Environmental Hearing Board

Adjudications and Opinions

2011
VOLUME II

COMMONWEALTH OF PENNSYLVANIA
Thomas W. Renwand, Chief Judge and Chairman

JUDGES

OF THE

ENVIRONMENTAL HEARING BOARD

2011

Chief Judge and Chairman	Thomas W. Renwand
Judge	Michelle A. Coleman
Judge	Bernard A. Labuskes, Jr.
Judge	Richard P. Mather, Sr.
Acting Secretary	Maryanne Wesdock

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2011.

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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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK T. PERANO **v.** **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TILDEN TOWNSHIP, Permittee**	: : : : : : : :	**EHB Docket No. 2009-067-L (Consolidated with 2010-033-L and 2010-104-L)** **Issued: August 2, 2011**

A D J U D I C A T I O N

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board finds that the Department's decision to deny the operator of a private sewer plant's application for a permit renewal was lawful, reasonable, and supported by the facts. A consent order and agreement between the Department and the municipality where the plant is located, in which the municipality agrees to plan for the new sewage treatment needs area created by the permit denial, is also upheld.

FINDINGS OF FACT

1. Frank T. Perano ("Perano") is the owner and operator of the Pleasant Hills Mobile Home Park in Tilden Township, Berks County (the "Township"). (S.T. 22.)[1]

2. Sewage from Pleasant Hills is conveyed to an on-site wastewater treatment plant also owned and operated by Perano (the "plant"). (S.T. 22.)

---

[1] The record in this matter by agreement of the parties includes the transcript and exhibits from a supersedeas hearing held on July 21-23, 2010, and the hearing on the merits held on February 14-16, 2011. References to pages in the transcript from the supersedeas hearing will be referred to as "S.T." Pages from the transcript from the merits hearing will be cited as "T." Perano exhibits will be cited as "P. Ex." and Department exhibits will be cited as "DEP Ex."

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3. Pursuant to NPDES Permit No. PA 0053104 issued by the Department of Environmental Protection (the "Department"), treated effluent from the plant is permitted to be discharged to an unnamed tributary of the Schuylkill River (the "receiving stream"). (P. Ex. 2.)

4. The permit was set to expire on August 31, 2010, but the Department agreed to administratively extend it until the issuance of this Adjudication. (P. Ex. 2; Board's Order dated November 1, 2010.)

5. The plant was built and permitted in 1990. (S.T. 9, 23.)

6. The Department previously renewed the permit in 1995, 2000, and 2005. (T. 9.)

7. The plant is permitted as an interim facility. The permit requires that it be decommissioned when sewerage at a more suitable location becomes available. (P. Ex. 2.)

8. Pleasant Hills currently has approximately 568 residents who live in mobile homes that would be difficult to move if the park were to be closed. (T. 35, 40-42.)

9. James Perano is Perano's brother and the Chief Operating Officer of GSP Management Company, a d/b/a for Perano. James Perano oversees all aspects of operations, handles all interactions with the Department, and represents most of Perano's interests with respect to Pleasant Hills. (S.T. 37, 153-54; T. 8.)

10. Perano's plant uses the extended aeration process and utilizes activated sludge, a biological treatment process. (S.T. 343.)

11. The plant contains several components:

- Flow from the park goes first to a lift station, which lifts the sewage up to an equalization tank. (S.T. 343.)

- Flow then goes into the aeration zone where a bacterial mass digests the waste. The aeration zone is very active because air is pumped into it to ensure a good mix of oxygen and food. (S.T. 344-45.)
- Flow then goes to a settling tank, which is a quieter zone where heavier material settles out. (S.T. 345-46.)
- An underbaffle helps prevent floatables from escaping from the settling tank. Weirs at the end of the settling tank are supposed to provide even distribution of flow. A weir sits lower so water can go over it. It is notched with "v"s like a saw tooth. (S.T. 349-50.)
- Flow then goes into the sand filters. (S.T. 350.)
- After the sand filters, the flow goes into the chlorine contact tank, then into the finishing tank to further clarify or stabilize and dechlorinate the effluent before it is discharged to the stream. (S.T. 352.)

12. Edward Corriveau, P.E., the Department's qualified expert on sewage treatment plant design and operation, credibly opined as follows:

a. The plant has fundamental design flaws that inhibit its ability to handle the frequent high flows that it experiences;

b. Because of the design flaws, constant operator attention is required at the plant, which increases the potential for and frequency of operator errors resulting in pollutional discharges; and

c. There are insufficient operational safeguards or redundancies when the plant experiences peak flows, which helps explain why sewage sludge is regularly observed in the receiving stream.

(T. 556-65; DEP Ex. 33.)

13. In addition, Corriveau credibly opined as follows:

a. An inspection by the Department on November 22, 2010 revealed a plant that is not being operated properly. Among other things, a massive amount of solids had been left uncontrolled and had discharged to the clearwell, with a high danger at that point of being discharged into the stream. The sludge in the clearwell was many inches deep. (T. 656-72.)

b. The typical effective life of the plant design utilized by Perano is about 20 years. Perano's plant was built in 1990. (T. 577, 580.)

c. Perano's package plant was originally conceived for use by commercial facilities and it has difficulty accommodating the large fluctuations in flow that come in a residential setting. (T. 556, 559, 560, 580.)

d. The plant's design is getting to be dated. He cannot recall this design being permitted in the last decade. (T. 576.)

e. This plant was designed to be an interim, relatively short-term facility. (T. 576-77.)

f. Differential settling and a high rate of backwash from filters contribute to this particular plant's problems. (T. 561, 582.)

g. This plant design requires daily adjustments, every one of which is an opportunity for error, unlike larger publicly owned treatment works ("POTWs"), which are more automated. (T. 563-64, 569.)

h. Bypasses in the filters illegally installed by Perano have the effect of eliminating an important component in the treatment train and enable a discharge of excessive solids into the receiving stream. (T. 562, 565-66.)

i. The side water depth of the plant's tanks is less than ideal and the shorter height has not been shown to be justified based upon a successful operating experience. (T. 319, 364-65; DEP Ex. 33.)

14. Thomas Brown, another of the Department's qualified experts on operation and maintenance of sewage treatment plants, credibly opined as follows:

a. The plant has discharged significant quantities of solids into the receiving stream from 2007 to the present day (close of the record). (T. 507-08, 515, 523.)

b. Sampling reported in a facility's Discharge Monitoring Reports ("DMRs"), even as enhanced pursuant to the administrative extension of the permit authorized by the Department pending this Adjudication, does not cover the majority of the operating time of the facility. (T. 544.)

c. The Department's November 22, 2010 inspection revealed a plant that is not being operated properly. (T. 522.) Among other things, the condition of the clarifier showed that the buildup of sludge must have been going on for some time, which is difficult to reconcile with the operator's duty to monitor such conditions on a daily basis. (T. 527, 550.)

d. Perano on multiple occasions has essentially converted the sludge holding tank, which is supposed to be operated in an aerobic condition, into a passive, ineffective unaerated holding tank in which a significant amount of even anaerobic treatment is unlikely to occur. (T. 519-22, 532, 539.)

e. The bypasses Perano installed without notice or a permit would normally not be permitted, but even if they were, their use would need to be reported in detail, and extra monitoring would be required. (T. 511-12, 545.)

15. James Cieri, P.E., Perano's qualified expert on sewage plant design and operation, testified that the plant is not designed significantly different from other package plants of its day, that the plant's DMRs would suggest that it is capable of operating in compliance with its permit, and sludge seen throughout the treatment train does not necessarily mean that the sludge will end up in the receiving stream every time. (S.T. 355-57, 360-67; T. 314, 323, 329, 331.) However, Cieri also testified as follows:

a. The plant has problems any time there is an inch or more of rain. (T. 348.)

b. He has prepared several reports on how to try to improve the plant's performance. Those reports have identified several problems with the plant, including chlorinators that do not work, return line to aeration zone broken, diffusers clogged, blowers not working, untreated sewage overflows, and differential settlement of treatment train components. (S.T. 367-73; P. Ex. 29.)

c. Although the plant is a "pain" to operate, the "operators just have to get over it and deal with it." (S.T. 383.)

d. Perano, without notifying the Department or seeking a permit modification, changed the type of pumps used at the facility. (S.T. 401.)

e. The plant, when manned at all, is manned on a regular basis by uncertified operators. (T. 377.)

f. Package plants require more attention than POTWs. Larger plants "tend to run themselves." Package plants require constant attention. (T. 326, 352-54, 384, 390.)

g. Cieri advised Perano in July 2010 to hide from the Department the fact that the plant's sludge holding tank was not being operated properly. (T. 332-36; DEP Ex. 49.) Cieri's explanation for this advice was that the condition was "temporary," but he admitted that he did not know how long the condition had continued. (T. 332-36.)

h. Photographs from the Department's November 2010 inspection depict a plant that is not being operated properly. (T. 342-46, 363.)

i. The plant has had multiple mechanical problems. (T. 348-49.)

j. Over the years the clarifiers at the plant have settled, and that could be contributing to the plant's problems. (T. 353-54, 361-62; *see also* S.T. 387-88; T. 581; DEP Ex. 3.)

k. Sludge buildup is a constant operational problem at the plant. (DEP Ex. 54.)

16. The frequent observation of sludge on the surface of the plant's clarifiers, weirs, and clearwell, as well as in the receiving stream, is unacceptable and is an indication that the plant's design and operation are inadequate. (S.T. 324, 356, 549-51; T. 344-48, 388, 401, 565.)

17. The plant's sludge holding tank has not consistently operated as designed and permitted. (T. 338-39, 518-20; DEP Ex. 49.)

18. The sludge holding tank is frequently used as an unaerated holding tank. This practice does not result in the reduction of solids one would expect from a functioning and permitted system. (T. 335-36, 519-20; DEP Ex. 49.)

19. The plant's problems are most severe when there is an inch or more of rain, which suggests that the conveyance system to the plant has an infiltration and inflow ("I & I") problem. The plant is usually at least theoretically capable of handling lower flows in compliance with its permit. (S.T. 191; T. 314, 328, 348, 525, 560.)

20. The plant is not particularly different from other package plants of its day in terms of basic design. (S.T. 366-67; T. 315, 321-327, 362-65.)

21. Part B, Section I.D of Perano's NPDES permit provides in part as follows:

> D. Proper Operation and Maintenance
>
> The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the terms and conditions of this permit.

(P. Ex. 2.)

22. In February 2005, Perano exceeded the monthly average discharge permit limit for ammonia (NH 3-N). (P. Ex. 7.)

23. In March 2005, Perano exceeded the monthly average discharge permit limit for ammonia. (P. Ex. 7.)

24. In April 2005, Perano exceeded the monthly average discharge permit limit for ammonia. (P. Ex. 7.)

25. In May 2005, Perano exceeded the monthly average discharge permit limit for ammonia. (P. Ex. 7.)

26. In June 2005, Perano exceeded the monthly average discharge permit limit for ammonia. (P. Ex. 7.)

27. On June 10, 2005, the Department and Perano entered into a consent assessment of civil penalties of $7,500 for effluent violations of dissolved oxygen (DO) and ammonia reported on Perano's monthly DMRs. (S.T. 290; T. 9-10; P. Ex. 7)

28. In July 2005, Perano exceeded the monthly average discharge permit limit for ammonia and fecal coliform. (P. Ex. 7.)

29. In August 2005, Perano exceeded the monthly average discharge permit limit for ammonia. (P. Ex. 7.)

30. In September 2005, Perano exceeded the monthly average discharge permit limit for ammonia. (P. Ex. 7.)

31. An inspection on November 9, 2005 revealed that Perano had discharged inadequately treated sewage resulting in an accumulation of sewage sludge in the receiving stream downstream of the plant's outfall. Perano also had no calibration logs to calibrate pH and dissolved oxygen meters at the plant. (S.T. 469; P. Ex. 7; DEP Ex. 10.)

32. In November 2005, Perano exceeded the plant's design flow. (P. Ex. 7.)

33. In January 2006, Perano exceeded the plant's design flow. (P. Ex. 7.)

34. An inspection on January 13, 2006 revealed that sewage sludge was present in the stream downstream from the facility's outfall. (P. Ex. 7.)

35. An inspection on January 17, 2006 revealed the following:

- Sewage sludge and rags in the stream downstream of the plant's outfall;
- Inadequately treated sewage was discharged to the stream; and

- The inadequately treated sewage discharge was not reported to the Department.

(S.T. 460, 470; P. Ex. 7; DEP Ex. 11.)

36. In February 2006, Perano exceeded the plant's design flow. (P. Ex. 7.)

37. In March 25, 2006, Perano bypassed the plant's sand filters for eight hours. (P. Ex. 7.)

38. An inspection on April 4, 2006, revealed the following:

- Sewage sludge in the receiving stream downstream of the plant's outfall; sludge, sewage smell, and tubifex worms (which thrive in sewage sludge) were evident in the entire reach of the stream downstream of the plant's outfall; and
- Untreated and inadequately treated sewage was discharged from the plant.

(S.T. 452-56, 460-61, 470-72; P. Ex. 7; DEP Ex. 13.)

39. In June 2006, Perano exceeded his monthly limit for ammonia. (P. Ex. 7.)

40. In July 2006, Perano exceeded the plant's design flow. (P. Ex. 7.)

41. An inspection on June 26, 2006 revealed the following:

- The equalization tank was overflowing, resulting in the release of raw sewage into the receiving stream that was not reported to the Department; and
- The facility was exceeding NPDES effluent limits for ammonia and fecal coliform.

(S.T. 472-75; P. Ex. 7; DEP Ex. 14.)

42. During the June 26, 2006 inspection, Perano had tanker trucks on site attempting to pump down the sewage, but it was still flowing into the stream. (S.T. 462-63.)

43. An inspection on September 18, 2006 revealed the following:

- The comminutor and an aeration tank were offline;
- Solids were present on the surface of the clarifiers; and
- The facility was exceeding NPDES effluent limits for ammonia.

(S.T. 474-75; P. Ex. 7; DEP Ex. 15.)

44. An inspection on November 1, 2006 revealed the following:

- Sewage sludge and rags in the receiving stream downstream of the outfall for the plant;
- For several days, raw sewage had been backing up into a resident's yard and was not reported to the Department;
- The facility operator dumped samples if they looked bad;
- There was a large accumulation of sewage sludge throughout the plant;
- Two recycle valves were broken;
- The clarifiers had a large amount of sludge on the surface;
- The clearwell had approximately six feet of sewage sludge in it;
- The plant's effluent was very cloudy and had an odor; and
- The facility was exceeding its NPDES effluent limit for total suspended solids ("TSS").

(S.T. 475-77; P. Ex. 7; DEP Ex. 16.)

45. On September 5, 2006, Perano reported that the plant's equalization tank was overflowing due to a water main break. (P. Ex. 7.)

46. On or before November 17, 2007, Perano's logbook recorded that raw sewage from the equalization tank had overflowed into the receiving stream, but the incident was never reported to the Department. (S.T. 459; P. Ex. 7.)

47. In December 2006, Perano exceeded the plant's design flow. (P. Ex. 7.)

48. An inspection on January 8, 2007, revealed that Perano discharged extremely cloudy effluent, allowed sludge to accumulate in the stream, and exceeded the permit limits for TSS and biochemical oxygen demand ("BOD"). (S.T. 477-78; P. Ex. 7; DEP Ex. 17.)

49. In January 2007, Perano exceeded the plant's design flow. (P. Ex. 7.)

50. On February 27, 2007, Perano allowed layers of sewage sludge to accumulate on the surface of the clarifiers, cloudy water to form in the sand filter tanks, and sludge to accumulate in the chlorine tank. The decant pump was broken off and lying on the bottom of the sludge holding tank. (S.T. 478-82; DEP Ex. 18.)

51. In February 2007, Perano exceeded his effluent limit for total residual chlorine and the plant's design flow. (P. Ex. 7.)

52. On March 2, 2007, Perano reported that raw sewage from the plant's equalization tank had overflowed into the stream. (P. Ex. 7.)

53. In March 2007, Perano exceeded the plant's design flow. (P. Ex. 7.)

54. On April 12, 2007, Perano allowed large amounts of sewage solids to accumulate on clarifier No. 1. Effluent was discharging in violation of the permit's limits for fecal coliform. (S.T. 482-84; P. Ex. 46; DEP Ex. 19.)

55. In May 2007, Perano failed to comply with his permit limit for DO. (P. Ex. 7.)

56. In August 2007, Perano failed to comply with his permit limit for pH. (P. Ex. 7.)

57. On January 22, 2008, Perano allowed the clarifiers and the chlorine contact tank to accumulate thick layers of sludge and white foam to collect in the dechlorination tank. (S.T. 488-89; DEP Ex. 22.)

58. On May 13, 2008, Perano allowed a large amount of sludge to be discharged and build up in the stream. (P. Ex. 7.)

59. An inspection on June 25, 2008 revealed that Perano had discharged sludge into the receiving stream. Sludge had accumulated on the surface of the clarifiers. Perano failed to flow-proportion composite samples collected for testing and reporting as required by his permit. (S.T. 486-88; P. Ex. 7; DEP Ex. 21.)

60. In July 2008, Perano exceeded his effluent limit for ammonia and the design flow of the plant. (P. Ex. 7, 10.)

61. An inspection on April 13, 2009 revealed that an operator at the plant had noted in the logbook that a pollution event and a loss of sewage solids had occurred. Perano failed to report the pollution event to the Department. The plant was exceeding its permit limits for TSS and BOD. The plant's effluent was dark, turbid, and full of solids. Sewage sludge was floating in the clarifiers, sand filters, chlorine tank, and dechlorination tank. Untreated sewage and sewage solids lying on the ground next to the influent pump station indicated that a recent overflow had occurred. (S.T. 492-96, 577-81, 585-88; T. 165; P. Ex. 7; DEP Ex. 23, 24, 26.)

62. On July 1, 2009, Perano allowed sewage solids to enter the stream and allowed sludge to clog the clarifier weirs. (T. 378, 383, 390; P. Ex. 7; DEP Ex. 52.)

63. Pat Brennan, the plant operator, refused to clean out the clarifier. He said they would be cleaned twice a month, as previously scheduled. (T. 383.)

64. Sludge which makes it to the clarifiers is ripe for discharge to the stream. Most of the time there is no one at the plant to see it happen. (T. 385.)

65. On July 28, 2009, Perano allowed sewage sludge to clog the clarifier weirs and sewage solids to cover the entire surface of the clearwell. Perano's flow chart was not able to measure high flows because it reached its peak at less than the highest flows at Pleasant Hills. There was up to three inches of sewage sludge in the receiving stream downstream of the plant's outfall. The sand filters had been short circuited. (T. 393-98; P. Ex. 7; DEP Ex. 51.)

66. On December 9, 2009 an inspection revealed that Perano bypassed sand filter No. 1 using bypass valves installed without Department approval. An overflow of raw sewage from the influent pump station had occurred onto the ground that Perano also failed to report to the Department. (S.T. 497-98; P. Ex. 7; DEP Ex. 25.)

67. On January 8, 2010, the Department issued a notice of violation ("NOV") to Perano for installing two bypass values on the sand filters without Department approval, and for failing to notify the Department of the influent pump station overflow. (P. Ex. 7.)

68. On November 22, 2010, shortly before the hearing on the merits, an inspection revealed that Perano had improperly discharged sewage solids from his plant into the receiving stream, which resulted in an accumulation of up to two inches of sludge on the streambed. Perano also allowed the clarifier weirs to become clogged with sewage sludge and allowed sludge to enter the clearwell. Sewage sludge was also floating on the surfaces of the clarifier and sand filters, all which means that it was not surprising that sludge was observed in the stream. (T. 402-24, 457-58; DEP Ex. 30.)

