have been treated dissimilarly. A State Trooper cannot possibly ticket every driver exceeding the speed limit. It is no defense that there are other speeders. The equal protection clause only arguably comes into play if the speeder in question was selected based upon impermissible considerations. The administration of the law must not only be "intentional or purposeful," the courts use such phrases as "invidious," "malicious," "bad faith," or "administered with an evil eye." *See, e.g., Barsky v. Department of*

Public Welfare, 464 A.2d 590, 594 (Pa. Cmwlth. 1983). There is no evidence in this case that UMCO was invidiously singled out. UMCO appears to concede as much when it suggests, incorrectly, that no such improper basis or invidious motive is necessary. (Brief at 25.) In any event, UMCO certainly does not draw our attention to anything in the record to support a finding of invidious action or intentional and purposeful discrimination.

With regard to UMCO's specific contention that underground mines are not entitled to Chapter 105 permits, but shopping mall developers are, UMCO is simply wrong. To the extent an underground mine's *surface* activities result in an encroachment, it is entitled to a Chapter 105 permit. In fact, somewhat remarkably given UMCO's theory, UMCO's employee admitted in response to questioning by UMCO's attorney that UMCO itself has received Chapter 105 permits at its mine. UMCO was permitted to permanently eliminate wetlands on the site in order to install a mine shaft in exchange for a monetary contribution to the National Fish and Wildlife Foundation. (T. 1902-03.) Still further, UMCO, like other deep mine operators, received a Chapter 105 permit to perform actual remedial work in a stream that resulted from unanticipated subsidence damage. (T. 1906, 1910-13.) Thus, the facts directly contradict UMCO's claim that underground mines and surface developments are treated differently when an encroachment is involved.

There is also no evidence to support UMCO's theory that the Department has created a classification that is based on suspect factors (race, religion, etc.) or an irrational distinction. UMCO notes that surface developers must obtain their permits to encroach upon waters of the Commonwealth through the Chapter 105 permitting process. In contrast, underground mines must obtain their mining permits primarily through the underground mine permitting process. As previously mentioned, where an underground mine does involve surface encroachments, the

Chapter 105 permitting process *does* apply. Further, we believe it would be irrational *not* to permit shopping malls and underground coal mines under different regulatory programs. Both the encroachment program and the underground mining programs are fundamentally designed to regulate the amount of pollution that will be allowed. It is perfectly appropriate, not irrational, to achieve that goal with regulations geared specifically toward the many different activities that can result in pollution.

The equal protection clause does not afford all parties an equal opportunity to violate the law. The Clean Streams Law does not envision the permanent destruction of waters of the Commonwealth, at least without replacement of the lost resources under tightly controlled circumstances. *Machipongo Land and Coal Company, Inc. v. DEP*, 799 A.2d 751 (Pa. 2002). Even if UMCO had been able to show that the Department was authorizing illegal activity by way of Chapter 105 permits, it would merely show that the Department was violating the law with respect to those permits, not that UMCO is somehow constitutionally entitled to similar forbearance. Consistency would need to be achieved by correcting the other side of the equation, not authorizing more violations.

Along that same line, even if UMCO had a meritorious claim, it has been rather vague regarding what relief it contends would follow. We agree with the Department and PennFuture that it certainly does not automatically follow that the Department's Order would need to be vacated. An opportunity to apply for an encroachment permit does not make any sense because UMCO has not identified any "encroachment" that could be the subject of an encroachment permit. It is incumbent upon parties to explain and justify what relief they believe they are entitled to in the event they prevail. *See Schaffer v. DEP*, EHB Docket No. 2005-087-L (Adjudication, December 21, 2006). UMCO has suggested possibilities but not explained or

justified any particular remedy in any detail. There is no need to speculate further on what could have been done had UMCO prevailed on its theory.

CONCLUSIONS OF LAW

20. The Department's Order did not improperly subject UMCO to treatment disparate from any other similarly situated party or otherwise deprive UMCO of equal protection of the laws.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UMCO ENERGY, INC.	:	
	:	
v.	:	
	:	**EHB Docket No. 2004-245-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CITIZENS FOR PENNSYLVANIA'S FUTURE, Intervenor	:	

ORDER

AND NOW, this 19th day of March, 2007, it is hereby ordered that our Order of September 5, 2006 is revised to provide that UMCO's appeal is dismissed in its entirety. Jurisdiction is relinquished.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

GEORGE J. MILLER
Judge

THOMAS W. RENWAND
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: March 19, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BILLY J. HIGGINS and FRANCES HIGGINS, his wife	:	
v.	:	**EHB Docket No. 2005-315-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY, Permittee	:	**Issued: March 20, 2007**

OPINION AND ORDER ON MOTIONS TO AMEND

By Thomas W. Renwand, Judge

Synopsis:

The Pennsylvania Environmental Hearing Board denies the Permittee's Motion to Amend its Pre-Hearing Memorandum to add two expert witnesses. The Board finds that the Appellants would be prejudiced by the introduction of these new witnesses and new testimony after their expert has already testified. Permittee was aware of the Appellants' expert and his testimony for approximately eight months but took no steps until after the Appellants' expert testified at trial to come forward with expert testimony. Proper rebuttal testimony is not testimony which the Permittee should have brought forward in its case-in-chief.

The Board allows one of Appellant's existing experts to file a second Supplemental

Expert Report based on specific questions raised by Permittee's counsel during cross-examination of another expert witness called earlier in the trial by Appellants.

OPINION

Presently before the Pennsylvania Environmental Hearing Board is the Motion of the Permittee, Eighty-Four Mining Company, to Amend its Pre-Hearing Memorandum to Include Rebuttal Evidence (Motion to Amend). In addition, Appellants have filed a Motion to Amend their Pre-Hearing Memorandum to Include the Supplemental Report of Harold P. McCutcheon. We will first discuss Eighty-Four's Motion to Amend.

The trial in this case began on January 16, 2007 and January 17, 2007 and will continue in April 2007. The Appellants, Billy and Frances Higgins (Appellants or Mr. & Mrs. Higgins) contend that mining conducted by Eighty-Four Mining Company caused structural damage to their home and detached garage.

In accordance with the Environmental Hearing Board's pre-hearing orders, in April 2006 Mr. and Mrs. Higgins served the expert report of Mr. Benaquista, a geologist. Eighty-Four Mining Company, despite ample opportunity, neither identified an opposing expert to address the opinions of Mr. Benaquista nor did they submit an opposing expert report until filing the subject Motion to Amend on or about January 26, 2007. This was following the conclusion of Mr. Benaquista's trial testimony in accordance with his expert report.

Mr. and Mrs. Higgins cry foul. Their argument, which cites numerous cases and Rule 4003.5(b) of the Pennsylvania Rules of Civil Procedure, contends that it would be fundamentally unfair and prejudicial to them if we allowed Eighty-Four Mining Company to

trot out two surprise experts at this point in the trial. Eighty-Four Mining Company counters that this is proper rebuttal evidence and will help the Board reach an informed decision on the merits.

We agree with Mr. and Mrs. Higgins.

The Pennsylvania Rules of Civil Procedure in conjunction with the Board's Rules of Practice and Procedure govern expert discovery before the Board. 25 Pa. Code Section 1021.102. Pennsylvania Rule of Civil Procedure 4003.5 specifically deals with the discovery of expert testimony and states in part:

> **4003.5(a)(1)** A party may through interrogatories require (a) any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify and
>
> (b) the other party to have each expert so identified state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

A later subsection of the Rule allows the Board to exclude the testimony of a previously unidentified expert witness.

> 4003.5(a)(3)(b) An expert witness whose identity is not disclosed in compliance with subdivision (a)(1) of this Rule shall not be permitted to testify on behalf of the defaulting party at the trial of the action

In addition, Pennsylvania Rule of Civil Procedure 4019 provides the Board with additional authority to impose sanctions for the failure to identify an expert witness and serve the required information. Finally, the Board's own Rules and specifically 25 Pa. Code Section 1021.161 provide that:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board Rule of Practice and Procedure. The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including those permitted under Pa.R.C.P. 4019 (relating to sanctions regarding discovery matters).

At the outset, this is not proper rebuttal evidence. "A party cannot, as a matter of right, offer in rebuttal evidence which is properly part of his case-in-chief, but will be confined to matters requiring explanation and to answer new matter introduced by his opponent." *2 Henry, Pennsylvania Evidence Section 730 (Fourth Edition 1953) quoted in Klyman v. Southeastern Pennsylvania Transportation Authority*, 480 A.2d 299, 303 (Pa. Super. 1984). Under Permittee's logic any witnesses it calls and their testimony would be in rebuttal to the Appellants' case. Therefore, if Permittee is correct, it could wait until after the Appellants rested their case to come forward with witnesses "in rebuttal."

Appellants further point out that they do not have unlimited resources and it would be a hardship to attempt to respond to this testimony at this point in the case. Indeed. In addition, parties who follow our deadlines should not be penalized. The rigors of a trial are difficult enough without allowing a party to disregard our previous orders including our Pre-Hearing Order No. 2 and introduce new experts at this late point during the trial. Therefore, Mr. Sutphin and Mr. Henderson, the proposed experts, will not be permitted to testify in this case.

We now turn to Appellants' Motion to Amend. They seek to supplement the earlier served expert reports of Mr. Harold P. McCutcheon. Mr. McCutcheon wishes to expand on his earlier report based on questions Permittee's counsel asked Appellants' earlier expert

witness, Mr. Benacquista.

We find no prejudice to either the mining company or the Department. The proposed supplement merely expands on his earlier expert reports and is prompted by questions by Permittee's counsel. We assume similar questions will be asked of Mr. McCutcheon on cross-examination. By allowing this amendment we also are enabling both the Department and the Permittee to better prepare their cross-examination questions as they can more readily anticipate Mr. McCutcheon's responses to this area of questioning. In addition, this is very similar to traditional proper rebuttal testimony such as testimony from Appellants' expert responsive to an opposing expert's opinion produced after the service of Appellants' expert report.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BILLY J. HIGGINS and FRANCES HIGGINS, his wife	:	
v.	:	**EHB Docket No. 2005-315-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY, Permittee	:	

ORDER

AND NOW, this 20th day of March, 2007, it is ordered as follows:

1. Permittee's Motion to Amend is ***denied***;

2. Appellants' Motion to Amend is ***granted***.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Judge

DATED: March 20, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

FOUNDATION COAL RESOURCES CORPORATION and PENNSYLVANIA LAND-HOLDINGS CORPORATION and REALTY CORPORATION	:	
v.	:	**EHB Docket No. 2006-067-R (Consolidated with 2006-068-R; 2006-069-R; 2006-070-R and 2006-190-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNECO OIL COMPANY	:	**Issued: March 29, 2007**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By: Thomas W. Renwand, Judge

Synopsis:

The Pennsylvania Environmental Hearing Board Rule regarding summary judgment motions, 25 Pa. Code Section 1021.94a, requires that both the motion for summary judgment and the statement of material facts contained in the accompanying brief be concise. Permittee's Brief contains a statement of material facts consisting of 116 separately numbered paragraphs. This statement of facts is too long. The statement of material facts in the brief should be limited to those facts which are material to disposition of the summary

judgment motion and should not include lengthy recitations of undisputed background facts or legal content. Permittee may supplement its Brief in order to comply with our Rule.

OPINION

Presently before the Pennsylvania Environmental Hearing Board is Permittee Penneco Oil Company, Inc.'s, (Penneco Oil Company) Motion for Summary Judgment. In February, 2006, the Board amended its Rule on Summary Judgment. *See* 25 Pa. Code Section 1021.94a. The new Rule was supposed to simplify and streamline summary judgment motion practice. The practice, in some instances, had become unwieldy with long motions and responses filed. Therefore, the amended Rule sets forth that the motion should be concise and "should not exceed two pages in length." 25 Pa. Code Section 1021.94a(b). The Rule further requires that "the motion for summary judgment shall be accompanied by a brief containing," among other things, "a statement of material facts." Most importantly for our discussion here, the Rule requires that "the statement of material facts shall set forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted." 25 Pa. Code Section 1021.94a(c). The Rule requires that the opposing party admit or deny each separately numbered paragraph. Moreover, "an opposing party may also include in the responding statement additional facts the party contends are material and as to which there exists a genuine issue." 25 Pa. Code Section 1021.94a(f).

The Board and its Rules Committee have been attempting for several years to make the summary judgment practice more manageable and meaningful. For instance, the Pennsylvania Bulletin description of the Board's and Rules Committee's intent regarding the earlier version of the Rule is applicable today.

> The [Environmental Hearing Board Rules] Committee reviewed the practical effect that [the existing rule] has on dispositive motions filed with the Board. It noted that motions, and their corresponding responses and replies, are unnecessarily long because litigants feel compelled to include both background and material facts. The [Rules] Committee determined that this results in a needless burden on litigants because counsels' time and effort developing and responding to facts, bearing little materiality to the relief requested in the motion, is disproportionate to the value it creates for the Board in rendering its decision.

Although the Rule sets a two-page length on the motion for summary judgment it does not specifically limit the length of the statement of material facts in the accompanying brief. However, a comment to the Rule instructs that:

> The statement of material facts in the briefs should be limited to those facts which are material to disposition of the summary judgment motion and should not include lengthy recitations of undisputed background facts or legal context.

Penneco Oil Company has obviously spent a great deal of time and effort in drafting its motion for summary judgment and brief. We voice no opinion at this point on the substantive merits of its position. Nevertheless, the lengthy statement of material facts set forth in 116 separately numbered paragraphs is in contravention of both the letter and spirit

of our Rule requiring a concise statement of material facts. Counsel needs to distill the essence of their positions into a concise recitation of facts that allows the Board to decide the motion for summary judgment. Neither the Board nor the opposing party is required to wade through lengthy factual recitations in order to address the crux of the moving party's argument. Therefore, we will allow Permittee to file a supplemental brief in compliance with our Rule with a much more abbreviated section of material facts set forth in separately numbered paragraphs.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FOUNDATION COAL RESOURCES CORPORATION and PENNSYLVANIA LAND-HOLDINGS CORPORATION and REALTY CORPORATION	:	
v.	:	**EHB Docket No. 2006-067-R (Consolidated with 2006-068-R; 2006-069-R; 2006-070-R and 2006-190-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNECO OIL COMPANY	:	

ORDER

AND NOW, this 29th day of March, 2007, following review of the Brief of Permittee Penneco Oil Company in Support of Its Motion for Summary Judgment (Penneco Oil Company's Brief), it is ordered as follows:

1. On or before **April 4, 2007**, Penneco Oil Company may file a *supplemental brief* setting forth a much more abbreviated and concise statement of material facts in separately numbered paragraphs as required by 25 Pa. Code Section 1021.94a(b).
2. Foundation Coal Resources Corporation and the Pennsylvania Department of Environmental Protection may file *answering briefs* on or before **April 18, 2007**.

3. Penneco Oil Company may file a *Reply Brief* on or before **May 3, 2007.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Judge

DATED: March 29, 2007

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EHB Docket No. 2006-067-R
(Consolidated with 2006-068-R;
2006-069-R; 2006-070-R and
2006-190-R)

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SOLEBURY TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-183-MG**
	:	**(consolidated with 2006-116-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW HOPE CRUSHED STONE & LIME COMPANY	:	**Issued: March 29, 2007**

OPINION ON DISCOVERY ORDER

By George J. Miller, Judge

Synopsis

The Board explains its March 23, 2007 discovery order, which was issued without an opinion, managing expert discovery in a consolidated appeal involving an NPDES permit issued to a quarry operation and a challenge to the Department's compliance with a Board order directing a hydrogeologic study to be performed by the Department and a quarry operator in an earlier, related appeal. The Board's discovery order appended to this opinion allows limited deposition discovery of experts for both the Department and the permittee's experts to explore their factual knowledge which may be relevant to the objections raised in the appeals.

OPINION[1]

This matter comes before us as a request for a case management conference to resolve several issues involving deposition discovery of expert witnesses. Solebury Township noticed the depositions of the Department's designated expert Nathan Houtz, and two of New Hope Crushed Stone and Lime's (Permittee's) experts, Louis Vittorio and William Potter. Neither the Department nor the Permittee believed that depositions of these experts was appropriate and sought guidance from the Board. The parties were provided an opportunity to file letter briefs in support of their respective positions. A conference call was held on March 19, 2007, and the Board heard oral argument on whether or not the deposition of the experts was appropriate. At the conclusion of the call, a ruling was reserved to allow the Township's counsel the opportunity to provide the Board with copies of the answers to admission requests which he believed form the basis of his claim that deposition of the Department's expert was appropriate. After consideration of these materials the Board issued an order on March 23, 2007, which permitted limited deposition discovery of both the Department's expert and those of the Permittee. This opinion explains the reason for that ruling.[2]

---

[1] The substantive background of the appeals before us has been described in great detail in earlier decisions, and we will not repeat that background here. Rather, the reader is directed to *Solebury Township v. DEP,* 2005 EHB 898, and *Solebury Township v. DEP*, EHB Docket No. 2005-183-MG (Opinion issued May 10, 2006).

[2] The Department also filed a motion for a protective order which would require the Township to depose its expert and two other Department witnesses at their place of work, the Department's Pottsville District Mining Office, rather than at the Township's counsel's offices in King of Prussia. The Board granted that motion by order dated March 19, 2007.

Expert Discovery Before the Board

Expert discovery before the Board has never been a simple matter. While the Board generally subscribes to the Pennsylvania Rules of Civil Procedure in discovery matters, those rules, geared for civil proceedings between private parties, are not always a good fit to the unique quasi-judicial administrative proceedings before the Board.[3] This is especially true in matters of expert discovery where the line between an "expert retained in anticipation of litigation" and a consultant or Department scientist who was involved in the application process at the Department level can be blurred and not especially helpful in resolving discovery disputes before the Board. Accordingly, the Board has required that any Department employee from whom the Department intends to elicit expert testimony must file such an expert report, even though the individual is not technically an "expert retained in anticipation of litigation."[4]

The Board has also been faced with the scenario where an independent expert was involved in the preparation of the permit application or advised the Department in its consideration of a permit application and considered whether the expert discovery rule should apply to those activities which occurred prior to the filing of the appeal before the Board. Recently, Judge Labuskes held that a traffic consulting firm could not be deposed because the facts and opinions which they developed to advise the Department during the approval process were the very same facts and opinions that they would testify about

---

[3] The Rules of Civil Procedure generally limit the discovery of facts and expert opinions "acquired or developed in anticipation of litigation" by court order "by cause shown." Pa. R.C.P. No. 4003.5 (a).

[4] *Borough of Edinboro v. DEP*, 2003 EHB 725, *aff'd*, 2696 C.D. 2003 (Pa. Cmwlth. Ct. filed June 23, 2004).

before the Board.[5] In his view, "there is simply no logical basis for drawing a line between [the consultant's] involvement prior to the permit denial and following the permit denial."[6] However, former Board Chair Maxine Woelfling permitted the deposition of consultants who had been identified in discovery as fact witnesses regarding a permit application but were also testifying experts, observing:

> While it may be difficult as a practical matter to distinguish in some circumstances between facts developed during a permit application process and opinions later developed to challenge the Department's rejection of that permit application in an appeal to the Board, it cannot be held here that the Township is not entitled to depose these individuals regarding the permit application process. [7]

From these cases, what is clear is that when or why an expert was retained may not be useful in Board proceedings for determining whether or not the deposition of a designated expert should be allowed. Because no action of the Department is final until there has been an opportunity to appeal to the Board and because much of the work of the Department involves matters of science and engineering which require the input and consideration of experts at all stages, it is difficult to say at what point litigation is anticipated. This point is well-illustrated by the case before us which involves a Department action on a remand order from the Board. It should come as no surprise to anyone that the Department's approval of the report required by the Board's 2004 adjudication generated further litigation. Therefore, the Board must consider the unique

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[5] *Dauphin Meadows, Inc. v. DEP*, 1999 EHB 829.

[6] *Id.* at 832.

[7] *New Hanover Corp. v. DER*, 1991 EHB 975, 977; *see also New Hanover Township v. DER*, 1989 EHB 31 (allowing deposition of an environmental consulting firm which prepared a permit application even though they were subsequently identified as experts who would not testify at the hearing).

circumstances and equities of a particular case, which are more important factors in fashioning a resolution of these sorts of discovery disputes, rather than whether or not an expert was retained in anticipation of litigation. With this in mind, we turn our consideration to the specific experts in this appeal.

The Department's Expert

The Township seeks to depose Nathan Houtz, P.G., a hydrogeologist employed by the Department. He has been properly designated as an expert by the Department and has submitted an expert report to the Township. He reviewed the hydrogeological report which was submitted by the Permittee in response to the Board's 2004 remand order. The Department objects to the deposition because, in its view, requiring the Department to designate an expert and then not shield that individual from deposition absent a demonstration of cause is fundamentally unfair to the Department. In response the Township contends that Mr. Houtz verified the Department's answers to admissions, and that it is entitled to enquire into the reasons why certain of those admissions were denied. Although designated as an expert, Mr. Houtz clearly played a more extensive role than merely providing expert opinion. The Department counters that there are other non-expert Department witnesses who could have verified those admission requests and who can be deposed on the topics raised by that discovery.

We are not unsympathetic to the quandary in which the Department finds itself. And we agree that as a general principle, once designated as an expert and once a report has been provided, that Department experts should not be exposed to further discovery by deposition, absent a showing of cause. However, Mr. Houtz clearly played an expanded role beyond that of an expert, in the Department's answers to discovery. If other

Department witnesses could have verified the Department's answers to the admissions request, the Department could have protected Mr. Houtz from further discovery by having others provide that verification. But having opened that door, the Township is entitled to inquire, on a limited basis, into the reasons why those requests were denied to the extent Mr. Houtz's expert opinions on the merits of the Township's claims are not directly implicated. The Township has failed to provide good cause why we should allow a more extensive deposition of Mr. Houtz as an expert.

The Permittee's Experts

A central issue raised in the Township's appeals is the Department's compliance with the Board's remand order and the amount of time it took for the requirements of that order to be effectuated. Accordingly, the Township seeks to depose Louis Vittorio and William Potter and discover in what manner and on what schedule they developed the report that was submitted to the Department nearly a year and a half after the Board's order. The Permittee objects to their deposition and contends that the Township already has a substantial volume of discovery which the Permittee believes demonstrates that the steps taken to comply with the Board's order were timely, reasonable and responsive.

We have permitted a limited deposition of Messrs. Vittorio and Potter to allow the Township to discover factually how these experts went about their investigation of the Primrose Creek Basin and how the schedule was developed, resulting in the August 2005 report that was submitted to the Department. This information may be relevant to the Township's claims that the Department was dilatory in complying with the Board's order and to claims that the Department inappropriately relied on this report when it issued the current NPDES permit which was also appealed by the Township. However, this

deposition is not unlimited and not intended to allow the Township to investigate the expert opinions of Mr. Vittorio or Mr. Potter, since the Township has failed to demonstrate good cause for doing so.

Conclusion

In sum, we find that the Township has failed to demonstrate good cause for deposing the experts of the Department or the Permittee concerning their expert opinions relating to the scientific issues raised by the appeals. However, given that each of these individuals played a role in factual matters beyond their roles as experts, we have allowed limited deposition discovery of those facts which may be relevant to the development of the Township's case in the attached order dated March 23, 2007.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Judge

DATED: **March 29, 2007**

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SOLEBURY TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-183-MG**
	:	**(consolidated with 2006-116-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW HOPE CRUSHED STONE & LIME COMPANY, Permittee	:	

ORDER

AND NOW, this 23rd day of March, 2007, in consideration of the Department's motion for a protective order and letter briefs from the other parties, as well as supplementary material submitted by the parties, it is HEREBY ORDERED as follows:

1. The Department's motion is granted so that the depositions of Department employees Nathan Houtz, James Burke, Keith Laslow and Mike Menghini shall be taken at the Department's Pottsville District Mining Office unless otherwise agreed by the parties.

2. Because Nathan Houtz is offered by the Department as an expert under the Board's procedural rules and his report as an expert has been served on the other parties, his deposition shall be strictly limited to the subject as to the reasons for the Department's failure, to the extent known by Mr. Houtz, to admit to requests for admissions served on it by the Appellant in the Department's response verified by Mr. Houtz. The opinions of Mr. Houtz on the merits of the Appellant's claims shall not be inquired into at this deposition because of the absence of any good cause to take the deposition of an expert on the merits of his opinion.

3. For similar reasons, the depositions of the permittee's experts, Louis F. Vittorio and William Y. Potter, shall be limited to the facts as to how and on what schedule they proceeded to develop the report called for by the Board's order and their related opinions from the time of the Board's March 5, 2004 order until the time of the submission of the report to the Department. The Board believes that these individuals prepared this report in part in anticipation of further litigation, so that their opinions are protected from discovery in absence of a showing of good cause for taking their depositions.

4. Counsel shall advise the Board as to when these depositions are to be taken so that the presiding Judge may be available to resolve by telephone any disputes that may arise during the course of the depositions of the individuals named above.