69. The November 22 inspection is particularly significant because it shows that Perano is not able to operate the plant effectively even when he is under enhanced scrutiny by the Department pursuant to a conditional administrative extension of his permit. (T. 621.)

70. On July 14, 2010, Cieri advised Perano that the sludge holding tank, a key component of the treatment train, was not operating properly. (T. 334; DEP Ex. 49.)

71. Once the aeration tank goes offline it can take two weeks to build back up a proper level of treatment. (S.T. 463.)

72. The Department's inspections cover a tiny percentage of the plant's operation. (T. 663.)

73. On November 22, 2010, Wanda Bartholomew, an on-site employee of Perano and uncertified operator of the plant, incorrectly performed a chlorine test by using an expired chemical and failing to allow the test to develop for a sufficient period of time. (T. 55, 58, 405-06, 418; DEP Ex. 30.)

74. The Department issued Perano NOVs on November 3, 2005, February 17, 2006, August 18, 2006, October 16, 2006, December 11, 2006, July 31, 2008, June 8, 2009, August 7, 2009 and January 8, 2010. The Department also entered into a consent assessment of civil penalties with Perano on June 10, 2005 and issued Perano an administrative order on July 30, 2009.

75. On at least nine of its inspections, the Department noted the presence of sludge clogging the clarifier weirs and/or on the surface of the clarifiers, sand filters, and/or clearwell. (P. Ex. 7; DEP Ex. 15, 16, 18, 21, 23, 25, 30, 51, 52.)

76. Perano's permit, until November 1, 2010, did not specify the specific days on which effluent samples were required to be taken. The timing of sampling during a given month was entirely at Perano's direction. (S.T. 515; T. 544; P. Ex. 2.)

77. During the term of the current NPDES permit, an operator at the plant was observed discarding a sample that looked bad rather than have it tested. The operator explained that she discarded samples when they looked bad. (S.T. 161, 197, 476, 492, 515.)

78. Perano failed to report the unpermitted discharges of sewage that occurred on at least January 13 and 17, June 26, September 18, October 31 and November 1, 2006; January 8, 2007; June 25, 2008; and April 13, July 28 and December 9, 2009. (S.T. 462, 469-70, 473, 494-96, 497-99, 514; P. Ex. 7.)

79. Perano's permit requires him to report bypasses and overflows. (T. 623, 637-38; P. Ex. 2.)

80. The plant has experienced frequent mechanical failures including broken or inoperable pumps, sand filters not functioning properly, airlift not working, bisulfate pumps freezing, malfunctioning chlorinators, a broken return line to the aeration zone, clogged diffusers, an inoperable blower, a broken water line, and a malfunctioning comminutor. (S.T. 373-74.)

81. During one inspection Department personnel observed inoperable recycle valves, which are an important component in the treatment train, being held down by twisty ties so that they did not fall into the tank. (S.T. 467.)

82. Perano, without any legitimate excuse, failed to comply with his obligation under his permit to provide records requested by the Department. Perano's failure resulted in a July 30, 2009 Order, with which Perano also failed to comply until the Department petitioned to

enforce the Order in Commonwealth Court. *Perano v. DEP*, EHB Docket No. 2009-118-L (Adjudication issued May 10, 2011.)

83. Perano engaged in the spoliation of relevant evidence. *Perano v. DEP*, EHB Docket No. 2009-067-L (Opinion and Order issued January 11, 2011.)

84. The logbooks maintained by the operators at the plant note numerous instances of overflows, bypasses, "horrible" conditions, brown and turbid effluent, loss of solids, and essential equipment being offline. (S.T. 124-27, 498-50, 514; DEP Ex. 2.)

85. Internal emails and emails with outside contractors, some of which were uncovered only after our spoliation order, indicate that numerous violations have occurred at the plant and that Perano was aware of chronic operational problems at the facility. (DEP Ex. 35-44, 46-50.)

86. For example, a July 28, 2008 email from Wanda Bartholomew, one of Perano's unlicensed operators of the plant, to Leann Heller, Perano's operations manager, stated that "the baffles at the plant are still overflowing into the clarifiers and they are thick with sludge buildup…The clarifiers and baffles so bad the sludge is starting to get over into the final tank." (DEP Ex. 36.)

87. A December 8, 2007 email from Heller to James Perano inquires about the rapid air blower at the plant "that was removed from service more than a month ago." (DEP Ex. 37.)

88. A November 26, 2007 email from Bartholomew to Heller states, "got a big problem at the plant this morning? Lets hope that [Department inspector] Shawn Arbaugh doesn't come here today." Ms. Bartholomew also stated in her email that the chlorine contact tank and final effluent "are all horrible and we mean horrible" and that the chlorine contact tank and effluent "never looked so bad ever as they do today." (DEP Ex. 38.)

89. In a June 30, 2007 email, Ms. Heller informs James Perano that the "pump at the sewer plant is still tripping this has been going on since last Fall and we have burned up two of the original pumps and now the replacement is acting up." Ms. Heller asks James Perano "How long are we going to continue this game before we fix the actual electrical problem?" In addition, Ms. Heller states that when "this pump trips the EQ tank overflows onto the ground. This is recurring presently. I don't care what Steve says to stall it's a matter of time until Shawn bust us for sewage in the stream or on the ground." She concludes by asking "Gee I wonder who is getting throw under the bus if Shawn shows up?" (T. 133-34; DEP Ex. 39.)

90. In November 29, 2006 email by Ms. Heller that James Perano received, Ms. Heller advises him that "You can't run on the edge like this. We must repair or replace and have a spare pump so this plant always has two pumps to run off of if you ever hope to get out of sh-t. *That is from me who is looking out for your best interest.*" (emphasis in original). (T. 122; DEP Ex. 41.)

91. In a December 10, 2009 email to James Perano, Ms. Heller states that the "relief valve to sand filter one was open again because Pat is still having problem since we added more sand to that side. The water will not perk through." She also noted that an overflow onto the ground was "actually written in the log." (DEP Ex. 43.)

92. In a December 14, 2008 email, Ms. Bartholomew noted overflows onto the ground, a pump that stopped working because it was clogged with rags, the chlorine pump had stopped working, and that she had a "really big mess to deal with." (DEP Ex. 44.)

93. An April 12, 2006 email from Ms. Heller to James Perano states, "You should be pleased. There is no more worms out there. There were large areas of red worms very visible and the stream smells of sewer plant. *We are polluting the stream severely and need to knock*

it off. There is no Bsing here I smelt that cabbage smell as I was walking up to it and did not struggle to see what they were upset with us about...*Now, I can't do anything about the next section of the stream and if Gerry keeps dump nasties out there the problem is only going to move down stream. For now they should be please. It was good you sent me you needed to know the facts. And they aren't good. We need change here."* (emphasis in original). (DEP Ex. 48.)

94. An April 15, 2009 email from Ms. Heller to James Perano stated that the "sand filters should have collected the solids but didn't. Pat was thinking the media in the filters are short-circuiting and waste was going into the creek." (DEP Ex. 50.)

95. At least two of Perano's certified operators at the plant regularly and improperly estimated the percentage of solids in sludge removed from the facility and reported these "estimated" values to the Department on DMRs. (S.T. 140-42, 193-96, 267-68, 589; T. 625; P. Ex. 7, 32; DEP Ex. 7, 8, 31, 47.)

96. When reporting the percentage-of-solids result regarding excess sludge hauled away from the plant on DMRs to the Department, Perano's operators consistently overestimated the percentage of solids. The end result of this overestimation was that it created a false impression that more solids were being hauled away from the plant than were actually being removed. (S.T. 143; T. 496-513; P. Ex. 7; DEP Ex. 31, 33.)

97. At some point during 2009, Perano drilled two holes through the sand filters and installed bypass pipes at the plant for the purpose of bypassing the plant's sand filters during periods of high flow. This modification of the system of treatment at the facility was neither reported to, nor approved by, the Department. (S.T. 128-32, 497, 516-17; T. 412-13, 511-12; DEP Ex. 53.)

98. The Department would not likely have approved such a bypass mechanism. (T. 663.)

99. The use of a bypass results in the release of less than fully treated sewage to the receiving stream. (S.T. 402-04; T. 413, 415, 562; DEP Ex. 31.)

100. The Department has dedicated a significant amount of its resources to attempt to bring Perano into compliance with his legal obligations with respect to the plant, to no avail. (S.T. 517; T. 637.)

101. It would be difficult, if not impossible, for the Department to maintain its current level of regulatory oversight at the plant, which has diverted limited resources from other matters. (S.T. 318; T. 637-38.)

102. Perano discharged Stephen Cawley, the person who was the certified operator at the plant prior to the current operator, Pat Brennan, because Cawley complained to Perano that the plant needed seven-day coverage by a certified operator. (T. 110-11.)

103. Brennan is at the plant five days a week for about one hour at a time. (T. 11, 429-30.)

104. Brennan believes that the design of the plant "is kind of a pain…There is no fix." (S.T. 138; DEP Ex. 3.) He believes that the clarifier arrangement at the plant is difficult to manage and is susceptible to overloading. (S.T. 135-36, 147.) Brennan recommended that the plant should be closed and Pleasant Hills should be hooked up to public sewers. (S.T. 139.)

105. Brennan said that he was under the mistaken impression that system bypassing only needs to be reported if effluent limits are being violated. (S.T. 116.)

106. Brennan admitted to installing and using the bypass valves in an attempt to minimize even greater problems with the plant (e.g. discharges of raw sewage) when there was more flow into the plant than it could handle. (S.T. 114-15, 126, 129, 131-32.)

107. Brennan did not report the installation or use of the bypass valves to the Department. (S.T. 124, 127, 128.)

108. Brennan acknowledged that he should not have been "estimating" the amount of sewage sludge hauled away from the plant. (S.T. 142.)

109. Brennan has observed the plant discharging raw sewage. (S.T. 147.)

110. Brennan provided Perano with a list of numerous design and operational problems with the plant when he took over as operator. (T. 133; DEP Ex. 3.)

111. Brennan admitted to DEP inspector Roth that, during high-flow events, in order to help prevent solids from washing out, he will shut down the aeration tanks, add water to those tanks, shut down the sand filters, and open the valves on the bypasses so that process water can flow directly into the clearwell, dechlorination tank, and then the stream. (T. 412-13.)

112. Raw sewage has discharged from the plant upstream of the plant's permitted outfall on multiple occasions. No sewage sludge has accumulated in the receiving stream upstream from the point of the plant's influence on the stream. (S.T. 461-62, 472, 584, 588-90; T. 104, 244, 387, 398-400, 420, 457; DEP Ex. 26.)

113. The sewage sludge observed on numerous occasions in the receiving stream downstream of the plant's influence is not sedimentation caused by or originating from the spring-fed stormwater basin that constitutes the headwaters of the stream. The sewage sludge results from settled out sewage solids improperly discharged from Perano's plant. (S.T. 324-

27, 377-78, 393, 454-58; T. 22-24, 119-20, 355, 387-88, 398, 400, 418-20, 452-58, 460-61, 469-75, 478, 486, 488; DEP Ex. 9, 52; P. Ex. 7.)

114. Sampling confirmed it was sewage sludge. (T. 422; DEP Ex. 30.)

115. The sludge is characteristic only of an activated wastewater treatment plant. (T. 420.)

116. The record includes photographs of brown effluent being discharged directly from the plant's outfall pipe into the stream, which is consistent with what Department personnel observed on multiple occasions. (S.T. 579; DEP Ex. 24, 33.)

117. Sewage sludge emanating from Perano's plant is harmful to the stream. (S.T. 328, 604-12; T. 246, 400-01, 419; Perano Supplemental Exhibit[2] ("P. Supp. Ex.").)

118. Robert Schott, the Department's expert witness on aquatic biology, credibly opined based upon his review of multiple stream surveys conducted in accordance with accepted methodologies starting in 2006 that the relative number, pollution tolerance, and diversity of aquatic biological communities in the receiving stream upstream and downstream from the influence of Perano's plant demonstrates that Perano's plant is having an adverse impact on the stream. (S.T. 594-95, 600-12, 615-16.)

119. In a stream survey prepared by the Department on February 1, 2010, the Department concluded as follows:

> Conductivity and temperature were elevated and dissolved oxygen was less at the site downstream of the discharge, which is consistent with sewage related discharges.
>
> * * *
>
> The purpose of this study was to evaluate whether the [plant's] effluent was having an impact on stream quality. Based on the

[2] The record was reopened at Perano's request with no objection from the Department or the Township in order to admit this report.

findings of this study, we can say the results indicate the [plant's] discharge is degrading the stream through organic loading. Tolerant macroinvertebrates flourished downstream of the discharge despite the presence of habitat suitable for more sensitive taxa.

The presence of sewage fungus is particularly worrisome. This so-called "fungus", typically dominated by the bacterium *Sphaerotilus*, will coat all available substrate including cobble, boulders, and, if present, macroinvertebrates (Hynes 1960, Lemly 1982). This will ultimately lead to less interstitial habitat available for colonization of robust taxa. Additionally, it has been noted that *Sphaerotilus* will coat the gills of macroinvertebrates, amplifying mortality for those requiring high levels of oxygen (Lemly 1998). Although eliminating the sewage fungus would only be considered a first step in remediation, sensitive taxa will never be able to inhabit the stream unless this occurs.

In order for a diverse aquatic community to populate the stream, the discharge needs to be improved. We recommend that necessary actions be taken to ensure pollution is marginalized and remediation takes place.

(P. Supp. Ex.)

120. The Department's survey found that biological counts should have been better below the plant's outfall because of better stream and streambed characteristics, but the counts were not due to the plant's pollutional discharges. (P. Supp. Ex.)

121. The regular deposition of sewage sludge downstream of the plant's influence has led to a proliferation of pollutant tolerant organisms. (S.T. 605-12.)

122. Schott credibly testified that prolonging the release from the plant further will continue to have a negative impact on the receiving stream (S.T. 604-06, 623.)

123. Paul DeAngelo testified as an expert aquatic biologist on behalf of Perano that siltation of the stream above the influence of the plant's influence from the stormwater pond contributes to the impaired quality of the stream. (S.T. 317; T. 232-33.)

124. DeAngelo credibly testified that the receiving stream is impaired throughout its length. (T. 224, 228, 230-31, 238, 255.)

125. DeAngelo acknowledges that the plant is a contributing factor to the poor quality of the stream. (S.T. 334; T. 248-49.)

126. Ducks using the upstream stormwater basin are not contributing in any material way to the stream's poor condition. (S.T. 608.) If, in fact, the pond was so septic that it was discharging sludge, the pond would not be able to support the population of large-mouthed bass that it does. (S.T. 608.)

127. Sewage sludge will stick around in a stream for a little while. Normal flow will not take it away, but any kind of increase in flow will tend to clear it out. (T. 666.)

128. Operation of a sewage treatment plant results in the accumulation of excess sludge, which must be hauled away from time to time as waste. (DEP Ex. 31.)

129. The operator must report to the Department the amount of sludge hauled away. (S.T. 116-17.)

130. The Department's Instructions for Completing Sewage Sludge/Biosolids Supplemental Report instructs the reporting facility that: "The % Solids of liquid or dewatered sewage sludge or biosolids must be determined periodically through laboratory testing. Do not estimate or guess this value." (P. Ex. 54.)

131. For years, Perano simply estimated the percent solids of the sludge hauled from the plant. (S.T. 116-17, 143-44, 267-68.)

132. The extended use of estimated values for solids concentration of the wasted sludge led to inaccurate calculations that indicated implausible amounts of sludge had been hauled from the plant. (T. 500; DEP Ex. 31.)

133. Perano started measuring actual solids concentration by 2010. (DEP Ex. 31.)

134. Thomas Brown, the Department's aforementioned expert regarding problematic wastewater treatment plants and sludge handling practices, credibly testified that, at least for the years 2007 and 2008, based upon the influent coming into the plant as compared to the sludge that Perano likely actually hauled away as waste, large amounts of sludge are unaccounted for, which essentially means that those solids (absent unreported disposal elsewhere) were discharged into the stream. (T. 495-509, 515-21; DEP Ex. 31.)

135. In formulating his opinion, Brown utilized .9 percent solids, which is a mass concentration that averaged the measured values for mass concentration of solids hauled in 2010 as reported on Perano's DMRs. 2010 was the only year where the mass concentration values were not estimated. In Brown's credible expert opinion, .9 percent can reliably be used for sludge hauled in earlier years since Perano failed to submit appropriate data. (T. 499-503, 508, 535; DEP Ex. 31.)

136. Brown opined that, in 2007, Perano should have removed about 21,257 pounds of solids and actually removed about 15,027 pounds of solids. (DEP Ex. 31.)

137. In 2008, Perano should have removed about 20,384 pounds of solids and actually removed about 12,242 pounds of solids. (DEP Ex. 31.)

138. Brown's calculation corroborates and helps explain the Department's eyewitness testimony regarding sludge in the receiving stream. (T. 515-21; DEP Ex. 31.)

139. Based upon his sludge volume calculations, the presence of bypass valves installed in the sand filters, Department inspection reports, Department photographs, daily operational logs for the plant sludge observed on the surface of the clarifiers and the clearwell, and excessive inflow and infiltration causing washout of solids and the overflow of partially

treated wastewater, Brown credibly opined that the plant discharged several tons of solids into the receiving stream from 2007 to the present. (T. 515; DEP Ex. 31.)

140. Perano's experts regarding sludge handling did not contradict Brown's conclusions for 2007 and 2008. (S.T. 414-15; T. 290.)

141. Perano's experts, Brian Hagy and John Troutman, calculated a lesser amount of sludge loss for 2009 than Brown, but their opinions are less credible because--whereas Brown relied on actual data regarding the concentration of solids in the waste sludge hauled away (.9%)--Perano's experts used a default value (1.5%). (T. 517; DEP Ex. 31, 32.) The experts all agree that sludge generated was properly accounted for in 2010. (T. 310, 518.) More solids were hauled out of the plant in 2010. (T. 525-26.)

142. Perano, represented by James Perano, attended a meeting convened by the Department on February 5, 2008, at which he was informed that the Department did not intend to renew his permit when its current term expired in August 2010 because of the plant's compliance problems and the fact that there is a public sewer line 2,000 feet down the hill from the park. (S.T. 165, 263, 502, 505-07, 562; T. 47, 590, 596, 608-09, 646.)

143. The Department gave Perano two and one-half year's advance notice in order to give him sufficient time to plan accordingly, including an opportunity to negotiate with the Township for connection to its public sewers prior to the expiration of his permit, thereby minimizing disruption to him and his tenants. (S.T. 504-05, 512; T. 595.)

144. The phase-out of Perano's plant will create a "needs area" in the Township, which means that the Township will need to update its Official Act 537 Plan to address how the new need for sewage formerly treated at the plant will be met. (T. 601.)

145. The Township needs to update its Act 537 Plan because its existing Plan calls for Pleasant Hills's sewage to be treated by Perano's plant, but the closure of the plant means that sewage will somehow need to be addressed a different way. (T. 601.)

146. The Township will need to compare the costs and benefits of various options and select a method of sewage treatment (other than use of Perano's existing plant) that meets all regulatory criteria. The Department must approve the Township's choice. (T. 601.)

147. Actual planning has not begun. (Board Order, November 1, 2010.)

148. There is a sewer line with existing capacity to a POTW approximately 2000 feet down the hill from Pleasant Hills. (S.T. 505; T. 590-91.)

149. On March 27, 2008, the Department issued an order to the Township directing it to update its Act 537 Plan to provide that Pleasant Hills would be served by public sewers. (T. 47; P. Ex. 22.)

150. The Department withdrew that order and, on April 15, 2009, issued a second order to the Township that still required the Township to plan for the future needs area created by the closure of Perano's plant, but did not direct that any specific alternative be selected. (P. Ex. 6.) Perano's appeal docketed at EHB Docket No. 2009-067-L is from this order.

151. Although the Department intended not to renew Perano's permit as early as 2008, it viewed that expression of future intent as subject to continuing consideration and possible change up until the time the Department actually denied Perano's application in June 2010. (T. 646-47.)

152. On March 9, 2010, the Department and the Township entered into a consent order and agreement ("COA"). (P. Ex. 8.)

153. The COA provides that the Township had informally evaluated alternatives to address the future needs created by the phase-out of the Perano plant and determined that the extension of public sewer services from facilities already in the vicinity of the needs area was likely to be the most appropriate means for addressing the need. (P. Ex. 8.)

154. The COA went on to provide, however, that a final selection of a preferred alternative would need to be selected based upon the regulatory required alternatives analysis. (P. Ex. 8.)

155. It is not the Department's purview to dictate in the first instance what solutions the municipality comes up with. (T. 599.)

156. The only reason that the Department has ordered and the Township has agreed to update its Act 537 Plan is to address the new need for treatment caused by the impending closure of Perano's plant. (S.T. 512; T. 598-600.)

157. Perano submitted an application for renewal of his permit on February 26, 2010. (P. Ex. 5.)

158. The Department's review of Perano's renewal application focused on whether he had proposed anything to address the plant's known compliance problems. This focused review was typical of the Department's review of an application regarding a seriously noncompliant plant and was more limited than the review the Department would normally conduct of a renewal application for a plant that did not have ongoing, chronic compliance issues. (For example, the Department would normally review the numerical effluent limits in the previous permit to ensure that water quality was being protected, but it did not do so here.) (T. 281-82, 291-92, 480, 483-85, 604-05, 609-10, 612, 642, 644-46, 660.)

159. Perano did not propose anything in his renewal application to address the plant's known compliance problems. (S.T. 247; T. 67, 291-92, 480, 612-13; P. Ex. 5.)

160. The Department's review included Schott's review of additional stream surveys submitted by Perano. That review confirmed that the plant was having an adverse impact on the receiving stream. (T. 109, 614-16, 626-28.)

161. Had Perano proposed meaningful measures to address the plant's known compliance problems, the Department might have renewed the permit. In other words, the fate of Perano's permit was unresolved up until the time the Department reviewed his formal application. (S.T. 288-89; T. 608, 612, 642.)

162. Perano filed an application simply as a pro forma protective measure. (T. 32; P. Ex. 5; Brief, Proposed FOF 37.)

163. Perano was mistaken in his belief that the fate of the renewal application was a foregone conclusion. (T. 480, 609-10, 612.)

164. Perano did not identify the bypass valves or any other previously unreported facility alterations in the application. (P. Ex. 5.)

165. By letter dated May 26, 2010, the Department informed Perano that it intended to deny his renewal application. (P. Ex. 23.)

166. The letter afforded Perano the opportunity to attend an informal hearing to discuss the proposed denial. (P. Ex. 23.)

167. Perano expressed interest in attending an informal hearing, but then declined all of the Department's proposed dates in June and asked that the hearing be deferred until at least July. (T. 44, 108-08, 615.)

168. In light of the permit's expiration in August, the Department denied Perano's request for a delay and offered that it would still accept written comments. (S.T. 221-22; T. 44-45, 107, 615-16.)

169. Perano submitted comments, including the stream surveys mentioned above, which the Department reviewed. (S.T. 222; T. 109, 616.)

170. By letter dated June 21, 2010, the Department denied Perano's application for renewal of his permit. The reasons for the Department's denial were: (1) Perano's lack of ability or intention to comply with applicable requirements, (2) the repeated release of sewage sludge from the plant to the receiving stream, (3) design and performance deficiencies of the plant, and (4) damage to the receiving stream caused by the operation of the plant. (P. Ex. 7.)

171. The Department's denial letter accurately reflects the Department's true reasons for denying Perano's renewal application. The Department did not deny Perano's application because it does not like him, because it wanted to assist the Township in obtaining PennVEST funding, because it wanted Perano to settle litigation, or because of any reason other than those set forth in the letter, the likely availability of a viable alternative, and the Department's general preference for regionalization. (S.T. 285, 511, 571; T. 591, 596-97, 600, 618-29, 641, 654.)

172. The Department provided some ultimately unsuccessful assistance to the Township in its attempt to obtain PennVEST funding *after* the Department had already decided that Perano's plant would likely need to be shut down. (S.T. 509-12, 571.)

173. The Department reminded Perano in the denial letter of the alternative of him connecting to municipal sewerage service provided by the Township and stated the

Department's willingness to consider an appropriate extension of the permit to allow him to pursue that option. (P. Ex. 7.)

174. The Department remains open to the option of a conditional administrative extension of the permit. (S.T. 264; T. 628-29.)

175. The Department did not rely upon the section of the Perano's permit that required the plant to connect to more suitable sewerage services when such services become available. (P. Ex. 7.)

176. The Department's denial of the Perano's permit was not based upon the current availability of public sewers to Pleasant Hills. (T. 590-93.)

177. Nevertheless, the Department reasonably factored into its decision the fact that the plant was permitted as an interim facility and nearby public sewers appear to be a viable option. (T. 591-92.)

178. The Department favors regionalization for numerous reasons, including the fact that larger plants tend to require less regulatory oversight, have less dramatic fluctuations in flow, more qualified personnel who are on site more often, the plants are more automated with better technology, and they benefit from economies of scale that make them more efficient. (T. 592.)

179. The Department has administratively extended Perano's permit during the pendency of this appeal. (Board Order, November 1, 2010.)

180. The Department's administrative extension of the permit was subject to Perano's compliance with stricter limits on some effluent criteria and more frequent and random sampling. (T. 17-21, 667-68.)

181. The Board conducted a site view on July 21, 2010.

182. The Department acted reasonably in denying Perano's renewal application.

183. The Department acted reasonably in entering into the COA with Tilden Township.

DISCUSSION

This matter involves Perano's consolidated appeals of (1) the Department's order to Tilden Township to plan for the new needs area created by the phase-out of Perano's plant, (2) the consent order and agreement ("COA") between the Department and the Township wherein the Township agreed to plan for the new needs area, and (3) the Department's June 21, 2010 denial of Perano's NPDES permit renewal application for his plant. The matter docketed at 2009-067-L is Perano's third-party appeal of the order to the Township. The matter docketed at 2010-033-L is Perano's appeal of the COA between the Township and the Department. The matter docketed at 2010-104-L is Perano's appeal of the Department's June 21, 2010 denial of the renewal application. Although the Department took three actions, they all reflect one basic and underlying decision: the decision not to renew Perano's permit.

No person may discharge treated sewage into the waters of the Commonwealth without first obtaining an NPDES permit from the Department. 35 P.S. §§ 691.201, 691.202; 25 Pa. Code § 92a.1(b). NPDES permits have a fixed term not to exceed five years. 25 Pa. Code § 92a.7(a). A permittee may apply for renewal of the permit every five years. 25 Pa. Code § 92a.75(a). The Department may not renew a permit if a permittee has failed and continues to fail to comply with the law or has shown a lack of ability or intention to comply with the law as indicated by past or continuing violations. 35 P.S. § 691.609; 25 Pa. Code § 92a.75(b).

We review the Department's decision not to renew Perano's NPDES permit to ensure that it constitutes a lawful and reasonable exercise of the Department's discretion that is

supported by the facts. *Wilson v. DEP*, 2010 EHB 827, 833. Perano bears the burden of proof. 25 Pa Code § 1021.122.

There is no doubt that the Department had the legal authority to deny Perano's renewal application. 35 P.S. § 691.609. This case, then, turns on whether the Department's decision was reasonable in light of the facts. There are five facets of the Department's decision not to renew Perano's permit that, taken together, convince us that the Department's decision was reasonable and supported by the facts:

1. Perano's plant is permitted as an interim facility;
2. Perano is not able or willing to comply with the law in operating a deficient plant that is chronically polluting the receiving stream;
3. The Department gave Perano substantial advance notice that his permit was not likely to be renewed;
4. Tilden Township, the municipality where the plant and its users are located, has agreed to plan for the new needs area created by phasing out Perano's plant; and
5. The Department has conditionally agreed to the possibility of administratively extending Perano's permit until alternative sewerage becomes available.

We are not suggesting that all five of these components of the Department's action were necessary for its action to pass muster. We have no need or desire to speculate whether the Department's action would have passed muster if one or more of these components had not been present. Determining whether the Department erred in a case such as this is highly fact-specific and fact-intensive.

Interim Facility

Perano's plant was never intended to be a permanent facility. (Findings of Fact ("FOF" 7.) Perano seems to have forgotten this fundamental point even though he agreed to it when he accepted his permit. For example, he complains that it will be expensive for him and/or his

tenants to hook up to public sewers. That expense, however, was inevitable: the only question being when, not if, it would be incurred.

This case serves as a textbook example of why the Department and the law favor regionalized sewage treatment. *See* 35 P.S. § 691.5(a)(3) (the Department in taking any action pursuant to the Clean Streams Law shall consider the feasibility of combined or joint treatment facilities); *Whitemarsh Disposal Corporation v. DEP*, 2000 EHB 300, 338; *Interstate Traveller's Services v. DER*, 1981 EHB 187, 191-92. The Department has devoted an inordinate amount of taxpayer-funded resources to regulatory oversight of the Pleasant Hills plant. Regional plants tend to require less oversight, have less dramatic fluctuations in flow, and are more efficient. They have more automation, better technology, and more on-site personnel. (FOF 178.) Perano says that his is a typical package plant. If that is true (and we do not necessarily believe that it is), it explains why such plants should normally only be permitted as interim facilities.

We need to emphasize that we are *not* considering the validity of the permit condition in Perano's permit that requires him to shut down when better alternatives become "available." (P. Ex. 2, Part C.I.D.) To the contrary, our function here is to assess whether the Department acted lawfully and reasonably even though that permit condition does not come into play.[3] The fact that Perano's plant was always intended to be an interim facility and was only permitted as such in our view is only relevant in this case because it, together with the other facets of the Department's action, supports our conclusion that the Department acted reasonably.

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[3] The permit condition should not be understood to mean that an interim facility cannot be shut down (for, e.g. the environmental concerns that are present here) *unless* alternative facilities become available.

Compliance History

The Department tells us that the driving factor behind its decision to deny the renewal application was Perano's unwillingness or inability to comply with the law at this facility.[4] The Department's finding that Perano is unable or unwilling to operate the Pleasant Hills plant in compliance with the law has three interrelated subparts:

1) The plant has design and performance deficiencies that make it difficult to operate in conformance with the permit and the law at all times;

2) The plant has chronically polluted the waters of the Commonwealth; and

3) Perano has shown that he cannot be trusted with the privilege of retaining a permit for this plant.

The factual record provides abundant support for the Department's conclusion. Again, whether any one of these subparts would have been sufficient by itself is a matter of speculation. In combination they clearly show that the Department's action was appropriate.

Plant design and operation

We credit the expert opinion of the Department's engineer, Edward Corriveau, P.E., that the plant has design deficiencies that make it very difficult to operate consistently and effectively in compliance with its permit. (FOF 12-13.) Without repeating all of that background here, suffice it to say that the Department's November 22, 2010 inspection, shortly before the hearing, revealed a sewage treatment plant with serious design and performance deficiencies. Sewage sludge was clogging the clarifier weirs and was floating on the surface of the clarifiers, sand filters, and the clearwell. The Department's photographs graphically depicted these conditions. No one on behalf of Perano testified that this state of affairs constituted proper operation of the facility. In addition, the Department observed two inches of sewage sludge coating the

[4] Tilden Township submitted a short post-hearing memorandum incorporating by reference all of the Department's proposed findings of fact and legal arguments.

streambed downstream from the plant. The facility's unlicensed operator was improperly conducting chlorine testing. This inspection showed nothing new. For example, on at least nine previous occasions, the Department noted the presence of sewage sludge on the clarifier weirs and/or on the surface of the clarifiers, sand filters, and/or clearwell, places where sludge at the amounts found simply should not be.

Also relatively recently, in a July 14, 2010 email from James Cieri, P.E., Perano's engineer and expert witness, to James Perano, Cieri informed James Perano that the plant operator was not operating the sludge holding tank as it was designed and permitted. Specifically, the sludge holding tank was not being operated in an aerobic manner. This improper operation was taking place over some unknown period of time. Cieri suggested to James Perano that "PADEP may not know of this so therefore it may be better left alone..." Consistent with this suggestion, Cieri excluded this information from the expert report he prepared in this case regarding the design and operation of the plant.

There actually was not a great deal of disagreement between Corriveau and Cieri on the key points. They both agree that the design is outdated and requires a lot of operator attention, which the plant has not always received. They agree the plant has a long history of operational problems, especially during periods of high flow. The main difference, as demonstrated by Cieri's words and demeanor, was that he feels the problems are no big deal and that this plant is not unlike many other package plants. Of course, that is a value judgment, but in any event it is not supported by the record. Even if true, the problem is with lax enforcement at the other allegedly poor performing plants, not with the proper level of action here. We also disagree with Cieri that, so long as a plant is submitting DMRs that show that effluent limits are being met, it necessarily follows that the plant is well designed and operated. To the extent the engineers

disagreed, we find Corriveau's testimony, which also is much closer in line with the bulk of the record evidence, to be more credible.

Stream Impairment

The plant is impairing the stream. In addition to the many documented permit effluent limit exceedances, the plant has chronically discharged inadequately treated sewage into the stream, which has resulted in the regular deposition of significant levels of sewage sludge on the streambed. Instead of collecting and handling sewage solids *before* they enter the stream, Perano has in effect converted the stream itself into the last step in his treatment train. This is, of course, entirely unacceptable. The record is replete with credible testimony from multiple eyewitnesses that the streambed below the plant has regularly been coated with measurable coatings of sewage sludge identified by sight and smell. The record includes numerous photographs verifying the same thing. One particularly graphic example depicts thousands of red worms in the stream that feed on such material. We were shown pictures of brown effluent actually being discharged from the plant's outfall. Perano's operator has been caught in the act of discarding a water sample of the final effluent rather than submitting it for testing because it was brown, and she referred to other occasions where that occurred out of the Department's presence. The plant operators' logbooks and other evidence reveal numerous instances of bypasses and overflows of inadequately treated or untreated raw sewage going into the stream.

Perano's protestations to the contrary notwithstanding, the presence of sewage sludge in the stream is not a mystery. Of course, Occam's razor comes into play here. There is no other source for the sludge. As noted above, there are photos and other evidence of the plant discharging brown water. There have been documented raw sewage overflows. There is extensive evidence of sludge being found much further along in the treatment train in the plant

than it is supposed to be. Perano installed bypass mechanisms to allow for direct discharges of inadequately treated sewage. They are obviously not there for decoration. Finally, the Department's expert on sludge management, Thomas Brown, credibly opined that, at least in 2007 and 2008, Perano shipped much less waste sludge off site than would have been expected. The only place this waste sludge could have gone (assuming no illegal or unreported shipments) was into the stream. In truth, Perano merely estimated the amount of wasted sludge for years. Without accurate data on sludge hauled from the plant, Perano cannot account for sludge hauled away or reliably dispute Brown's explanation. Brown credibly opined that the plant's discharge resulted in thousands of pounds of sludge in the stream over the years.

Perano has presented several explanations in the face of this overwhelming evidence of chronic pollution in an effort to discount the Department's findings, none of which have merit.[5] He first contends that Department personnel are lying and do not know sewage sludge when they see and smell it: If they saw anything, which he denies, it might have just been "other organic sedimentation." We reject this argument. Highly experienced and credible Department witnesses correctly identified the material by sight and smell as sewage sludge originating from the plant.

Perano suggests that what the Department identified as inches-deep sewage sludge was actually fecal material from the ducks that frequent the upstream stormwater pond. Putting aside common sense, the Department's expert, Schott, unequivocally and credibly rejected the theory, explaining that, among other things, if the pond was so impaired that it was discharging sewage sludge into the stream, the pond would be unable to support the population of large-mouth bass that it supports.

[5] Conspicuously absent is any acknowledgment of a problem and a commitment to fix it, which reinforces our conclusion, as discussed more fully below, that the Department has correctly concluded that Perano is unwilling to comply with the law.

Perano says that the stream is not always loaded with sewage sludge. That is undoubtedly true, but that does not refute that sludge is seen and smelled in the stream far too often, as testified by multiple credible witnesses. With respect to the Department's showing that not enough sludge was being hauled from the facility in 2007 and 2008, Perano submits that "there is no need to look at those calculations," apparently because, at least by 2010, the parties agree that Perano was hauling expected amounts. Aside from conceding Brown's conclusions for 2007 and 2008, this response misses the point of the evidence, which is simply to provide added support pinpointing the plant as the source of sludge in the stream.

Perano takes issue with the fact that Department witnesses have variously described the material as "fluffy and brown," versus "chunkier looking," versus "a muddy or slushy mass." He points to photographs that show sludge floating on the surface in the plant as having different color than sludge that has settled in the stream. None of this detracts from the Department's witnesses' credibility or the accuracy of their testimony.

Perano seems to believe that his conduct is acceptable because the plant discharges to a poor quality stream. Indeed, we have no reason to doubt the opinion of Paul DeAngelo, Perano's expert aquatic biologist, that an analysis of macroinvertebrates in the receiving stream showed that the receiving stream is currently impaired from top to bottom and that it is not attaining its designated uses. (S.T. 309-11; T. 223-32.) He also opined that the stream might not reach attainment status even after the plant ceases discharging. (T. 240.) These opinions are largely irrelevant. It is true that the receiving stream is unlikely to ever be featured in a Sierra Club calendar. But there is obviously no right to further pollute an already polluted stream. *Commonwealth v. Harmar Coal Co.*, 452 Pa. 77, 101 (1973). That sort of thinking was rejected decades ago. *Commonwealth v. Barnes & Tucker Co.*, 455 Pa. 392, 412 (1974). *See also*

UMCO Energy, Inc. v. DEP, 2006 EHB 489, 557. The goal of the Clean Streams Law is not only to protect existing stream quality, but it is to enhance it as well. 35 P.S. § 691.4(3).

DeAngelo opined that it is "debatable" whether eliminating the plant's discharge will result in an improvement in stream quality. (T. 250.) Of course, that is a rather neutral statement. DeAngelo at other points said the plant's discharge might even be helping the stream because it adds so much flow. If that is true, query why macroinvertebrate populations are about the same above and below the discharge. This is consistent with the conclusion in the Department's latest stream survey that other things being equal, the population should be much better below the outfall, but they are not.

In any event, DeAngelo's statement is based upon a very limited understanding of all of the pertinent facts. He admitted to only a "casual" review of the plant's compliance record, and he was not aware of any permit violations other than the effluent limit violations reported in DMRs. (S.T. 321, 323.) He repeatedly emphasized that his opinion assumed that the plant has and will continue to operate in conformance with the effluent limits in its permit. (S.T. 314, 317-18, 328.) Of course, the record shows that the plant is *not* capable of operating in conformance with its permit and without discharging excess sewage solids into the stream. DeAngelo conceded the obvious point that sewage sludge is not good for the stream, and if sewage solids were being regularly discharged and coating the streambed, eliminating that practice would in fact improve the quality of the stream. (S.T. 328-29; T. 246, 250.) He acknowledged that sedimentation upstream of the influence of the plant (which he considered upstream of the outfall pipe) was not sewage sludge. (T. 244.) He did not dispute the Department's eyewitness and expert opinion testimony that sewage sludge was regularly seen downstream of the plant. (S.T. 326.) He did not dispute the Department's finding that the plant was the likely source of that

sludge. (S.T. 327.) He said that waterfowl in the stormwater pond could contribute to nutrient sources in the stream, but to his credit, he never suggested that the ducks were the source of the sewage sludge. (S.T. 307; T. 243.) In short, there is nothing contained in DeAngelo's opinions which gives us pause in concluding that the Department's actions in this case were lawful, reasonable, and supported by the facts.