5. This order is issued without an accompanying opinion to facilitate the prompt taking of these depositions. An opinion containing the reasons for this order will be served on the parties in the very near future.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Judge

DATED: March 23, 2007

Via Fax/Regular Mail

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Debra K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

LOUISE A. BERTOTHY	:	
	:	
v.	:	**EHB Docket No. 2005-312-R**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	**Issued: April 3, 2007**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Judge

Synopsis:

Although the Appellant states that this appeal is moot, we decline to dismiss it on the basis of mootness where it is not clear that is what the Appellant intends. However, where the Appellant's response to the Department's motion for summary judgment does not demonstrate that any material facts are in dispute and where the Department is entitled to judgment as a matter of law, the motion for summary judgment is granted. The Department properly issued an order requiring removal of waste tires from the Appellant's property.

OPINION

This case involves an appeal by Louise Bertothy (the Appellant) challenging an order issued by the Department of Environmental Protection (Department) directing her to remove and properly dispose of solid waste, including tires and municipal waste stored on her property and to cease accepting the same. The Appellant is in bankruptcy, as are the two businesses that operated

on the site, R.T. Merryman Trucking, Inc. (Merryman) and Classic Motor Lines (Classic), of which the Appellant was an officer and employee. Nearly identical orders were issued to both Merryman and Classic in care of the bankruptcy trustee. The Appellant contends that the order should not have been issued to her but only to the bankruptcy trustee and to the principal of Merryman. The matter now before the Board is a motion for summary judgment filed by the Department.

Summary judgment may be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Martz v. DEP*, EHB Docket No. 2004-241-MG (Opinion and Order issued December 6, 2006), *slip op.* at 2, n. 1; *Snyder Brothers, Inc. v. DEP*, EHB Docket No. 2006-002-K (Opinion and Order issued December 4, 2006), *slip op.* at 3. As Judge Labuskes recently held in *Citizen Advocates United to Safeguard the Environment, Inc. et al. v. DEP et al.*, EHB Docket No. 2006-005-L (Opinion and Order on Motions for Partial Summary Judgment issued February 6, 2007), summary judgment is appropriate "when a limited set of material facts are truly undisputed and the appeal presents a clear question of law." *Slip op.* at 6.

The Appellant filed a one and one-half page response to the Department's motion. The response does not comply with the Board's rule on responses to motions for summary judgment at 25 Pa. Code § 1021.94a(f) in that it contains no statement either admitting or denying the facts set forth in the Department's motion.

What the response does say is that the waste has been removed from the property and that no further disposal is taking place. The Department concurs with this statement; in the brief supporting its motion, the Department states that the order has been complied with and that the property has been cleaned up. According to the Department and the Appellant's counsel, the

cleanup was done through efforts of the bankruptcy trustee. The Appellant also points out in an affidavit submitted by her counsel that she no longer owns the property and that the businesses in which she was an officer have been dissolved.

Finally, the Appellant states that the appeal is moot since there is no longer a case or controversy before the Board. It is not clear, however, from the Appellant's response that she intends to have her appeal dismissed as moot. Since in the context of a dispositive motion all doubts must be resolved in favor of the non-moving party, *Upper Gwynedd Township v. DEP*, EHB Docket No. 2005-358-MG (Opinion and Order issued January 30, 2007), we are reluctant to dismiss the appeal on the basis of mootness.

We, therefore, turn to the argument set forth in the Department's motion. The Department asserts that there is no dispute that waste was being illegally disposed at the Appellant's site, that the Department had the authority to issue the order in question and that it was appropriate to issue the order to the Appellant as the owner of the site and officer and employee of the entities depositing waste at the site.

Based on the Appellant's failure to comply with 25 Pa. Code § 1021.94a(f), the Department's statement of material facts is deemed admitted. Furthermore, in an affidavit filed with the response, the Appellant's counsel admits that Merryman and Classic deposited tires on the property over a period of years. The Appellant's principal argument in this appeal seems to be that the Department's cleanup order should have been issued to Merryman alone (and/or to the bankruptcy trustee for Merryman) since it was primarily responsible for depositing the tires on the property. As noted earlier, an order was issued to Merryman, as well as to Classic. However, the Department also has the authority to order the owner of the property where waste tires have been dumped without a permit to clean up the property and properly dispose of the

waste. As the Department correctly points out, Section 610 of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §§ 6018.101 – 6018.1003, makes it unlawful for any person to "permit the dumping or depositing, of any solid waste onto the surface of the ground. . .unless a permit for the dumping of such solid wastes has been obtained from the [D]epartment. . . ." Id. at § 6018.610. *See also,* Sections 301 and 501 of the Solid Waste Management Act, 35 P.S. §§ 6018.301 and 6018.501, which prohibit the storage and disposal of waste without a permit.

The Appellant points to the fact that the property has been cleaned up to the Department's satisfaction. In the affidavit, the Appellant's counsel states the Department has "refused to drop or dismiss the Order for the cited reason that they could be held liable for attorneys' fees and costs." (p. 3, Loftus Affidavit) Simply because the order has been complied with is not necessarily a reason for it to be withdrawn. As we recently noted in *Hercules, Inc. v. DEP*, EHB Docket No. 2005-337-R (Opinion and Order issued January 31, 2007), compliance with an order does not necessarily render it moot. *Slip op.* at 8.

Because the Appellant has not shown us that any material facts are in dispute and because the Department's order is in compliance with the Solid Waste Management Act, we find that it is appropriate to grant the Department's motion for summary judgment.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LOUISE A. BERTOTHY	:	
	:	
v.	:	**EHB Docket No. 2005-312-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 3rd day of April 2007, the Department's motion for summary judgment is granted and this appeal is ***dismissed.***

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

GEORGE J. MILLER
Judge

THOMAS W. RENWAND
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: **April 3, 2007**

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

R. J. RHODES TRANSIT, INC.	:	
	:	
v.	:	**EHB Docket No. 2007-055-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 20, 2007**

OPINION AND ORDER
DISMISSING THE CASE

By Michelle A. Coleman, Judge

Synopsis:

The EHB Rule on representation before the Board, found at 25 Pa. Code § 1021.21, requires that corporations be represented by counsel. When a corporation fails to comply with an Order to obtain counsel, the Board may impose dismissal of the appeal as a sanction.

OPINION

This is an appeal from a Department of Environmental Protection, Division of Underground Storage Tanks, Order imposing civil penalties in the amount of $4,000 on R.J. Rhodes Transit, Inc. Appellant filed a timely Notice of Appeal by fax on February 1, 2007. The Notice of Appeal listed R.J. Rhodes as the Appellant and Jefrey F. Wall, Vice President-Operations, as the contact person. There was no mention of counsel in the Notice of Appeal.

On February 2, 2007, the Board issued Pre-Hearing Order No. 1. Also issued on that date was an Order requiring Appellant to obtain counsel on or before March 2, 2007 pursuant to 25

Pa. Code § 1021.21(b). Said Order stated that "(f)ailure to obey this Order shall result in the imposition of sanctions pursuant to 25 Pa. Code § 1021.161 which could...include dismissal of the appeal with prejudice."

On March 6, 2007, the Board issued a Rule to Show Cause why the appeal should not be dismissed for Appellant's failure to obtain counsel by March 2. The Rule was returnable on or before March 27, 2007. In addition, the Rule gave Appellant a second chance to obtain counsel by granting that "the filing of an entry of appearance by counsel for R.J. Rhodes will discharge the Rule."

To date, no response to the Rule has been filed and no entry of appearance has been recorded. In fact, the Board has received no correspondence from Appellant since the filing of the Notice of Appeal.

It is well established that the Board has the power under its Rules to impose sanctions for failure to comply with Board rules.[1] While there are sanctions which are less stringent than dismissal of an appeal,[2] this case has not proceeded far enough for such sanctions to be appropriate here. In *Swistock v. DEP*,[3] Judge Miller "dismissed an appeal for failing to comply with orders of the Board signifying an intent not to pursue an appeal."[4] The same is true here. By failing to comply with the Order to Obtain Counsel and the Rule to Show Cause, Appellant has demonstrated a lack of interest in pursuing this appeal. Therefore, the Board dismisses the appeal for failure to comply with a Board Order pursuant to 25 Pa. Code § 161, and issues the following Order.

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[1] See *Zazo v. DEP* and *Selvaggio Enterprises, Inc.*, 2006 EHB 650; *Kennedy v. DEP*, 2006 EHB 477.
[2] E.g., preclusion of evidence; barring of witnesses.
[3] 2006 EHB 398.
[4] *Swistock* citing *Sri Venkateswara Temple v. DEP*, 2005 EHB 54.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

R. J. RHODES TRANSIT, INC.	:	
	:	
v.	:	EHB Docket No. 2007-055-C
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 20th day of April 2007, it is hereby ordered that this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: April 20, 2007

c: **DEP Litigation:**
Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

THOMAS GORDON	:	
	:	
v.	:	**EHB Docket No. 2005-323-R**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA: DEPARTMENT OF ENVIRONMENTAL :		
PROTECTION	:	**Issued: April 26, 2007**

ADJUDICATION

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

Synopsis:

The Board dismisses an appeal from a $9,000 civil penalty assessment issued to an owner of a mobile home park for violations of the Solid Waste Management Act and regulations. The Department established that the appellant was improperly disposing of waste on the property after being repeatedly warned via multiple notices of violation and that the penalty was a reasonable fit given the circumstances of the violations.

Background

The Appellant, Thomas Gordon, filed an appeal on November 9, 2005, challenging a civil penalty assessment by the Department for violations of the Solid

Waste Management Act[1] and regulations. Specifically, the Appellant complained that he was not responsible for the dumping on his property as charged in the assessment, that the Department improperly considered old violations, and that the penalty was due without a finding of guilt. The Appellant proceeded with appeal without the assistance of counsel.

A hearing was held on December 11, 2006, before the Honorable Thomas W. Renwand. Although the Appellant appeared at the hearing, he was precluded from offering exhibits or the testimony of witnesses on his own behalf as a sanction for failing to file a pre-hearing memorandum as twice ordered by the Board.[2] He was permitted to cross-examine Department witnesses and present his own testimony. The hearing generated a transcript of 78 pages and 22 exhibits. The Department filed a post-hearing memorandum on February 21, 2007. The Appellant did not file a post-hearing brief.

After full consideration of these materials, we make the following:

FINDINGS OF FACT[3]

1. The Department of Environmental Protection is the agency with the due and authority to administer and enforce the Solid Waste Management Act and the regulations promulgated thereunder.

2. The Appellant, Thomas R. Gordon, Sr. is the owner and operator of

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[1] Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003.

[2] See Order dated December 5, 2006.

[3] The notes of testimony are cited as "N.T.". The Commonwealth's exhibits are

Gordon's Mobile Home Park, located in Quemahoning Township, Somerset County.

3. William Shawley is a solid waste specialist for the Department. He has held that position for 26 years. He has inspected the Gordon mobile home park as part of his regular duties since 1997. (N.T. 23-24)

4. Samuel Donia is a board chairman and superintendant for Quemahoning Township. He has held that position for 27 years. He has visited the Gordon mobile home park several times in response to complaints since 1997. (N.T. 8-10)

5. The Appellant has never had a permit from the Department for the disposal of solid waste at the mobile home park. (Shawley, N.T. 24)

6. Since 1997, Mr. Donia has received numerous complaints about garbage and burning at the Appellant's mobile home park. (Donia, N.T. 10-13; see also Shawley, N.T. 25-26)

7. Mr. Shawley has inspected the mobile home park several times since 1997.

8. On July 11, 2002, he inspected the mobile home park in response to complaints about odors and vectors. He observed an open-topped roll-off container or dumpster full of waste that was creating odors and attracting flies. (Shawley, N.T. 27-28; Donia, N.T. 12)

9. Similarly he inspected the site on August 13, 2002, and observed that the dumpster was still overflowing with waste. He issued a field notice of violation to the Appellant and mailed him a copy of the inspection report. (N.T. 29-31; Exs. C-5, C-6)

"Ex. C-_."

10. In response to complaints about illegal dumping, Mr. Shawley again inspected the site on October 2, 2002. He observed a Ford Packard garbage truck half-full of household trash. He also saw a white Chevy dump truck that was full of trash and covered with a tarp. He mailed a copy of his inspection report to the Appellant. (N.T. 32-33; Ex. C-7)

11. Mr. Shawley again followed up with an inspections on October 18, and October 29, 2002. For the most part conditions at the site remained unchanged. Demolition waste was still on the ground. However, the Chevy dump truck and the roll-off container had been removed. (N.T. 34-36; Exs. C-8, C-9)

12. A copy of the inspection reports was mailed to the Appellant. (Shawley, N.T. 37)

13. Mr. Shawley also filed three summary citations with the local magistrate for violations observed on October 2, 2002, and October 18, 2002. The Appellant was found guilty and charged a $300 fine. (N.T. 38)

14. Mr. Shawley next inspected the mobile home park on March 17, 2003. He observed the Packard truck parked near several occupied dwellings and it was full of foul-smelling trash. (N.T. 39; Ex. C-11)

15. Mr. Shawley also observed that two piles of construction and demolition waste remained on the property. (N.T. 39; Ex. C-11)

16. A copy of the inspection report was mailed to the Appellant. (N.T. 39)

17. On June 5, 2003, Mr. Shawley again inspected the mobile home park. He

observed that old abandoned mobile homes had been recently burned to dispose of waste and facilitate salvage metal. Although the Packard truck was farther away from residences, it still contained foul-smelling waste. On the ground there was waste, including scrap wood, roofing, sinks, carpet, and insulation. (N.T. 40; Ex. C-12)

18. On June 19, 2003, the site was again inspected by Mr. Shawley. He was accompanied by his supervisor, Stan Whitsel.[4] (N.T. 42)

19. He again observed waste wood, insulation, a sink and other waste deposited on the ground. The Packard truck was still full of waste and was attracting flies and other vectors. It appeared that the truck had not been unloaded in more than a year. (N.T. 42-43; Ex. C-13; see also Whitsel, N.T. 64)

20. Mr. Donia contacted Mr. Shawley on July 18 2005, to report that he had received several complaints about burning at the mobile home park. (Shawley, N.T. 43; Donia, N.T. 13-14)

21. Mr. Shawley visited the site on July 18, 2005, and observed that mobile homes had been burned, that there were piles of trash sitting around, and piles of scrap metal stacked up at the site. (N.T. 43-44; Ex C-14)

22. In response to burning complaints, Mr. Shawley also visited the mobile home park on July 20, 2005. He observed the Appellant operating a backhoe and depositing burned debris into a pit. Mr. Shawley also observed waste that had been

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[4] Stanley P. Whitsel is a regional operations supervisor for the Department. He has held that position since 1989. Before that he held positions as a solid waste

deposited into the pit. (N.T. 47, 53; Ex. C-15)

23. Mr. Shawley issued a notice of violation which he personally delivered to the Appellant. (NT. 55; Ex. C-15)

24. The notice of violation directed the Appellant to cease all disposal activities and properly remove and dispose of waste that was on the site. (N.T. 56)

25. Mr. Shawley has received numerous complaints about odors and smoke from the mobile home park from residents and also from residents in the vicinity of the mobile home park. (N.T. 59-60)

26. Mr. Whitsel calculated the civil penalty assessed on September 15, 2005. The only violation that formed the basis of the penalty was causing or allowing improper waste disposal at the mobile home park without a permit on July 20, 2005. (N.T. 66-67; Ex. C-20)

27. The first component of the penalty was based on the degree of severity of the violation. Because the Appellant had burned waste near residences, attempted to bury the residue in the ground and did not do much to clean up the waste, $1,500 was assessed. (Whitsel, N.T. 68; Ex. C- 21)

28. The next component to the penalty was for the willfulness of the violation. Although Mr. Whitsel believed that the Appellant's conduct was deliberate and premeditated, he decided to classify the Appellant's conduct as "reckless". (N.T. 69)

29. Mr. Whitsel believed that the Appellant's conduct was willful because the

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specialist and a solid waste specialist trainee. (N.T. 63-64)

Department had spent a lot of time since 1997 to bring him into compliance with solid waste regulations. Rather than improving his conduct, in Mr. Whitsel's view, the Appellant had graduated from merely depositing waste at the site to creating a small landfill by digging the pit and depositing waste into the ground. (N.T. 69)

30. However, in order to create a "reasonable" penalty in accordance with the Department guidance document and his experience with other violators, Mr. Whitsel classified the Appellant's conduct as "reckless" and assessed $7,500 for this portion of the penalty. (N.T. 70-71; Ex. C-22)

31. Accordingly, the total penalty assessed was $9,000. Mr. Whitsel believed this to be a reasonable penalty for the violation. (N.T. 72)

32. Mr. Whitsel also considered deterrence against the Appellant and others who might act in a similar manner. (N.T. 72)

33. Although not factored into the penalty assessed by the Department, Mr. Whitsel calculated that it would cost the Appellant between $468 and $624 in fuel and vehicle expenses to haul waste to a local landfill located 15 miles away from the mobile home park. (N.T. 73-74)

34. The Appellant collected a waste disposal fee from the tenants of the mobile home park. (Ex. C-2)

DISCUSSION

The Board's review is *de novo*.[5] That means that we may consider not only evidence that was before the Department at the time that it issued the civil penalty assessment, but additional relevant evidence as well.[6] In this case, it is the Department that bears the burden of proof.[7] Specifically the Department must prove (1) the existence of facts supporting the assessment; (2) demonstrate that the penalty was authorized by applicable law; and (3) that the penalty was a reasonable and appropriate exercise of the agency's discretion.[8] As we explain more fully below, the Department has fully met this burden of proof and will uphold the penalty assessment.

The evidence in the record clearly establishes the fact of the violation. The Department inspector witnessed the violation in progress and we find his testimony convincing.[9] The Appellant did not offer any evidence to the contrary.[10] Furthermore, depositing solid waste into the ground without a permit is clearly a violation of the Solid Waste Management Act, which prohibits dumping or depositing waste on the surface of

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

[6] *Leatherwood v. Department of Environmental Protection*, 819 A.2d 604 (Pa. Cmwlth. 2003).

[7] 25 Pa. Code § 1021.101(c).

[8] *Stine Farms and Recycling, Inc. v. DEP*, 2001 EHB 796; *see also Farmer v. DEP*, 2001 EHB 271.

[9] Shawley, N.T. 47, 53; Ex. C-15.

[10] In fact, the Appellant chose to leave the courtroom rather than exercise his right to cross-examine witnesses or offer his own testimony. N.T. 52.

the ground or underground without a permit.[11] The Appellant had no permit.[12] Therefore the violation was established and the Department was authorized to assess a civil penalty.[13]

Section 605 of the Solid Waste Management Act authorizes the Department to issue a civil penalty for a violation of any provision of the Act or the regulations:

> Such a penalty may be assessed whether or not the violation was willful or negligent. 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.[14]

The Act authorizes a penalty of up to $25,000 per offense.[15] In this case, the Department considered the severity of the violation and the reckless conduct of the Appellant and arrived at a civil penalty of $9,000. Although the Department also considered deterrence and that the Appellant was retaining funds paid to him by the tenants with which he could have properly disposed of the waste, those factors were not assigned a dollar value in the penalty.

Given the circumstances surrounding the July 20, 2005 violation, and the Appellant's past history of violating the Act, this penalty is a perfectly reasonable fit

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[11] 35 P.S. § 6018.610.
[12] Shawley, N.T. 24
[13] 35 P.S. § 6018.605.
[14] *Id.*
[15] *Id.*

for this violation. The Department had been trying to work with the Appellant for nearly eight years to secure his compliance with the Act by issuing numerous written inspection reports, successive notices of violation and filing summary citations with the local magistrate for failing to properly dispose of solid waste generated by the residents of the trailer park. Those notices certainly informed him that failing to dispose of waste properly was a violation of the law. The Appellant's failure to do so constituted reckless conduct, or a "conscious disregard of the fact that one's conduct may result in a violation of the law."[16]

Further, the residents of the trailer park were paying the Appellant to properly dispose of their waste.[17] There was a landfill located a reasonable distance from the trailer park where the Appellant could have properly disposed of waste from the trailer park.[18] The Appellant apparently had trucks on the property which could likely been used to transport that waste. There does not seem to be any reasonable excuse for his failure to comply with the law.

Mr. Whitsel testified that in reviewing the Appellant's compliance history, his lack of compliance with the Act was escalating and showed no signs of improving.[19] There was no indication that the Appellant had any interest or made any attempt to dispose of waste in accordance with the Act. Neither the notices of violation from the

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[16] *Farmer*, 2001 EHB at 285.
[17] Ex. C-2.
[18] Whitsel, N.T. 73-74.
[19] N.T. 69.

Department nor the fine imposed by the district magistrate appeared to have any effect on the Appellant. Accordingly, the Department acted well within its discretion by imposing an appropriate civil penalty in an effort to secure his future compliance. We find nothing unreasonable in the Department's action, and will dismiss the Appellant's appeal.

We therefore make the following:

CONCLUSIONS OF LAW

1. The Board's review is *de novo*. 35 P.S. § 7514.

2. On July 20, 2005, the Appellant violated the Solid Waste Management Act by depositing solid waste into a hole in the ground without a permit. 35 P.S. § 6018.610.

3. The Appellant's conduct was at least reckless.

4. The Department's $9,000 civil penalty assessment was lawful. 35 P.S. § 6018.605.

5. The Department's $9,000 civil penalty assessment was a reasonable fit for the nature and scope of the violation.

We enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THOMAS GORDON	:	
	:	
v.	:	**EHB Docket No. 2005-323-R**
	:	
COMMONWEALTH OF PENNSYLVANIA: DEPARTMENT OF ENVIRONMENTAL : PROTECTION	:	

ORDER

AND NOW, this 26th day of April, 2007, the appeal of Thomas Gordon in the above-captioned matter is hereby **DISMISSED**.

ENVIRONMENTAL HEARING BOARD

Thomas W. Renwand

THOMAS W. RENWAND
Acting Chairman and Chief Judge

George J. Miller

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: April 26, 2007

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

For the Commonwealth, DEP:
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Gail Guenther, Esq.
Southwest Regional Counsel

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

HJH, LLC	:	
	:	
v.	:	**EHB Docket No. 2006-152-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 30, 2007**

OPINION AND ORDER
ON CROSS MOTIONS FOR SUMMARY JUDGMENT

By George J. Miller, Judge

Synopsis

This appeal was filed by the Appellant after the Department of Environmental Protection suspended the review of the Appellant's permit application for a municipal waste transfer station. The suspension was a result of the Department's Act 67/68 review of a potential conflict between the proposed project and the local land use regulations. The Board grants the Department's motion for summary judgment and dismisses this appeal. There are no material facts in dispute and the Department has shown that it did not act improperly or otherwise abuse its discretion when it conducted the Act 67/68 review. Act 67/68 authorizes the Department to rely on comprehensive plans and zoning ordinances, but does not require the Department to settle land use issues when there is a conflict between existing local land use regulations and the proposed project in the permit application.

Factual & Procedural Background

HJH, LLC's (HJH or Appellant) filed an appeal on June 9, 2006 objecting to the Department of Environmental Protection (DEP or Department) suspending review of HJH's permit application (Permit Application) for a municipal waste transfer station in Bensalem Township, Bucks County, Pennsylvania by letter dated May 12, 2006.[1] Currently before the Board are cross motions for summary judgment that present the only remaining issue of this appeal. That issue is whether or not the Department abused its discretion when it suspended review of HJH's Permit Application after conducting an Act 67/68 review based on a letter from the township indicating a conflict between the proposed project and local land use regulations.

On May 24, 2005 HJH sent its Permit Application for approval of the waste transfer station to DEP. The Permit Application contains a General Information Form (GIF) which has a section entitled "Land Use Information".[2] The Appellant provided in the GIF that the project did not conflict with local zoning or comprehensive plans.[3] Subsequent to the Department receiving the Appellant's Permit Application counsel for Bensalem Township sent a letter dated January 6, 2006 to the Department indicating that a conflict existed between HJH's proposed waste station and local comprehensive plans and zoning ordinances of Bucks County.[4] That letter states that the proposed facility does not fit into the permitted uses under the R-55 District.[5] After the Department's receipt of that letter it was forwarded to the Department's Policy Office to conduct

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[1] *See* HJH Exhibit (Ex.) 21; DEP Ex. 8.

[2] *Id.*

[3] *Id.*

[4] HJH Ex. 3.