The testimony of the Department's aquatic biologist, Robert Schott, comports well with the record facts. Schott's opinion assumes, accurately, that the plant's discharge has resulted in the excessive deposition of solids in the stream on a regular basis. Schott did not suggest that ceasing the plant's discharge, which is causing this condition, will make the stream pristine, but he did credibly make the rather unassailable point that eliminating the regular discharge of this material will improve the health of the stream. (S.T. 613.) He also credibly explained that the sewage sludge seen in the stream originates from the plant, not the stormwater pond. (S.T. 608, 631-32.)

After we closed the record, Perano moved to reopen the record to admit a stream report prepared by the Department. The Department, not surprisingly, did not object and we admitted the report. It is somewhat odd that Perano pushed to have this report admitted because the report concluded as follows:

> Conductivity and temperature were elevated and dissolved oxygen was less at the site downstream of the discharge, which is consistent with sewage related discharges.
>
> * * *
>
> The purpose of this study was to evaluate whether the [plant's] effluent was having an impact on stream quality. Based on the findings of this study, we can say the results indicate the [plant's] discharge is degrading the stream through organic loading. Tolerant macroinvertebrates flourished downstream of the

> discharge despite the presence of habitat suitable for more sensitive taxa.
>
> The presence of sewage fungus is particularly worrisome. This so-called "fungus", typically dominated by the bacterium *Sphaerotilus*, will coat all available substrate including cobble, boulders, and, if present, macroinvertebrates (Hynes 1960, Lemly 1982). This will ultimately lead to less interstitial habitat available for colonization of robust taxa. Additionally, it has been noted that *Sphaerotilus* will coat the gills of macroinvertebrates, amplifying mortality for those requiring high levels of oxygen (Lemly 1998). Although eliminating the sewage fungus would only be considered a first step in remediation, sensitive taxa will never be able to inhabit the stream unless this occurs.
>
> In order for a diverse aquatic community to populate the stream, the discharge needs to be improved. We recommend that necessary actions be taken to ensure pollution is marginalized and remediation takes place.

(P. Supp. Ex.) Apparently, Perano wanted to show that the Department concedes that the entire stream is impaired. We do not understand the Department, however, to have ever argued that it was not impaired. Further, while the biological counts are similar both upstream and downstream of the plant's outfall, the count should have been better downstream all else being equal because of a more favorable stream habitat (e.g., substrate, banks, flow). (*Id.*) DeAngelo never accounted for this very important variable.

Demonstrated inability or unwillingness

"It is now long-accepted practice that one indication of any entity's ability and intent to comply with the law is its compliance history." *O'Reilly v. DEP*, 2001 EHB 19, 44; *Whitemarsh Disposal Corp. v. DEP*, 2000 EHB at 339. In considering whether a permittee has shown a lack of ability or intention to comply with the law as indicated by past or continuing violations, we consider such factors as the number, duration, and severity of the violations, harm to the environment caused by the violations, and the permittee's efforts to solve the conditions leading

up to the violations. *See, e.g., O'Reilly v. DEP*, 2001 EHB 19, 44-46; *Belitskus v. DEP*, 1998 EHB 846, 868-870.

Perano has a very poor compliance history that goes back many years and continues to the close of the record. (FOF 14, 16-19, 22-75, 77, 78, 80-97, 99, 105-116, 131, 132, 134, 136, 137.) Perano's violations include the release of tons of sewage sludge to the receiving stream, violations of effluent standards, overflows of raw sewage onto the ground and into the stream, regular bypassing of the treatment systems, persistent operational problems, frequent mechanical breakdowns, and failure to report most of these things to the Department. Perano has vaguely alluded that some measures have been taken to reduce the problems at the plant over time, but he provided little in the way of details: James Perano mentioned "increased monitoring" and "further study" leading to possible corrective action, but no actual improvements. (T. 67.)

Perano's day-to-day operational problems are of course a serious concern. It is difficult to imagine violations more serious at a sewage treatment plant than the discharge of solids at such levels as to regularly leave a coating of odiferous sludge in the steam. Yet, some of Perano's violations are worthy of even greater concern in the immediate context. Perano surreptitiously installed a bypass mechanism in the plant that allows his operators to bypass complete treatment.[6] Perano has rarely if ever advised the Department of problems at the plant as required by his permit. Perano failed without legitimate excuse to provide records in response to the Department's information requests. *Perano v. DEP*, EHB Docket No. 2009-118-L (Adjudication issued May 10, 2011). Perano's operator has admitted to and in fact been caught in the act of discarding samples taken at the end of the treatment train without testing because of the samples' poor appearance. Any one of these violations would stand out as clearly evincing a

[6] To the extent Perano suggests that these bypasses were better than the alternative of having the system back up and fail, he effectively concedes that the plant is inadequately designed.

lack of respect for the law. These violations go well beyond operational competence and speak directly and convincingly to the permittee's commitment to abide by the law.

Aside from the documented compliance history, we are struck by the fact that, at the end of lengthy proceedings including six days of hearings, we do not have the sense that Perano understands or appreciates that an NPDES permit is a privilege, not a right. *See Tri-State Transfer Co. v. DEP*, 722 A.2d 1129, 1133 (Pa. Cmwlth. 1999) (*citing Plowman v. Dep't of Transp.*, 535 Pa. 314 (1995); *Crooks v. Pa. Sec. Comm'n*, 706 A.2d 360, 362 (Pa. Cmwlth. 1998); *1412 Spruce, Inc. v. Pa. Liquor Control Bd.*, 453 A.2d 382 (Pa. Cmwlth. 1982)); *Sedat, Inc. et. al. v. DEP*, 2000 EHB 927, 934; *Attaweed Foundation, Inc. v. DEP*, 2004 EHB 858, 876; *Livingston v. DEP*, 2000 EHB 467, 492; *Whitemarsh*, 2000 EHB at 345. Perano has been granted a privilege to discharge pollutants into the waters of the Commonwealth, and with that privilege comes a responsibility to comply with the law. It comes with a responsibility to cooperate with the Department, not battle it at every turn, such as when it requests documents. It comes with a responsibility to be technically competent, vigilant, and forthright.

Perano has listed many excuses for his behavior, but we did not hear him say he understands there have been problems and he is doing everything in his power to correct them. Such an acknowledgment is noticeably absent from his testimony. He complains that the Department should have helped him more. This complaint is very telling because, not only does it represent an attempt to shift the blame rather than take responsibility, it seems to effectively concede that he is incapable of running the plant on his own. A permittee who cannot independently run his plant should not be a permittee. *Whitemarsh*, 2000 EHB at 339 ("The argument that the Department should have been more vigilant in discovering violations and reporting them to [the operator] borders on the absurd. [The operator] has no one to blame but

itself.") Perano says the problem lies with infiltration and inflow (I & I) rather than the plant itself. Even if this were true, it begs the question why Perano has not done something to correct the I & I problem.

At the end of the day, this case turns in large part on whether Perano is willing and able to comply with the law; i.e., whether he can be entrusted with the privilege of a permit that allows him to discharge to the waters of the Commonwealth. Perano's testimony at the hearing exhibited no such ability or willingness. Although given every opportunity to do so, he expressed no understanding of his obligations. He complained that public sewers will cost more. (S.T. 46-48.) He suggested without any record support that the Department fabricated compliance problems to appease a state legislator who wanted to see the Township obtain PennVEST funding. (S.T. 53-58.) He testified, "[o]ur biggest problem is not operating plants [at his 70 mobile home parks], it's the DEP interfering with our operations." (S.T. 60.) He said the Department "manufactured a compliance history" (S.T. 68), and that "the DEP is the biggest problem we have in the operation of these facilities" (T. 85). Given the complete lack of record support for these accusations, these are not the expressions of a person who should be entrusted with a permit. Quite simply, a permittee that cannot work cooperatively with the regulating agency cannot be allowed to continue in operation.

Perano argues that the Department's position is based solely on historic conditions at the plant. The Department has several responses to this argument, all of which we find to be persuasive. First, the contention is simply not true as a factual matter. The Department conducted an inspection in *November 2010*, after the supersedeas hearing and a few months before the hearing on the merits. Among other things, the Department found as much as two inches of sewage sludge in the stream. Sludge covered multiple parts of the treatment

components in the plant, such as the "clearwell," which as its name implies is supposed to be clear. We viewed convincing photographic evidence of the problem. If ever there was a time that Perano would want to manage the plant correctly--a looming hearing, operating pursuant to an administrative extension conditioned upon compliance, multiple appeals pending before the Board--this was it. Yet, clearly, Perano is unable to manage the plant properly. Similarly, in an email dated *July 14, 2010*, James Cieri, Perano's engineer, informed James Perano that the sludge holding tank--arguably the most important part of the plant's treatment train--was not operating properly. Cieri recommended that this fact be hidden from the Department, and in fact, there is no record that it was reported as required by Perano's permit.

Furthermore, some of Perano's most egregious violations--failure to provide information upon request and installing illegal bypass valves come to mind--have nothing to do with day-to-day operations. Still further, the fact that Perano's compliance has improved, even if true, would not change the fact that the plant by design demands a significant amount of careful attention by a committed permittee. Finally, the Department justifiably believes that any improved performance would not outlast the intense scrutiny associated with this case and the Department's enforcement efforts, which the Department does not have the resources or manpower to sustain.

Perano says the Department failed to consider the positive impact of his latest plant operator, Pat Brennan. This is somewhat ironic because Brennan, who is at the plant almost every day, said it is "a pain" to operate, and he recommended that Perano should connect to public sewers. The facility is a "constant headache," and "there is no fix." (S.T. 138-39, 151.) In addition, Brennan has refused to sign an inspection report, is responsible for installing the illegal bypass valves, and he improperly estimated rather than measured wasted sludge.

Perano makes much of the fact that he usually meets his numerical effluent limits. In fact, this might very well be characterized as his primary defense on the compliance issue. Again, however, we are not persuaded. First, there are many occasions where Perano has *not* met his limits. Perano points to fourteen samples the Department took in 2006 and 2007 and states that only three showed violations. An eighty percent compliance rate, however, is hardly acceptable. He points out that his compliance percentages have improved with time, but as explained above, better compliance given everything that has taken place is not surprising.

Perano appears to be focused on the numerical limits in his permit, but there are other applicable requirements directly related to the quality of the discharge that also apply. Paragraph 2 of the permit says "[f]ailure to comply with the terms, conditions, **or** effluent limitations of this permit is grounds for...denial of a permit renewal application." (emphasis added) Part A 1 and 2 read as follows:

> 1. The permittee shall provide for effective disinfection of this discharge to control disease-producing organisms during the swimming season (May 1 through September 30) to achieve a fecal coliform concentration not greater than 200/100 ml as a geometric average (mean), and not greater than 1,000/100 ml in more than ten percent of the samples tested. During the period October 1 through April 30, the fecal coliform concentration shall not exceed 2,500/100 ml as a geometric average (mean).
>
> 2. All discharges of floating materials, oil, grease, scum, sheen, and substances which produce color, tastes, odors, turbidity, or settle to form deposits shall be controlled to levels which will not be inimical or harmful to the water uses to be protected or to human, animal, plant, or aquatic life.

Part A.III.A.1 says that "[s]amples and measurements taken for the purpose of monitoring shall be representative of the monitored activity." Part A.III. B.1 reads:

> The permittee shall effectively monitor the operation and efficiency of all wastewater treatment and control facilities, and the quantity and quality of the discharge(s) as specified in this permit.

Part A.III.C requires the permittee to give notice to the Department of planned physical alternations, anticipated noncompliance, unanticipated noncompliance, and incidents causing or threatening pollution. Part B.I.C creates a duty to provide information upon request. Part B.I.E says:

> The permittee shall take all reasonable steps to minimize or prevent any discharge, sludge use or disposal in violation of this permit that has a reasonable likelihood of adversely affecting human health or the environment.

Finally, Part B.I.F, sets severe restrictions on when bypasses are allowed.

Notwithstanding Perano's DMRs, there is no escaping the fact that sludge continues to get into the stream. Effluent sampling is not continuous. Quite the contrary. It is true that Perano met his effluent limits for the few months of enhanced sampling that he was forced to perform as a condition for getting an administrative extension, but for many *years* prior to that the plant was sampled very infrequently and at any time Perano chose. This, coupled with the fact that Perano's employees have been caught red-handed and admitted to discarding bad samples (S.T. 161, 197, 476, 492, 515; T. 169; DEP Ex. 42), leaves us with little confidence that dispositive weight can be placed on effluent samples alone. In revealing testimony, James Perano said that cloudy samples did not always need to be tested because they might not be "representative." "If you want the permittee to sample when the effluent is cloudy, you should write that into the permit." (T. 170.) "[A] cloudy effluent may not have been indicative or representative of the way the plant was operating at the time." (T. 170-71.)

Similarly, the fact the Department inspectors usually do not witness excessive solids actually being discharged is not surprising. Although the plant runs continuously, the Department can only very rarely inspect it. Inspector Roth has about 150 facilities in his

territory. (T. 449.) The problems at the facility are now well documented and the Department has taken appropriate action. There is little reason to maintain a heavy inspection schedule.

In addition, we have a considerable number of admissions from Perano's operators. For example, Ms. Heller warned that, "We are polluting the stream severely and need to knock it off." She said the facility was dumping "nasties out there" and that the problem is "only going to move downstream." In a December 8, 2007 email, Ms. Heller refers to a rapid air blower that had been out of service "for over a month." In another email she noted problems the plant was experiencing with pumps and warned James Perano that he "can't run on the edge like this." This is symptomatic of the frequent mechanical breakdowns experienced at the plant that were documented in the logbooks.

Ms. Bartholomew in an email mentions a "Big Problem" at the plant and expressed the hope that the Department's inspector, Shawn Arbaugh, would not show up at the facility. She mentions that conditions at the plant "are all horrible and we mean horrible" and noted that the clarifiers and chlorine contact tank "are really really bad." Although the alarming entries in the logbooks have decreased, the decrease coincided with management's instructions to the operators to tone it down. (T. 141.)

A permittee has a duty to operate his plant properly, independently of the quality of the effluent. This case illustrates why failure to comply with the separate legal responsibility to operate a plant correctly (P. Ex. 2, Part B.I.D) can result in problems even where effluent samples viewed in isolation might give a false impression that there are no problems. Perano's admission that the sludge found on multiple occasions overrunning the plant only showed there were "potential problems," and that "potential problems" are acceptable is not only incorrect, it is disconcerting.

In the end, effluent results are only one type of evidence. Here, we also have photographs, the testimony of experienced and credible Department inspectors and supervisors, credible expert testimony, and an alarming trail of emails and logbook entries by Perano representatives, many of which were only revealed after we found that Perano had engaged in a spoliation of evidence. *Perano v. DEP*, EHB Docket No. 2009-067-L (Opinion and Order, issued January 11, 2011.) Taken together, this evidence paints a picture of chronic and persistent noncompliance by Perano at the plant. Perano's employee, Leeann Heller said to James Perano, "We are polluting the stream severely and need to knock it off." We agree.

Perano argues that the Department could have taken less draconian measures. We believe that the Department's choice here is entirely reasonable given everything we have already discussed. Too many of the public's resources have already been devoted to the effort to get Perano to comply with the law, with little to show for it. Denial of the permit renewal should not be viewed as a punitive measure. The objective is not to punish Perano. Rather, the objective is to protect and enhance the waters of the Commonwealth. It is simply not acceptable to degrade the waters of the Commonwealth with noxious sewage sludge, ignore self-reporting, install illegal bypasses, and ignore information requests. The Department has convinced us that the only way to protect the environment in this severe situation is to terminate the permit. The Department's response is measured and appropriate.

Advance Notice

Perano complains that the Department told him his permit would not be renewed on February 5, 2008, which is two and one-half years before the permit expired. The Department memorialized its decision not to renew the permit no later than April 15, 2009, when the

Department ordered Tilden Township to revise its Official Plan.[7] The order to the Township included the following findings:

> H. On February 5, 2008, the Department informed Pleasant Hills Mobile Home Park ("Pleasant Hills"), located in Tilden Township, Berks County, Pennsylvania, that the NPDES Permit No. PA 0053104 that authorizes Pleasant Hills to discharge treated sewage into the unnamed tributary of the Schuylkill River that expires on August 31, 2010, would not be renewed once it expired.
>
> I. As a result of the Department's decision not to renew the NPDES Permit No. PA0053104 once it expires on August 31, 2010, there is a future sewage disposal needs area in Tilden Township.

Perano argues that, by denying his renewal application before he even submitted it, the Department failed to follow proper procedures and failed to give his application any serious substantive consideration. Therefore, he argues that his application should be remanded to the Department for proper consideration utilizing proper procedures.

Aside from the fact that a remand would be a complete waste of time and resources in light of our *de novo* review of the entire situation, *see Fiore v. DER*, 655 A.2d 1081, 1086 (Pa. Cmwlth. 1995), the record does not support Perano's argument as a factual matter. First, the Department's alleged procedural error is that it did not hold an informal hearing before denying his renewal application. (Perano does not assert that the Department should have held an informal hearing back in 2008 or 2009, but he does believe it should have done so in the context of the formal denial.) Section 609(2) of the Clean Streams Law, 35 P.S. § 691.609(2), requires that the Department afford a permittee "an opportunity" for an informal hearing before denying a

[7] The parties have argued at length whether this order to the Township constituted a final appealable action regarding Perano's permit. We question whether this debate has any continuing relevance now that the Department has clearly denied Perano's renewal application and Perano has appealed that action. We will assume for purposes of discussion that the April 2009 order to the Township was a final action not only with respect to the Township, but with respect to Perano's permit as well.

permit based upon, among other things, a lack of ability or intention to comply with the law. The Department did exactly that. By letter dated May 26, 2010, the Department informed Perano of the impending denial and offered to hold an informal hearing. (P. Ex. 23.) The Department offered several dates in June but apparently Perano was too busy and asked that it be deferred until at least July. (T. 44.) This is consistent with other instances where Perano has refused or delayed meetings with the Department. *See, e.g., Perano v. DEP*, 2010 EHB 439. We suspect a permittee who was seriously interested in an informal hearing would not have refused all dates offered over the course of five weeks with the permit expiration date looming. Rather than brook further delay, the Department offered to accept and consider written comments (and in fact did so), and proceeded to deny the application on June 21. By taking action when it did, the Department afforded Perano an opportunity to file a timely appeal and a timely petition for a supersedeas before this Board before the permit expired in August.

Secondly, Perano argues that the Department did not give his renewal application any serious consideration in 2010 because it had already in reality been denied in 2008 and certainly no later than 2009. Again, however, the record does not support the allegation. The problems with Perano's plant were well known and documented at the time of the Department's review of his formal application. The Department did not need to review Perano's application to know that, based on numerous inspections, DMRs, and other evidence, the plant was in chronic noncompliance. It would have been wasteful and inappropriate for McDonnell to assign a Department engineer to research Perano's compliance history from scratch.

We credit the testimony of Department witnesses that they gave Perano's application serious substantive consideration to assess whether Perano proposed anything new in his application to address those problems. Among other things, the Department's biologist reviewed

stream surveys submitted by Perano and concluded that they only confirmed that the plant was continuing to have an adverse impact on the receiving stream. (T. 614-16, 626-28.) McDonnell credibly testified that, had Perano proposed measures to correct the plant and his operation thereof, the Department could very well have allowed him to continue operating with, say, tighter requirements in a renewed permit. (T. 612, 642.) The Department employees testified that Perano made no such proposals. (FOF 159; P. Ex. 43.) Our review of the application bears that out. (P. Ex. 5.)[8] Thus, unlike the situation in *Harrisburg v. DEP*, 1996 EHB 1518, the record here does not support Perano's allegation that denial of his permit was a foregone conclusion at the time of his application.[9]

Perano complains that the Department only performed a limited review of his application when compared to other permit renewal applications. To the extent it is appropriate to engage in any such comparisons, Perano has not referred us to any other case where the Department was reviewing a renewal application for a facility with chronic problems approaching those associated with Perano's plant. It makes no sense to compare the Department's review of Perano's application to the Department's review of, say, a proposed new facility, or a large POTW, or a small plant with no compliance problems. In any event, under the circumstances, it would have been a wasteful use of resources to conduct a full-scale review that included such exercises as reviewing and formulating permit effluent limits. The Department appropriately focused its attention on whether Perano had admitted to problems and devised solutions to address them. Again, he did not.

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[8] We also note that Perano made no mention in his application of the previously unpermitted modifications to the facility such as the bypass valves.

[9] The Department's continuing openness to new proposals was further evidenced by the parties' joint request, which we granted, to stay the supersedeas hearing pending what proved to be a protracted, but ultimately unsuccessful, effort to settle the matter.

Perano complains that the Department has put a hold on all of his permit applications at his 70 or so mobile home parks without telling him that it was doing so due to the situation at Pleasant Hills. The record does not support this contention, but even if it did, this complaint might be relevant with respect to another application put on hold but we do not see why it is relevant with respect to the Pleasant Hills application itself. The Department as we have discussed did not put a hold on the Pleasant Hills application: it reviewed it and denied it.

Credible testimony has convinced us that the Department's program staff sincerely believed that the declarations of future intent dating back to 2008 were simply that: declarations of future *intent*. The Department's subjective belief in this case is significant, not because it pertains to our jurisdiction, but because it supports our conclusion that the Department was truly open to the idea of allowing the plant to continue operating until the day of the denial, and perhaps even thereafter, as evidenced by the parties' aforementioned agreement in lieu of a supersedeas.

On this last point and others, Perano has attacked the veracity of Joseph Roth, Shawn Arbaugh and William McDonnell, three of the Department's key players in regulating Perano's plant. He has listed several examples of their testimony that purport to show contradictions and outright lies. We have reviewed his examples and find them to be, at best, trivial. Roth, Arbaugh and McDonnell have consistently acted in a professional manner under difficult circumstances without any personal bias or animus against Perano and with the single-minded goal of protecting the Commonwealth's environment while minimizing unintended consequences to innocent third parties. We find their testimony to be credible.

In sum, contrary to Perano's criticism of the Department's advance notice, we take it as further support for our conclusion that the Department acted reasonably. In both *Whitemarsh*

and *Interstate*, *supra*, we noted that the Department should normally allow time for an orderly transition when it phases out a plant in favor of treatment at a regional facility. *Whitemarsh*, 2000 EHB at 342-43; *Interstate*, 1981 EHB at 192-93. The Department's actions here were designed to do exactly that, which leads us to the next facet of the Department's action.

Local Planning

Part of what convinces us that the Department acted reasonably is that its action has not left Perano or his tenants high and dry. As a result of the Department's actions, Tilden Township has agreed to recognize Pleasant Hills as a new area that requires sewage treatment by some means other than the existing plant. It has agreed to go through the planning process envisioned in the Sewage Facilities Act, 35 P.S. § 750.1 *et seq.*, and the regulations promulgated thereunder to determine how to address that newly created need.

Perano complains that the Department should not have cajoled the Township into a planning obligation *before* it denied his permit renewal.[10] Perano complains that the Department has put him into a difficult negotiating position with the Township. If the decision not to renew his permit is upheld, he "will have to accept whatever sewage alternatives are proposed by Tilden Township without ever litigating whether or not the plant should have been forced to connect in the first place." (T. 52.)

Well, Perano has now been able to litigate whether his plant should be required to connect in the first place. Furthermore, the point of the Department decision to not renew Perano's permit is to enforce the law against a noncompliant operator unsuccessfully trying to run a dysfunctional plant. We have before us an enforcement case, not a sewage planning case.

[10] As previously mentioned, the appeal docketed at EHB Docket No. 2009-067-L is Perano's appeal from the order that the Department issued to Tilden Township to revise its official plan. The Township subsequently agreed to revise its plan and entered into a consent order and agreement (COA) requiring it to do so. Perano appeal from the COA is docketed at EHB Docket No. 2010-033-L. Whatever challenges Perano mounted and defenses the Department raised regarding the order have been subsumed by the COA and do not require separate consideration.

The enforcement action is what has created the need for a treatment alternative, which is what has created a need to plan. Sewage planning is only indirectly or secondarily implicated as a result of the Department's enforcement action. Without the enforcement action, there would have been no basis for requiring the Township to update its plan to provide for the new needs area created by that enforcement action. In fact, if Perano carries through with his threat to close the park, sewage planning will not be necessary. Although Perano's plant was permitted as a temporary facility, which was only intended to operate until alternate treatment at a more suitable location became available, the Department decided that it could not wait until that time due to Perano's poor performance. As previously stated, the Department has not invoked the permit condition requiring shutdown when a more suitable alternative becomes available as the basis for its action. It has invoked the provisions of his permit and the law that make his permit contingent on compliance with the law.

Perano objects that the Department has engineered a situation in which connecting to public sewers is a *fait accompli*. However, the COA between the Department and the Township requires the Township to perform a complete alternatives analysis. This correctly recognizes that planning must be done in the first instance by the municipality. 35 P.S. § 750.5; *Community College of Delaware County v. Fox*, 342 A.2d 468, 478 (Pa. Cmwlth. 1975). The Department already recognized as much when it withdrew its first order to the Township requiring the Township to propose a plan update specifically providing for the extension of public sewers. The COA recognizes connection to public sewers is an obvious choice, but it does not direct the Township that it must make that choice. One alternative that is *not* on the table is Perano's continued operation of his existing plant, but beyond that the Township will have unbridled flexibility to consider all alternatives in accordance with regulatory criteria.

We are not intimating that extension of public sewers to the park is the wrong choice. We are simply saying that the Township has the right and the duty to consider all alternatives. We do not view the COA as having improperly limited the Township's options. To the contrary, we conclude that the Department's intervention with the Township in the interest of Perano's tenants by setting the search for alternatives in motion provides yet further support for our ultimate conclusion that the Department acted appropriately in denying Perano's renewal application.

A consent order and agreement between the Township and Perano entered into in 1999 to resolve litigation in the Court of Common Pleas evidently expressed an "intent" that sewage treated at Perano's plant would continue to be treated. Whether this consent order limits the Township's planning options is not ripe until the Township makes a planning decision. The consent order certainly in no way constrains *the Department's* ability to phase out Perano's plant due the plant's environmental violations.

Perano says that the Department only gave him advance notice and encouraged him to work with the Township in order to force him to withdraw his appeals. This argument is belied by the fact that the offer has remained open throughout the appeal process and remained open as of the close of the record. The Department has done nothing to hinder Perano's appeal rights, and in fact went so far as to enter into an agreement administratively extending Perano's permit during the course of his appeal. When it comes down to it, the only thing the Department has really insisted upon without qualification is that Perano's interim plant will need to be shut down at some point.

A major theme that pervades Perano's appeals is that the Department's actions equate to an order to shut down his mobile home park and evict all of his tenants.[11] We disagree. In fact, we believe the Department has done everything reasonably possible to avoid that eventuality while still fulfilling its responsibility to protect the environment. Virtually every step that the Department has taken in conjunction with deciding not to renew Perano's permit has been designed to ensure that Perano can continue to operate his park if he wants to do so. The Department has jump-started a planning process designed to create an opportunity to lessen the impact of the plant closure. Perano is certainly free as far as the Department and Township are concerned to reject that opportunity and close his park. That is his prerogative, at least as far as the Department is concerned.[12] However, if Perano closes the park, it will have been because of his continuing unwillingness and inability to comply with the law and cooperate in the effort to find treatment alternatives, not because the Department has been unduly harsh. Perano may not hold his tenants hostage to his desire to operate a malfunctioning plant in perpetuity.

Thus, we see no merit to Perano's contention that the Department failed to comply with its statutory obligation under Section 5(a) of the Clean Streams Law to consider the economic impact of its actions on the citizens of the Commonwealth. Section 5(a) provides:

> The Department, in adopting rules and regulations, in establishing policy and priorities, in issuing orders or permits, and in taking any other action pursuant to this act, shall, in the exercise of sound judgment and discretion, and for the purpose of implementing the declaration of policy set forth in section 4 of this act, consider, where applicable, the following:
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> * * *

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[11] The record does not really bear out that Perano is serious about this threat. When asked what he would do if the renewal denial is upheld, James Perano said he could not speculate due to there being too many variables to consider. (T. 198.) He never mentioned closing down the park.

[12] We express no opinion on Perano's legal rights or duties regarding tenants, financial institutions, governmental entities, or any other third parties.

(5) The immediate and long-range economic impact upon the Commonwealth and its citizens.

35 P.S. § 691.5(a). In both *Whitemarsh* and *Interstate*, we noted the Department should consider the economic implications of a decision to phase out a package treatment plant. *Whitemarsh*, 2000 EHB at 335; *Interstate*, 1981 EHB at 193. Speaking more generally, there is no dispute that the Department should consider the economic impact of its actions on the community and public at large. *Mathies Coal Co. v. DER*, 559 A.2d 506, 511 (Pa. 1989); *DER v. Borough of Carlisle*, 330 A.2d 293, 299 (Pa. Cmwlth. 1974) (DER to consider immediate and long-term economic impact on Commonwealth and its citizens). *See also Altoona City Auth. v. DER*, 1991 EHB 1381, 1389-90. This includes such things as the effect on the local tax base and local employment. *Community College of Delaware County v. Fox*, 342 A.2d 468 (Pa. Cmwlth. 1975). The Department is not, however, necessarily required to consider the economic consequences to the discharger. *Mathies*, 559 A.2d at 512; *Whitemarsh*, 2000 EHB at 335. Here the Department has structured its actions with precisely these impacts in mind. If the Department had not been interested in the economic impact of phasing out Perano's plant, it could have simply revoked his permit based upon his compliance history. Instead, the Department has bent over backwards to accommodate a smooth transition to alternative sewage treatment.

Administrative Extension

The final facet of the Department's action that underpins our conclusion that the Department acted lawfully and reasonably is that it has signaled that it is conditionally willing to administratively extend Perano's permit going forward subject to Perano's compliance with the law and his good faith cooperation in the Township's planning process.[13] Although we endorsed the Department's giving of advance notice, as things developed Perano has done little or nothing

[13] Perano obviously does not question the Department's ability to administratively extend the permit.

to date to prepare for a plant closure. The Township has yet to even begin the planning process. The Department agreed to this interlude pending our Adjudication. Agreeing to consider a further administrative extension following this Adjudication confirms that the Department has done nothing to impede Perano's appeal rights, the Department has clearly fulfilled its responsibility to consider the impact of its decisions on the citizens of the Commonwealth, and it has done everything reasonably possible and in the correct order to minimize the disruption caused by the need to close Perano's plant.

Evidentiary Rulings

Perano asks the Board to reconsider its ruling during the hearing on the merits that precluded him from introducing evidence of statements made by the Department's counsel and William McDonnell during settlement discussions. (T. 34.) The Department objected to the admission of any such evidence because the statements were made during the course of settlement negotiations between the Department and Perano, and the Department cited an explicit agreement between the parties that the negotiations would be held in confidence and not be subject to being brought up in future litigation. Judge Labuskes sustained the Department's objection because the collateral fact doctrine, upon which Perano relied, was abandoned when Pa.R.Ev. 408 was amended in 2000. *See Comment* to Pa.R.Ev. 408 ("This rule does not follow the common law rule that distinct admissions of fact made during settlement discussions are admissible"). Although Perano has abandoned his reliance on the defunct collateral-fact doctrine in his brief, he suggests for the first time that McDonnell's statement could have been admitted to show his bias or prejudice against Perano and the "true reasons" why the Department denied his renewal application.

McDonnell's statements during settlement negotiations are specifically excluded by Rule 408(a), which says that such statements are "not admissible on behalf of any party, when offered to . . . impeach through a prior inconsistent statement or contradiction." Pa.R.Ev. 408(a). Further, the Department presented a massive amount of evidence by numerous witnesses on the "true reasons" why it did not renew Perano's permit, all of which we credit. Isolated statements made by McDonnell in an effort to reach a settlement would not change our view. Perano's attempt to admit statements made during settlement discussions, which were held at Perano's request and moderated by the Board, violates both the letter and the spirit of the parties' agreement to enter into those discussions under the understanding that things said during the negotiations would not be brought up in future litigation. Finally, Perano's proffer flies in the face of the Board's effort to encourage settlements, which depends upon the free and open exchange of proposals and ideas.

Perano also asks the Board to reconsider whether Perano should have been allowed to introduce photographs in his rebuttal case showing the appearance of the receiving stream from various vantage points to rebut statements made by Inspector Roth, who testified that he was able to see the streambed at certain locations upstream from where he had been standing. At the hearing, the Department objected on the basis that this was not appropriate rebuttal testimony. Again, we see no need to reconsider this ruling.

Rebuttal evidence will only be admitted at the discretion of the Board, Pa.R.Ev. 611; 25 Pa. Code § 1021.126, and it is generally limited to an unexpected new matter. *Higgins v. DEP*, 2007 EHB 203, 233. It generally will not be admitted if it reasonably could have been made a part of the proponent's case-in-chief or presented during cross-examination. *See Downey v. Weston*, 301 A.2d 635, 641 (Pa. 1971); *Flowers v. Green*, 218 A.2d 219 (Pa. 1966). By the time

Perano offered the photographs of "vantage points," a rather insignificant point to begin with, we had already held six days of hearings. We were inundated with testimony and photographic depictions of sewage sludge seen on the streambed over the course of many years. Perano's photographs went well past the point of diminished returns. Even if there were "solids" in the stream above the outfall, it does not reduce Perano's responsibility for sewage sludge downstream of the outfall.

More to the point, it is not clear to us exactly what testimony Perano wanted to rebut. He refers us to Roth's testimony that Roth did not walk the entire length of the receiving stream between the stormwater pond and the outfall, but that he did walk to an area "just downstream from the road next to the duck pond," and that he has also been in the area of the plant's outfall. He admitted that he has never seen some areas of the stream and "it is possible but not very probable" there were "solids" in those unseen areas. (T. 440-41.) Perano's proffered photographs would have done nothing more than confirm that Roth did not see all of the stream, a point which we readily accept but which makes no difference whatsoever.

Finally, Perano has not adequately explained why the photographs could not have been offered earlier in the hearing. Perano was well aware that the Department's inspector would describe his observations at Pleasant Hills and what he found in the receiving stream. Even if Perano was not previously aware of the precise location where the inspector stood to make his observations, if Perano had evidence that an inspector would not have been able to observe certain portions of the stream because of some condition that would impede the inspector's view, he should not have waited until rebuttal to make his point.

CONCLUSIONS OF LAW

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

2. Perano bears the burden of proof in all three appeals. 25 Pa Code § 1021.122

3. Perano failed to satisfy his burden of proof in these consolidated appeals.

4. The Department had the legal authority to take the actions under appeal. 35 P.S. § 691.609; 35 P.S. § 750.5.

5. No person may discharge treated sewage into the waters of the Commonwealth without first obtaining an NPDES permit from the Department. 35 P.S. §§ 691.201, 691.202; 25 Pa. Code § 92a.1(b).

6. The Department may not renew a permit if the permittee has failed and continues to fail to comply with the law or has shown a lack of ability or intention to comply with the law as indicated by past or continuing violations. 35 P.S. § 691.609; 25 Pa. Code § 92a.75(b).

7. The Board reviews the Department's decisions to ensure that they constitute lawful and reasonable exercises of the Department's discretion that are supported by the facts. *Wilson v. DEP*, 2010 EHB 827, 833.

8. The Department's actions under appeal constitute lawful and reasonable exercises of the Department's discretion that are supported by the facts.

9. An NPDES permit confers a privilege to discharge into the waters of the Commonwealth, not a right. *Tri-State Transfer Co., Inc. v. DEP*, 722 A.2d 1129, 1133, n.3 (Pa. Cmwlth. 1999).

10. DEP can order a municipality to update its official sewage facilities plan to address an area where a new need for sewage treatment is necessary due to the closure for enforcement reasons of an existing facility.

11. Sewage planning must be done in the first instance by the municipality. 35 P.S. § 750.5.

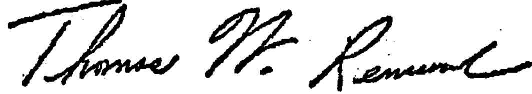
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2009-067-L**
	:	**(Consolidated with 2010-033-L**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 2010-104-L)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and TILDEN TOWNSHIP,	:	
Permittee	:	

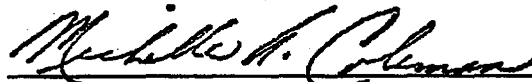
ORDER

AND NOW, this 2nd day of August, 2011, it is hereby ordered that these consolidated appeals are dismissed.

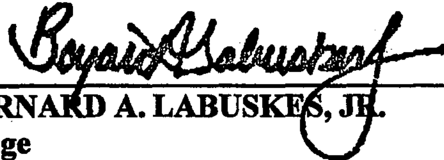
ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

DATED: August 2, 2011

c: **DEP Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2008-051-CP-C**
	:	**Issued: August 16, 2011**
MR. KIRK E. DANFELT and MRS. EVA JOY GIORDANO	:	

OPINION AND ORDER
DISMISSING MOTION FOR RECONSIDERATION
AND/OR MOTION TO COMPEL AMENDED COMPLAINT

By Michelle A. Coleman, Judge

Synopsis:

The Board denies a motion for reconsideration and/or a motion to compel an amended complaint. The motion for reconsideration is denied because the movant has not alleged any exceptional circumstances in order for the Board to grant the motion. The motion to compel an amended complaint is denied because movant has not provided any authority to allow the Board to order the Department to amend its complaint, and the motion appears to be a preliminary objection which Board rules do not permit.

OPINION

Before the Board is a Motion for Reconsideration and/or a Motion to Compel an Amended Complaint ("Motion") filed by the Defendant, Eva Joy Giordano ("Giordano") on July 18, 2011. Giordano requests the Board to reconsider its July 14, 2011 Opinion and Order

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denying Giordano's motion for summary judgment. In the alternative, Giordano requests the Board to order the Department to file an amended complaint.

Giordano filed both of the motions together as one motion. Although Giordano's motions are submitted as one, the rules governing each motion are indeed different and require different submissions. *See* 25 Pa. Code § 1021.151; 25 Pa. Code § 1021.95. Giordano fails to include orders for either motion, as required by Board rules. 25 Pa. Code § 1021.91(b). There is also no memorandum of law. Although the motion for reconsideration does not require a memorandum of law, the motion to compel, a miscellaneous motion under 25 Pa. Code § 1021.95(d) is required to include a memorandum of law. In a motion that contains five paragraphs to address both the motion for reconsideration and motion to compel amended complaint and has no memorandum of law, there is little legal support for a motion that is seeking two contrary theories of relief. Despite these procedural errors, we will address both of Giordano's requests below.

Motion for Reconsideration

Pursuant to 25 Pa. Code § 1021.151(a) a petition for reconsideration must demonstrate that extraordinary circumstances justify reconsideration of the matter by the Board. "Reconsideration of an interlocutory order must not only be based upon 'compelling and persuasive reasons,' it must also be clear that 'extraordinary circumstances' require the Board to reconsider the matter immediately, despite the fact that it is merely an interlocutory ruling . . . ." *Earthmovers Unlimited, Inc. v. DEP*, 2003 EHB 577, 578-580. This is a very high standard.