[5] *Id.* The thirteen page letter from the township discusses, among other things, that the area in which the proposed project is located was rezoned to R-55 Riverfront Revitalization District as part of a Riverfront Revitalization Plan between six municipalities to promote residential uses. This change in zoning does not allow for HJH's proposed facility. The letter provides that "this effort [to revise its zoning ordinance to create a Riverfront Revitalization District] began long before HJH filed its permit application and continued through the adoption of the Ordinance No. 2005-08 on September 27, 2005. *Id.*

an Act 67/68 land use review of the Permit Application.[6]

Under Acts 67 and 68 of the Municipalities Planning Code, enacted June 22, 2000, the Department is to consider local zoning and land use when reviewing permit applications.[7] The section relevant here provides:

> (a)Where municipalities have adopted a county plan or a multimunicipal plan is adopted under this article and the participating municipalities have conformed their local plans and ordinances to the county or multimunicipal plan by implementing cooperative agreements and adopting appropriate resolutions and ordinances, the following shall apply:
>
> (1) ....
>
> (2) State agencies shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities.[8]

The Department drafted a Policy Document to be used as guidance when conducting an Act 67/68 review which is entitled, "Policy for Consideration of Local Comprehensive Plans and Zoning Ordinances in DEP Review of Permits for Facilities and Infrastructure" Document Number 012-0200-001, effective March 6, 2004 (Policy Document).[9] The purpose of an Act 67/68 review is to avoid or minimize conflicts with the Department's permitting decisions and local land use.[10] The Policy Document sets forth two major components for conducting a land use review, which are:

> 1) The inclusion of land use questions as part of the permit application process (i.e. on the DEP GIF or as part of the permit application form in programs that do not use the GIF) and 2) An opportunity for municipal and county comment to DEP on the

[6] HJH Ex. 2; *see also* DEP Ex. 11, pp. 7-11.
[7] 53 P.S. § 10101-11107.
[8] 53 P.S. § 11105(a)(2).
[9] DEP Ex. 11.
[10] DEP Ex. 11, p. 7.

accuracy of a permit applicant's answers to the referenced land use questions.[11]

Here, the requested Act 67/68 land use review was conducted by Louis Guerra, Executive Policy Specialist of the Department's Policy Office.[12] Guerra testified that during his Act 67/68 review he determined the municipality identified the conflict between the proposed facility and the local zoning laws of the municipality, and at that point his review was finished.[13] After Guerra's review of HJH's Permit Application, he emailed his recommendation on February 8, 2006 to the Regional Director of the Southeast Region.[14] Guerra provided, "suspension of the technical review of the application is a valid option for the project."[15]

The Regional Director decided the review of the Permit Application should be suspended and informed the Waste Management Program.[16] A letter dated May 12, 2006 was sent to HJH informing it that the Department was suspending review of the Permit Application until an Act 67/68 conflict was resolved. HJH appealed that letter to the Board on June 9, 2006 and both motions for summary judgment were filed with the Board on January 16, 2007.

Opinion

The Board is authorized to grant summary judgment when the record establishes that there is no genuine issue of material fact in dispute and the moving party is entitled to judgment as a matter of law.[17] The record is defined as the pleadings, depositions, answers to interrogatories, admissions, affidavits, and certain expert reports.[18] The Board views the record in

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[11] DEP Ex. 11, p. 3.
[12] DEP Ex. 4, pp. 6-8.
[13] DEP Ex. 4, pp. 14-16.
[14] HJH Ex. 6.
[15] HJH Ex. 6.
[16] DEP Ex. 5, pp. 34-37.
[17] *See* 25 Pa. Code § 1021.94(b); *Scalice v. Pennsylvania Benefits Trust Fund*, 883 A.2d 429 (Pa. 2005); *Jones v. SEPTA*, 772 A.2d 435 (Pa. 2001); *Martz v. DEP*, 2006 EHB 988.
[18] Pa.R.C.P. 1035.2; *Holbert v. DEP*, 2000 EHB 796, 807-809, *citing County of Adams v. DEP*, 687 A.2d

the light most favorable to the nonmoving party.[19]

These cross motions do not present a dispute of material facts, therefore, all that remains before the Board is a legal issue. The Board has held that summary judgment is appropriate "when a limited set of material facts are truly undisputed and the appeal presents a clear question of law."[20] Here, the question of law before the Board is whether the Department abused its discretion when it conducted the Act 67/68 review of HJH's Permit Application which resulted in suspending review of the Permit Application for the waste transfer station. An abuse of discretion is found only where the Department's action was unreasonable, inappropriate or in violation of law.[21]

Here, Guerra testified at his deposition that when conducting an Act 67/68 review he determines whether the municipality has identified the conflict and local zoning laws; if both are identified then his review is finished.[22] HJH does not dispute Guerra's role in identifying the existence of a conflict, but denies that such a review is sufficient.[23]

HJH argues that in order for the Department to conduct a sufficient review it must determine whether an actual conflict exists which entails consideration of the comprehensive plan and zoning ordinances, as well as the Permit Application.[24] HJH provides that if Guerra would have reviewed the Permit Application when doing the Act 67/68 review he would have

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1222, 1224 (Pa. Cmwlth. 1997).

[19] *Holbert v. DEP*, 2000 EHB 796, 808.

[20] *Bertoty v. DEP*, EHB Docket No. 2005-312-R (Opinion and Order issued April 3, 2007), slip op. at 2, *citing Citizen Advocates United to Safeguard the Environment, Inc., et al. v. DEP, et. al.*, 2006 EHB Docket No. 2006-005-L (Opinion and Order on Motions for Partial Summary Judgment issued February 6, 2007) slip op. at 6.

[21] *County of Berks v. DEP*, 2005 EHB 233, 266-65, *aff'd*, 894 A.2d 183 (Pa. Cmwlth. 2006), *pet. den.*, 907 A.2d 1104 (Pa. 2006).

[22] Dep. Ex. 4, pp. 14-16. *See also* the Policy Document which provides, ". . . it is the Department's intent to rely only on comments received from municipal and county officials or their designated planning agencies to determine whether a project may conflict with comprehensive plans and zoning ordinances. DEP Ex. 11, p. 6.

[23] HJH Response Brief, ¶¶ 15, 16.

[24] HJH Motion, p. 1; DEP Ex. 4, pp. 67-70.

seen that the Township letter contradicts the Permit Application.[25] HJH further argues that in such a situation the Policy Office should do a further review to determine "whether there was in fact a legitimate conflict between the proposed facility and local land use regulations."[26] The Township's letter states that the facility cannot now be constructed under the Township's zoning ordinance, even though it might have been constructed under the ordinance existing at the time of the Permit application.[27]

The Department counters by stating that it does not have the authority under Act 67/68 to determine the legitimacy of such a land use issue. In the Department's response brief it provided:

> when a county or municipality has identified a conflict with sufficient specificity, but the Department is in receipt of contradictory information from the applicant as to the legal validity of that conflict, the Policy Office does not attempt to resolve the resulting land use issue, as local zoning boards and courts or common pleas have exclusive jurisdiction over such issues. Rather, in that situation the Policy Office relies on information provided by the county or municipality.[28]

Guerra testified that the Township's letter was very thorough and pinpointed the conflict between the proposed facility and the local zoning laws of the municipality.[29] Guerra testified that, "the nature of the review that [he] did was to determine whether there was a conflict or not."[30] He also added that he does not check to see whether the "ordinance has any kind of legal value, substance, anything other than whether they could show . . . there was a specific conflict . . . ."[31]

The Department's position above is consistent with past Board decisions which provide that "Act 67/68 does not require the Department to become a 'super zoning board' and

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[25] HJH Brief, pp. 11-12.
[26] *Id.*
[27] HJH Ex. 3.
[28] DEP Response Brief, p. 2.
[29] DEP Ex. 4, p. 73.
[30] *Id.* at 15.
[31] *Id.* at 16.

independently re-evaluate local zoning and land use issues."[32] The Board has also held that "Act 67/68 does not require the Department to resolve zoning conflicts."[33] HJH suggests that if Guerra were to consider the Permit Application in his review he should have then considered the zoning ordinance and comprehensive plan in order to validate the Township's representation that a conflict existed.

The Board finds that no further analysis needed to be conducted by the Policy Office when an existing conflict exists as to whether or not the proposed facility can be constructed under the Township's existing zoning ordinance. The Township's position as to the effect of its existing ordinance appears to be expressed in good faith and raises a reasonable question as to whether or not the law existing at the time of the application or the presently existing zoning ordinance should govern. The Department need not resolve this legal question, but is entitled to rely on the Township's zoning ordinance that raises a question as to whether or not the facility may eventually be constructed. Accordingly, it acted properly when it suspended[34] review of the Permit Application.

Accordingly, we enter the following:

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[32] *County of Berks*, 2005 EHB 233, 269-70.

[33] *Id.* at 271.

[34] No party has raised whether or not the Board has jurisdiction. Accordingly, we do not rule on that question without briefing from counsel. Nevertheless, the Board questions whether or not it has jurisdiction over this appeal. Prior cases of the Board have provided that "it was never intended that the Board would have jurisdiction to review the many provisional, interlocutory "decisions" made by DER during the processing of an application." *Corco Chemical Corp. v. DEP*, 2005 EHB 733, 740, *citing Phoenix Resources v. DEP*, 1991 EHB 1681, 1684; *see also Central Blair County v. DEP*, 1998 EHB 643 (the board held that it did not have jurisdiction to hear an appeal of a letter from the Department stating that it was returning the NPDES application to the applicant because of a sewage authority's change in sewage flow which may affect the application, but that the applicant may resubmit the NPDES application); *United Refining Co. v. DEP*, 2000 EHB 132 (The Board found that the Department letter, to the applicant concluding its application for air quality approval was incomplete because of a new source review, was not a final action).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HJH, LLC	:	
	:	
v.	:	**EHB Docket No. 2006-152-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 30th day of April, 2007, the Department's Motion for Summary Judgment in the above-captioned appeal is hereby granted and this appeal is dismissed.

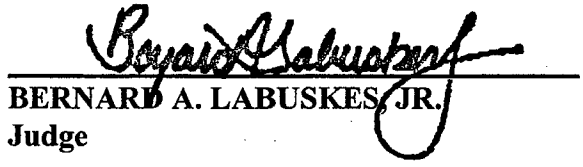
ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chief Judge and Chairman

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

Judge Labuskes would have dismissed for lack of jurisdiction and, therefore, concurs in the result.



BERNARD A. LABUSKES, JR.
Judge

DATED: **April 30, 2007**

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2003-004-CP-L**
RICHARD C. ANGINO, ESQUIRE, KING DRIVE CORPORATION, and SEBASTIANI BROTHERS	:	**Issued: May 10, 2007**

OPINION AND ORDER ON APPLICATION FOR STAY

By Bernard A. Labuskes, Jr., Judge

Synopsis

A petition for a stay pending an appeal to Commonwealth Court is denied where the applicant failed to make a claim of irreparable harm and the applicant has very little likelihood of success on the merits. The issues that are being appealed are highly factual in nature and are supported by substantial record evidence.

OPINION

The Department of Environmental Protection (the "Department") filed a complaint for civil penalties against Richard C. Angino and King Drive Corporation (together, "Angino") for violations of the Clean Streams Law, 35 P.S. §§ 691.1 *et seq.*, arising from earth disturbance activities at Angino's Felicita Resort in Middle Paxton Township, Dauphin County. After a hearing, the Board assessed a civil penalty in the amount of $21,000 against Angino. *DEP v. Angino*, EHB Docket No. 2003-004-CP-L (Adjudication, March 13, 2007). Angino appealed the

Board's Adjudication and Order to the Commonwealth Court at Docket No. 664 CD 2007. Angino has now filed an application pursuant to Pa. R.A.P. 1781 to stay our Order imposing civil penalties pending the disposition of the appeal by the Commonwealth Court.

Acting Chief Judge Renwand recently addressed applications for stay pending review in *Lang v. DEP*, 2006 EHB 116:

> Pennsylvania Rule of Appellate Procedure 1781(a) states that an application for stay of an order pending review in an appellate court shall ordinarily be made to the government unit. When ruling on an application for stay pending appeal, the Board employs the same criteria as that in ruling on a petition for supersedeas. *Heston S. Swartley Transportation Co., Inc. v. DEP*, 1999 EHB 160, 163; *E. Marvin Herr v. DEP*, 1997 EHB 977. In other words, we consider the following factors: irreparable harm to the applicant, the likelihood of the applicant prevailing on the merits, and the likelihood of injury to the public or other parties.

2006 EHB at 117. *See also* 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a); *Pennsylvania Public Utility Commission v. Process Gas Consumers Group*, 467 A.2d 805, 808-09 (Pa. 1983).

Angino's application for a stay fails to allege that Angino will suffer irreparable harm if the stay is not granted. Even if this deficiency in Angino's application were not the fatal lapse that it happens to be, we would be compelled to deny the stay because Angino has little likelihood of prevailing on the merits. Angino conducted extensive earth disturbance activities without an NPDES permit, without approved E&S plans, and without installing proper controls designed to protect the environment. The issues listed in Angino's appeal are heavily factual in nature, and the Board's findings have abundant support in the record. Regardless of Angino's legal theories, the facts are simply not there to support them. Angino argues, for example, that the earth disturbance activities along Straw Hollow Road did not require an NPDES permit or approved E&S plans. There is significant record evidence, however, showing that the earth disturbance activities along Straw Hollow Road were part of a larger common plan of development that

involved five or more acres of earth disturbance over the life of the project. Based on that factual finding, not likely to be reversed on appeal, there is no question that an NPDES permit and an approved E&S plan were required. 25 Pa. Code §§ 102.4(b) and 102.5(a). Similarly, the Board found that Angino's activities within the so-called Boy Scout Tract did not constitute the sort of timber harvesting activities that fall within an exception to the permit requirement. 25 Pa. Code §§ 102.1 and 102.5. Again, Angino is not raising cutting-edge legal arguments that could go either way; rather, he simply seems to be attempting to relitigate the facts. Where, as here, there is substantial record evidence establishing Angino's violations, the Commonwealth Court is likely to uphold the Board's decision on appeal. *See Tire Jockey Service, Inc. v. DEP*, 915 A.2d 1165, 1185 (Pa. 2007) (Board decision shall be upheld unless the findings of fact necessary to the adjudication are not supported by substantial evidence); *Groce v. DEP*, No. 2355 C.D. 2006, slip op. at 30 (Pa. Cmwlth. Ct. April 11, 2007) (Board decision upheld when there was substantial record evidence to support findings).[1]

Angino argues that a stay of the $21,000 civil penalty will not substantially harm the Department or the Commonwealth because "$21,000 is a tiny fraction of the budgets of these large organizations." As the Department correctly points out, the relative value of a civil penalty payment compared to the operating budget of the Department is not indicative one way or the other of injury to the public. Absent hardship to the appellant, not even alleged here, or appropriate bonding arrangements, not requested or proposed here, appeals from penalty assessments should generally be on the appellant's dime, not the public's.

Accordingly, we issue the following Order.

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[1] It is worth noting that a large portion of the assessed civil penalty does not even seem to be the subject of Angino's appeal. More than 50 percent of the civil penalty was assessed for Angino's failure to install best management practices, which should have been installed regardless of whether a permit was required. 25 Pa. Code § 102.4(b)(1).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2003-004-CP-L**
RICHARD C. ANGINO, ESQUIRE, KING DRIVE CORPORATION, and SEBASTIANI BROTHERS	:	

ORDER

AND NOW, this 10th day of May, 2007, it is ordered that Richard C. Angino and King Drive Corporation's application to stay the imposition of civil penalties while the matter is on appeal to the Commonwealth Court is denied.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: May 10, 2007

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DAVID A. PEKAR	:	
	:	
v.	:	**EHB Docket No. 2005-195-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NUANGOLA BOROUGH, Permittee, and MIRIAM ADDOMS, et al, Intervenors	:	**Issued: May 10, 2007**

OPINION AND ORDER GRANTING JOINT MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Judge

Synopsis:

In an appeal from the Department's approval of a Borough's Act 537 Plan calling for the construction of a central sewage collection system to meet its sanitary sewage needs, the Board grants the Joint Motion for Summary Judgment filed by the Department and the Intervenors on the grounds that the Appellant has failed to show by his late filed letter response to the motion that he has admissible evidence to support the objections raised in his notice of appeal. In addition, the Appellant has failed to act on the additional opportunity given him by the Board to demonstrate that he has any such admissible evidence. Accordingly his motion for an extension of time to file such a response is denied.

Procedural Background

Before the Board is a joint motion for summary judgment (Joint Motion) by the

Department of Environmental Protection (DEP or Department) and the Intervenors which seeks to dismiss the appeal of David A. Pekar (Mr. Pekar or Appellant). Mr. Pekar's appeal was filed on June 13, 2005 and challenged the Department's May 13, 2005 approval of the Nuangola Borough's Act 537 Plan which provides for the construction of a centralized sewage collection system within the Borough.

The Joint Motion was filed on December 15, 2006 and argues that the Appellant lacks sufficient evidence to support the claims in his notice of appeal and the objections raised by the Appellant require expert testimony, to which no expert testimony was identified by the Appellant. The Appellant, who has proceeded with this appeal *pro se*, failed to respond to the Joint Motion within thirty days, as provided by the Board's Rule 1021.94a(f).[1] On January 29, 2007, after the thirty day response period had run and no response was received from Mr. Pekar, this Board issued a rule to show cause why the appeal should not be dismissed for failure to respond to the Joint Motion. The rule was returnable to the Board on February 20, 2007.

On February 20, 2007 the Department and Intervenors filed a response with the Board requesting that the material facts in the Joint Motion be deemed admitted pursuant to Section 94a(f) and summary judgment be granted in their favor pursuant to Section 94a(h) of the Board's rules.[2] The Appellant responded to the rule to show cause on February 21, 2007 via letter requesting that the appeal not be dismissed and the Joint Motion be denied.[3]

The Appellant's letter responding to the rule to show cause merely requested the Board to

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[1] 25 Pa. Code § 1021.94a(f) ("Within thirty days of the date of service of the motion, a party opposing the motion shall file a brief containing a responding statement either admitting or denying . . . the facts in the movant's statement and discussion of the legal argument in opposition to the motion.") *Id.*

[2] Joint Response of the Department and Intervenors to the Board's Rule to Show Cause, *citing* 25 Pa. Code § 1021.94a(f), 1021.94a(h).

[3] Letter from David A. Pekar of February 19, 2007.

deny the Joint Motion and provides a general recitation of his objections to the Department's approval of the Act 537 Plan. On April 4, 2007 the Board deferred ruling on the Joint Motion, and again gave the Appellant an opportunity to file an appropriate response to the Joint Motion by April 20, 2007.[4] On April 20, 2007 the Appellant did not file a response, but instead filed a letter requesting an extension of time to file his response to the Joint Motion until May 21, 2007.[5] In light of the Board's rules on responding to motions for summary judgment, as well as the Appellant's ample opportunities to respond, the Board grants the Joint Motion for Summary Judgment and dismisses the appeal.

Factual Background

The objections raised in Mr. Pekar's notice of appeal contend: the Borough failed to consider alternatives to the centralized sewer system; the estimated cost of $59 to $60 per month for the system is excessive; the cost to hook up the centralized system is unknown; the Act 537 Plan does not give consideration to any blasting that may occur in constructing the system; the Act 537 Plan unfairly burdens the residents of the Borough; the sanitary survey conducted in connection with the Act 537 Plan is unreliable; funding for the construction of the sewer system is not feasible; and construction of the public sewer system will render the Borough bankrupt.[6] During the discovery phase of this litigation, the Intervenors propounded their first set of interrogatories and a request for admission on the Appellant on July 12, 2006.

After receiving Mr. Pekar's responses to discovery the Department and Intervenors filed this Joint Motion. The Joint Motion states that Mr. Pekar bears the burden of proof at trial and it is

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[4] Board Order of April 4, 2007.

[5] On April 20, 2007 Mr. Pekar filed a Motion for Leave for Extension of Time to Respond. Subsequently, on April 30, 2007, the Department submitted a Joint Response to Appellant's Motion for Leave for Extension of Time to Respond.

[6] Notice of Appeal, ¶¶ 1-6, 8, 9.

his obligation to prove his claims and prove the Department's action was unreasonable, inappropriate or not in accordance with the law.[7] The Department and Intervenors argue that Mr. Pekar has not provided sufficient evidence, including required expert testimony, to support the allegations in his appeal.[8]

Opinion

While the Appellant in this proceeding bears the burden of proving the facts on which the objections contained in his notice of appeal are based, it is plain from the motion for summary judgment that he has presented no such evidence despite many opportunities to do so. First, he has presented no expert testimony on technical issues where such testimony is clearly required. Secondly, we agree with the Department's and Intervenors' contention that the allegations in Mr. Pekar's appeal require expert testimony in the areas of "engineering, sewer planning, sewage systems funding, economics, hydrogeology and blasting."[9]

Alternatives to the Centralized Sewer System

Mr. Pekar's objection that other alternatives to the centralized system cannot be sustained. Mr. Pekar's response to the interrogatories, when asked to provide information on the possible alternatives to the centralized sewer system, identified CromaGlass Systems and Suburban Wastewater Company as alternatives to the centralized sewer.[10] Although he

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[7] Joint Motion, ¶ 7, *citing* 25 Pa. Code § 1021.122(c)(2); *Bruce C. Jackson v. DEP*, 2005 EHB 496, 499, n. 6.

[8] Joint Motion, ¶¶ 8, 11.

[9] Brief in Support of Joint Motion, p. 8.

> The Brief states, ". . . Paragraph 1 of his June 20, 2005 letter deals with sewage planning and sewage treatment or disposal alternatives; Paragraphs 2, 3, 5, 8 and 9 deal with economics of sewage planning, including cost and funding issues; Paragraph 4 deals with blasting and hydrogeology; and Paragraph 6 deals with the condition of existing systems and sewage planning. *Id.*

[10] Joint Motion for Summary Judgment Exhibit (Joint Motion Ex.) F, Interrog. 3.

identified two systems, he failed to identify which alternative would be most suitable and beneficial.[11] The Department and Intervenors point out that under the Department's Sewage Planning Regulations, the system selected does not have to be the "best alternative", "it must simply be acceptable from a technical, environmental and administrative standpoint."[12] The Department and Intervenors further provide that the selection of an alternative is not the Department's responsibility, rather it is the municipality who ensures the plan adequately address the sewage disposal needs within the area.[13]

Costs & Funding of the Centralized Sewer System

Mr. Pekar's appeal also objects to the costs and funding of the project. However, Mr. Pekar failed to provide estimated costs of the project and comparative costs for his suggested alternative systems in his discovery responses.[14] The Joint Motion asserts that the consideration of costs is not beyond the purview of the Department, but that the Department's review is whether the plan is "able to be implemented" or is "feasible to implement".[15] Mr. Pekar again fails to provide any evidence that the centralized sewer system will not be able to be implemented or feasible to implement, nor does he provide any evidence of the estimated costs to the residents or Borough for installing the selected sewer system. In fact, Mr. Pekar responded that "I do not have cost estimates available[.]"[16] and "I do not have the expertise to comment on the estimated project costs."[17] The Joint Motion also points out that "private costs of this nature

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[11] *Id.*

[12] Brief in Support of Joint Motion (Brief in Support), p. 11, *citing* 25 Pa. Code § 71.21(a)(6), *Don Noll and Stephanie Clark v. DEP*, 2004 EHB 712, 722.

[13] Brief in Support, p. 11, *citing James Gilmore v. DEP*, 2006 EHB 679, 690.

[14] Joint Motion Ex. F, Interrogs. 3; 5.

[15] Brief in Support, p. 12, *citing Don Noll and Stephanie Clark*, 2005 EHB 505, 516-21; 25 Pa. Code §§ 71.32(d)(2), 71.61(d).

[16] Joint Motion Ex. F, Interrog. 4(c).

[17] Joint Motion Ex. F, Interrog. 5.

are not specifically considered for each individual homeowner as part of the Department's review of Act 537 Plans."[18] Additionally, Mr. Pekar did not provide or identify any evidence regarding his allegation that the Act 537 Plan unfairly apportions the burden on the residents and funding the construction of the sewer system will render the Borough bankrupt.

Blasting Concerns

Mr. Pekar's appeal also objects to the blasting and the potential impacts on the wells, he provides, "[m]ost areas will have to blast to get down 7!/2 feet (sic). What will happen to our wells? A well digger told me this type of rock could shift causing major problems-no water! Who will be responsible if this happens??"[19] However, Mr. Pekar has not provided any expert opinion on whether the project requires blasting, or whether blasting would have any material adverse impacts.

Sanitary Survey

The Act 537 Plan contains summaries of the survey which suggests that the only types of sewage facility to use are individual on-lot systems.[20] In Mr. Pekar's notice of appeal he alleged that the sanitary survey performed in the Borough was "problematic" and he needed to see "proof on septic system".[21] In the request for admissions, Mr. Pekar was unable to support his allegation that the sanitary survey is unreliable or how he planned to show the survey was flawed.[22]

Lay and Expert Witnesses

Lastly, the discovery propounded on Mr. Pekar asked him to identify the witnesses he intended to call and for what purpose they are testifying, he provided:

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[18] Brief in Support, p. 13.
[19] Notice of Appeal, ¶ 4.
[20] Joint Motion Ex. B, 8.
[21] Notice of Appeal, ¶¶ 5, 6.
[22] Joint Motion Ex. H, Nos. 17-27.

> I expect to call past and present members of Council, Sewer Authority members, employees of DEP, and Dr. Calabro.
>
> As well, he generally identified their testimony in the following manner: "Council Authority members will be asked to aver facts concerning adoption of the 537 Plan, and other related planning issues surrounding implementation of the plan. Authority members will be questioned on the scope of the project and funding issues. Dr. Calabro will be asked to testify on the Growing Greener study of the lake, and the water survey.[23]

As for his response to expert witnesses and the facts and opinions expected to be testified to, the only expert identified by Mr. Pekar is Joseph F. Calabro. Mr. Pekar provided, "Joseph F. Calabro. Ph.D of Aqua-Tech Laboratory, address unknown. Employed by Aqua-Tech Laboratory. Ph.D. The quality of Lake Nuangola, The protocols of the water study. That Lake Nuangola is a healthy body of water."[24] Nothing further was provided regarding experts and their opinions to support his allegations in his notice of appeal.

The Board recognizes that many of the objections, if not all, require expert testimony. With discovery completed in this appeal, it appears that Mr. Pekar has not presented a prima facie case and will not be able to meet his burden of proof at the hearing stage of this matter. The Board finds that the Department and Intervenors have sufficiently supported their Joint Motion.

The failure of the Appellant to respond to the motion for summary judgment citing evidence of record that indicates that he might be able to meet his burden of proof at the hearing on the merits of his appeal is fatal under both the Pennsylvania Rules of Civil Procedure and the Board's Rules of Practice and Procedure.

In accordance with the Board's rule, 25 Pa. Code Section 94a(f), a respondent is to file a response within 30 days and Mr. Pekar, to this day, has not done so. The only response to the Joint Motion was after a rule to show cause was issued and that came in the form of a letter

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[23]Joint Motion Ex. F, Interrog. 9.

generally requesting the Joint Motion be denied. Section 94a(f) requires that Mr. Pekar file a brief containing a responding statement either admitting or denying each fact and to provide a discussion of the legal arguments that oppose the Joint Motion. Mr. Pekar's letter does not come close to doing that. Since the Department and Intervenors have sufficiently supported their Joint Motion to show that Mr. Pekar is unable to establish a prima facie case and he has not responded in the appropriate manner, Section 94a(f) authorizes us to deem admitted all material facts in the movant's statement which are sufficiently supported for the purpose of the motion.[25]

Under Rule 1035.2(2) of the Pennsylvania Rules of Civil Procedure an award of summary judgment is proper when a party bearing the burden of proof has failed to show by evidence of the record or by affidavits that he has evidence of facts showing that there is a genuine issue for trial.[26] Mr. Pekar may not rely merely on assertions in the notice of appeal or conclusory statements in his correspondence, but must show that he is able to produce admissible evidence in support of his objections.[27] He clearly has failed to show that he has any such evidence.

We will also deny Mr. Pekar's motion for a further extension of time to respond to the

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[24] Joint Motion Ex. F, Interrog. 10.

[25] "A party may not rely on mere allegations or denials . . . if a party does not respond, summary judgment may be entered against the adverse party." 25 Pa. Code § 1021.94a(h); *Earthmovers Unlimited, Inc., v. DEP*, 2004 EHB 165 (The Board entered summary judgment against the appellant for failing to respond. The Board stated that an adverse party may not rest on mere allegations or denials alone.); *see also Ertel v. Patriot News Co.,* 674 A.2d 1038 (Pa. 1996) (Appellee filed suit against appellants for defamation. Appellant newspaper and appellant investigator filed a motion for summary judgment. The court held non-moving parties cannot rest on mere allegations or denials. They need to have enough evidence to support an issue on which they bear the burden of proof. The Court found that the Appellant did not offer evidence to support his suit of defamation, therefore, there was no genuine issue of material fact. The newspaper was entitled to summary judgment as a matter of law). *Id.* at 1043; Pa.R.C.P. 1035.

[26] Pa.R.C.P. 1035(2); *Kleinberg v. SEPTA,* 765 A.2d 405, 408 (Pa. Comwlth. 2000); *Bruce C. Jackson v. DEP*, 2005 EHB 496, 499.

[27] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (U.S. 1986).

Joint Motion for Summary Judgment. This litigation has already been unduly prolonged by Mr. Pekar's refusal to abide by the Board's orders and its Rules of Practice and Procedure. In April of last year he and other appellants were ordered to obtain joint counsel on pain of dismissal of their appeals. Mr. Pekar refused to do this on a plea of inadequate financial resources. The Board did not dismiss his appeal then out of sympathy for his position, but warned him that if he continued to represent himself he did so at great risk. He has had four months since the motion for summary judgment was filed to produce evidence in support of his claims. His failure to respond adequately to the motion even after the Board gave him additional leave to file an additional response may not be excused regardless of his plea of conflict with professional or personal matters. The Borough is entitled to move forward with its plan to meet the Borough's sewage needs, and this litigation must now come to an end.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID A. PEKAR	:	
	:	
v.	:	**EHB Docket No. 2005-195-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NUANGOLA BOROUGH, Permittee, and MIRIAM ADDOMS, et al, Intervenors	:	**Issued: May 10, 2007**

ORDER

AND NOW, this 10th day of May, 2007, the Appellant's request for an extension of time to file a response to the Joint Motion for Summary Judgment is **denied**. It is further ordered that the Department's and Intervenors' Joint Motion for Summary Judgment in the above-captioned appeal is hereby granted and this appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chief Judge and Chairman

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: May 10, 2007

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

For the Commonwealth, DEP:
Sean L. Robbins, Esquire
Northeastern Regional Counsel

For the Appellant *pro se:*
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For Intervenors:
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WETZEL, CAVERLY, SHEA
PHILLIPS & RODGERS
15 Public Square, Suite 210
Wilkes-Barre, PA 18701

Rodney L. Kaiser, Esquire
96 Mercedes Drive
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

HERITAGE BUILDING GROUP, INC.	:	
	:	
v.	:	**EHB Docket No. 2006-072-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WARWICK TOWNSHIP, CHESTER COUNTY, Intervenor	:	**Issued: May 16, 2007**

ADJUDICATION

By George J. Miller, Judge

Synopsis

In an appeal from the Department's denial of a land developer's private request to order a municipality to implement its Act 537 Plan, the Board finds that the Department failed to exercise its independent judgment in evaluating whether or not the municipality's Act 537 Plan is not being implemented or is inadequate to meet the land developer's sewage disposal needs. Accordingly the Board will remand the appeal to the Department to fully consider whether the municipality's plan as it is being interpreted by the municipality is inadequate to meet the developer's sewage disposal needs.

Background

This matter is an appeal from a Department letter dated January 30, 2006, which denied a private request by Heritage Building Group. That request sought an order from the Department to Warwick Township in Chester County to either revise or implement its Act 537 Plan to allow Heritage's selected alternative for sewage disposal. Heritage alleged,

among other things, that the Township's insistence that the alternatives analysis in the planning module was incomplete was unreasonable and amounted to a failure to implement its Act 537 Plan. In Heritage's view it had successfully demonstrated that the Township's preferred alternative, spray irrigation, was not a feasible means of sewage disposal for the Property because Heritage was required by the U.S. Fish and Wildlife Service to provide sufficient groundwater recharge to protect an area of bog turtle habitat that was present on the property.

A two day hearing was held on February 5 and 6, 2007, before the Honorable George J. Miller. That hearing generated a transcript of 443 pages and 50 exhibits. The parties also agreed to an extensive stipulation of facts which was admitted into evidence as Board Exhibit 1. The parties filed post-hearing briefs which included proposed findings of fact, conclusions of law and legal analysis in support of their positions.[1] After full review and consideration of these materials, we make the following:

FINDINGS OF FACT[2]

1. The Appellant, Heritage Building Group (Heritage), a Pennsylvania Corporation, is the owner of approximately 114 acres of land located at the southwest corner of Ridge and Bulltown Roads (Property) in Warwick Township, Chester County, Pennsylvania (Township). (Stip. ¶ 1)

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[1] The last brief was filed with the Board on May 2, 2007.

[2] The parties entered into a factual stipulation which was admitted into evidence as Board –1. It is cited as "Stip ¶ ___. The Appellant's exhibits are designated as "Ex. H-__; the Township's as Ex. W-__; and the Department's as "Ex. C-__." The notes of testimony are cited as "N.T.".

2. On September 26, 2002, Heritage submitted to the Township a preliminary subdivision and land development application (Preliminary Application) to subdivide the Property to create 47 lots and to construct 46 new single-family homes, retaining one existing residence (Proposed Development). This application was approved by the Township in October 2003. (Stip. ¶ 8; Tressler, N.T. 21)

The Township's Act 537 Plan and Consideration of the Appellant's Planning Modules

3. In 1991, Warwick Township, a township of the second class, adopted a Wastewater Facilities Management Plan (Act 537 Plan), which was subsequently revised in 1993 and 1999. The most recent amendment to the Act 537 Plan was approved by the Department on June 13, 2000. (Stip. ¶ 2)

4. The Plan provides for nine types of community disposal technologies which are appropriate. These technologies are listed in the plan in order of preference. An applicant is directed to evaluate the technologies in the order listed. If an alternative is approved by the Township, the applicant need not consider technologies which are lower in the list. The technologies provided for in the Plan are:

a. Lagoon/pond system/SRLA[3]

b. Community aerobic unit/slow rate land application (i.e. spray irrigation)

c. Community septic tank with sand filter to sub-surface disposal

d. Community aerobic unit with sand filter to sub-surface systems

e. Community tertiary treatment with discharge to groundwater

[3] Slow rate land application, also known as spray irrigation.

f. Community aerobic treatment unit with spray irrigation of treated effluent in summer months and stream discharge of treated effluent in winter months

g. Community aerobic system with sand filter to stream discharge

h. Transport to existing wastewater treatment plant

i. Central Holding tank

(Ex. H-11)

5. The Property is not served by public water. Accordingly, each lot will be provided with water from an individual on-lot well. Similarly, the Property is not located in an area designated for public sewer. As such, Heritage must provide on-site sewage treatment and disposal. (Stip. ¶¶ 3, 4)

6. Additionally, nitrate levels in the groundwater for the property exceed 10 mg/l, the Department's drinking water standard. Accordingly, additional levels of nitrate can not be introduced by any method of sewage disposal and any proposal for sewage disposal must reduce nitrates. (Lane,[4] N.T. 118; White,[5] N.T. 180)

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[4] Michael Lane is a senior soil scientist with Brickhouse Environmental, formerly Walter B. Satterwaite and Assoc. He is a certified soil scientist and sewage enforcement officer. He has prepared or participated in the preparation of at least 100 planning modules for residential development. He was admitted by the Board as an expert in soil science and sewage facility planning. (N.T. 95-105; 110; Ex. H-10)

[5] Paul White is the director of operations and vice president of Brickhouse Environmental. He is a professional geologist licensed in Pennsylvania and Delaware with a specialization in hydrogeology. He is especially knowledgeable in the area of mass nitrate studies and has performed at least 50 such studies in the last four years and has made presentations on this topic. He was admitted by the Board as an expert in geology and hydrogeology. (N.T. 155-175; 176; Ex. H-13)

7. The Township prefers lagoon treatment and spray irrigation discharge with crop management uptake as the community wastewater system to be used on the Property (Township's Preferred Alternative). (Stip. ¶ 7)

8. The selected alternative proposed by Heritage for the Property is on-site community wastewater system consisting of: (a) a mechanical sewage treatment plant on the Property that employs a tertiary treatment process; and (b) discharge of the treated effluent through a sand filter and into subsurface trenches to maximize groundwater recharge (Selected Alternative). (Stip. ¶ 6)

9. On September 26, 2002, Heritage submitted to the Township a Sewage Facilities Planning Module (Planning Module) requesting that the Township revise and/or implement the Act 537 Plan to permit the installation of the Selected Alternative. (Stip. ¶ 6)

10. On March 11, 2003, June 5, 2003, and August 13, 2003, Heritage submitted revised versions of the Planning Module to the Township. The Township reviewed the revised versions of the Planning Module and found them incomplete and so notified Heritage. (Stip. ¶ 9)

11. On January 6, 2005, Heritage submitted to the Township a revised Planning Module dated December 2004, prepared by Walter B. Satterthwaite Associates, Inc. (WBSAT) and signed by Paul White, P.G. and Michael Lane. (Stip. ¶ 10)

12. On March 1, 2005, the Township rejected the revised Planning Module as incomplete and inconsistent with the Act 537 Plan. (Stip. ¶ 12)

13. On March 10, 2005, Patrick C. O'Donnell, Esquire, the Township Solicitor, informed Heritage and its counsel, in writing, that the Township rejected the Planning Module. (Stip. ¶ 13)

14. The letter stated that the planning module was rejected because the Selected Alternative was inconsistent with the Township's Act 537 Plan because it failed to demonstrate that the Township's preferred method of sewage disposal could not be implemented at the Property. (Ex. W-3)

15. Additionally, the Township found that the module was incomplete for the reasons articulated by Castle Valley Consultants in their report. (Ex. W-3)

The Department's Review

16. On August 19, 2005, Heritage submitted a Private Request to the Department requesting that the Department: (i) approve the Planning Module; (ii) order the Township to implement or revise its Act 537 Plan to permit use of the Selected Alternative; and (iii) determine that the Sewage Facilities Management Act preempts the Township from dictating the type or method of community sewage treatment and disposal system that is to be used in connection with the Proposed Development on the Property. (Stip. ¶ 14)

17. The private request was primarily reviewed by Kelley Sweeney. However, since she was relatively new in her position, she was heavily supervised by Clinton Cleaver, a sewage planning specialist supervisor for the Department. (Cleaver, N.T. 263)

18. The Department's review focused on evaluating whether the Township was implementing its Act 537 Plan or whether the Plan was adequate to meet the applicant's needs. (Cleaver, N.T. 263)

19. Mr. Cleaver has no scientific background. Mr. Cleaver holds a bachelor's degree and a master's degree in theater. He has worked for the Department for 13 years in the sewage program. He has been a sewage planning specialist supervisor for four years. (N.T. 260-62; 275)

20. Therefore, he relied on the review of other Department personnel to conclude that the private request was inconsistent with Department regulations. (N.T. 271-72; 275)

21. He also concluded that the private request was not consistent with the Township's Act 537 Plan because the Township's Preferred Alternative, spray irrigation, was not adequately considered. He relied on the Township's input to reach that conclusion. (N.T. 271-73, 282)

22. He made no investigation to determine the truth of the Township's statement that the entire 62 acres of open space were available and adequate for a spray irrigation system. (N.T. 283)

23. The Department's denial letter was signed and authorized by Jenifer Fields, the Department's Water Program Manager for the Southeast Region. (N.T. 84, 93)

24. While Mr. Cleaver testified that he read the Appellant's alternative analysis, he apparently failed to tell Ms. Fields anything about it. (Cleaver, N.T. 275-76)

25. Ms. Fields did nothing to determine whether the statements made in the denial letter presented to her for signature were true and accurate. (N.T. 85-86)

26. Ms. Fields did not review the Township's Act 537 Plan or the Appellant's alternatives analysis before signing the denial letter. (N.T. 86)

27. On January 30, 2006, the Department denied Heritage's Private Request. (Stip. ¶ 15; Ex. H-4)

Heritage's Alternatives Analysis and Selected Alternative

28. The Property includes several areas that are generally unsuitable for locating sewage facilities, including a cathodic bed area, stormwater detention basins, an existing pond and an area of steep slopes. (Lane, N.T. 140-41; Tressler, N.T. 23-32; *see also* Cleaver, N.T. 284; Ex. H-1)

29. Heritage also cannot place sewage facilities within 300 feet of the delineated bog turtle habitat. This area is referred to as the bog turtle buffer zone (Tressler, N.T. 23; Dudley, N.T. 406; Ex. H-1; Cleaver, N.T. 284)

30. Additionally, nitrate levels in the groundwater for the property exceed 10 mg/l, the Department's drinking water standard. Accordingly, additional levels of nitrate cannot be introduced by any method of sewage disposal. (Lane, N.T. 118; White, N.T. 180)

31. Although there were several environmental factors that had to be considered in designing a sewage system for the property, the two most pressing issues that had to be addressed in choosing a method of sewage disposal were the elevated nitrate levels and preserving the bog turtle habitat. (Lane, N.T. 117-18; White, N.T. 194)[6]

32. Maximizing groundwater recharge is a stated policy in the Township's Act 537 Plan. (Lane, N.T. 125; Ex. H-11 at 11)

33. Mr. Lane, the Appellant's consultant, considered the methods provided in the Plan in order of preference in order to prepare the alternatives analysis. He also considered the policies articulated by the Township in the Plan. (N.T. 119)

[6] See Findings of Fact below relating to the bog turtle habitat.

34. He testified that the only feasible option for the Property is the selected method of tertiary treatment with subsurface discharge. This alternative is a combination of two accepted technologies listed in the Township's Act 537 Plan. (Lane, N.T. 120, 135-36)

35. In Mr. Lane's and Mr. White's opinion, none of the other technologies listed in the Township's Act 537 Plan are suitable for the site. (Lane, N.T. 136; White, N.T. 210)

36. Mr. Lane testified that Technology A, lagoon treatment with spray irrigation, was not a good alternative for the site, because lagoons will not remove nitrogen from the wastewater sufficient to meet the drinking water standard for groundwater. Further, spray irrigation does not return sufficient groundwater recharge to maintain the bog turtle habitat. (Lane, N.T. 125)

37. Mr. Lane testified that Technology B, an aerobic unit with spray irrigation, is unacceptable because it will not remove nitrates from the wastewater. (Lane, N.T. 133)

38. Mr. Lane testified that Technology C, a septic tank with subsurface disposal, is also unacceptable because it will not remove sufficient nitrates from wastewater. Similarly, an aerobic unit with subsurface disposal (Technology D), will not effectively remove nitrates. (Lane, N.T. 133-34)

39. Mr. Lane testified that Technology E, tertiary treatment with a discharge to groundwater alone, is unacceptable because Department regulations no longer permit the direct discharge of wastewater to groundwater. (Lane, N.T. 135)

40. Accordingly, in both Mr. Lane's and Mr. White's opinions, the chosen alternative, tertiary treatment with subsurface disposal, which is a combination of Technologies D and E, was the only feasible alternative which would address both the

removal of nitrates and also maximize the recharge of groundwater. (Lane, N.T. 120,135-36, 143; White, N.T. 196-97; 210)

41. The Selected Alternative was different from the other technologies because the tertiary treatment plant is the only listed technology that would adequately denitrify the wastewater. The subsurface disposal component of Technology D is the technology that will maximize groundwater recharge. (White, N.T. 193-94)

42. The U.S. Fish and Wildlife Service (FWS) expressed a concern that a withdrawal of water from the aquifer out of the drinking water wells in the proposed development may cause a habitat problem for the bog turtle, because the turtles like an upwelling of groundwater to loosen material for burrowing and hibernation. (White, N.T. 189)

43. This meant that groundwater recharge is a critical concern in designing a method of sewage disposal for the site. (White, N.T. 194)

44. Accordingly, Mr. White prepared a simple water balance study and concluded that of the water withdrawn from the wells, about 85% would be recharged through the subsurface disposal system. (White, N.T. 189-90)

45. However, further study was necessary to make sure that the recharge would reach the bog turtle habitat. (White, N.T. 192)

46. Mr. White consulted with Dr. Brannica of the FWS, visiting the site with him and consulting with him to design the studies necessary to demonstrate that groundwater recharge would be maximized. (White, N.T. 200)

47. By letter dated May 9, 2005, the FWS informed the Appellant that it was satisfied that the proposed system, a tertiary treatment system with a subsurface trench

system located on the high ground that slopes towards the bog turtle habitat, was sufficient to protect the turtle's habitat. (White, N.T. 201-203; Ex. H-14)

48. The FWS has not expressed a position regarding spray irrigation and its impact on the bog turtle habitat. (White, N.T. 230)

49. The geologic conditions at the site are suitable for subsurface disposal. (White, N.T. 188)

50. The Township's expert, Gary Weaver,[7] explained that a properly designed spray field coupled with a nutrient and crop management plan could manage nitrate levels at the site. (Weaver, N.T. 389-92)

51. Mr. Weaver could offer no opinion on the impact of a spray irrigation system on the bog turtle habitat. (N.T. 392)

52. Although crop management is often used successfully in conjunction with spray irrigation to address the denitrification of wastewater, both Mr. White and Mr. Lane testified that crop management is antithetical to maximizing groundwater recharge. Specifically, crops are grown during the summer months (March through October) to take up wastewater and nitrogen, which the plants use as fertilizer. Recharge is therefore maximized during the winter by the Appellant's Selected Alternative, but wastewater can not be sprayed and crop management will not be effective in the winter because there are no plants growing and the ground is frozen. (Lane, N.T. 129-32; White N.T. 217-18)

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[7] Gary Weaver is a principle of Castle Valley Consultants. He holds a bachelor's degree in mechanical engineering technology and has done some graduate work. He has designed lagoon treatment systems for sewage disposal and some mechanical treatment plants. He was admitted by the Board as an expert in the design and installation of wastewater treatment systems. (N.T. 377-81; 385; Ex. W-6).

53. In Mr. Lane's opinion, spray irrigation and crop management will not sufficiently recharge the groundwater because water is lost through transpiration when wastewater is sprayed into the air or is taken up by the crops and later transpired through the plants. (N.T. 132; White, N.T. 219)

54. Mr. White consulted a variety of sources and estimated that with a spray irrigation system of wastewater disposal, about 80 percent of wastewater generated would be available for groundwater recharge. (White, N.T. 216)

55. He characterized this estimate as conservative. A spray irrigation system can lose water by evaporation and other factors. It is difficult to quantify what the water loss might be from a particular spray system. (White, N.T. 210-12)

56. He testified that this view is supported by a recent USGS study which estimated that only 30-40% of available water was recharged by spray irrigation. So he felt that even less than 80% might be recharged. (White, N.T. 215-16)

57. The difference in the estimated recharge rates for the Appellant's Selected Alternative and the Township's Preferred Alternative was significant because of the importance of recharge to the bog turtle habitat. (White, N.T. 216)

58. Gary Weaver agreed that the Appellant's Selected Alternative provides greater recharge than spray irrigation with crop uptake, the alternative preferred by the Township. (Weaver, N.T. 388; Ex. W-5)

59. The Department's denial letter notes that the Township's consultant identified 62 acres of open space "which is more than adequate for a lagoon treatment/spray irrigation system . . . ." (Ex. H-4)

60. Mr. Lane disagrees that there are 62 acres of open space, because the 62 acres of open space includes the bog turtle buffer zone, high-water table zone, cathodic bed area, detention ponds, and existing pond and an area of steep slopes. (Lane, N.T. 140; *see also* Tressler, N.T. 32; Ex. H-1)

61. Further, Mr. Lane believed that, given the opportunity, he could address the technical comments raised by the Department related to sewage disposal. In his experience with other applications, it would not be necessary to resubmit the entire private request application. (N.T. 142; H-4)

62. In his experience, it is not unusual to receive technical comments concerning a proposal for sewage disposal from the Department that would require a response. (Lane, N.T. 142)

63. Mr. Lane further stated that none of the Department's technical comments which related to sewage system design or soils testing would be difficult to address. (Lane, N.T. 143)

64. Mr. White testified that the technical comments relating to hydrology could be addressed without resubmitting the entire private request. (N.T. 223)

65. Specifically, some of the technical deficiencies noted by the Department are related to a photocopying error. When the private request was assembled, the 11 inch by 17 inch drawings and other site figures were not completely copied. Therefore, those deficiencies could be addressed by submitting a complete copy of that data. (White, N.T. 224; 233-34)

66. Further, none of the technical comments relate to a major issue. Rather the Department apparently did not fully understand the study protocols or values used for

certain calculations. These issues could be clarified with a letter attaching a few more figures and complete copies of the original drawings. (White, N.T. 225)

67. Mr. Lane also did not agree with the opinion of Castle Valley Consultants that the planning module was incomplete. The alternatives analysis is the most lengthy that he's ever done. His analysis included maintenance and operations costs for the Selected Alternative. He further believes that he followed the instructions in the Township's Act 537 Plan and that the Selected Alternative is consistent with that plan. (N.T. 136-39)

DISCUSSION

The Board conducts hearings *de novo* to determine whether the departmental action in dispute is supported by the evidence, and a proper exercise of authority.[8] The Board's *de novo* authority allows it to consider evidence that was not before the Department when it made its initial decision.[9] Upon appeal of discretionary departmental actions, the Board may substitute its own discretion for that of the Department and make its own conclusions, rather than relying on the facts which were before the Department.[10] The Board is not required to substitute its discretion.[11] The Board's power to substitute its discretion for that

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[8] *Pennsylvania Trout v. Department of Environmental Protection*, 863 A.2d 93 (Pa. Cmwlth. 2004); *Browning-Ferris Industries, Inc. v. DEP*, 819 A.2d 148 (Pa. Cmwlth. 2003); *Leatherwood, Inc. v. DEP*, 819 A.2d 604 (Pa. Cmwlth. 2003); *Borough of Edinboro v. DEP*, 2003 EHB 725, *aff'd,* 2696 C.D. 2003 (Pa. Cmwlth. filed June 23, 2004); *Smedley v. DEP*, 2001 EHB 131; *Leeward Construction, Inc. v. DEP*, 2000 EHB 742, *aff'd*, 821 A.2d 145 (Pa. Cmwlth. 2003); *see O'Reilly v. DEP*, 2001 EHB 19.

[9] *O'Reilly v. DEP*, 2001 EHB 19; *Grand Central Sanitary Landfill, Inc. v. DER,* 1993 EHB 357; *Hrivnak Motor Co. v. DER,* 1993 EHB 432. *See also Conners v. DEP,* 1999 EHB 669.