Here, Giordano has not provided any extraordinary circumstances that would justify reconsideration of the July 14, 2011 Opinion and Order by the Board. In fact, Giordano mischaracterizes the Board's Opinion by stating " [s]ince the Board concluded the Department

failed to allege a factual basis for liability, Movant's request for Summary Judgment should be granted, as absent a basis for liability, Movant would be entitled to judgment as a matter of law." Motion, p. 2. We did not say that the Department failed to allege a basis for liability. We stated, "[i]t is most appropriate to grant motions for summary judgment when a limited set of material facts are truly undisputed and the appeal presents clear questions of law. *Bertothy v. DEP*, 2007 EHB at 255; *CAUSE* v. *DEP*, 2007 EHB 101, 106. That is not the case here." *DEP v. Danfelt and Giordano*, EHB Docket No. 2008-051-CP-C (Opinion issued July 14, 2011), slip op. 5. The Board's opinion, cited above, states that what is needed is a "more developed factual record . . . ." *Id.* at 5. The Board is aware that Giordano has served interrogatories on the Department as of July 19, 2011 and that the Department has taken the deposition of Giordano on August 10, 2011. These are steps in the right direction that will lead to a more developed record. Given Giordano's mischaracterization of our Opinion and the failure to allege any exceptional circumstances to reconsider a decision, we deny this portion of the Motion.

Motion to Compel Amended Complaint

As an alternative to the motion to reconsider, Giordano presents a motion to compel amended complaint. Giordano claims that the Department's February 27, 2008 complaint fails to allege a factual basis for Giordano's liability under the Clean Streams Law. Giordano believes that she cannot adequately prepare a defense to the February 27, 2008 complaint unless there is a factual allegation that would support her liability.

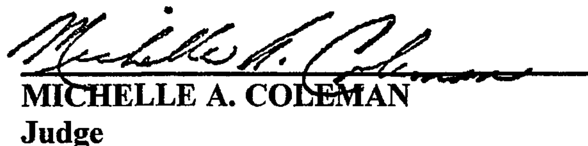
We would treat a motion to compel as a miscellaneous motion under Rule 1021.95. This rule in subsection (d) requires that a memorandum of law *shall* be filed in support of the motion. 25 Pa. Code § 1021.95(d). Since Giordano has not submitted a memorandum of law or cited any rules or provided any authority for the Board to order a party to amend its complaint, it appears

that this motion is a preliminary objection disguised as a motion to compel. Preliminary objections challenge a pleading because the pleading fails to conform to law or rule, is insufficiently specific or is legally insufficient, among other things. *See* 25 Pa. Code § 1021.74(e); Pa. Ra.Civ.P. 1028; *DEP v. Perano*, 2010 EHB 327, 328. Giordano is requesting that the Board have the Department amend its complaint because it is insufficiently plead. This is a preliminary objection. Section 1021.74(e) of the Board rules prohibit the filing of preliminary objections. Similarly in *DEP v. Perano*, 2010 EHB 327, 329, Judge Labuskes stated that the Defendant's repeated arguments about the complaint lacked specificity and they were "assaults…..[that] smack of preliminary objections and are not permitted under our rules. 25 Pa. Code § 1021.74(e)." For the foregoing reasons, Giordano's Motion to Compel an Amended Complaint is denied.

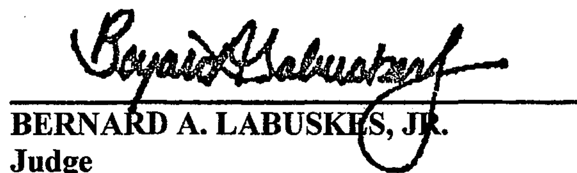
This Opinion is in support of the Board's Order issued on August 9, 2011, a copy of which is attached.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

Richard P. Mather Sr.

RICHARD P. MATHER, SR.
Judge

DATED: August 16, 2011

c: **DEP, Bureau of Litigation:**
Connie Luckadoo, Library

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2008-051-CP-C**
MR. KIRK E. DANFELT and MRS. EVA JOY GIORDANO	:	

ORDER

AND NOW, this 9th day of August, 2011, in consideration of Giordano's Motion for Reconsideration and/or Motion to Compel Amended Complaint and the Department's response thereto, it is hereby ordered that the motions are denied. An Opinion will follow.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

DATED: August 9, 2011

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STEVE MACYDA	:	
	:	
v.	:	**EHB Docket No. 2010-088-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOLIDATION COAL COMPANY, INC., Intervenor	:	**Issued: August 24, 2011**

OPINION AND ORDER
ON MOTION FOR SUMMARY JUDGMENT

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants the Permittee's motion for summary judgment and dismisses Appellant's appeal from the Department's decision to deny his subsidence damage claim. The Appellant's claim involves water loss to six springs and one well that Appellant alleged were protected water supplies under Section 5.1(a)(1) of the Bituminous Mine Subsidence and Land Conservation Act (hereinafter "BMSLCA or the Subsidence Act)". 52 P.S. § 1406.5a(a)(1). The Board agrees with the Permittee and the Department that these existing sources of water do not qualify as a protected "water supply" because they were not used for any of the listed purposes or uses when the Permittee conducted its mining operations. The water supply protection established by Section 5.1(a)(1) only extends to existing sources of water that are used for any of the listed purposes or uses in Section 5.1(a)(3). The undisputed record before the Board establishes that none of the existing sources of water identified by the Appellant were used for

any of the listed purposes to qualify as a protected water supply within the appropriate time frames.

OPINION

Introduction

The Appellant, Steve Macyda, is a landowner who owns three contiguous parcels in Greene County: Tax Parcel 2503-127; Tax Parcel 2503-127B; and Tax Parcel 2503-100. He purchased the property from David Coccari in 2007. The Consolidated Coal Company, Inc., (hereinafter "Consol") conducted underground coal mining operations beneath or near a portion of Mr. Macyda's property between April of 2008 and February of 2009.

Several existing sources of water were located on Mr. Macyda's property at the time Consol conducted underground mining beneath his property. One spring was located on Tax Parcel 2503-127B. One well and two springs were located on Tax Parcel 2503-127. Three springs were located on Tax Parcel 2503-100.

On December 21, 2009, Macyda submitted a subsidence damage claim form to the Department claiming water loss for the seven (7) sources of water listed above. The form indicated that the well went dry and the springs quit flowing or had diminished flow as a result of underground mining of Consol's longwall panel 20-M-LW and 19-M-LW. On the form, Mr. Macyda stated that his property was "vacant land" in response to the question no. 6. Mr. Macyda's claim was for loss of water or for the diminution of flow of water. These impacts are quantity based as contrasted with quality based impacts that considers the changes in water quality or chemistry of the water.

Under the Department's underground mining regulations, Consol conducted an investigation of Mr. Macyda's claim and prepared a rebuttal report for the Department. Consol's

rebuttal report asserted that Consol was not liable for the water loss to the sources of water located on Macyda's property because these sources of water were not in use as water supplies and were not protected under Section 5.1 of BMSCLA. The Department reviewed Consol's rebuttal report and concluded that Consol had no legal responsibility for the water loss under the existing mining regulations and laws for the reasons set forth in Consol's rebuttal report. The Department conveyed its decision to Mr. Macyda by letter dated May 25, 2010.

On June 18, 2010, Mr. Macyda filed a Notice of Appeal with the Board challenging the Department's May 25, 2010 decision. The Notice of Appeal listed seven (7) paragraphs containing objections. The objections raised three general points. First, Macyda asserted that certain of the sources of water were previously used for domestic and agricultural purposes by persons who owned the property before Macyda purchased the property. Second, he asserted that the sources of water were currently used for several purposes at the time of mining. Finally, Macyda asserted that he intends to develop his property in the future and will need a water supply when he develops the property in the future. Macyda claimed that the sources of water on his property were in use for the purposes of determining whether they were protected water supplies under Section 5.1 of BMSCLA and that Consol had the duty to restore or replace these water supplies that were lost or diminished.

The Board established deadlines for conducting discovery and filing dispositive motions. The parties conducted discovery. On March 21, 2011, Consol filed its Motion for Summary Judgment. On April 20, 2011, the Department filed a response in support of Consol's motion that included a statement of undisputed material facts. On April 19, 2011, Macyda filed a response in opposition to Consol's motion. Consol filed a reply to Macyda's response on May 3, 2011.

In its motion, Consol asserts one major argument in support of its motion. Consol believes that it is entitled to summary judgment because Macyda has failed to present any evidence which demonstrates that the water sources were being used as water supplies at the time of mining for any purpose identified in Section 5.1(a)(3) of the Subsidence Act. 52 P.S. § 1406.5a(a)(3). Consol's motion contained a statement of undisputed material facts and a supporting memorandum of law and the other items required by the Board's Rules at 25 Pa. Code § 1021.94a.

In his response, Macyda appears to just make the legal argument that his "planned future uses", which are agricultural or residential, establish that the existing sources of water on his property constitute protected water supplies under Section 5.1(a)(3), given the documented past uses of some of the water sources for residential and agricultural purposes. In addition, Macyda asserts that Consol's argument is directly contrary to the analysis and conclusion drawn by the federal Office of Surface Mining Reclamation and Enforcement (hereinafter "OSM") when it reviewed and approved Pennsylvania's regulatory program governing water supply replacement requirements associated with underground coal mining. Macyda's response only contains legal argument, and it fails to address several of the mandatory requirements for responses to motions for summary judgment established by the Board's rules at 25 Pa. Code § 1021.94a(f). As a result of Macyda's failure to comply the Board's rules, Macyda's efforts to oppose Consol's motion will be limited by the Board's ability to flesh out the arguments that Macyda is still entitled to make in light of its deficient response.[1]

The Department filed a response in support of Consol's motion for summary judgment.

[1] As a result of Macyda's failure to comply with the Board's rules regarding the mandatory elements of a complete response to a motion for summary judgment, the Board will accept Consol's statement of material facts as undisputed and true for purpose of deciding Consol's motion for summary judgment for the reasons set forth later in this opinion.

Its response contained a statement of undisputed material facts. The Department concurred with and supported Consol's motion. The Department also asserts that none of Macyda's existing sources of water qualify as a protected water supply and that Macyda's plans for future usage are not sufficient to change their status.

Standards for granting motion for summary judgment

As a general rule, the Board may grant a motion for summary judgment where the pleadings, depositions, answers to interrogatories and admissions, together with any supporting affidavits, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as matter of law. 25 Pa. Code § 1021.94a(1); *Angela Cres Trust of June 25, 1998 v. DEP*, 2007 EHB 111, 114; *Snyder Bros., Inc. v. DEP*, 2006 EHB 978, 980; *DEP v. Weiszer*, 2010 EHB 483, 485. "The record is to be viewed in the light most favorable to the nonmoving party, and all doubts as to the presence of a genuine issue of material fact must be resolved against the moving party." *Albright v. Abington Mem'l Hosp.*, 696 A.2d 1159, 1165 (Pa. 1997). "[S]ummary judgment is granted only in the clearest of cases, where the right is clear and free from doubt…." *Lyman v. Boonin*, 635 A.2d 1029, 1032 (Pa. 1993). The granting of summary judgment is appropriate when a limited set of material facts are truly undisputed and the appeal presents a clear question of law. *Bertothy v. DEP*, 2007 EHB at 254; 255; *C.A.U.S.E. v. DEP*, 2007 EHB 101, 106.

Macyda's failure to follow Board's rules governing responses in opposition to motion for summary judgment

The Board rules at 25 Pa. Code § 1021.94a provide detailed requirements for parties preparing and responding to motions for summary judgment. These mandatory requirements set forth both substantive and procedural requirements that allow the Board to better assess whether there are any disputes regarding material facts and to decide whether the moving party is entitled

to summary judgment.

Consol filed its motion for summary judgment and a reply to Macyda's response, and Consol's motion and reply complied with the Board's Rules at Section 1021.94a. The Department filed a response to Consol's motion.[2] Macyda filed a response to Consol's motion, but Macyda's response failed to comply with Board's Rules in several major respects.[3] Under Rule 1021.94a, a party responding to a motion for summary judgment shall file a response to the motion not to exceed two pages which contains a concise statement as to why the motion should not be granted. 25 Pa. Code § 1021.94a(f)(1). Macyda failed to comply with this requirement. Under Rule 1021.94a(f)(2), Macyda also had to file a response to Consol's statement of undisputed material facts admitting or denying or disputing Consol's facts. 25 Pa. Code § 1021.94a(f)(2). Under this provision, Macyda had an opportunity to include a statement of additional facts which he contends are in dispute. Macyda failed to comply with his mandatory duty to file a response to Consol's statement of material facts or to take advantage of the opportunity to identify additional material facts in dispute. Rule 1021.94a(f)(3) also directs Macyda to file a brief containing legal argument in opposition to Consol's motion. Macyda did file a response that did contain legal argument.

Although Macyda's response is quite deficient as set forth above, the Board will construe it as barely sufficient to avoid the automatic granting of Consol's motion as Rule 1021.94a(k) allows when a party files no response. There are, however, consequences from Macyda's failure to comply with Rule 1021.94a(f)(1) that requires Macyda to identify any disputed issues of

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[2] The Board's Rules at Section 1021.94a do not specifically address the situation when the Department files a response in support of a permittee's motion for summary judgment in a third-party appeal. It appears that the Department followed the Rule's requirements for responses in opposition to a motion for summary judgment. 25 Pa. Code § 1021.94a(f).

[3] The Board will focus on the major substantive deficiencies of Macyda's response, but the Board should note that the lack of page numbers, lack of structure, typographical errors and overall poor quality of the five page response hinders the Board's efforts to evaluate Macyda's legal arguments.

material fact. The Board will construe the facts in Consol's motion as undisputed material facts. *See Blue Marsh Labs. v. DEP*, 2007 EHB 777, 779 (Failure to response to statement of material facts allows Board construe the undisputed material facts as admitted for the purpose of resolving the motion).

In addition, the Department included additional material facts which it asserts are not in dispute in its response in support of Consol's motion.[4] The Department filed its statement of additional material facts after Macyda filed its response to Consol's motion. In its reply Consol concurred with the Department's statement of additional undisputed material facts. Although the Board recognizes that Macyda did not have an opportunity to contest the Department's statement of additional undisputed material facts as a matter of right, the Board will consider these additional material facts as uncontested.[5] Macyda failed to comply with Rule 1021.94a(f)(2), failed to contest Consol's statement of material facts and failed to identify any disputed issues of material when it had an opportunity. Macyda's failure to raise any factual disputes when required or allowed precludes Macyda from disputing any of the material facts set forth in support of Consol's motion by either Consol or the Department.[6] In light of Macyda's failure to comply with the Board's Rules governing motions for summary judgment, the Board will not consider any arguments in opposition to Consol's motion involving disputes issues of material fact. The Board will only consider Macyda's legal arguments in opposition to Consol's motion.

Statutory requirements to restore or replace water supplies if that water supply was adversely affected by underground coal mining

Prior to June 22, 1994 underground coal mine operators had no state statutory duty to

[4] The Department also concurred with the material facts set forth in Consol's motion.
[5] The Board's Rules at 1021.94a(j) authorize the Board to allow additional briefing upon a party's request. 25 Pa. Code § 1021.94a(j). Macyda did not ask the Board for permission to respond to the Department's response, including its additional statement of undisputed material facts.
[6] In addition, the Department statement of undisputed material facts is fully supported with citations to deposition transcripts.

restore or replace domestic water supplies that were adversely affected by their underground mining operators. In 1994, the General Assembly added Section 5.1 to the Bituminous Mine Subsidence and Land Conservation Act (BMSLCA), Act of June 22, 1994 (P.L. 357, No. 54), 52 P.S. § 1406.5a. Section 5.1(a)(1) provides:

> (a)(1) After the effective date of this section [August 21, 1994], any mine operator who, as a result of underground mining operations, affects a public or private water supply by contamination, diminution, or interruption, shall restore or replace the affected supply with an alternate source which adequately services in quantity and quality the pre-mining uses of the supply or any reasonable foreseeable uses of the supply.

52 P.S. § 1406.5a(a)(1); *see also* 25 Pa. Code § 89.145a(b). For purposes of Section 5.1(a)(1), BMSLCA defines the term of "water supply as:

> For purposes of this section, the term "water supply" shall include any existing source of water used for domestic, commercial, industrial or recreational purposes or for agricultural uses, including use or consumption of water to maintain the health and productivity of animals used or to be used in agricultural production and the watering of lands on a periodic or permanent basis by a constructed or manufactured system in place on the effective date of this act to provide irrigation for agricultural production of plants and crops at levels of productivity or yield historically experienced by such plants or crops within a particular geographic area, or which serves any public building or any noncommercial structure customarily used by the public, including, but not limited to, churches, schools and hospitals.

52 P.S. § 1406.5a(a)(3); *see also* 25 Pa. Code § 89.5(a) (regulatory definition of "water supply").

Congress enacted a similar water supply replacement requirement for underground mine operators in 1992 as part of the Energy Policy Act of 1992, Pub.L. 102-486, 106 Stat. 2776 (1992) (hereinafter "E PACT") Section 2504 of E PACT amended the Federal Surface Mining Control and Reclamation Act of 1977 (hereinafter "SMCRA"), 30 U.S.C. §§ 1201 et seq., and added a new Section 720. Section 720(a)(1) requires underground mine operators which damage

certain structures as a result of subsidence to repair or replace the structure, and Section 720(a)(2) requires the prompt replace of certain water supplies which have been adversely affected by underground coal mining operations 30 U.S.C. § 1309a(a)(1) and (2). The state and federal statutory water supply replacement requirements are similar, but the state requirements cover more types of water supply uses than the drinking, domestic or residential uses protected by federal law under Section 720.

Section 503(a) of the federal SMCRA permits a state to assume primary jurisdiction for the regulation of surface coal mining and reclamation operations within its borders by demonstrating that its state mining program meets the federal requirements. *See* 30 U.S.C. § 1253(a)(1) and (7). OSM approved the Pennsylvania state mining program on July 30, 1982. 47 F.R. 33050 (July 30, 1982); *See also* 30 CFR § 938.11, 938.12, 938.15 and 938.16 (subsequent amendments to the Pennsylvania program). After the General Assembly enacted Act 54 to amend BMSLCA in 1994, the Department submitted an amendment to its approved regulatory program to OSM for review and approval. On December 27, 2001, OSM approved Pennsylvania's program amendment, with a few exceptions. 66 F.R. 67010 (December 27, 2001). Macyda relies upon this Federal Register Notice containing the Preamble to OSM's approval of Pennsylvania's program amendment to oppose Consol's motion.

Since 1994, an underground mine operator in Pennsylvania who, as a result of underground mining operation affects a water supply by contamination, diminution or interruption shall restore or replace the affected water supply. A water supply includes "any existing source of water used for domestic, commercial, industrial or recreational purposes or for agricultural uses. ..." 52 P.S. § 1406.5a(a)(3). Since 2001, the Department has implemented these water supply replacement requirements consistent with OSM's approval of its permanent

regulatory program. Under these requirements, the Department implements a two part analysis to determine whether there is a protected water supply. First, the Department determines whether there is an "existing source of water" at the time of mining. Second, the Department determines whether the "existing source of water" is "used" for one or more of the listed purposes or uses.

All parties agree that Mr. Macyda had existing sources of water on his property. Each of these sources of water was identified by Macyda when he notified Consol and the Department of his water loss. There is also no question that Macyda complied with the notification requirements in Section 5.2(a)(1) of BMSLCA. 52 P.S. § 1406.5b(a)(1); *Consol Pa. Coal Co. v. DEP*, No. 1326 C.D. 2010, slip op. (Pa. Cmwlth. June 30, 2011) (Affected landowner must file water loss claim within two years of water supply being adversely affected). Thus, the only issue before the Board is whether these existing sources of water were "used" within the meaning of the definition of water supply in Section 5.1(a)(3) to qualify as a protected water supply.[7] See also 25 Pa. Code § 87.5(a) (regulatory definition of "water supply").