[10] *Pequea Township v. Herr,* 716 A.2d 678 (Pa. Cmwlth.1998); *Environmental & Recycling Services, Inc. v. DEP,* 2002 EHB 461; *Conners v. DEP,* 1999 EHB 669.

[11] *DEP v. City of Philadelphia*, 692 A.2d 598 (Pa. Cmwlth. 1997); *Warren Sand & Gravel v. Department of Environmental Resources,* 341 A.2d 556, 565 (Pa. Cmwlth. 1975). *See Western Hickory Coal Co. v. Department of Environmental Resources*, 485 A.2d 877 (Pa. Cmwlth. 1984); *Harbison-Walker Refractories v. DEP*, 1996 EHB 116.

of the Department includes the power to modify the Department's action and to direct the Department in what is the proper action to be taken.[12]

In this appeal, the Appellant bears the burden of proof.[13] Accordingly, the Appellant must demonstrate that the Department's decision to deny its private request was not reasonable, supported by the facts or was not in accordance with the law.[14] Under Section 5(b) of the Sewage Facilities Act, it must be demonstrated that the Township is not implementing its Act 537 Plan, or that the existing plan is inadequate to meet the applicant's needs.[15] An Act 537 Plan is inadequate if it fails to afford an individual with a feasible means to address his sewage disposal needs.[16] The private request must include a

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[12] *Pequea Township v. Herr,* 716 A.2d 678 (Pa. Cmwlth. 1998); *Environmental & Recycling Services, Inc. v. DEP*, 2002 EHB 461; *People United to Save Homes v. DEP,* 1999 EHB 457.

[13] 25 Pa. Code § 1021.101(b).

[14] *Gilmore v. DEP*, 2006 EHB 679.

[15] Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. § 750.5(b). Specifically, that section provides:

> Any person who is a resident or legal or equitable property owner in a municipality may file a private request with the department requesting that the department order the municipality to revise its official plan if the resident or property owner can show that the official plan is not being implemented or is inadequate to meet the resident's or property owner's sewage disposal needs. This request may be made only after a prior written demand upon and written refusal by the municipality to so implement or revise its official plan or failure of the municipality to reply in either the affirmative or negative within sixty days or failure of the municipality to implement its official plan within the time limits established in the plan's implementation schedule or failure to revise its official plan within the time limits established by regulation. The request to the department shall contain a description of the area of the municipality in question and a list of all reasons why the plan is believed to be inadequate. Such person shall give notice to the municipality of the request to the department.

[16] *Gilmore v. DEP*, 2006 EHB 679.

list of reasons why the official plan is believed to be inadequate and contain evidence that the plan is not being implemented.[17]

The central question in this appeal is whether the Department properly concluded that the provisions of the Township's Plan were appropriately applied to the Appellant.[18] The Township's selection hierarchy requires an applicant to evaluate the list of technologies "in the order in which they appear." At the point that an alternative is identified "as agreed to by the Township," lower ranked technologies need not be evaluated. In the event that a technology is selected "without demonstrating to the satisfaction of the Township, that all higher ranked technologies are not feasible" the Township will refuse to approve a selected alternative for sewage disposal.[19] The Township thus reserved for itself broadly defined parameters for the approval of a proposed method of sewage disposal. Accordingly, it is proper for the Department to consider whether the Township's evaluation of the spray irrigation analysis may have amounted to either a failure to implement the plan or effectively left the Appellant without a feasible means of sewage disposal for its property.[20]

The Appellant takes the position that the Department blindly deferred to the Township and did not perform a meaningful review of the private request. The Department argues that its review was appropriate because the Appellant failed to adequately consider

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[17] 25 Pa. Code § 71.14; *Yoskowitz v. DEP*, 2006 EHB 342, 350.

[18] *See Gilmore,* 2006 EHB at 687. The Appellant argues that the technology selection hierarchy in the Township's Act 537 Plan contravenes the language and spirit of the Sewage Facilities Act. In response to this argument the Township explains in great detail the history of the selection hierarchy and the development of the Township's Act 537 Plan. We view this argument as a direct attack on the Township's 537 Plan. As such, it is beyond the scope of an appeal of the Department's rejection of the Appellant's private request. *Gilmore; Yoskowitz v. DEP*, 2005 EHB 401.

[19] Ex. H-11 at pp. 18-19.

[20] *Gilmore v. DEP*, 2006 EHB 679.

whether spray irrigation would harm the bog turtle habitat and failed to consider whether or not "construction of [a spray irrigation system] would change or disrupt its record development plans and lot configuration."[21]

It is clear to us that the Department took a very narrow view of its duty to evaluate the private request under 25 Pa. Code § 71.14, and did not completely consider whether the Township's Plan, as interpreted by the Township, really offered the Appellant a feasible means of sewage disposal. A great deal of evidence was offered by the Appellant's experts that spray irrigation did not provide as much groundwater recharge as the Selected Alternative. The Township's consultants offered no opinion about groundwater recharge and the needs of the bog turtle habitat and in fact agreed that the Selected Alternative would provide more recharge than spray irrigation.[22] Yet the Department's lead reviewer did not appear to have engaged into his own inquiry as to whether the Township's interpretation of its Act 537 Plan was tantamount to a failure to provide the Appellant with a feasible means of sewage disposal for the Property. Rather, it appears that Mr. Cleaver simply accepted the Township's view that the alternatives analysis was incomplete, and therefore the Appellant had failed to demonstrate that spray irrigation was not feasible. It appears that the Department failed to consider the alternatives analysis prepared by Mr. Lane and Mr. White contending that spray irrigation is not a feasible means of treatment for the reasons expressed in their testimony. In particular, it does not appear that the Department considered that a spray irrigation system would require a crop management component to denitrify the wastewater, but that crop management conflicts with maximizing groundwater recharge because plants take up water in addition to nitrates.

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[21] Department's Post-hearing Brief at 12.
[22] Weaver, N.T. 388, 392; Ex. W-5.

Further crop management is not a technology specifically listed in the Township's Plan. But Clinton Cleaver testified that he relied on the Township's comments when he reviewed the private request and made the decision that it should be denied.[23] He did not advise Ms. Fields of the contents of the alternatives study because she testified that she considered nothing other than the contents of the denial letter.

To simply defer to the Township without a critical and thorough evaluation of the private request and alternatives is to make the private request process a nullity. While the Sewage Facilities Act places a great deal of responsibility for the sewage planning and approval process upon local governments, the statute also recognizes that there may be circumstances where a landowner may need to seek relief in a more objective forum. Obviously, if the Township had believed that the Appellant's planning module was consistent with the Township's Act 537 Plan, it would have approved the planning module rather than force the Appellant to file a private request with the Department. Therefore, the Department has an affirmative duty under Section 5(b) of the Sewage Facilities Act to make an independent and objective evaluation of the private request and planning module included as part of that request, rather than simply deferring to the Township's view that the proposal is inconsistent with the Plan. The plan which requires the applicant to demonstrate the infeasibility of the preferred alternatives "to the satisfaction of" the Township. The Department may not rely on that phrase as a basis for skirting its responsibilities under Section 5(b).

We are not suggesting that the Department must disregard the Township's review of the planning module and comments on the private request. We are simply holding that

[23] N.T. 271-73, 282.

the Department must conduct an independent and critical review of both the Township's position and the Appellant's analysis to ensure that the Appellant had not been deprived of a reasonable and lawful use of its property because the Township has not provided a feasible means of sewage disposal.[24] At the very least, the issue deserved a more critical look by the Department. Importantly, there is no evidence that the Department considered whether or not the crop management component of an approvable spray irrigation component[25] was antithetical to effective groundwater recharge as explained by the Appellant's experts or was even an appropriate alternative under the Township's Plan.

The Department argues that it correctly denied the private request because there were unresolved technical issues as evidenced by the technical review comments in its denial letter. However, the Appellant's experts explained that none of those comments were substantial defects. Some were related to misunderstandings of the proposal that required simple clarification and others were due to the fact that several pages of the request were accidentally "lopped off" by improper photocopying. No one from the Department rebutted this view. The Department also contends that it was justified in denying the private request because of comments by the Chester County Health Department (CCHD). There was testimony at the hearing which suggested that the health department had approved an earlier, virtually identical proposal by the Appellant, but changed its concurrence at the request of the Township. Mr. Cleaver testified that he took these comments of CCHD into consideration. No witness was offered to comment on

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[24] *Gilmore*, 2006 EHB at 686 ("A municipality can just as easily fail to adequately provide for its residents' sewage disposal needs by creating illegal or unreasonable procedural hurdles as it can by creating illegal or unreasonable substantive limitations.")

[25] Gary Weaver testified that crop and nutrient management is required by the Department as a component of a spray irrigation system. N.T. 403-404.

whether the Department considered whether the health Department's position was well-founded and unbiased.

Given all these circumstances, we believe that it is appropriate to remand this matter to the Department for further consideration. First, it does not appear that the Department gave independent consideration to the Appellant's alternatives analysis. On remand, the Department should consider Mr. White's supplemental recharge analysis and whether any further analysis is reasonably necessary, which may include further consultation with the Fish and Wildlife Service regarding what impact, if any, a spray irrigation system may have on the bog turtle habitat.

Second, it does not seem unreasonable for the Department to provide the Appellant with the opportunity to respond to the technical comments made by the Department in the technical review letter. Both Mr. Lane and Mr. White testified that in their experience, it is the Department's practice to provide such an opportunity because it is not unusual for the Department to require clarification on certain points. This is especially true where data is missing from an application, not because the Appellant failed to do the work, but because photocopies were not made on the correct paper size. There was no testimony from Mr. Cleaver or any other person from the Department that any of the technical comments were serious,[26] nor did any witness dispute the characterization of usual Department practice by Mr. Lane and Mr. White. This supports our view that the Department overwhelmingly relied on the Township's opposition to the Appellant's proposal and did not apply independent judgment in analyzing the requirements of the Township's Plan and how those requirements were applied to the Appellant. Similarly the Department should

[26] In fact, Mr. Cleaver does not have any type of scientific background and conceded that he could offer no opinion on the technical aspects of the private request.

independently consider and evaluate comments of other agencies, such as the county health department in its review of the Appellant's private request.

We do not mean to suggest that the Department must approve the Appellant's private request. It may well be that there are significant technical flaws in the Appellant's proposal or that on further review the Department may determine that spray irrigation with crop uptake is possible without unreasonably or unnecessarily limiting the extent of the Appellant's land development proposal. We are only directing the Department to consider not only the Township's view, but to consider the Appellant's view that its Selected Alternative is the only feasible means of meeting it's waste disposal needs.

CONCLUSIONS OF LAW

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

2. The Board's review is *de novo. Pennsylvania Trout v. Department of Environmental Protection*, 863 A.2d 93 (Pa. Cmwlth. 2004).

3. The Appellant bears the burden of proof. 25 Pa. Code § 1021.101(b).

4. The Department failed to exercise its independent judgment by failing to fully evaluate whether or not the Township's Act 537 Plan is inadequate to meet the Appellant's sewage disposal needs absent unreasonably or unnecessarily limiting the extent of the Appellant's land development plans.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HERITAGE BUILDING GROUP, INC.	:	
	:	
v.	:	**EHB Docket No. 2006-072-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WARWICK TOWNSHIP, CHESTER COUNTY, Intervenor	:	

ORDER

AND NOW, this 16th day of May, 2007, the above-captioned appeal is hereby **REMANDED** to the Department for further consideration consistent with this opinion.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chief Judge and Chairman

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: May 16, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SOLEBURY TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-183-MG**
	:	**(Consolidated with 2006-116-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW HOPE CRUSHED STONE & LIME CO., Permittee	:	**Issued: May 16, 2007**

OPINION AND ORDER ON MOTION FOR PROTECTIVE ORDER

By George J. Miller, Judge

Synopsis:

The Board grants in part and denies in part a motion for a protective order. Although some of the discovery requests are relevant to the contentions raised in this appeal, others are unduly burdensome given their very attenuated relevance to the appeal.

OPINION

Before the Board is a motion for a protective order filed by the Permittee, New Hope Crushed Stone, seeking relief from discovery posed by Solebury Township in the form of requests for admissions, contention interrogatories related to those admission requests and requests for documents. As we explain more fully below much of the discovery sought is either not relevant, or related to matters already addressed in the parties expert reports. However, other discovery is at least arguably relevant to contentions raised in the notice of appeal for the purpose of discovery.

Background

This consolidated appeal involves the operation of a stone quarry by New Hope Crushed Stone and Lime Company (Permittee) in Solebury Township, Bucks County. As the result of the 2002 appeal of the Department's renewal of the Permittee's NPDES permit, the Board's adjudication issued on March 5, 2004 vacated and remanded the renewal of the permit subject to the Department's (1) further consideration of appropriate discharge limits to minimize disturbance to the hydrologic balance of the Primrose Creek Basin in which the quarry is located, (2) requiring the Department or the Permittee to conduct an in depth study of the basin to determine what additional limits should be placed on the discharge from the quarry particularly during times of drought, and (3) amending the permit renewal to authorize the Permittee to discharge no more than necessary to keep the pit dry enough to meet production needs but no more than four mgd per day on a monthly average until the Department completes the review ordered in the adjudication. The Board's order further provided that all other conditions and requirements of the Permittee's NPDES permit remain in full force and effect.[1]

Nearly a year later, the Department issued an administrative order on May 19, 2005, requiring the Permittee to complete the hydrologic study required by the Board's adjudication. Following completion of this study, the Department issued a letter to the Permittee on October 11, 2005 that "discharged" the Department's administrative order since the required study had been submitted and approved by the Department.

Solebury Township filed an appeal on June 10, 2005 at EHB Docket No. 2005-183-MG, challenging the Department's compliance with the Board's previous adjudication and order. In particular, this notice of appeal claims, among other things, that the Department has not

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[1] *Solebury Township v. DEP*, 2004 EHB 95.

complied with the Board's order, that the Permittee is unlawfully discharging water without a permit, and that the Township has been excluded from the Department's consideration of compliance with the Board's order. Thereafter, on March 16, 2006, the Department issued a revised renewal of the Permittee's NPDES permit. The Township also filed an appeal from this revised renewal.

The Motion

The Permittee's motion for a protective order is the latest in a long line of discovery skirmishes among the parties, some of which they have settled for themselves, and others which have required Board mediation. The present motion was one of several discovery motions filed since the beginning of May, 2007. A conference call was held by the Board on May 10, 2007 and by order dated that same day the Board disposed of a motion to compel by the Permittee, a motion related to electronic records and denied a motion to disqualify and depose the Permittee's counsel.[2] Although the Board issued oral rulings on some aspects of the protective order, the purpose of this opinion is to reduce those rulings to writing with explanations and to rule on certain matters that were deferred during the conference call.

In resolving discovery disputes the Board is guided by the Pennsylvania Rules of Civil Procedure which relate to discovery.[3] As a general rule, the Board is liberal in allowing discovery which is either directly related to the contentions raised in an appeal or is likely to lead to admissible evidence that is related to the contentions raised in an appeal.[4] However, we may issue a protective order which protects a party from certain discovery, if we find that the request

[2] That order also extended the deadlines for discovery and dispositive motions.
[3] 25 Pa. Code § 1021.102.
[4] Pa. R.C.P. No. 4003.1.

will cause "unreasonable annoyance, embarrassment, oppression, burden or expense . . . ."[5]

Admission Request Nos. 23-25, 38-40

These admission requests seek discovery related to the alleged creation of sink holes resulting from quarry operations and an alleged petroleum leakage that may be contributing to contamination of local wells. The Permittee argues that these topics are not relevant to the appeal. In particular, the Permittee observes that the petroleum leak occurred fifty years ago. The Township argues that these matters are important because the permit incorporates prior permit applications from 1974, 1991, 1997, and 2005.[6] We do not believe that this paragraph in the permit opens up the permitting process of past permits to all manner of challenge in the present appeal, particularly at this late date in the discovery process.

To the extent that the Township believes that the sinkhole issue may be relevant as to whether or not the March 2006 NPDES permit was properly issued, that subject may be addressed more properly through the testimony of expert witnesses. Accordingly, the protective order is granted as to Admission Request Nos. 23-25 and 38-40 and the accompanying contention interrogatories.

Admission Nos. 29-36; 41-64; 69

These admission requests deal with the nature of a stretch of Primrose Creek that no longer exists. The Permittee argues that this line of discovery is an attempt to relitigate the 1995 permit, and is simply not relevant to the current appeal. We agree that the relevance of this historical event is questionable. To the extent it may be relevant, it can be addressed by expert testimony. Moreover, as we explained above, although the current permit incorporates statements made by the Permittee in historical permit applications, that does not mean that a wholesale

[5] Pa. R.C.P. No. 4012(a).

reexamination of all those past permits becomes appropriate or relevant in this appeal. The Permittee's request for a protective order is granted.

Admissions 1-6; 9-14; 16-22

Admission requests 1-6 relate to a repletion of the history of the prior appeal which is the subject of our adjudication. Requests 9-14 and 16-22 relate to studies performed by the Permittee's consultants, ERG. We find both of these groups of questions redundant of information that is already known to the parties and therefore burdensome to answer. The first set is set out in our adjudication and does not require an admission by the Permittee. The second set is information contained in ERG's expert report, which the Township already has. To require the Permittee to answer this discovery would be duplicative and needlessly burdensome.

Admission Nos. 7-8; 15; 65-67; 71-79

We will deny the motion for protective order for the remaining admissions and accompanying contention interrogatories. Admission Nos. 7 and 8 relate to whether the Permittee or the Department conducted "in-depth" hydrogeologic studies. This issue is central to the Township's appeal and subject to easy admission or denial. Admission No. 15 relates to whether April 18 to May 26, 2005, was "not a time of drought." Apparently the Department has already answered that question and the Permittee can reference the Department response accordingly. Admission Nos. 65-67 and 71-73 relate to the quality of discharge water from the quarry to the Primrose Creek. We believe this relates to the Township's claim that the permit should have included monitoring requirements for solids, turbidity, temperature and quarterly biomass monitoring. Therefore the answers may lead to relevant evidence, and the Permittee shall answer that discovery. The answers to Admission Nos. 74 and 75, relating to the volume of discharge

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[6] Township's Answer to Motion for Protective Order, Ex. A ¶ F.

appear to be obvious, but the Permittee has agreed to answer those admissions. Finally Admission Nos. 76-79 concern the quantity of water available in the basin and the data that the Permittee may or may not have. The availability of water may be relevant to whether the pump rates and discharge limits in the 2006 permit were appropriate. Therefore we will require the Permittee to respond.

Request for Documents

The Permittee also seeks a protective order for the Township's Set II, Request for Documents and Set III, Request for Document Nos. 1-3 and 6-8. We will grant this request.

The Set II discovery request included a notice to preserve computer data. At the conference call, we directed the Permittee to review its email records to be sure that no further relevant discovery was available to deliver to the Township, but otherwise denied the motion. However the Set II request also included a request for manufacturer's references and maintenance records for the pumps in use at the quarry. Since such records are burdensome to assemble and weighed against the questionable relevance to any issues raised in this appeal, we will grant the Permittee's motion for a protective order.

Set III document requests 1-3 seek documents related to well repairs and replacements. However, without any limitation as to timeframe, these requests are overly broad and burdensome to answer. If the Township really believes that there is data concerning well replacements and repairs that it does not already have, it may submit a further discovery request with a reasonable temporal limitation.

Document Request No. 6 asks for all documents that the Permittee submitted to the Department in support of the March 2006 permit. Clearly the Township should have all of these documents from its inspection of the Department file. At this late date, we see no reason to

require the Permittee to compile further documents that duplicate documents that the Township already has.

Finally the Township seeks documents that were relied on by the Department but submitted by third parties. We will grant the protective order for this request, because the Permittee can not know what unrelated parties may have submitted and which of those documents the Department relied upon. It seems to us that this request is more properly directed to the Department.

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOLEBURY TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-183-MG**
	:	**(Consolidated with 2006-116-MG)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and NEW HOPE CRUSHED	:	
STONE & LIME CO., Permittee	:	

ORDER

AND NOW, this 16th day of May, 2007, upon consideration of the motion for protective order by New Hope Crushed Stone in the above-captioned matter, it is hereby ORDERED that:

1. The motion is **GRANTED** as to Requests for Admissions Nos. 1-6; 9-14; 16-25; 29-36; 38-64, and related Contention Interrogatories.
2. The motion is **DENIED** as to Request for Admission Nos. 7-8; 15; 65-67; 71-79, and related Contention Interrogatories.
3. The motion is **GRANTED** as to Request for Documents Set II and Request for Documents Set III Nos. 1-3 and 6-8.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Judge

DATED: May 16, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ROBERT K. SWINEHART	:	
	:	
v.	:	**EHB Docket No. 2006-056-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION (State Board for Certification of Water and Wastewater Systems Operators)	:	**Issued: May 18, 2007**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses an appeal of Robert K. Swinehart from the State Board for Certification of Water and Wastewater Systems Operators' denial of Swinehart's application to renew his wastewater systems operator's license. The Certification Board's denial of Swinehart's application was reasonable and appropriate because Swinehart was convicted of three misdemeanors that related to his operation of a wastewater system.

FINDINGS OF FACT

1. The State Board for Certification of Water and Wastewater Systems Operators (the "Certification Board") is an entity created within the Department of Environmental Protection (the "Department") that has the duty and authority to certify operators of water and wastewater systems pursuant to the Water and Wastewater Systems Operators' Certification Act, 63 P.S. §§ 1001 *et seq.*

2. Robert K. Swinehart ("Swinehart") is an individual residing in Zerbe Township, Northumberland County, Pennsylvania.

3. Swinehart was the certified wastewater systems operator for the Zerbe Township wastewater treatment plant. (N.T. 15, 58.)

4. Every wastewater treatment plant must have at least one certified operator. (N.T. 50.)

5. Between January 2000 and June 2002, Swinehart deliberately falsified approximately 50 Discharge Monitoring Reports ("DMRs") that he submitted to the Department. (Commonwealth Exhibit ("C.Ex.") 3; N.T. 15, 23-25.)

6. Among other things, Swinehart reversed the influent and effluent numbers on the DMRs, making it appear that the Zerbe Township plant was operating properly when, in fact, it was not. (N.T. 23-25.)

7. Swinehart primarily modified the measurements on the DMRs for chemical biological oxygen demand and total suspended solids. (N.T. 24.)

8. On March 25, 2003, as a result of the falsified DMRs, Swinehart pled guilty in a plea agreement with the Attorney General's Office to three misdemeanor counts. (C.Ex. 1; C.Ex. 3; N.T. 62.) The crimes were tampering with public records or information, 18 Pa.C.S. § 4911(a)(1), unsworn falsification to authorities, 18 Pa.C.S. § 4904(b), and unlawful conduct under the Clean Streams Law, 35 P.S. § 691.611. (C.Ex. 1; C.Ex. 3; N.T. 10.)

9. Swinehart's convictions were directly related to his employment as a certified wastewater systems operator for Zerbe Township. (C.Ex. 3; C.Ex. 9; N.T. 10.)

10. DMRs are the foundation of how wastewater plants are monitored. The Department reviews the data reported on DMRs to determine whether a plant is functioning properly and whether there is any stream degradation. (N.T. 16, 22, 48-49.)

11. On December 6, 2004, Swinehart submitted an application to renew his wastewater systems operator's license to the Certification Board. Attached to his application was a criminal history record that reflected his three misdemeanor convictions related to his falsification of the DMRs. (C.Ex. 1; N.T. 5, 10.)

12. On January 17, 2006, Swinehart attended a Certification Board meeting and addressed the Board regarding his renewal application and criminal history. (C.Ex. 3; N.T. 7, 9.)

13. The Certification Board is comprised of seven members. They include a certified wastewater systems operator, a certified drinking water systems operator, a representative from a public system, a representative from a privately owned system, a representative from the general public, a professor from an accredited university that deals with sanitary or environmental engineering, and a Department representative. (N.T. 43-44.)

14. Four of the seven current Certification Board members are certified water or wastewater systems operators. (N.T. 44.)

15. On January 19, 2006, the Certification Board notified Swinehart that it denied his renewal application due to his three misdemeanor convictions related to his operation of a wastewater treatment plant. (C.Ex. 9; N.T. 10-11.)

16. Zerbe Township has advised Swinehart that he "would always have a job." Swinehart continues to do the same work that he has done at the plant for 32 years. Swinehart continues to work, without objection, at the treatment plant under the supervision of a certified operator. (N.T. 64-66.)

DISCUSSION

The Certification Board's decision to deny Swinehart's license renewal application is the equivalent of an action of the Department. 63 P.S. § 1004(a)(1). Where a Department decision

is appealed to the Board, we are required to conduct a hearing *de novo* to determine whether the evidence presented to us can sustain the Department's decision. 35 P.S. § 7514; *Groce v. DEP*, No. 2355 C.D. 2006, slip op. at 25 (Pa. Cmwlth. Ct. April 11, 2007); *Gordon v. DEP*, EHB Docket No. 2005-323-R, slip op. at 8 (Adjudication, April 26, 2007). We may consider not only evidence that was before the Board at the time it denied Swinehart's renewal application, but additional relevant evidence as well. *Leatherwood v. DEP*, 819 A.2d 604 (Pa. Cmwlth. Ct. 2003); *Gordon v. DEP*, EHB Docket No. 2005-323-R, slip op. at 8. Although our review of the Department's decision is *de novo*, we do not start from scratch by determining what decision we might independently believe to be appropriate. Rather, we review the Department's decision for reasonableness. *Alexander v. DEP*, 2006 EHB 306, 309-10; *Barra v. DEP*, 2006 EHB 198, 201; *see also Shenango v. DEP*, 2006 EHB 783, 793; *UMCO v. DEP*, 2006 EHB 489, 541 n.1. The Certification Board bears the burden of proof in this matter and must establish its case by a preponderance of evidence. 25 Pa. Code § 1021.122(b)(3); *Alexander v. DEP*, 2006 EHB at 309.

The Waste and Wastewater Systems Operators Certification Act provides that persons who operate water and wastewater treatment plants in Pennsylvania must be certified to do so.[1] 63 P.S. §§ 1001 *et seq*. The Act grants the Certification Board the power, among other things, to review and act upon applications for renewal of certification of wastewater systems operators. 63 P.S. § 1004(a)(1). The Act also requires that all applicants, including those who wish to renew their certification, submit a report of criminal history record from the Pennsylvania State Police to the Certification Board along with their application. 63 P.S. § 1004(a)(1). The Certification Board has the authority to suspend or revoke a license where the applicant has been convicted of a felony, or where the applicant has been convicted of a misdemeanor which relates

[1] The Act, which became effective in 1968, was substantially overhauled in 2002. For a discussion of the 2002 amendments, *see Alexander v. DEP*, 2006 EHB 306, 310.

to the operation of water or wastewater systems. 18 Pa.C.S. § 9214(c); 63 P.S. § 1004(a)(1). The Certification Board has discretion in deciding whether or not to suspend or revoke a license. 18 Pa.C.S. § 9214(a).

Here, Swinehart's three misdemeanor convictions were directly related to his operation of the Zerbe Township wastewater treatment plant. Swinehart falsified approximately 50 DMRs over a period of two and a half years, which led to his conviction for tampering with public records, unsworn falsification to authorities, and unlawful conduct under the Clean Streams Law. Upon receiving Swinehart's renewal application, the Certification Board invited Swinehart to address the members of the Board during their January 17, 2006 meeting. After Swinehart spoke at the meeting, the Certification Board voted unanimously to deny Swinehart's application for renewal. The Certification Board supported its decision by noting that Swinehart's three misdemeanor convictions "were directly related to the occupation of a certified operator, occurring during the operation of a treatment plant, and that [Swinehart's] actions presented a threat to the environment and public health and safety." (C.Ex. 9.)

Swinehart has not argued that the Certification Board acted unlawfully or outside of its authority, and we see nothing to suggest that the Board's unanimous decision not to review Swinehart's license was anything other than reasonable and appropriate. Swinehart has argued that he falsified a great majority of the DMRs merely to make the numbers appear to be consistent, not to cover up permit violations, that he was simply trying to save the township money and did not gain anything personally from his actions, and the receiving stream of the Zerbe Township wastewater treatment plant is a small acid mine drainage creek, but none of these explanations excuse Swinehart's actions or convince us that the Certification Board's decision to deny Swinehart's renewal application was unreasonable.

As we have said before, self-reporting is a key component of the NPDES program. *Kennedy v. DEP*, EHB Docket No. 2005-299-CP-L, slip op. at 13 (Adjudication, January 22, 2007); *DER v. East Penn Manufacturing Co.*, 1995 EHB 259, 271, *DER v. Wawa*, 1992 EHB 1095, 1202. The Department uses DMR data to determine whether a plant is functioning properly and whether there may be any stream degradation or concerns for other stream uses. Without proper information, as a practical matter the Department is virtually blind in terms of what is occurring at a particular plant. The Department relies heavily on the many water and wastewater systems operators throughout the Commonwealth to report accurate and reliable information. Given that Swinehart falsified 50 DMRs, we see nothing unreasonable in the Certification Board's decision that Swinehart cannot be trusted in the future to certify DMRs. Swinehart may continue, and in fact has continued, to work at the plant; the Certification Board's action only limits Swinehart's ability to act as the plant's certified operator.

Swinehart argued during the hearing and in his post-hearing brief that he believes he is being punished twice for the same offense because his sentence for the three misdemeanors did not include the revocation of his license. It is true that the double-jeopardy clauses of both the United States and Pennsylvania Constitutions prohibit multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Commonwealth v. Hogan*, 393 A.2d 1133 (Pa. 1978). They do not, however, preclude the imposition of civil consequences, such as the revocation of a license, for conduct for which a criminal conviction has already been obtained. *Sweeny v. State Board of Funeral Directors*, 666 A.2d 1137, 1140 (Pa. Cmwlth. Ct. 1995). As a general rule, the protection against double jeopardy does not apply in civil proceedings such as those before administrative agencies that result in license revocations. *Bhattacharjee v. State Board of Medicine*, 808 A.2d 280, 284 (Pa. Cmwlth. Ct. 2002); *Nicoletti*

v. State Board of Vehicle Mfrs. Dealers & Salespersons, 706 A.2d 891, 894 (Pa. Cmwlth. Ct. 1998); *Tandon v. State Board of Medicine*, 705 A.2d 1338 (Pa. Cmwlth. Ct. 1997). That the Certification Board waited until Swinehart's certification was up for renewal before taking action is somewhat odd, but the wait did not render the action unlawful or unreasonable.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this appeal. 35 P.S. § 7514; 63 P.S. § 1004(a)(1).

2. The Certification Board's denial of Swinehart's renewal application was lawful, reasonable, and otherwise appropriate because Swinehart was convicted of three misdemeanors that directly related to his operation of a wastewater treatment plant. 18 Pa.C.S. § 9124(c); 63 P.S. § 1004(a)(1).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT K. SWINEHART	:	
	:	
v.	:	**EHB Docket No. 2006-056-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION (State Board for Certification of Water and Wastewater Systems Operators)	:	

ORDER

AND NOW, this 18th day of May, 2007, it is hereby ordered that the appeal of Robert K. Swinehart is dismissed.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: May 18, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

TIMOTHY A. KECK	:	
	:	
v.	:	**EHB Docket No. 2005-280-L**
	:	**(Consolidated with 2005-355-L)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: June 26, 2007**
PROTECTION	:	

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board holds that a person cannot be cited for surface mining coal without a permit unless the person extracts or retrieves some coal.

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act, 52 P.S. §§ 1396.1-1396.19a, the Clean Streams Law, as amended, 35 P.S. §§ 691.1-691.101, Section 1917-A of the Administrative Code of 1929, as amended, 71 P.S. § 510-17, and the rules and regulations of the Environmental Quality Board adopted under those statutes. (Board Exhibit 1: Parties' Stipulations, Paragraph 1 (hereinafter "Stip. 1").)

2. Timothy A. Keck ("Keck") is an individual who is primarily in the business of drilling for oil and gas, but who has also dabbled in mining coal. (Stip. 2; Notes of Transcript page 122 ("T. 122").)

3. Keck uses rock to build well locations and roads associated with his oil and gas drilling and production operations. (Stip. 3.)

4. In December 2004, Keck was exploring for and removing rock on property located in Monroe Township, Clarion County owned by him and another individual (the "Site"). At the same time, Keck planned to test the coal on the property. (Stip. 4.)

5. The Site was previously known as the Beck Mine. The Beck Mine had been previously mined for coal by Glacial Minerals. (Stip. 5.)

6. The Department's Mine Conservation Inspector, Richard Stempeck, inspected the Site on August 19, 2005. At the time of Stempeck's inspection, Keck had removed approximately 300 cubic yards of soil and overburden. (Stip. 6.)

7. Stempeck found Keck operating a D-8 dozer. (T. 36-37, 44, 71; Commonwealth Ex. No. ("C.Ex.") 2G.)

8. Keck had dug a pit measuring approximately 125 feet by 80 feet. Within that area, using a borrowed skid steer loader, Keck cleaned off a portion of a coal seam measuring 50 by 80 feet. Keck partially cleaned off the coal seam in the remaining portion of the pit. (Stip. 6; T. 41, 99; C.Ex. 2A, 2B, 2C, 2D, 2E, 3.)

9. The coal seam in question was about eight to ten feet beneath the original ground surface. (T. 42; C.Ex. 2A, 2B, 2C, 2D.)

10. Keck did not remove or otherwise excavate any coal from the pit area he had exposed. (Stip. 8.)

11. Keck did not obtain a surface coal mining activity permit from the Department before he conducted the activities on the Site on August 19, 2005. (Stip. 9.)

12. Inspector Stempeck advised Keck that Keck had not violated any rules because

Keck had not removed any coal from the ground. (T. 45, 58.) He advised Keck, however, not to do any more work until Keck obtained a permit. (T. 45, 72.)

13. When Stempeck returned to the office, he determined that Keck had not notified the Department of his intent to explore or obtained a special exploration permit which would have allowed up to 250 tons of coal removal for testing only. (T. 48.) He also consulted with his supervisor, John Sims, who later visited the Site and directed Stempeck to issue a compliance order to Keck. (T. 74-78.)

14. On August 24, 2005, Inspector Stempeck issued the compliance order that is the subject of this appeal to Keck (the "Order"). The Order cited Keck for surface mining coal on his property without having first obtained a permit authorizing coal mining in violation of Section 4(a) of the Surface Mining Act, 52 P.S. § 1396.4(a), and 25 Pa. Code § 86.11. The Order directed Keck to cease all surface mining activities and reclaim the area. (Stip. 10.)

15. Keck reclaimed the site on the same day that he received the order, August 24, 2005. (Stip. 11.)

16. On December 1, 2005, the Department assessed the civil penalty of $1,500 that is also the subject of this consolidated appeal for conducting surface mining activities without first obtaining a permit. (C.Ex. 10.)

DISCUSSION

This appeal presents the question whether a person can be cited for mining coal without a permit if the person never removes any coal from the ground. In this case, the parties stipulated that Keck never extracted any coal. (Finding of Fact 10.) In light of that stipulation, we conclude that Keck cannot be cited for mining coal without a permit.

The Order cites Keck for violating Section 4(a) of the Surface Mining Conservation and

Reclamation Act (the "Surface Mining Act"), 52 P.S. § 1396.4(a), and 25 Pa. Code § 86.11. Section 4(a) of the Surface Mining Act requires a person to apply for a permit before proceeding "to mine coal by the surface mining method." Section 86.11(a) provides that "no person may operate a mine" unless the person has obtained a permit. Keck did not mine coal. Mining coal involves the extraction or exposure and retrieval of coal. 52 P.S. § 1396.3; 25 Pa. Code § 86.1; *Black Fox Mining & Development Corp. v. DER*, 1984 EHB 799 and 1985 EHB 172. Keck explored for coal, exposed some coal, and he might even have been in the process of preparing to mine the coal, but he never extracted or retrieved any coal.

The Department seems to argue in this case that the Surface Mining Act goes beyond requiring a permit for "mining coal" and also requires a permit for all "surface mining activities." (See, e.g., Post-Hearing Brief, proposed conclusion of law 6.)[1] If that were true, we would be concerned about the validity of some of the mining regulations, which excuse or authorize waivers of permits for what the Department characterizes as surface mining activities. For example, 25 Pa. Code § 86.11(c), reads as follows:

> Except as provided in § 86.12 (relating to continued operation under interim permits) and Subchapter E (relating to coal exploration) ... no person may engage in or carry out coal mining activities within this Commonwealth unless that person has obtained a valid permit and authorization issued by the Department.

If the Surface Mining Act truly required all coal mining activities to be permitted and/or all coal exploration constituted a coal mining activity, Section 86.11(c) and Subchapter E itself would arguably be invalid. Regulations may not excuse or allow waivers of an express statutory

[1] To the extent that this is the Department's position, it may not be entirely consistent with the Department's position in two other cases currently pending before the Board wherein the Department argues that certain surface mining activities do *not* require a permit. *Lower Milford Township*, EHB Docket No. 2006-109-L; *Cumberland Coal Resources v. DEP*, EHB Docket No. 2006-234-R.

requirement. *Tire Jockey Service, Inc. v. DEP*, 915 A.2d 1165, 1186 (Pa. 2007); *Pelton v. DPW*, 523 A.2d 1104, 1107 (Pa. 1987). Fortunately, this unsavory result is avoided because, as just noted, the Act does not specify that all coal mining activities must be permitted. Furthermore, earthmoving activities do not constitute surface mining activities unless the activities include some coal extraction or retrieval.

The Act defines "surface mining activities" as follows:

> **"SURFACE MINING ACTIVITIES"** shall mean the extraction of coal from the earth or from waste or stock piles or from pits or banks by removing the strata or material which overlies or is above or between them or otherwise exposing and retrieving them from the surface, including, but not limited to, strip, auger mining, dredging, quarrying and leaching, *and all surface activity connected with surface or underground mining*, including, but not limited to, exploration, site preparation, entry, tunnel, drift, slope, shaft and borehole drilling and construction and activities related thereto, but not including those portions of mining operations carried out beneath the surface by means of shafts, tunnels or other underground mine openings.

52 P.S. § 1396.3 (emphasis added). *See also* 25 Pa. Code § 86.1, to the same effect.

The statutory and regulatory definitions of surface mining activity have two parts: (1) mining (i.e. mineral extraction or retrieval), and (2) activities "connected with" that mining. In other words, there must be some mining, i.e. extraction or retrieval of coal, or it cannot be surface mining activity. Without mining, there is nothing for the other listed activities to be "connected with."

We commented upon the two parts of the regulatory definition in *Holbert v. DEP*, 2000 EHB 796.[2] We noted that one part of the definition relates "to the parameters of the concept of extraction of mineral material," while the second clause "brings within its terms 'all surface

[2] Although *Holbert* was a noncoal mining case, it provides helpful analysis in this case due to the similarity of the coal and noncoal mining statutes. See *Lower Milford Twp. v. DEP*, EHB 2006-091-L (Opinion June 26, 2007).

activity connected with surface or underground mining'." 2000 EHB at 815 n.15. We noted that an existing mining operation's "gravitational force" can pull related activities within the regulatory definition. The point remains, however, that something must create the "gravitational force" and that something is the extraction of coal, at least as it pertains to the permitting requirement. Mineral extraction or retrieval is the *sine qua non* of mining and mining activity.

The fact that the phrase "surface mining activities" is defined very broadly does not suggest that there can be mining activity without coal mining. Mining activities are defined very broadly to make it clear that it is not merely the actual removal of coal that must be permitted. To the extent that an operation involves coal removal, virtually everything that occurs before, during, and after that removal that is in any way "connected with" that removal must also be permitted. For example, very recently in *Robachele, Inc. v. DEP*, 2006 EHB 997, we were presented with the question whether loading minerals onto trucks and hauling the minerals away constituted a part of the surface mining activities at an active mining operation. There was no question in that case that the minerals involved had originally been extracted from the earth on the site. We concluded that "activity on a permitted site that involves the handling of the noncoal minerals *that were excavated on the site* is activity 'connected with' mining." *Id.* at 1000-01 (emphasis added). Thus, once "paradigmatic mining" is found to take place on a site, surface activity in any way connected with that mining also requires a permit. *Id.*

In *Robachele*, we simply followed the Board's earlier decision in *Bedford County Stone and Lime Co. v. DER*, 1987 EHB 91. In *Bedford*, this Board held that handling material that was already extracted, processed, and segregated constitutes surface activity "connected with" the surface mining itself. Again, there was no question that the minerals being handled had been removed from the earth.

In fact, there has never been a case where this Board or a court found a person to have illegally mined without a permit where the person did not remove any coal or noncoal minerals. To the contrary, minerals were *always* removed precedent to a finding of unpermitted mining. *See Ginter Coal Co. v. EHB*, 306 A.2d 416 (Pa. Cmwlth. 1973) (removing coal from culm banks constitutes surface mining); *Holbert*, 2000 EHB 796 (picking bluestone from old bluestone piles constitutes surface mining); *Linde Enterprises, Inc. v. DEP*, 1996 EHB 382, *aff'd*, 692 A.2d 645 (Pa. Cmwlth. 1997) (removing dirt from borrow pit constitutes a surface mine). In each of these cases, there was no question that a party actually removed or extracted minerals from the earth or from waste piles. In contrast, there is no question that Keck did *not* extract any coal. Coal removal was not shown to be a part of Keck's on-site activity. If Keck had removed even one bucketful of coal we would have had no hesitation in concluding that his site preparation/exploration activities constituted surface mining activities. The parties' stipulation that absolutely no coal was removed, however, prevents us from reaching that conclusion.

Black Fox Mining & Development Corp. v. DER, 1984 EHB 799 (Opinion and Order on Summary Judgment) and 1985 EHB 172 (Adjudication) is on point. In *Black Fox Mining*, a pit had been excavated at the site. A high lift was used to remove overburden. A coal seam was exposed in the pit. It was eventually determined that Black Fox's employees used shovels to remove 30 pounds of coal. The Department issued two compliance orders and a civil penalty assessment citing Black Fox for mining without a permit.

We concluded that Black Fox had illegally mined without a permit, but only because it removed coal. We stated several times in both opinions that there is no surface mining unless coal is extracted or exposed and retrieved. *See, e.g.*, 1984 EHB at 800 (removal of coal is the critical factual question); 1984 EHB at 801 (the definition of surface mining requires that there

be extraction or exposure and retrieval of minerals); 1984 EHB at 803 (the legislature intended that any removal of coal, no matter what the amount might be, should be considered surface mining) 1984 EHB at 805 ("if the facts as proven demonstrate that appellant extracted, exposed or retrieved coal from the site in question, it is clear that such activity falls within the Surface Mining Act's definition of surface mining"); 1985 EHB at 181 ("surface mining consists of the extraction or exposure and retrieval of minerals"; if established that Appellant removed coal from the pile, surface mining will be found to have occurred); 1985 EHB at 193 (same). We also had this to say:

> It is absurd, appellant argues, to characterize the removal of a few pounds of coal as surface mining for which a permit is required. Admittedly, the permitting process is a complex and time consuming one. However, the regulatory scheme takes this into consideration. In some circumstances coal exploration may be conducted without a permit. 25 Pa. Code § 86.133(d) provides that:
>
> > Any person who intends to conduct coal exploration operations in which coal will be removed shall, prior to conducting the exploration, obtain a permit under this chapter; except that, prior to removal of any coal, the Department may waive the requirement for the permit to enable the testing and analysis of coal properties, if less than 250 tons is removed.
>
> This regulation makes clear, however, that in the first instance a permit is required to conduct coal exploration operations where coal is to be removed -- just as one is required to conduct full scale mining operations. ...***We note that the permit is necessary only where coal is to be removed -- a requirement consistent with the statutory requirement that there be extraction or retrieval in order for activities to constitute surface mining.*** (Emphasis added; footnote deleted.)

1984 EHB at 803-04. To repeat, Keck did not remove 30 pounds of coal. Keck did not remove one ounce of coal. Under that unique circumstance, it is impossible to conclude that he needed a

permit.

Interestingly, the Board in *Black Fox* did not mention *Kerry Coal Company v. DER*, 1984 EHB 161, *reconsideration denied*, 1984 EHB 728, which had been decided almost contemporaneously. In *Kerry*, there was no dispute that there was a mining operation capable of creating the "gravitational pull" we mentioned in *Holbert*. The only issue in *Kerry* was whether some blasting work which was done in advance of receiving the mining permit was connected with that mining operation or a separate but somewhat related project involving the construction of a parking lot. The Board weighed all of the evidence, including the facts that no coal was exposed by the blasting, no coal was removed, and the area in question was not prepared for coal removal. Although the Department pointed to evidence that a sign had been posted at the site advertising it as a permitted mine site and "uncertainties" as to whether the blasted material could be or was in fact used in the construction project, the Board found that the blasting activity was not connected with the mining operation. The Board seemed to suggest that no coal needs to be removed for activity to be "sufficiently connected with surface mining to constitute surface mining" under the statutory definition. That suggestion, however, was not repeated in *Black Fox*, which unequivocally and repeatedly stated that coal must be removed. Further, the Board's suggestion in *Kerry* is *dicta* because we found that Kerry did not in fact engage in unpermitted mining activity, incidentally relying in large measure on the fact that no coal was removed. More fundamentally, the Board in *Kerry* was essentially picking between two options, one of which was whether the blasting was part of larger mining operation. In that respect, *Kerry* is no different than the *Gintner-Holbert-Robachele* line of cases discussed above: once mining is found to exist, any activity associated with that mining must be permitted. The difference in the instant case is that there was never any mining, i.e. coal extraction, to create the "gravitational

pull."

One other aspect of *Kerry* is worth mentioning. We held there, and reaffirm today, that intent should play no role in assessing whether certain activity constitutes mining. 1984 EHB at 733. Neither the statute nor the regulations speak of intent, and such a subjective standard is too nebulous to work with. Intent to mine is not the key; actual mining is, and that does not occur unless the operation includes coal extraction. Keck's operation was simply not shown to include such extraction.

Finally, the mining regulations themselves support our conclusion that mining permits are only required if coal is removed. Under the Department's exploration regulations, a permit is only required if coal is to be removed. 25 Pa. Code § 86.133. *Cf. Lower Milford Township v. DEP*, EHB Docket No. 2006-109-L (Opinion, June 26, 2007).[3] If coal removal is the *sine qua non* for a permit requirement to conduct exploration activity, we fail to see why such a dividing line would not apply to other work alleged to be associated with mining. In fact, creating a bright line has some merit. For example, surface reconnaissance may constitute exploration, but it makes sense not to require a permit to do it. Similarly, digging a hole needs to be connected with mineral extraction or it does not constitute mining activity.

The Department did not cite Keck for conducting exploration activity without submitting a notice of intent to explore in accordance with 25 Pa. Code § 86.133(a). Accordingly, any questions regarding the scope of the Department's authority to require such notices, or the Department's authority to waive permits, or to regulate exploration activities in general are not directly implicated in this case. This Adjudication is limited to and defined by the Department's

[3] We specifically invited the parties to comment upon the relevance of the exploration regulations in this case. Interestingly or perhaps tellingly, the Department declined our invitation.

decision to cite Keck for mining without a permit.[4]

CONCLUSION OF LAW

1. A person cannot be cited for surface mining coal without a permit unless the person extracts or exposes and retrieves some coal.

[4] There was also no dispute that Keck's activities could be regulated under other applicable programs regardless of whether mining was taking place (e.g. requirements regarding erosion and sedimentation controls).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TIMOTHY A. KECK	:	
	:	
v.	:	**EHB Docket No. 2005-280-L**
	:	**(Consolidated with 2005-355-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 26th day of June, 2007, Keck's appeals are sustained.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: June 26, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

LOWER MILFORD TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2006-109-L**
	:	**(Consolidated with 2006-147-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GERYVILLE MATERIALS, INC., Permittee	:	**Issued: June 26, 2007**

OPINION AND ORDER ON DISPOSITIVE MOTIONS

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Noncoal Surface Mining Act does not require that a permit be issued for exploration work that does not involve the removal of minerals.

OPINION

This appeal concerns the Department of Environmental Protection's (the "Department's") regulation of noncoal exploration activities. The regulation at the center of the controversy is 25 Pa. Code § 77.109. Section 77.109 divides exploration activities into two categories: those in which noncoal minerals will be removed in the course of the exploration work and those in which they will not. If no minerals are to be removed, the person engaged in exploration is only required to file with the Department a written notice of intent to explore. § 77.109(a). No permit is required. Exploration may proceed after a brief waiting period unless the Department notifies the person otherwise. § 77.109(c). If, however, the person intends to remove minerals, a permit

is required. § 77.109(e). The Department may waive the permit requirement to enable the testing of the removed minerals. *Id.*

Regardless of whether a permit is required, is not required, or is required but has been waived, a person conducting exploration must observe distance limitations, comply with certain specified environmental protection performance standards, and reclaim the site. § 77.109(f)-(h). Regardless of whether a permit is required, the exploration activities are subject to the Department's broad inspection and enforcement authority. § 77.109(i).

Pursuant to Section 77.109, Geryville Materials, Inc. ("Geryville") notified the Department of its intent to conduct exploration activities in Lower Milford Township, Lehigh County. Partly as a result of a confusing form used by the Department, it was not clear whether Geryville intended to remove minerals. The Department assumed that minerals might be removed, treated Geryville's notification as a request for a permit waiver, and granted the waiver. Lower Milford Township filed this appeal from that Departmental action. Lower Milford asked us to supersede the Department's action, without success. Geryville completed its work on the site. In the meantime, when it became clear that Geryville did not intend to remove any minerals from the site, the Department rescinded its permit waiver. The Department explained that the waiver should never have been issued in the first place because Geryville's activities did not require a permit "as no minerals were removed from the site." The Department from that point forward treated Geryville's original notification as a notice of intent in accordance with Section 77.109(a). Lower Milford filed a second appeal from the rescission letter, and we consolidated the two appeals.