Macyda's existing sources of water were not used within meaning of Section 5.1(a)(3)

Macyda asserts two major arguments in support of its position that his existing sources of water on his property qualify as protected water supplies. First, Macyda asserts that Consol's argument is directly contrary to OSM's preamble discussion in the 2001 Federal Register Notice that approved Pennsylvania's amendment to its approved underground coal mining regulatory program that added water supply replacement requirements. Second, Macyda asserts that his "planned future uses", which he asserts are agricultural and residential, are sufficient to qualify

[7] Because the Department denied Macyda's claim for the reason that the existing sources of water were not used and were therefore not protected water supplies, the Department never evaluated the amount or extent of water loss. The Board will also not address this aspect of Macyda's claim because the Board agrees that Macyda's sources of water were not used and did not qualify as protected water supplies.

his existing sources of water as protected water supplies. The Board will address each of these arguments separately.

Macyda has misapprehended OSM's 2001 Preamble to its approval of Pennsylvania's approved mining program amendment

The issue before the Board in this appeal is whether Macyda's plans for future development convert the existing sources of water on his property into protected water supplies. The discussion in Macyda's brief indicates that Macyda believes OSM addressed this issue when it approved Pennsylvania's mining program in 2001. The Board disagrees. OSM did not address this issue in the portions of its 2001 Preamble cited by Macyda. OSM was addressing a different issue, the issue of the adequacy of a replacement water supply for a water supply that was affected by mining. In this context of reviewing the adequacy of the replacement water supply, OSM stated that reasonably foreseeable uses and potential uses by a future owner need to be considered.

Macyda has misapprehended OSM's 2001 Preamble to its approval of Pennsylvania's program amendment. OSM never stated that plans for future development convert existing water sources into protected water supplies. OSM never made this statement because the federal mining laws and regulations do not impose such a requirement. *See* 30 U.S.C. § 1309a; 30 C.F.R. Part 817. Under state and federal requirements, an existing source of water must first qualify as a protected water supply before reasonably foreseeable uses or plans for future development are relevant when evaluating the adequacy of a replacement water supply. Here, as discussed below no water supplies are involved because none of the existing sources of water on Macyda's property were used for any purpose protected under Section 5.1 of BMSLCA. Macyda has misconstrued OSM's earlier statements about evaluating the adequacy of a replacement water supply as applying to the issue of whether a particular water source qualifies

as a water supply. Macyda is therefore wrong in his assertion that OSM's statement directly contradict Consol's argument.

Macyda's reliance on OSM's Preamble discussion is also misplaced given the more narrow scope of the water supply replacement requirements required by federal law.[8]. The federal requirement and OSM's discussion and approval only covers those portions of Pennsylvania's program that are required by federal law. Macyda's alleged recreational and agricultural uses are not required by federal and OSM's discussion about federal requirements is not applicable to that part of the state program that cover the replacement of water supplies used for recreational purposes or agricultural uses.

Current usage of existing water sources for alleged recreational and agricultural purposes is insufficient to qualify sources as protected water supplies in this appeal

Macyda asserts in his Notice of Appeal that recreational uses were present on his property "before the mining, during the mining and continuing after the mining."[9] Paragraph Nos. 3 and 6 of Macyda's Notice of Appeal. Macyda has not raised the issue of the current usage of the existing water sources in its response to Consol's motion. Macyda only argues that his "planned future uses" or his "potential future use" along with an existing water source constitutes a protected water supply under Section 5.1(a)(3) of BMCLCA. Macyda presented no factual evidence to support this argument about current usage.[10] He also neglected to raise, mention or discuss this issue in his brief, which he previously raised in his Notice of Appeal.

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[8] The federal program only covers water supplies used for domestic or residential purposes. The state program covers this aspect, and it also extends to cover commercial, industrial or recreational purposes and agricultural uses.

[9] If, as Macyda asserts, the existing recreational usage continued after mining, the Board has a concern about Macyda's claim for the loss of his alleged water supply. If it continued after mining, how can it be lost?

[10] As previously mentioned Macyda failed to either respond to Consol's statement of material facts, as required or took advantage of his opportunity to provide the Board with additional material facts in support of his response.

There is no basis for the Board to deny Consol's motion for summary judgment based on Macyda's assertion in his Notice of Appeal that Macyda's current usage of existing water sources constitute a protected water supply.

If, for the sake of argument, Macyda had continued to raise the issue that the alleged current recreation usage of some of the existing water supplies constituted a protected water supply, the Board would still reject this argument for the reasons set forth in the Department's response in support of Consol's motion. The recreation usage that Macyda claims is a narrow aspect of hunting. It is related to the use of the existing source of water for the propagation of wild life for hunting purposes. Notice of Appeal, Paragraph No. 2. Hunting, as described by Macyda as the possible use of the water by wildlife for propagation, is not a recreational usage that is protected under Section 5.1(a)(3). Thus, the Board would still have rejected Macyda's argument that it identified in its Notice of Appeal if it had raised it in its response to Consol's motion and supported it as required by the Board's Rules.[11]

In addition to his current recreational usage, according to the Department, Macyda asserts that he uses one of the springs when he is on the property. The Department's response identifies this current usage as: "Macyda sometimes uses spring "D" to wash his hands and face when he is walking on his property." Department's response at page 7; Macyda Deposition Transcript, pp 66, line 3-8. This type of current usage, even if establish in the record, is insufficient to qualify an existing source of water as a protected water supply.

It is also important to mention that Macyda admits that the existing sources of water on his property were not used when mining occurred because he described this property as "vacant

[11] Macyda's Notice of Appeal also asserts that the existing water sources were involved in "dissipation agricultural production." While agricultural production is a well-established concept, the Board is unable to comprehend what Macyda means by "dissipation agricultural production." Dissipation is defined as "the act or process of dissipation" or "an act of self-indulgence, especially one that is not harmful." Neither meaning helps to explain what Macyda claims as a protected water supply.

land" on the subsidence damage claim form that he submitted to the Department to document his water loss claim. This form is a standardize claim form developed by the Department that asks persons who claim subsidence damage to provide identification information and specific information about the damage claim. Question six on the form asks the question: "When was this structure built?" In response to the question Macyda answered "vacant land." Macyda's subsidence damage claim form admits that there are no structures on his property and that it is "vacant land". The Board is at a loss to see how vacant land without any residential, commercial or agricultural structures supports any water use or purpose that would qualify the existing sources of water as a protected water supply. Thus, Macyda's own written statements on his claim form support Consol's and the Department's position.

In addition, the fact that Macyda had just purchased the property from Mr. Coccari in 2007 does not support his claim that the existing water sources on the property are protected water supplies. Mr. Coccari's deposition testimony which describes the prior history of water usage on the property is also not supportive of Macyda's claim. In fact, it supports Consol's and the Department's position.

Macyda has not provided the Board with any evidence that he took any steps to advance his plans to use the water from the time Macyda acquired the property in 2007 until the mining occurred in 2008 and 2009. His deposition testimony that the Department includes in its response clearly establishes that Macyda took no concrete steps to effectuate any of the so-called plans that he described during his deposition for this property. The property remained "vacant land" as he described it on his subsidence damage claim form, and Macyda did not undertake any action to change its status after he purchased the property in 2007. Macyda's unrealized claim of "planned future uses" are not sufficient to qualify his existing sources of water as

protected water supplies.[12]

Prior usage of existing water sources for residential and agricultural purposes is insufficient to qualify sources as protected water supplies in this appeal

Macyda makes two points related to the prior usage of some of the existing sources of water. First, he assets that the prior usage, by itself, establishes that the existing sources of water are protected as water supplies: Once a water supply always a water supply. Second, Macyda asserts that the prior usage strengthens the argument that the "planned future uses" constitute a protected water supply if this usage occurred earlier.[13] The Board will address this second aspect of Macyda's argument in the following portion of this opinion where the "planned future uses" issue will be addressed.

A drilled well and six (6) springs are present on Macyda's property, and the record before the Board indicates that some of these sources were used previously.[14] Although some of the water resources were used as water supplies decades ago, none of the water resources are currently in use.

The parties agree that an occupied dwelling and a barn associated with agricultural operations were once located on one of the tax parcels that Macyda currently owns. The well and the spring associated with the cistern were previously used in connection with these activities. In addition, there is no dispute that one of the springs (spring D) was previously used by an adjacent landowner. There is no evidence before the Board that springs "C", "E", "F" and

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[12] There may be circumstances where a property owner, who has taken concrete steps to realize his "planned future uses" such as developing the sources, obtaining building permits or local approvals or securing utility hookups, would be able to qualify the existing sources of water as protected water supplies. The Board will wait for the appeal that has these facts, lacking in this appeal, to address the issue.

[13] The Board rejects Macyda's arguments based upon the facts of this appeal.

[14] The well, a cistern identified as spring "B" and spring "C" are located on Parcel No. 2503-127. Spring "O", a hand-dug well in a hillside embankment next to a road, is located on Parcel No. 2503-127B. Springs "E" and "F" and "G" are located on Parcel No. 2503-100.

"G" were ever used as a water supply. Thus, the parties are in agreement that some of the existing sources of water were previously used for residential and agricultural purposes.

There is also no dispute that these uses were discontinued decades ago. The well in question has not been used and has not been in a usable condition since 1974. (37 years ago). The spring and associated cistern was last used in 1979 (32 years ago). Spring "D" was last used by an adjacent landowner in about 1991 (20 years ago).

There is also no dispute that the dwelling on the one parcel is no longer habitable in its present condition. This parcel has been vacant and unoccupied for more than thirty (30) years. The property owner before Macyda, Mr. Cocarri, lived on the property until 1976 when he moved to a different location. The last person to reside on the property left in 1979. The pump for the well disappeared in the late 1970's. The barn which was built on the property in the early 1900's collapsed in 1992. The septic system for the dwelling was built in 1974, and the area where it and the well are located was bulldozed and leveled to create a staging area for timbering lumber on a portion of the parcel. When Cocarri sold the property to Macyda in 2007, the existing sources of water on the property were no longer being used for residential or agricultural purposes and these prior uses had not existed for 20 to 30 or more years.

While there are no disputes concerning the underlying facts, the parties disagree whether this history of prior usage influences whether the existing sources of water on Macyda's property are protected water supplies. The Board does not believe that the documented prior water usage that terminated twenty to thirty-seven years ago affects the Board's decision that the existing sources of water on Macyda's property are not protected water supplies. There may be circumstances where prior usage will affect the Board's evaluation, but the extreme length of time that the usage was discontinued make this an easy case to conclude that the prior usage does

not support a conclusion that the existing sources of water are not protected water supplies. The Board will leave for future cases the issue of whether different circumstances can support such a conclusion.

The evidence presented to the Board in this appeal does not support a conclusion that the existing sources of water on Macyda's property were used for any of purposes listed in Section 5.1(a)(3) during a time period having any connection to Consol's mining operations. The decision to discontinue these prior uses of some of the existing sources of water occurred decades before Consol conducted its mining operations. The decision to discontinued usage was not in any way influenced by or as a result of Consol's mining.

There is one additional aspect of this issue that the Board should address. The Department and Consol appear to assert that an existing source of water has to be in use on the day that mining occurred to qualify as a protected water supply. The Department also appears to suggest that a temporary interruption of usage when mining occurred might be sufficient to disqualify as otherwise protected water supply. If this is their view, the Board disagrees. The Board does not share this narrow view, and it recognizes that there may be circumstances where a property owner may be able to meet the requirements of a protected water supply (existing source of water used for various purposes) based upon evidence of prior or planned usage. It is also possible that a planned or unexpected interruption in current usage may not disqualify an otherwise protected water supply.

Macyda's response to Consol's motion highlights this issue. Macyda provides two examples of water supplies that he believes would be unprotected under the Department's and Consol's view. Implicit in this argument is Macyda's belief that this appeal and Macyda's existing sources of water are similar to the two examples. The Board disagrees that these

examples are similar to the situation confronting the Board in this appeal, but it is, nevertheless, useful to discuss Macyda's two examples. In addition, regardless of the Department's and Consol's view, the Board would not view these examples as unprotected water supplies. Both examples involve protected water supplies in which the existing sources of water are being used, but the usage has been temporarily interrupted. In the first example, a dairy farm exists with its associated water usage. The farmer decides to switch from a dairy farm to a beef cattle farm, and no beef cattle are present for a winter season after the dairy cattle are sold. The fact that animals are not present over a winter season, because of a planned change in the agricultural business plan, does not in any way detract from the overall conclusion that a farm with associated water usage exists at the time of mining. In the second example, a dwelling exists on the property that was involved in a fire. The fire temporarily interrupted the occupation of the dwelling until it can be rebuilt. The water supply associated with the dwelling remains protected during the temporary interruption because the existing source of water was used at the time of mining even though its usage was temporarily interrupted. The examples provided by Macyda are fact-specific as is this appeal. The Board will await future cases to determine when evidence of prior usage or a temporary interruption is an important consideration. This appeal is, however, clear cut. Prior water usage that was abandoned 20 to 37 years ago is of no moment when deciding whether a particular existing source of water qualifies as a protected water supply today.

Macyda's planned future uses of existing water sources for residential and agricultural purposes are insufficient to qualify policies as protected water supplies in this appeal

Macyda's main argument in opposition to Consol's motion is that his "planned future uses" for the existing water sources on his property are sufficient to establish that these existing water sources are protected water supplies under Section 5.1(a)(3). The Board rejects Macyda's argument based upon the facts in this appeal.

The facts establish that Macyda has no definite or concrete plans to develop or use the existing sources of water on his property. At best the record before the Board indicates that he may have had thoughts or ideas about possible future development of his property, but none of his ideas about possible future development were fully developed or explored to the point where Macyda had definite or concrete plans for any type of activity that would involve the use of the existing sources of water for any purpose or use that would qualify these water sources as protected water supplies. The lack of any concrete plans for development and the lack of any effort on Macyda's part to execute upon any of the general ideas for development that he described in his deposition are two factors that support Consol and the Department's argument that none of Macyda's existing sources of water are protected water supplies.[15]

Use of "existing use" terminology

The Department's brief uses the phrase "water supply with an existing use" to define the limits of water supply protection under BMSCLA. This phrase is not in the Department's mining regulations or statutes regarding water supply protection and replacement. The Department also uses the term "existing use" in its brief in a similar fashion, and this term is also not found in the Department's mining laws and regulations governing water supply protection and replacement. The Board is concerned that the use of these terms and phrases in this context has the potential to create unintended confusion. The "existing use" term is used in the Department's water quality standards. The term has a definite regulatory meaning, and it has been applied in various water quality standards regulatory contexts. To avoid confusion between the general water quality standards context and the BMSLCA water supply protection context the Board will avoid using the phrase "water supply with an existing use" or the term "existing

[15] There may be circumstances where definite and concrete plans for future development with efforts to execute upon those plans support a different decision, but the Board will await the specific facts of a future appeal to address these circumstances.

use" of a water source.

The Board will use the language in Section 5.1(a)(3). The phrase "existing source of water used for domestic, commercial, industrial or recreational purposes or for agricultural uses…" is used to define the term water supply for purposes of water supply protection under BMSLCA and its implementing regulation. 52 P.S. § 1406.5a(a)(3); 25 Pa. Code § 89.5(a). (definition of "water supply"). The word "existing" modifies the word "source" and it does not modify the word "used." The Department's description of the obligation imposed by Section 5.1(a)(3) is similar to the Board's construction of the statutory language in Section 5.1(a)(3) as this opinion indicates. The Board will, however, avoid using the Department's suggested terminology to avoid any possible confusion through the overuse of the term "existing use."

Accordingly, we issue the Order that follows.

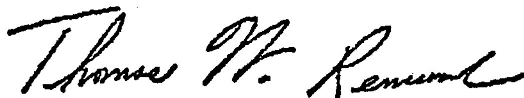
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STEVE MACYDA	:	
	:	
v.	:	**EHB Docket No. 2010-088-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOLIDATION COAL COMPANY, INC., Permittee	:	

ORDER

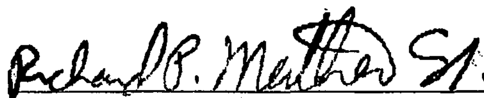
AND NOW, this 24th day of August, 2011, the Permittee's motion for summary judgment is **granted** and the appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



RICHARD P. MATHER, SR.
Judge

DATED: August 24, 2011

c: **DEP Bureau of Litigation:**
Attention: Connie Luckadoo, Library

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STEVE MACYDA	:	
	:	
v.	:	**EHB Docket No. 2010-088-M**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and CONSOLIDATION	:	
COAL COMPANY, INC., Intervenor	:	

DISSENTING OPINION OF BERNARD A. LABUSKES, JR.

Summary judgment in appeals before this Board should be limited to cases that involve a limited set of material facts that are truly undisputed and that present a clear question of law. *Kraft v. DEP*, EHB Docket No. 2010-042-M, slip op. at 4 (Opinion, January 28, 2011); *DEP v. Weiszer*, 2010 EHB 483, 485-86. Doubts must be resolved against the moving party, and summary judgment should only be granted "in the clearest of cases, where the right is clear and free from doubt." *Id.* (quoting *Lyman v. Boonin*, 635 A.2d 1029, 1032 (Pa. 1993)). These principles are particularly apposite to Board proceedings because we provide the only due-process review that there is of the Department's actions. Our duty is to develop our own de novo record, assess the credibility of witnesses who provide live testimony, and adjudicate the matter based upon a majority vote of all of the judges.

This case involves neither a "limited set of material facts that are truly undisputed" nor a "clear question of law." As to the facts, Consol's statement of undisputed facts tells me nothing other than there are several springs and a well on Macyda's property. The Majority relies on the Department's short supplemental statement of undisputed facts despite acknowledging that Macyda had no opportunity to respond to that statement because the Department -- in my view

improperly -- included it as part of a "response" to Consol's motion.[16] Putting my procedural problem aside, the Department actually says in its statement that the springs have been put to recreational and agricultural use. As to the well, it exists, apparently, but it is not in a "usable condition," whatever that means. Macyda responds that the springs are "developed" and the "drilled well" remains in place. This falls far short of the sort of record that justifies the grant of summary judgment. We should not be delving into the *deposition* testimony of multiple witnesses in an attempt to flesh out these purportedly undisputed facts. This case would have benefited greatly from an evidentiary hearing, which we undoubtedly could have completed in one day.

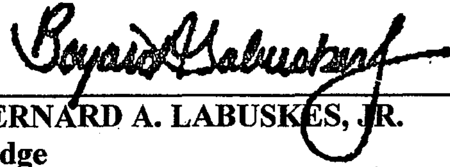
This appeal also does not involve "a clear question of law." Deciding whether there is an existing water supply is fact-intensive and case-specific. Beyond that, the underlying legal question of what constitutes an existing source used for certain purposes is complex and unresolved. The Majority says a water resource may qualify if used "within the appropriate time frames." "Prior or planned" usage might qualify. "Current" usage is evidently not required. I tend to think that it is the *existence* of a supply that matters, not the timing of its actual usage. If, for example, a preexisting, developed well has been sitting dormant on a site for over 20 years prior to mining but is perfectly usable, the well adds value to the property and I do not see why that well would not qualify as a protected water supply. Further, under the Majority's approach, virtually every site in Pennsylvania will have an "existing source" (e.g. groundwater, springs), which then necessarily shifts the focus to the *timing of usage*, yet the language in the pertinent legal provisions clearly does not define protected water supplies by way of reference to the

[16] The majority seems to be relying on the Department's proposed facts as something of a sanction against Macyda. Although Macyda's filing leaves much to be desired, I wonder at what point litigation before the Board becomes so byzantine, expensive, and rule-bound that only the Department and other parties with substantial resources can afford to pursue it. *See* 25 Pa. Code § 1021.4 (liberal construction of rules).

timing of usage. More to the point, I would have preferred to wrestle with these questions in the context of an Adjudication based upon a properly developed record after having given Macyda his day in court.