Geryville and the Department filed motions to dismiss the original appeal as moot. They argued that all of the work had been completed, no further work under the existing notification

was contemplated or allowed, and Lower Milford was in part challenging a waiver decision that had been rescinded. We concluded that, while the appeal was technically moot in the sense that we could no longer grant any effective or meaningful relief, we decided to retain jurisdiction because "the questions posed and challenges made by Lower Milford to the Department's action in this case in issuing the Permit Waiver Letter would recur and would seemingly always evade review," and because "this appeal presents questions of important public interest about the relationship between the Noncoal Surface Mining Conservation and Reclamation Act and its regulations and how both affect mining exploration activities." (Opinion and Order, June 29, 2006.) In a subsequent Board Order issued in response to Geryville's motion for a protective order, we re-emphasized that all other issues in the appeal were moot, and we would only concern ourselves with the "purely legal question" of whether Section 77.109 "can allow certain exploration activities either upon notice alone or upon a so-called 'permit waiver'." (Order, September 7, 2006.)[1] Motions practice ensued and we now have before us a motion to dismiss from Geryville and summary judgment motions from the Department and Lower Milford.

It is undisputed that Geryville did not remove any minerals from the site. Therefore, any opinion that we might express regarding the Department's permitting program where minerals *are* removed from the site would be purely advisory. For example, the Department's authority to waive permits for other sites where minerals might be removed is beside the point in this appeal. We will focus solely upon situations where, as here, no minerals are removed.

Lower Milford's case boiled down to its essence is that the Department should have required Geryville to get a permit before allowing it to conduct exploration activities. If Geryville was not required to get a permit, Lower Milford's case falls apart.

[1] This appeal was transferred for primary handling from former Chief Judge Krancer to Judge Labuskes on March 29, 2007.

Section 77.109(a) through (c) provide that no permit is required to perform exploration work so long as no minerals are removed. If Lower Milford is correct in arguing that a permit is required under the enabling statute even where no minerals are removed, it would seem to necessarily follow that Section 77.109(a) through (c) are invalid. If the statute says that a permit is required and the regulation says that it is not, the regulation must fail. We are, of course, loath to invalidate a regulation where it is possible to interpret it as lawful and consistent with the enabling statute. *See Tire Jockey Service, Inc. v. DEP*, 915 A.2d 1165, 1186 (Pa. 2007); *Pelton v. DPW*, 523 A.2d 1104, 1107 (Pa. 1987). Fortunately, we see no conflict here between the applicable statute, the Noncoal Surface Mining Conservation and Reclamation Act (the "Act"), 52 P.S. § 3301 *et seq.*, and 25 Pa. Code § 77.109(a) through (c). Neither the Act nor the regulation required Geryville to obtain a permit because no minerals were removed.

We held today in *Keck v. DEP*, EHB Docket No. 2005-280-L (Adjudication, June 26, 2007), that no permit is required for mining activities where no coal is to be extracted. Although *Keck* involved coal mining pursuant to the Surface Mining Conservation and Reclamation Act, 52 P.S. § 1396.1 *et seq.*, we believe and have held in the past that the coal and noncoal mining statutes can often be interpreted consistently. *See, e.g., Holbert v. DEP*, 2000 EHB 796, 812. The permitting provisions in both statutes are quite similar. Therefore, the principles we espoused in *Keck* have been helpful to us in reaching our decision in this case. Section 77.109(a) through (c) validly excuse permitting for noncoal exploration activity that does not involve mineral extraction because the Noncoal Act, like the coal mining statute, does not require a permit for such activity.

Without repeating everything that we said in *Keck*, we would briefly point out that we do not agree with Lower Milford's assertion that the Noncoal Mining Act "plainly and

unambiguously" requires a permit. The Act only requires a permit for a person that intends to "operate a surface mine or allow a discharge from a surface mine." 52 P.S. § 3307. Drilling a few boreholes without removing any minerals as Geryville has done hardly constitutes the operation of a surface mine.

We also do not see any support for Lower Milford's argument in the definition section of the Act. The Act defines surface mining as the "extraction of minerals." It goes on to say that surface mining includes all surface activity connected with mining, but we do not read this language to eliminate the requirement in the beginning of the definition that there must be some extraction of minerals before there can be mining. Without mineral extraction, there is nothing for the other surface activities to be "connected with."[2] Of course, if the operation at any point includes mineral extraction, every activity connected with that extraction is covered and must be permitted. *Robachele, Inc. v. DEP*, 2006 EHB 997, 1000. On the other hand, if the operation does not include mineral extraction, no permit is required. Geryville's activity was not shown to be connected with any mineral extraction.

Lower Milford paints a dire picture of detrimental environmental consequences if Section 77.109 is applied as written and permits are not required for nonextractive exploratory activity. Initially, we repeat that any allegations to the effect that Geryville's *actual* activity on *this particular site* caused harm did not survive our prior rulings regarding mootness. As to the more programmatic issue that did survive our rulings, we do not share Lower Milford's gloomy view. First and foremost, as we have now repeatedly stated, the absence of a permit requirement does not necessarily mean that the activity is not regulated. To the contrary, the Department may preclude the activity if it is not satisfied with the notice of intent to explore, and if the project is allowed to go forward, strict performance and reclamation standards apply. 25 Pa. Code §

[2] 25 Pa. Code §§ 77.1 and 77.101 are to the same effect.

77.109(c), (f)-(i). Furthermore, what has perhaps been lost in the discussion here is that Geryville cannot extract any minerals from this site unless it obtains a permit. If it wishes to test or analyze a small amount of minerals off-site, there is a possibility of a permit waiver for that testing and analysis, but nothing more. Lower Milford's concerns regarding endangered-species habitat and the protection of the environment in general will receive a full airing in the course of that permit review process if such a process ever occurs. If Geryville is not satisfied with the Department's decision if such a decision is ever forthcoming, it may file an appeal before this Board. We see little value in attempting to litigate important environmental issues in the immediate context. In other words, we see no material threat to Lower Milford, or anyone else for that matter, at this time. In contrast, Geryville and the Department are being forced to spend considerable time, effort, and expense litigating issues of no pressing or immediate practical significance. We can see how parallel considerations of low risk and limited resources would explain the Environmental Quality Board's decision in Section 77.109 not to require a permit for nonextractive exploratory activity.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LOWER MILFORD TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2006-109-L**
	:	**(Consolidated with 2006-147-L)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and GERYVILLE	:	
MATERIALS, INC., Permittee	:	

ORDER

AND NOW, this 26th day of June, 2007, it is hereby ordered as follows:

1. The Department's motion for summary judgment is granted.
2. Geryville's motion to dismiss is denied.
3. Lower Milford's motion for summary judgment is denied.
4. Lower Milford's motion to reopen discovery is denied.
5. This consolidated appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Thomas W. Renwand

THOMAS W. RENWAND
Acting Chairman and Chief Judge

George J. Miller

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: June 26, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BOROUGH OF AMBLER	:	
	:	
v.	:	**EHB Docket No. 2005-336-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 2, 2007**
	:	

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Judge

Synopsis:

The Board denies a motion for summary judgment in a complex dispute over the legality and propriety of a limit for phosphorus discharges under the NPDES permit issued to a municipal waste water treatment facility. A final resolution of this appeal requires a hearing in which disputes of material fact can be resolved. Any such resolution depends in part on the credibility of expert testimony.

BACKGROUND

This appeal and the Appellant-Borough of Ambler's motion for summary judgment involve the discharge requirements for phosphorus set forth in the NPDES permit issued by the Department of Environmental Protection (Department) on November 7, 2005, to the Appellant's waste water treatment facility for discharges to the

Wissahickon Creek. This facility is located in Ambler Borough, Dublin Township, Montgomery County.

This permit requires that average monthly discharges of phosphorus as P beginning on year three of the permit be limited to 2.0 mg/l. The Appellant contends that the Department improperly relied on an invalid or inapplicable regulation and that the time for compliance is unreasonable considering the time required to design, bid and construct the facilities necessary to comply with the 2.0 mg/l discharge requirement.

The Appellant contends that the Department has no legal basis for imposing such a limit because (1) the Department improperly determined that Appellant's discharge impaired any uses of the Creek; (2) that the regulation relied upon as the basis for this limitation is an unlawful water quality requirement adopted without necessary comment under both Pennsylvania and federal requirements under the Clean Water Act; and (3) that the Department has no evidence that Appellant's discharges have impaired any uses of the creek. The Appellant also contends that the limit may not be applied because it conflicts with the TMDL issued for the Wissahickon Creek by the Environmental Protection Agency (EPA).

The Department's regulation[1] on which this limitation on phosphorus discharges is based states as follows:

> When it is determined that the discharge of phosphorus, alone or in combination with the discharge of other pollutants, contributes or threatens to impair existing or designated uses in a free flowing surface water, phosphorus discharges from point source discharges shall be limited to an average monthly concentration of 2 mg/l. More stringent controls on point source discharges may be imposed, or may be otherwise adjusted as a result of a TMDL which has been developed.

[1] 25 Pa. Code § 96.5(c).

The Department contends that this regulation directly authorizes the permit limitation because Appellant's discharges contribute to an impairment of, or threaten to impair, the use of the Wissahickon Creek by macroinvertebrate populations. This position is based in part on the opinion of its expert, Alan C. Everett, attached as Exhibit 6 to the Appellant's Motion for Summary Judgment. The Department also appears to argue that this limit is a technology-based discharge limit so that no provision of the Clean Water Act relating to water quality is relevant to whether the regulation adopted and approved by relevant Pennsylvania authorities is unlawful. The Department also argues that this limit is supported by, and is consistent with, certain provisions of the TMDL for Wissahickon Creek issued by EPA .

Appellant's second ground for summary judgment is that the time within which the limit on phosphorus discharges must be met is unreasonably short because the limit cannot be achieved in that time frame given the requirements to design, bid and construct the necessary facilities. This position is supported by an affidavit of a qualified engineer, William Brown. He states that technology using alum, a likely technology, may well result in violation of other water quality standards, and that, in any event, it would take more than two years to engineer, design, bid, construct and test any new treatment units to meet the limit. He also certifies that additional time would be associated with the Department permitting process for construction of any new treatment units.

The Department shows no sympathy to this claim in its response. The Department says that the way to achieve compliance is the responsibility of the Appellant whether or not alum is an effective technology. It says that at present there is no record as to why the Department believes this time frame is reasonable, but that it will support the

reasonableness of this timeframe at the hearing on the merits. As a preview, the affidavit of Jenifer L. Fields, attached to the Department's response as Exhibit D, states that similarly situated municipal waste dischargers have been held to the 2.0 mg/l limit and have had no problem in achieving this limit. The Department also says Appellant has not presented a case for summary judgment on this issue because the affidavit of William Brown is said to be made on information and belief and not on Brown's personal knowledge as is required to support for a motion for summary judgment.

OPINION

The grant of summary judgment is proper under Rule 1035.2 of the Pennsylvania Rules of Civil Procedure whenever (1) there is no genuine issue of material fact that could be established by additional discovery or expert report, or, (2) after completion of discovery relevant to the motion, the party opposing the motion who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.[2] The grant of summary judgment is warranted only in a clear case, and the record must be viewed in the light most favorable to the non-moving party resolving all doubts regarding the existence of a genuine issue of material fact against the grant of summary judgment.[3]

The Board has made it clear in applying these principles that it will grant summary judgment only where the right to judgment as a matter of law is clear and that

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[2] *Jones v. SEPTA*, 772 A.2d 435 (Pa. 2001); *Schreck v. Department of Transportation*, 749 A.2d 1041 (Pa. Cmwlth. 2000).

[3] *Young v. Department of Transportation*, 744 A.2d 1276 (Pa. 2000); *County of Adams v. DEP*, 687 A.2d 1222 (Pa. Cmwlth. 1997).

summary judgment will not be granted in complex cases involving mixed questions of law and fact or conflicting opinions of experts.[4]

The size and complexity of the Appellant's motion papers alone suggests that summary judgment is not indicated in this case. The original motion papers, including the brief, two affidavits and 34 exhibits stand two and three-quarter inches above the desktop. The motion is based on 89 statements of "undisputed" material facts (seven of which are "reserved"). The Department's response flatly denies 41 of these statements and admits only 17. The others are denied "as stated" or with other qualifications. While the examination of witnesses may demonstrate that many of these are true statements, this process requires a hearing. The Appellant's Reply Brief with 17 additional exhibits adds 30 pages of brief for the Board's consideration.

Of course in a properly substantiated motion for summary judgment the Department could not rest only on its denials. However, in this case many of the Department's denials are based on the expert opinion of Alan C. Everett whose affidavit includes references to scientific literature in support of his opinion, the affidavit of Will S. Brown with respect to the Department's nutrient criteria development work, as well as the affidavit of Jenifer L. Fields concerning the timeframe given for compliance with the 2.0 mg/l standard.[5] Since these affidavits based on personal knowledge or apparent

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[4] *Citizen Advocates United to Safeguard the Environment*, EHB Docket No. 2006-005-L (Opinion issued February 6, 2007), slip op. at 6; *Groce v. DEP,* 2006 EHB 268, 270; *Mountaintop Joint Area Sewer Authority v. DEP*, 2006 EHB 153, 161-162; *Defense Logistics Agency v. DEP*, 2001 EHB 337, 348.

[5] In framing this opinion we do not disregard the Department's contention that Appellant's affidavits are inadequate because they are given on "information and belief" even though every experienced litigation lawyer knows that affidavits in support of a motion for summary judgment in both state and federal courts must be made on personal knowledge. Pa. R.C.P. No. 1035.4. While this defect in the Appellant's affidavits is

qualified opinion directly contradict many of the facts that the Appellant's motion papers take as undisputed material facts, summary judgment is inappropriate.

Appellant's reply brief also contends that we should grant summary judgment on the ground that the Department has no evidence that the discharge from Appellant's treatment plant caused the impairment cited by the Department. Here again, the Appellant is faced with the investigation made by Mr. Everett indicating that large portions of the algal growth are located above and below the discharge point from Appellant's facility and that in his opinion, this discharge has impaired and continued to threaten impairment of the stream. Accordingly, the claim of an absence of causation is not a ground for summary judgment.

Finally, Appellant's reply brief says that summary judgment should be granted on the time allowed for compliance. It argues in part that the Department's regional head of water regulation who issued the permit cannot be qualified to give an opinion as to the length of time needed to comply with permit conditions. We are disinclined to agree with that as a matter of law on a motion for summary judgment. We do recognize, however, that the time for compliance may present some technical problems on the method of treatment as the Appellant's affidavits claim. The hearing will give Appellant ample time to present its evidence in support of its claims for further time in which to comply to be fully considered by the Board in exercise of its *de novo* review.

In reaching this conclusion we express no view on Appellant's imaginative and thorough interpretation of the Clean Water Act, the TMDL and the claimed insufficiency

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undoubtedly due to the inadvertent, habitual recital for most affidavits, we could not grant summary judgment on the basis of the Appellant's affidavits for this reason. *Heidelberg Township v. DEP,* 1999 EHB 800; *Yourshaw v. DEP,* 1998 EHB 819.

of the data on which the Department's conclusion with respect to an actual or threatened impairment to the Wissahickon might be based. One or more of those contentions may or may not prevail after a hearing on the merits. We hold only that this case is not an appropriate case for summary judgment.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF AMBLER	:	
	:	
v.	:	**EHB Docket No. 2005-336-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 2nd day of July, 2007 the Appellant's motion for summary judgment is DENIED. The Board will consult with counsel promptly on the schedule for the filing of prehearing memoranda and the hearing on the merits.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Judge

DATED: July 2, 2007

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

LANGELOTH METALLURGICAL COMPANY	:	
	:	
v.	:	
	:	**EHB Docket No. 2006-272-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 5, 2007**

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board grants the Department's motion to dismiss, holding that a notice of violation that requests further study by a specific date is not a final action of the Department.

OPINION

Langeloth Metallurgical Company ("LMC") filed this appeal from a notice of violation issued by the Department of Environmental Protection (the "Department") on October 31, 2006 (the "NOV"). The NOV reads as follows:

> On October 19, 2006, the Department conducted an inspection of Langeloth Metallurgical Company (LM) in order to gather information necessary to process the NPDES renewal application. Accordingly, you will find enclosed a report of the October 19, 2006 inspection.
>
> During the inspection, Outfall 003 was viewed; this area had a heavy accumulation of unexplained black, gray and white

solids that included some shiny flakes of a metallic substance. Additionally, the sediment produced sheen when it was disturbed. The amount of material present, and the stratification of the material indicate a reoccurring pollution incident and/or treatment plant upset impacts this outfall.

Both LM personnel present at the time (Mr. Smydo and yourself) were unsure of the origin of this material, but did state that there had been no known incident(s). Personnel indicated that this outfall is not routinely monitored, as there are several internal monitoring points that are monitored instead. In order to assist the facility with tracking pollution, this outfall should be visually inspected at least monthly to record any changes in its appearance.

The depth of the material and the layered quality of it indicates that there have been numerous incidents that have allowed this material to discharge from your outfall. Additionally, Department photographs taken in 1996 indicate there has been a significant change in the condition of this swale since 1996. The above-mentioned accumulation of solids in the swale after the outfall pipe did not exist in 1996. For your convenience, I have attached those photographs to this letter. Sample results are not available at this time, but will be provided to LM as soon as they are supplied to the Program.

The presence of this material is a violation of your NPDES permit and The Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. Sections 691.1-196.1001 (The Clean Streams Law). Any violations of The Clean Streams Law is subject to penalties provided by law.

Please note that this condition is a concern for the potential rerouting of Outfall 003 to discharge into Burgetts Fork Creek. Currently, this material has been deposited along an artificial channel that then discharges into an area impounded with water and sediments. In order to fully address potential impacts on Burgetts Fork Creek, the Department requests Langeloth investigate and identify the source of this material prior to completing the rerouting of Outfall 003.

The Department requests you review your records for all treatment facilities present at LM in order to ascertain if there has been any upset conditions in the past 5 years that would have resulted in this material being discharged from your outfall. Please submit your findings to the Department by November 26, 2006.

This Notice of Violation is neither an order nor any other final action of the Department of Environmental Protection. It neither imposes nor waives any enforcement action available to the Department under any of its statutes. If the Department determines that an enforcement action is appropriate, you will be notified of the action.

The Department argues that the Board lacks jurisdiction over this appeal because the NOV was not a final action. The Department argues that the NOV merely identifies what the Department believes to be violations and does not order or impose upon LMC any obligations that subject LMC to liability.

LMC acknowledges that the NOV may not be an appealable action, but it wished to err on the side of caution by filing an appeal to preserve its right to challenge the claim by the Department that a violation occurred. LMC notes that the Department's finding of a violation and its request that LMC submit its findings by a specific date suggests that the NOV is appealable. LMC is particularly concerned that the NOV could have a preclusive effect in further proceedings.

We hold that the October 31, 2006 NOV is not appealable, and we grant the Department's motion to dismiss. Section 4(a) of the Environmental Hearing Board Act provides that the Board has the power and duty to hold hearings and issue adjudications on orders, permits, licenses or decisions of the Department. 35 P.S. § 7514(a). The Act further provides that "no action of the Department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the Board ...." 35 P.S. § 7514(c). The Board only has jurisdiction to review final actions of the Department. 25 Pa. Code § 1021.2. To be appealable, a Department action must affect personal or property rights, privileges, immunities, duties, liabilities, or obligations of a person. *Id.*; *Protect Environment and Children Everywhere v. DEP*, 2000 EHB 1, 2; *DER v. New Enterprise Stone and Lime Co.*, 359 A.2d 845, 847 (Pa. Cmwlth. 1976). We have consistently held that an NOV containing a listing of violations, the mention of the possibility of future enforcement actions or the procedure necessary to achieve compliance is not an appealable action. *Lower Providence Twp. Municipal*

Authority v. DEP, 1996 EHB 1139, 1140-41; *M.W. Farmer Co. v. DER,* 1995 EHB 29. *See, e.g., Fiore v. DER*, 510 A.2d 880, 883 (Pa. Cmwlth. 1986); *Sandy Creek Forest v. DER*, 505 A.2d 1091, 1093 (Pa. Cmwlth. 1986); *Sunbeam Coal Corporation v. DER*, 304 A.2d 169, 170-71 (Pa. Cmwlth. 1973); *Beaver v. DEP*, 2002 EHB 666, 674; *Goetz v. DEP*, 1999 EHB 824, 825; *Eagle Enterprises v. DEP,* 1996 EHB 1048; *The Oxford Corporation v. DER*, 1993 EHB 332, 333-34. However, an NOV that orders the recipient to take some action affecting its personal or property rights has been held appealable. *See, e.g., S.H. Bell Company v. DER*, 1991 EHB 587, 588-90.

At first glance, the NOV appears to walk the line between notifying LMC of violations, and "ordering" LMC to take action. Indeed, this case highlights that it is impossible to draw a bright line between appealable and nonappealable actions, and such a determination must be made on a case-by-case basis. *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121; *Ford City v. DER*, 1991 EHB 169, 172. As we recently pointed out in *Redbank Valley Municipal Authority v. DEP*, 2006 EHB 813, 819, not all Department communications fall neatly into appealable and non-appealable categories. We discussed the many factors to consider in determining whether a Department action is appealable in *Borough of Kutztown v. DEP*:

> In deciding whether a Departmental letter constitutes a final "action" or "adjudication," we consider such factors as the wording of the letter, the substance, meaning, purpose, and intent of the letter, the practical impact of the letter (with an eye to what actions a reasonably prudent recipient of the letter would take in response to the letter), the regulatory and statutory context of the letter, the apparent finality of the letter, what relief the Board can offer (i.e., the practical value of immediate Board review), and any other indicia of a letter's impact upon its recipient's personal or property rights.

2001 EHB at 1121.

We must start with the specific wording of the letter. *Id.*; *see also 202 Island Car Wash v. DEP*, 1999 EHB 10, 12; *Highridge Water Authority v. DEP*, 1999 EHB 1, 4. Similar to the

letter we analyzed in *Kutztown*, the Department's NOV includes language that is somewhat tentative (the depth of the material "indicates" that there have been numerous incidents; "sample results are not available at this time, but will be provided to [LMC] ..."), and some language that reads like a request ("... this outfall should be visually inspected at least monthly ..."; "... the Department requests Langeloth investigate the source of this material ..."; "... the Department requests you review your records ....") Such qualified findings and simple requests or suggestions are indicative of a nonappealable action. *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1122; *see Sandy Creek Forest, Inc., v. DER*, 505 A.2d 1091, 1093 (Pa. Cmwlth. 1986). However, the Department's NOV also asks LMC to "submit your findings to the Department by November 26, 2006." This request shares some commonality with the language in the *Kutztown* letter, which we held to be appealable. In fact, we had this to say: "The fact that the letter imposes a specific deadline for submitting a plan adds to our conviction that the letter is appealable." *Borough of Kutztown v. DEP*, 2001 at 1122. Nevertheless, the Department's NOV in this case is set apart from the letter in *Kutztown* in that it has all the hallmarks of a tentative, interim action. The Department's NOV indicates that the investigation is not complete ("[s]ample results are not available at this time ...") and requests that LMC review its records, allowing for further study. *Compare id.* at 1123-24. The Department's request that LMC submit its findings by November 26, 2006 is just that – a request. The Department is not telling LMC to take certain measures, it is asking it do so. It is clear that the matter is still up for further debate and study. Viewed as a whole, the Department's NOV does not contain the mandatory language we have held to be appealable. *Id.* at 1122, *See, e.g., Borough of Edinboro v. DEP*, 2000 EHB 835; *Westtown Sewer Company v. DEP*, 1992 EHB 82; *Bethel Park v. DER*, 1984 EHB 716; *Hatfield Township Municipal Authority v. DER*, 1982 EHB 331.

Another important factor to consider in determining whether a Department communication is appealable is the statutory and regulatory context of the matter. *Lower Salford Twp. Authority v. DEP*, 2006 EHB 657, 660. Here, the statutory and regulatory context supports our conclusion that the Department's October 31, 2006 NOV is not appealable. When the Department wrote the NOV it was in the process of reviewing LMC's application for renewal of its NPDES permit. That review is ongoing. The NOV appears to be as much a part of that review process as anything else. The Department requests LMC to review its records to ascertain if there have been any conditions in the past that would have resulted in the observed material being discharged from its outfall. This request stems from the fact that the Department is not aware of the specific source of the material and has not reached a final conclusion regarding LMC's renewal application. The Department's NOV invites an open dialogue with LMC that should be encouraged. Further, there is not much practical relief we could offer. If we were to "vacate" the Department's letter, it would essentially result in the same course of action the Department is currently suggesting – further study and analysis leading up to a decision on the renewal application.

LMC is right about one thing: Because the NOV is not a final, appealable action, it has no preclusive effect in future proceedings. There can be no future claim of administrative finality based upon the findings set forth in the NOV.

For the reasons set forth herein, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LANGELOTH METALLURGICAL COMPANY	:	
	:	
vi.	:	
	:	**EHB Docket No. 2006-272-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 5th day of July, 2007, it is hereby ordered that the Department's motion to dismiss is granted. This appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: July 5, 2007

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SECRETARY TO THE BOARD

SENECA LANDFILL, INC.; ARDEN LANDFILL, INC.; WASTE MANAGEMENT DISPOSAL SERVICES OF PENNSYLVANIA, INC.; WASTE MANAGEMENT OF PENNSYLVANIA; LAUREL HIGHLANDS LANDFILL, INC.; CHAMBERS DEVELOPMENT COMPANY, INC.; PINE GROVE LANDFILL, INC.; USA SOUTH HILLS LANDFILL, INC.; USA VALLEY FACILITY, INC.; CHRIN BROTHERS, INC.; REPUBLIC SERVICES OF PENNSYLVNIA, LLC; NEW MORGAN LANDFILL COMPANY, INC.; GREENRIDGE RECLAMATION, LLC AND GREENRIDGE WASTE SERVICES, LLC; LANCASTER COUNTY SOLID WASTE MANAGEMENT AUTHORITY; and VEOLIA ES GREENTREE LANDFILL, LLC,	:	EHB Docket No. 2006-012-R (Consolidated with 2006-013-R through 2006-028-R; 2006-098-R and 2006-073-R))
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	Issued: July 5, 2007

OPINION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Acting Chairman and Chief Judge

Synopsis:

The Board denies the Appellants' Joint Motion for Summary Judgment and grants the Department's Motion for Summary Judgment. The Department is entitled to judgment as a

matter of law because it has provided refunds of Act 90 fees to the Appellants in accordance with Section 702(e) of Act 101.

OPINION

Before the Board are cross motions for summary judgment filed by the Pennsylvania Department of Environmental Protection (Department) and several landfills who are seeking a refund of disposal fees they paid on solid waste used as alternate daily cover since the fee's inception in 2002. The fees were collected by the Department pursuant to § 6301 of Act 90, Act of June 29, 2002, P.L. 596, *as amended*, 27 Pa.C.S. § 6301. On March 14, 2005, the Commonwealth Court interpreted § 6301(b) of Act 90 as exempting all process residue and nonprocessible waste used as alternate daily cover from the fee coverage, regardless of its source. *Joseph J. Brunner v. DEP*, 869 A.2d 1172 (Pa. Cmmw. 2005). The Department had applied the exception only to process residue and nonprocessible waste generated by a resource recovery facility. These cross motions for summary judgment ask the Pennsylvania Environmental Hearing Board to determine whether Appellants Seneca Landfill, Inc. et al. (collectively referred to as Appellants) are entitled to refunds dating back to the Third Quarter of 2002, which is when the fee was first collected, or whether they are limited to the refunds issued by the Department which dated back to the earlier of either the *Brunner* decision or six months prior to the landfills' request for refunds.

This matter originated before former Chief Judge Michael L. Krancer and on February 5, 2007 was transferred to Acting Chief Judge Thomas W. Renwand. Oral argument was held before Judge Renwand on March 1, 2007.[1] After review of the record, the Board denies the

[1] The Board acknowledges and thanks counsel for the excellent briefs filed in this matter. The Board also appreciates the oral argument which served to better crystallize the issues and the positions of the parties.

Appellants' Joint Motion for Summary Judgment and grants the Department's Motion for Summary Judgment. We find as a matter of law that the refunds were made in accordance with the prescribed procedure for providing refunds under Section 702(e) of Act 101, Act of July 28, 1988, P.L. 556, *as amended*, 53 P.S. §§ 4000.101 – 4000.1904, at § 4000.702(e), which is incorporated into Act 90 by reference.

Factual and Legal Background:

These consolidated appeals emerged as a result of the *Brunner* litigation which the Commonwealth Court decided on March 14, 2005. The *Brunner* case and these consolidated appeals involve Act 90 which went into effect on July 9, 2002. At the center of the controversy in *Brunner* was Section 6301 of Act 90, which imposed a $4.00 per ton disposal fee on all solid waste collected by municipal waste landfills as follows:

> (a) Imposition. – Except as otherwise provided in subsection (b), each operator of a municipal waste landfill shall pay, in the same manner prescribed in Chapter 7 of [Act 101] . . . a disposal fee of $4 per ton for all solid waste disposed of at the municipal waste landfill. The fee established in this section shall apply to process residue and nonprocessible waste from a resource recovery facility that is disposed of at the landfill and is in addition to the fee established in section 701 of [Act 101].

Subsection (b) of § 6301 provides an exception to the fees that must be collected. Relevant to this litigation is (b)(1) which states as follows:

> (b) Exceptions. – The fee established under this section shall not apply to the following:
>
> (1) Process residue and nonprocessible waste that is permitted for beneficial use or for use as alternate daily cover at a municipal waste landfill.

27 Pa. C.S. § 6301.

The Department interpreted subsection (b)(1) as excepting only process residue and

nonprocessible waste that was generated by a resource recovery facility and notified municipal waste landfills accordingly by letter dated July 5, 2002. (Stip. ¶ 23) The letter explained that the disposal fee would be due quarterly, with the first fee being due October 20, 2002. The Department's interpretation was further clarified in a letter dated July 30, 2002 which emphasized that only process residue and nonprocessible waste from a resource recovery facility would be exempt under § 6301(b)(1). (Stip. ¶ 24) Joseph J. Brunner (Brunner), a municipal waste landfill operator in Beaver County, Pennsylvania, disagreed with the Department's interpretation of subsection (b)(1) and contended that all process residue and nonprocessible waste used as alternate daily cover was exempt, regardless of whether it was generated by a resource recovery facility. For that reason, Brunner withheld its Third Quarter 2002 payment of the $4 disposal fee on all process residue and nonprocessible waste used as alternate daily cover, regardless of its source. (Stip. ¶ 26) The Department sent Brunner a Notice of Deficiency, which Brunner appealed to the Environmental Hearing Board.[2] (Stip. ¶ 27) No other landfill operators challenged the Department's collection of the fee, nor did any seek to intervene in the *Brunner* appeal.[3] In a divided opinion, the Board ruled in favor of the Department and found that only alternate daily cover from a resource recovery facility was excused from the $4 disposal fee. *Joseph J. Brunner, Inc. v. DEP*, 2004 EHB 684 (Krancer, C.J. and Renwand, J., *dissenting*).

Brunner appealed the Board's ruling to the Commonwealth Court. On March 14, 2005 the Commonwealth Court reversed the Board and ruled that process residue and nonprocessible waste did not need to be generated by a resource recovery facility in order to qualify for the exemption in § 6301(b)(1). *Joseph J. Brunner, Inc. v. Department of Environmental Protection*,

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[2] Brunner withheld payment only for the Third Quarter of 2002. Thereafter, he paid the fee under protest. (Stip. ¶ 26; Transcript of Oral Argument, p. 60-61)

[3] However, the Appellants point out in their briefs that they were well aware of the *Brunner*

869 A.2d 1172 (Pa. Commw. Ct. 2005).

The Department filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court. While the petition was pending, the Department continued to collect disposal fees in accordance with its now discredited interpretation. The disposal fees collected at that time were placed in escrow. (Stip.¶ 32) Also during this time period, the Department began to receive a series of letters from various landfill operators, including the Appellants, stating that they were paying the fee on non-resource recovery material used as alternate daily cover under protest and reserving their right to a refund of such fees. (Stip. ¶ 39-57 and Ex. G-Y to Stip) One of the Appellants, Seneca Landfill, Inc. (Seneca) continued to submit quarterly reports but began to withhold payment of fees on alternate daily cover. (Stip. ¶ 33) The Department responded to the letters, notifying the landfill operators to continue paying the fee and advising them that the fees were being placed into escrow pending a decision by the Supreme Court. The Department considered the first correspondence from each of the landfills in relation to the $4 disposal fee paid on alternate daily cover to constitute a petition for refund. (Stip. ¶ 38)

On September 8, 2005, the Pennsylvania Supreme Court denied the Department's Petition for Allowance of Appeal, leaving intact the Commonwealth Court's holding that the $4 disposal fee collected on waste did not apply to process residue and nonprocessible waste used as alternate daily cover regardless of whether it was generated by a resource recovery facility. *Department of Environmental Protection v. Joseph J. Brunner, Inc.*, 85 A.2d 44 (Pa. 2005).

At that point, the Department faced the task of notifying landfills to cease the remittance of fees for solid waste used as alternate daily cover. Since it was nearing the end of the Third Quarter of 2005, when fees would again be collected, the Department contacted an industry

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litigation and advise us that the waste industry funded this test case.

representative, Mary Webber, Executive Director of the Pennsylvania Waste Industries Association, and asked her to notify municipal landfill operators to cease paying the disposal fee on solid waste used as alternate daily cover. (Stip. ¶ 34 and Stip. Ex. F) According to the Department, correspondence via email was used as an immediate means to notify landfills to make the proper adjustment to their Third Quarter 2005 calculations. (Beatty Affidavit, ¶ 1)

A more sizable task facing the Department was refunding the collection of disposal fees paid by landfills for alternate daily cover. Refunds are governed by Section 702(e) of Act 101.[4] That section states that "[n]o refund of the recycling fee shall be made unless the petition for the refund is filed with the department within six months of the date of overpayment." 53 P.S. § 4000.702(e). All of the Appellants' petitions/letters for refund were submitted to the Department between April and November 2005. Therefore, pursuant to § 702(e) of Act 101, the Department issued refunds dating back six months from the date of each landfill's petition or letter. Brunner received a refund dating back to the Third Quarter of 2002 since that is when it protested the application of the fee to non-resource recovery material. Where petitions were filed more than six months after the *Brunner* decision, the Department refunded back to the date of the *Brunner* decision, March 14, 2005. Landfills that did not file petitions were also refunded back to the *Brunner* decision. (Stip. ¶ 36-38; Stip. Ex. G5, H2, I2, J5, K5, L4, M3, N5, O5, P1, Q4, R1, S2, T4, U5, V5, W5, X5, Y5, Z) All refunds were issued on December 16, 2005. (Stip. ¶ 35) These consolidated appeals followed.

The Appellants and Department have filed cross motions for summary judgment on the question of what point in time the fees collected on non-resource recovery-generated process

[4] Section 6301(a) of Act 90 states that the disposal fee is imposed "in the same manner prescribed in Chapter 7 of [Act 101]. . . ." 27 Pa.C.S. § 6301(a). Section 702(e) of Act 101 sets forth the refund procedure for the payment of fees governed by Chapter 7.

residue and nonprocessible waste used as alternate daily cover should have been refunded. The parties agree that there are no genuine issues of material fact and that this issue may be decided as a matter of law. It is the Department's contention that the clear language of § 702(e) dictates that refunds may be issued only dating back six months from the date they were requested. The Department argues that the Appellants failed to pursue the statutory remedy available under Section 702(e) until the Second Quarter of 2005, despite the fact that this remedy was available at the time of the initial payment of the fee. (Dept. Brief, p. 19). The Appellants argue that they should have received refunds for all of the disposal fees they paid on alternate daily cover dating back to the fee's inception, as opposed to simply those payments dating back six months from the dates of their petitions or letters of protest. It is their contention that the payments were not considered "overpayments" under § 702(e) of Act 101 until there was "judicial pronouncement that those payments were no longer legally due." (App. Brief, p. 3).

Summary judgment may be granted where the record demonstrates there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.2; *Angela Cres Trust v. DEP*, EHB Docket No. 2006-086-R (Opinion and Order issued February 8, 2007), p. 4; *Holbert v. DEP*, 2000 EHB 796, 807-809, *citing County of Adams v. DEP*, 687 A.2d 1222, 1224 (Pa. Cmwlth. 1997). After review of the record, we agree with the parties that there are no genuine issues of material fact and that this matter is ripe for summary judgment.

Refund provision of § 702(e) of Act 101:

The parties do not dispute that § 702(e) of Act 101 governs refunds of monies paid under the disposal fee provisions of Act 90. That section provides:

> Refunds. – Any operator that believes he overpaid the recycling fee may file a petition for refund to the department. If the

> department determines that the operator has overpaid the fee, the department shall refund to the operator the amount due him, together with the interest at a rate established pursuant to section 806.1 of the act of April 9, 1929 (P.L. 343, No. 176), known as The Fiscal Code, from the date of overpayment. *No refund of the recycling fee shall be made unless the petition for the refund is filed with the department within six months of the date of overpayment.*

53 P.S. § 4000.702(e) (emphasis added).

The Appellants focus on the word "overpayment." It is their contention that they were not required to file, and had no basis for filing, petitions for refund until the fees on alternate daily cover became overpayments, and, according to their analysis, that did not happen until the Commonwealth Court issued its ruling in *Brunner* on March 14, 2005. At that time, the Appellants assert they became entitled to a refund of all payments on process residue and nonprocessible waste used as alternate daily cover up to that point.

The Department contends that the question of when the payments may have become overpayments is irrelevant since the Appellants were aggrieved with each quarterly payment they made under Act 90 and could have petitioned for a refund or otherwise sought redress at the time the payments were made in accordance with their statutory remedies. The Department argues that the *Brunner* decision cannot be applied retroactively to the Appellants since they did not preserve their eligibility for a refund and, therefore, they are limited to a six-month refund in accordance with § 702(e).

In examining the language of § 702(e), the Appellants urge us not to defer to the Department's interpretation which, in their opinion, is clearly erroneous. It is true that the Department may be given some deference in the interpretation of its own regulations. *DEP v. North American Refractories, Inc.*, 791 A.2d 461 (Pa. Cmwlth. 2002). However, where a statutory provision is at issue, the Department is not entitled to deference. That function is

performed by the Environmental Hearing Board, acting in its adjudicative capacity. *See generally, Arippa v. PUC*, 792 A.2d 636, 660 (Pa. Cmwlth. 2002), *appeal denied*, 815 A.2d 634 (Pa. 2003) ("Only when an agency is acting in its expert capacity, either issuing a regulation or acting in an adjudicative capacity, is an agency given deference in its interpretation of a statute.") Nor is the Department entitled to deference when its construction of a regulation is contrary to its plain meaning, *Eagle Environmental, L.P. v. DEP*, 833 A.2d 805, 809 (Pa. Cmwlth. 2003), *appeal denied,* 854 A.2d 968 (Pa. 2003), or where its interpretation is set forth to justify its position in litigation, *Arippa, supra.* In this case, we neither defer to the Department's interpretation of § 702(e) nor accord it any greater weight than the interpretation advanced by the Appellants, but, rather, carefully consider each side's argument in reaching our decision.

Turning to § 702(e) and the Appellants' position regarding the term "overpayment," the Board disagrees with the fundamental premise of the Appellants' argument that prior to March 14, 2005 there existed no right to demand a refund. In addressing the issue of whether the fees became overpayments on March 14, 2005, it is important to keep in mind the role of the court in our tripartite system of government. It is well settled that the lawmaking power is vested in the legislature, not the judicial branch. We agree with the Appellants that it is "Civics 101" that the legislature creates the laws, the executive branch executes them and the court interprets them. In other words, the court does not create the law. *See generally, Laundry Owners Mutual Liability Insurance Assoc. v. Worker's Compensation Appeal Bd.*, 617 A.2d 860 (Pa. Cmwlth. 1992) *aff'd,* 644 A.2d 697 (Pa. 1994). Therefore, the March 14, 2005 decision by the Commonwealth Court in the *Brunner* litigation was judicial interpretation of the law. It did not create a right of action on the part of the Appellants that did not previously exist. To say that the Appellants had no basis for requesting a refund until the Commonwealth Court issued its ruling in *Brunner* is simply

incorrect.

Moreover, the facts do not support the Appellants' argument that they did not believe the fees were overpayments prior to March 14, 2005. The Appellants were aware of the *Brunner* litigation from the start and, in fact, helped to fund it. (App. Motion, Ex. 1, ¶ 6; Ex. 2 and 3, ¶ 4-6) According to the affidavit of Mary Webber, the Executive Director of Pennsylvania Waste Industries Association (PWIA), a trade association for the solid waste industry, the industry was aware that the *Brunner* litigation involved the issue of whether alternate daily cover, regardless of its source, was exempt from the Act 90 disposal fees. (App. Motion, Ex. 1, ¶ 4,5) Members of PWIA, including at least some of the Appellants, coordinated with Brunner's counsel and contributed financially toward the litigation. (App. Motion, Ex. 1, ¶ 6; Ex. 2 and 3, ¶ 6) The Appellants were, therefore, well aware and supportive of a challenge to the Department's collection of fees on non-resource recovery material used as alternate daily cover.

This is not a situation where the industry was in the dark about the controversy surrounding § 6301(b)(1). They knew this was an issue from the very beginning, yet Brunner was the only one to challenge it. We have no way of knowing, nor does it matter, whether Brunner drew the short straw and agreed to be the test case while the others stayed in the good graces of the Department of Environmental Protection while the litigation was proceeding. In any event, the industry was well aware they had a dispute with the Department's interpretation of § 6301(b)(1) and freely chose to sit on their appeal rights.

The Appellants make much of the fact that it would have been fruitless or even hazardous to challenge the Department's collection of fees on alternate daily cover prior to the *Brunner* decision. At the very least, they assert, it would have been pointless and unduly burdensome to file petitions for refund when the Department had made it clear that those petitions would not be

granted due to its interpretation of § 6301(b)(1). At worst, they assert, if they had withheld payment and received a Notice of Deficiency, they could have been subject to civil and criminal penalties and permit ramifications.[5]

We disagree that the Appellants had no option but to sit back and wait until a decision was handed down in *Brunner*. This is clearly evidenced by the fact that Brunner exercised one of those options – it withheld payment of the fee for the Third Quarter of 2002, received a Notice of Deficiency and appealed it, thus opening the door to a challenge to the Department's manner of collecting the fees. We are not saying, however, that the Appellants needed to follow that route, especially if they were concerned about the permit and penalty ramifications for doing so. They simply could have paid the fee and included a refund request or some form of written protest or reservation of rights in the letter accompanying the payment. The Appellants argue that it would have been unduly burdensome to make them file a refund petition with each quarterly payment. We fail to see the burden. According to the Department's regulatory counsel, the Department does not require – nor does it have – a specific form for filing a refund petition. Requests for refund may simply be done by letter. (Transcript of Oral Argument, p. 33) All the Appellants had to do was draft such a letter once and include an updated copy of it with their quarterly payment. In fact, including a sentence in the cover letter accompanying the first payment stating that the landfill was reserving its right to a refund of any payment on alternate daily cover would appear to have been enough to preserve their rights, since the Department treated the first correspondence from a landfill regarding the disposal fee as a petition for refund. (Stip. ¶ 38) Having done nothing, they have no basis for now seeking a refund of fees paid since the beginning of the fee collection.

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[5] There is no evidence in the record that any of the ramifications befell Brunner who did, in fact,

Legislative intent limits refunds to a six month period:

Moreover, the language of Section 702(e) indicates a clear intent on the part of the legislature to establish a time limit for the recovery of fees to which the Department is not entitled. The reasoning behind such a time limit is sound fiscal policy. As the Department notes in its memorandum in support of its summary judgment motion:

> The Commonwealth needs some assurance that once fees have been deposited and a reasonable time has passed for challenges, the fees will remain within the custody and control of the Commonwealth. If the status of fees deposited and allocated remains uncertain indefinitely, the environmental programs supported by these fees are unstable and seriously threatened. . . Circumstances that lend themselves to an unstable government could not have been the intent of the legislature.

(Dept. Brief, p. 21-22)

The Appellants here focus on what they believe to be the inequity of the Department collecting fees it was not entitled to in hindsight. But, in effect, what we have here is a six-month statute of limitations, and all statutes of limitations when applied to specific cases are going to bar what could otherwise be legitimate claims. Statutes of limitations are enacted for sound public policy reasons. For instance, if Brunner had decided not to challenge the Department's collection of fees on alternate daily cover at the time of Act 90's enactment in 2002 but had waited twenty years to launch its successful challenge, would the industry be entitled to a refund of all fees paid since 2002, even though they sat on their appeals rights during that time? Taking the Appellants' argument to an extreme, we can analogize this to a situation where an appellant challenges the Department's collection of permit application fees and convinces the Board and the Commonwealth Court that the Department has no authority to collect such a fee. We cannot envision a situation where the Department would then be required

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challenge the fee and received a Notice of Deficiency.

to refund every permit application fee it has ever collected. There must be some point in time from a public policy standpoint at which the Department's collection of a fee is considered to be final even if it is later found to be impermissible. There is sound public and fiscal policy for placing some limit on the time period in which a person may seek a refund of an improperly collected fee or payment. This is one of the purposes behind the concept of statutes of limitations.

The Department argues that this case is analogous to *DEP v. City of Philadelphia*, 692 A.2d 598 (Pa. Cmwlth. 1997) and *DEP v. Peters Township Sanitary Authority*, 767 A.2d 601 (Pa. Cmwlth. 2001), *allocatur denied*, 784 A.2d 120 (Pa. 2001). Those cases dealt with subsidy applications filed under Act 339, Act of August 20, 1953, P.L. 1217, *as amended*, 35 P.S. §§ 701-703 (now repealed).[6] The Act 339 program was implemented in 1953 and provided subsidies for a percentage of costs incurred for acquisition and construction of sewage treatment facilities.

In *DEP v. City of Philadelphia*, the City of Philadelphia sought to include its actual interest costs in the subsidy calculation as opposed to the cumulative rate of 1.5% that had been historically used by the Department. It filed a series of appeals challenging the Department's 1.5% cap, asserting that it should be allowed to include its actual interest costs in the calculation. The Environmental Hearing Board agreed with Philadelphia, as did the Commonwealth Court, *City of Philadelphia v. DEP*, 1996 EHB 47, *aff'd.* 692 A.2d 598 (Pa. Cmwlth. 1997), and Philadelphia was able to include its actual interest for the years appealed. It did not seek to include actual interest for prior years.

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[6] Act 339 is the popular name for the Contribution by Commonwealth to Costs of Abating Pollution Act, which was repealed by Act 68 of 1999, 27 Pa. C.S. §§ 6101-8114. However, the provisions of Act 339 remain in effect for those entities receiving payment on the effective date

The appellant in *DEP v. Peters Township Sanitary Authority,* took it one step further. Following the decision in *City of Philadelphia*, Peters Township asked for actual interest in its Act 339 application filed in 1997. It also asked for actual interest for a prior application submitted in 1994. The Department denied the request on the 1994 application and the Township appealed. The Board granted the Township's motion for summary judgment and the Department appealed to the Commonwealth Court, which reversed. The court concluded that Peters Township was "seeking to have DEP revisit its final determination of its allowed interest during construction in the 1994 application; an action barred by the finality of DEP's decision on the 1994 application." 767 A.2d at 604. The court noted that "the aggrieving administrative action was DEP's use of 1.5% interest on the 1994 application, and [the Township's] obligation to challenge it arose when DEP applied it to the 1994 application" and that "having not challenged it then, administrative finality bars [the Township's] claim in 1997 that it is now entitled to payments based on actual interest." *Id.*

Although this case does not involve administrative finality as did *City of Philadelphia* and *Peters Township*, those cases are nonetheless instructive here. In *Peters Township*, the appellant township argued that an intervening change in the law, such as the Commonwealth Court's holding that the Department could no longer cap interest at 1.5%, should allow it to recoup the prior years' interest. The court did not accept the argument, noting that Peters Township could have challenged DEP's use of the 1.5% interest in its 1994 application since "it was DEP's impermissible limitation on interest that needed correct[ing], not the law." *Id.*

Likewise, in this case it was the Department's impermissible collection of fees on alternate daily cover that needed correcting, not § 6301(b)(1). The Appellants may not go back

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of Act 68. 27 Pa. C.S. § 6109(a).

now and seek a refund of monies that could have been sought at the time they were paid, or at the very least reserved their right to do so. Just as the Commonwealth Court's overturning of the Department's limitation on interest in *City of Philadelphia* did not allow Peters Township to go back and apply for additional subsidies for the years preceding the court's decision, so the Commonwealth Court's overturning the Department's interpretation of §6301(b)(1) in *Brunner* does not open the door to the Appellants now going back and seeking refunds for the monies paid prior to the decision.

Conclusion:

For the reasons set forth herein, the Board grants the Department's Motion for Summary Judgment because as a matter of law the Department has properly issued refunds to the Appellants in accordance with Section 702(e). Therefore, the Board enters the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SENECA LANDFILL, INC.; ARDEN LANDFILL, INC.; WASTE MANAGEMENT DISPOSAL SERVICES OF PENNSYLVANIA, INC.; WASTE MANAGEMENT OF PENNSYLVANIA; LAUREL HIGHLANDS LANDFILL, INC.; CHAMBERS DEVELOPMENT COMPANY, INC.; PINE GROVE LANDFILL, INC.; USA SOUTH HILLS LANDFILL, INC.; USA VALLEY FACILITY, INC.; CHRIN BROTHERS, INC.; REPUBLIC SERVICES OF PENNSYLVNIA, LLC; NEW MORGAN LANDFILL COMPANY, INC.; GREENRIDGE RECLAMATION, LLC AND GREENRIDGE WASTE SERVICES, LLC; LANCASTER COUNTY SOLID WASTE MANAGEMENT AUTHORITY; and VEOLIA ES GREENTREE LANDFILL, LLC,	:	**EHB Docket No. 2006-012-R (Consolidated with 2006-013-R through 2006-028-R: 2006-098-R and 2006-073-R)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 5th day of July 2007, upon consideration of the Joint Motion for Summary Judgment filed by the Appellants and the Motion for Summary Judgment filed by the Department, IT IS ORDERED that *the Department's Motion is granted* and that these appeals are hereby **dismissed.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Acting Chairman and Chief Judge

GEORGE J. MILLER
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: July 5, 2007

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