Accordingly, I must, reluctantly, dissent.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: August 24, 2011

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DENNIS J. BAGLIER	:	
	:	
v.	:	**EHB Docket No. 2011-087-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 25, 2011**

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board dismisses an untimely appeal for lack of jurisdiction.

OPINION

On May 4, 2011, the Department of Environmental Protection (the "Department") issued an order to Dennis J. Baglier ("Baglier") pursuant to the Oil & Gas Act, 58 P.S. § 601.101 *et seq.*, and the Clean Streams Law, 35 P.S. § 691.1 *et seq.* Baglier received the order on May 5, 2011, but he did not file this appeal from the order until June 7, 2011. The Department has filed a motion to dismiss Baglier's appeal for lack of jurisdiction, arguing that Baglier's appeal arrived at the Board outside of the 30-day appeal period. Baglier has not filed a response.

We are receptive to a motion to dismiss where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *GEC Enterprises v. DEP*, 2010 EHB 305, 308; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Michael Butler v. DEP*, 2008 EHB 118, 119; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998

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EHB 1281, 1281. Motions to dismiss will be granted only when a matter is free from doubt. *Northampton Township, et al. v. DEP*, 2008 EHB 563, 570; *Emerald Mine Resources, LP v. DEP*, 2007 EHB 611, 612; *Kennedy v. DEP*, 2007 EHB 511. The Board evaluates motions to dismiss in the light most favorable to the non-moving party. *Cooley, et al. v. DEP,* 2004 EHB 554, 558; *Neville Chem. Co. v. DEP*, 2003 EHB 530, 531. Because Baglier failed to respond to the Department's motion to dismiss, the Board deems the properly pleaded and supported facts in the Department's motion to be true. 25 Pa. Code § 1021.91(f); *Tanner v. DEP*, 2006 EHB 468, 469; *Gary Berkley Trucking, Inc. v. DEP*, 2006 EHB 330, 332.

Based on the facts in the Department's uncontested motion, this appeal must be dismissed as untimely. The Board's rule is clear that the recipient of a Departmental action has 30 days to file an appeal with the Board. 25 Pa. Code § 1021.52(a)(1); *Greenridge Reclamation LLC v. DEP*, 2005 EHB 390, 391; *Martz v. DEP*, 2005 EHB 349, 350; *Pikitus v. DEP*, 2005 EHB 354, 357. If an appeal is filed beyond the 30 day deadline, the Board, absent a limited exception for *nunc pro tunc* appeals not applicable here, is deprived of jurisdiction to hear the appeal. *Rostosky v. DER*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976); *Pikitus*, 2005 EHB at 357; *Burnside Township v. DEP*, 2002 EHB 700, 702; *Sweeney v. DER*, 1995 EHB 544, 546. Baglier received the order on May 5, 2011. Therefore, an appeal needed to be filed no later than June 6, 2011, the first business day after the 30th day, which fell on a Saturday. Baglier did not appeal until June 7, 2011. He was one day too late.

Pennsylvania courts and this Board have long held that the failure to timely appeal an administrative agency's action is a jurisdictional defect which mandates the quashing of the appeal. *See Falcon Oil Co., Inc. v. DER*, 609 A.2d 876, 878 (Pa. Cmwlth 1992); *Cadogan Township Board of Supervisors v. DER*, 549 A.2d 1363, 1364 (Pa. Cmwlth. 1988); *Pennsylvania*

Game Comm'n v. DER, 509 A.2d 877, 886 (Pa. Cmwlth. 1986), *aff'd*, 555 A.2d 812 (Pa. 1989); *Weaver*, 2002 EHB at 276; *Dellinger v. DEP*, 2000 EHB 976, 980. "[T]he time for taking an appeal cannot be extended as a matter of grace or mere indulgence." *Bass v. Commonwealth*, 401 A.2d 1133, 1135 (Pa. 1979). *See also Rostosky, supra*, 364 A.2d at 763 ("Where a statute has a fixed time within which an appeal may be taken, we cannot extend such time as a matter of indulgence.") Moreover, the Board is not permitted to disregard such a defect and grant an extension of time "in the interests of justice." *See West Caln Township v. DER*, 595 A.2d 702, 705-06 (Pa. Cmwlth. 1991); *Weaver*, 2002 EHB at 277. Accordingly, the untimeliness of the appeal, even if only slightly overdue, deprives the Board of jurisdiction over the appeal. *McKissick Trucking v. DEP*, EHB Docket No. 2011-007-M (March 8, 2011) (one day late); *GEC, supra* (three days late); *Spencer v. DEP*, 2008 EHB 573, 575 (one day late); *Pedler v. DEP*, 2004 EHB 852, 854 (same); *Tanner*, 2006 EHB at 469 (two days late); *Martz*, 2005 EHB at 349-50 (11 days late); *Weaver*, 2002 EHB at 279 (11 days late).

Accordingly, we issue the Order that follows.

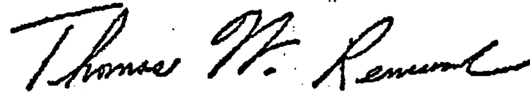
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DENNIS J. BAGLIER	:	
	:	
v.	:	**EHB Docket No. 2011-087-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 25th day of August, 2011, Department's motion to dismiss is hereby **granted**. This appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

DATED: August 25, 2011

c: **DEP Bureau of Litigation:**
Attention: Connie Luckadoo, Library

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BLUE MOUNTAIN PRESERVATION ASSOCIATION, INC.	:	
	:	
v.	:	**EHB Docket No. 2009-080-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ALPINE ROSE RESORTS, INC., Permittee	:	**Issued: August 25, 2011**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board holds that the Department's issuance of a new NPDES permit for post-construction stormwater discharges that was revised following an earlier remand by the Board complied with antidegradation requirements.

FINDINGS OF FACT

1. Blue Mountain Preservation Association, Inc. ("BMPA") is a nonprofit organization based in Eldred Township, Monroe County. (Joint Stipulation of the Parties Number ("Stip.")1.)

2. The Department of Environmental Protection (the "Department") is the agency of the Commonwealth responsible for issuing NPDES permits. (Stip. 3.)

3. Alpine Rose Resorts, Inc. ("Alpine") is the permittee. (Stip. 4.)

4. Alpine owns approximately 348 acres on the northern slope of Blue Mountain on Upper Smith Gap Road in Eldred Township, Monroe County. (Stip. 5.)

5. The Aquashicola Creek flows through the northeast corner of Alpine's property. (Stip. 6.)

6. The Aquashicola Creek and the tributaries thereto are designated as a High Quality (HQ), Cold Water Fishery, Migratory Fishes pursuant to 25 Pa. Code § 93.9d. (Stip. 7.) It has also been designated as a wild trout stream. (Alpine Exhibit No. ("A. Ex.") 9; Notes of Transcript page ("T.") 241; A. Ex. 9.) Wetlands bordering the northeast corner of the property are considered Exceptional Value (EV) wetlands because of their ecological significance. (T. 242; A. Ex. 9.) (Aquashicola Creek, its tributaries, and its associated wetlands will hereinafter be referred to collectively as "Aquashicola Creek" unless otherwise noted.)

7. The property is entirely within the drainage area of the Aquashicola Creek. (Stip. 8.)

8. The property extends from a maximum elevation of approximately 1500 feet above sea level to a low elevation of approximately 500 feet at the Aquashicola Creek. (T. 225.) The site gets less rocky and has more soil as one goes down the hill. (T. 226.)

9. The following water resources are within the boundaries of the site and are designated as HQ:

a. Floodplain wetlands adjacent to and within the floodplain of the Aquashicola Creek;

b. A first-order intermittent tributary stream system in the middle and lower slopes of the western portion of the site along with associated wetlands and the surrounding riparian corridor; and

c. A natural ephemeral water course and associated wetlands in a ravine on the eastern portion of the site.

T. 228-29, 236-38, 241-42; A. Ex. 9.)

10. The surface water resources are primarily sustained by groundwater, which includes interflow (shallow groundwater flow above any acquifers). (A. Ex. 9; T. 247-48.) Groundwater from the site also discharges into the Aquashicola Creek. (A. Ex. 9; T. 246, 322-23.)

11. Surface discharges of stormwater from the pre-construction property occur at the following discharge points.

a. Discharge Point No. 1 – The mouth of the ephemeral first-order tributary stream on the eastern side of the property. This watercourse discharges into the floodplain wetlands of the Aquashicola Creek on the property;

b. Discharge Point No. 2 – A culverted outfall from the first-order natural tributary stream system located on the western portion of the property. The discharge at this point is to off-property floodplain wetlands of the Aquashicola Creek; and

c. Discharge Point No. 3 – This discharge point is a culverted discharge which collects runoff water from the western lower slopes on the property, from the adjacent neighbor's property, and from Upper Smith Gap Road via a small swale on the southern edge of the road pavement. Discharge at this point is to the floodplain wetlands of the Aquashicola Creek.

(T. 239-41, 244-45; A. Ex. 9.)

12. Alpine plans to construct a road course for sports cars and high performance vehicles, as well as support facilities, on the site. (*Blue Mountain Preservation Ass'n v. DEP*, 2006 EHB 589 (*"Blue Mountain I"*), Finding of Fact ("FOF") 9.)

13. On September 17, 2002, Alpine submitted to the Department an NPDES Permit application for stormwater discharges to the Aquashicola Creek associated with construction activities at the property. (*Blue Mountain I*, FOF 11.)

14. On August 5, 2003, Alpine submitted to DEP a second NPDES Permit application for stormwater discharges to the Aquashicola Creek associated with construction activities at the property. (*Blue Mountain I*, FOF 17.)

15. During the review process, Alpine was required to submit additional technical and scientific information to justify issuance of an NPDES permit for the project. (*Blue Mountain I*, FOF 18.)

16. On August 27, 2004, Alpine submitted its revised erosion and sedimentation control (E&S) plan to the Monroe County Conservation District. (*Blue Mountain I*, FOF 19.)

17. Alpine's revised E&S Plan included erosion and sedimentation control Best Management practices ("BMPs"). (*Blue Mountain I*, FOF 28.)

18. Alpine's BMPs included the following: topsoil stockpiles; a stabilized construction entrance; a silt fence; benches; sediment basins; baffles installed in the basins; skimmers for discharges from basins; erosion control lining placed in swales; filtration devices; water quality inlet structures (Stormceptors); planting of grasses, plants and trees; dry and wet ponds; swales or lined channels to direct runoff; and a riparian buffer. (*Blue Mountain I*, FOF 31.)

19. Alpine's proposed BMPs meet the requirements of 25 Pa. Code Chapter 102 with regard to prevention of accelerated erosion and sedimentation. (*Blue Mountain I*, FOF 32, 33.)

20. As originally designed, there would have been a net increase in post-construction stormwater runoff, i.e., discharge into the Aquashicola Creek, as a result of the construction of the Alpine project. (*Blue Mountain I*, FOF 34.)

21. The increase in discharge as a result of the project triggered the requirement of compliance with the antidegradation regulations for the Alpine permit. (*Blue Mountain I*, FOF 35.)

22. Alpine did not show in the first appeal that stormwater discharges leaving the site would maintain and protect the existing water quality of Aquashicola Creek as required by antidegradation regulations. (*Blue Mountain I*, FOF 54, 57.)

23. Therefore, this Board remanded the permit to the Department for further consideration. (*Blue Mountain I*, 2006 EHB at 624; Stip. 9-12.)

24. Following the remand, Alpine prepared and revised an antidegradation analysis. (T. 242, 450-89; DEP Ex. 13, 15, 21; BMPA Ex. 13, 15; A. Ex. 9.)

25. Meetings, correspondence, application revisions, and a public hearing ensued. (Stip. 14, 15, 16; T. 450-59; DEP Ex. 13, 15, 21; BMPA Ex. 13, 15.)

26. On May 6, 2009, the Department issued a new permit (NPDES Permit No. PAS10S119) for the project. (Stip. 15.) Before us is BMPA's appeal from this new permit.

27. The original BMPs as described in *Blue Mountain I* remain as integrated components of the post-construction stormwater management plan under the new permit. (T. 250-55.)

28. In addition, Alpine has added a few new BMPs, most importantly 50-foot-wide infiltration beds within the grassed safety aprons along the entire length of the road course. (T. 253-54; A. Ex. 9, 27-32.)

29. Due to limitations of location, size, gradient, porosity, relation to the seasonal water table, and construction specifications, the infiltration beds by themselves are not designed to and in fact will not infiltrate all of the stormwater falling on the site during larger storms. (T. 28, 39-41, 49-54, 60, 67, 164-65, 277, 331-32, 363; A. Ex. 9, 30.)

30. Infiltration trenches will be installed as needed under some infiltration beds to allow for additional infiltration. (T. 60, 256-57, 263-65; A.Ex. 9, 30, 39.)

31. Alpine's integrated stormwater management system, which includes the infiltration beds and the other BMPs, together with natural infiltration and evapotranspiration on the very large portions of the site that will remain forested and undisturbed by the project, will ensure that there will be neither an increase nor a decrease in the quantity, quality, or flow rate of surface or subsurface flow into Aquashicola Creek post-construction. (T. 234-35, 246-59, 288-89, 297-300, 303-15, 335-36, 348-50, 385-90, 404-05, 470-72, 478-88, 497-500; A. Ex. 2, 9; BMPA Ex. 2.)

32. The permit requires that Alpine conduct a visual site inspection on at least a weekly basis, and also after each measurable precipitation event. Several special conditions have been added to the permit regarding implementation of the post-construction stormwater management plan according to the approved plans. Inspections are required by a Pennsylvania registered Professional Engineer, or the engineer's designee, to provide onsite project oversight. Also, any deviations from the approved plans must be approved by the Department prior to

construction, and "as-built" plans will be required to document any changes. (T. 493; BMPA 1; 2.)

33. Unlike the project as originally designed (*Blue Mountain I*, FOF 34), the project as modified will not create a net increase in post-construction runoff to Aquashicola Creek. (T. 246-50, 298-99, 322-24, 331-32, 335-40, 345, 351-52, 385-90; A. Ex. 2, 9.)

34. The project as it is now designed will preserve the existing stormwater regime and the hydrologic balance of the watershed. (T. 246-50, 298-99, 322-24, 331-32, 335-40, 345, 351-52, 385-90; A. Ex. 2, 9.)

35. The project as it is now designed will protect and maintain the waters of the Commonwealth. (T. 246-50, 298-99, 322-24, 331-32, 335-40, 345, 351-52, 385-90; A. Ex. 9.)

36. There is no credible record evidence that post-construction runoff will create excess erosion or sedimentation of waters of the Commonwealth. (*Blue Mountain I*, FOF 33; *See* T. 274-75, 301-307.)

37. There is no credible record evidence that post-construction runoff will transport any other pollutants to waters of the Commonwealth. (*See* T. 307-10.)

DISCUSSION

As BMPA correctly points out, resolution of this appeal rests on whether the Department's issuance of a new NPDES permit to Alpine following our remand complied with the antidegradation regulations codified at 25 Pa. Code Chapter 93. BMPA asserts that the Department has failed to properly consider two threats to the water quality of the Aquashicola watershed from Alpine's development: (1) pollution (sedimentation and "road course pollutants") associated with post-construction surface water discharges, and (2) reduced groundwater flow to the receiving waters. BMPA alleges that Alpine's project will convert some

of the pre-construction *subsurface* flow into *surface* flow with unknown but potentially harmful consequences to the receiving waters. BMPA concedes that it has no proof that actual degradation will occur, but it argues that yet another remand for further study is necessary because there will be changes to the hydrologic regime and no one knows what effect those changes will bring.

Our *de novo* review of the record convinces us that Alpine's project as it is now designed will replicate pre-construction conditions with respect to groundwater and surface water flow. There will be no adverse effect on the waters of the Commonwealth because there will be no appreciable change from pre-construction conditions. Therefore, BMPA's appeal must fail.[1]

Another thing that BMPA gets exactly right is that compliance with the laws against degradation "means more than simply engaging in some exercise using labels such as 'antidegradation,' 'nondischarge alternatives,' and 'ABACT.'" (Reply Brief, p. 4.) We have now explained on several occasions that compliance with the antidegradation requirement is ultimately not about checking off boxes on a form. *Crum Creek Neighbors v. DEP*, 2009 EHB 548, 564; *Blue Mountain I*, 2006 EHB 589; *Zlomsowitch v. DEP*, 2004 EHB 756. The overriding requirement of the antidegradation regulations is that the water quality of HQ and EV waters "shall be maintained and protected." 25 Pa. Code § 93.4a(b-c).[2] In the final analysis we will review the Department's issuance of a permit to ensure that special protection water quality will be maintained and protected.

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[1] Although Alpine proposed modifications that go beyond what is required by the permit as part of Board-mandated settlement discussions, those discussions were ultimately unsuccessful. Alpine never committed to implement the changes, the Department never reviewed them, and it turned out that they were not enough to satisfy BMPA. Accordingly, we have not considered them. Along the same lines, we have not considered revisions to the E&S and stormwater regulations codified at 25 Pa. Code Chapter 102 because they by their own terms do not apply to any person, such as Alpine, conducting earth disturbance activities under a permit issued before November 19, 2010. *See* 25 Pa. Code § 102.8(a).

[2] Water quality of HQ waters may be reduced with appropriate social or economic justification, 25 Pa. Code § 93.4c(b)(1)(iii), but no party has raised that exception in this case.

Many of our cases evolve into a battle of the experts, which requires us to choose between contradictory opinions of a highly technical nature. Here, however, there was no battle on the central issue of protecting water quality because BMPA did not present any expert testimony to contradict the credible opinions of Alpine's expert, Thomas Gillespie, P.G. BMPA, apparently due to its understandably limited budget (Reply Brief at 6), did not call an expert on hydrology, geology, or hydrogeology. BMPA's only expert witness was Michelle Adams, P.E. Adams is an engineer with expertise in the design and construction of stormwater management systems. (T. 21.) She has "an understanding" of groundwater and geology as they relate to system design (T. 22), but she is not an expert in hydrology, geology, or hydrogeology (T. 90-92).

Adams's testimony as an engineer on behalf of BMPA focused on the design of Alpine's infiltration beds. She believes that the beds will not infiltrate as much stormwater runoff as Alpine claims they will infiltrate during large storms. As a result, they will not be adequate in her view to capture all of the increased stormwater runoff from newly paved and lawned areas and some of them will "overflow." However, the combined testimony of Gillespie, who was also qualified in engineering geology, Philip Amico, P.E., the Department's engineer, and Christopher Blechschmidt, P.E., Alpine's engineer, persuades us that Adams's engineering-based concerns regarding Alpine's stormwater management system are largely unfounded.

We will not dwell on the engineering debate because, even if we give Adam's engineering concerns the benefit of the doubt, BMPA has failed to show that any of the escaped surface water flow that she describes will materially alter pre-construction surface or subsurface flows on the site. Adams did not credibly and within the bounds of her limited expertise testify that any of this uncaptured runoff will ever reach waters of the Commonwealth, let alone have an

adverse impact on the water quality of those waters. At one isolated point, Adams testified in response to highly leading questions from her counsel that "it appears that" runoff from one area will reach the floodplain wetlands. (T. 68-69.) She somewhat vaguely said that, "depending upon the amount of water and the slope and soil conditions" the overflows "could" cause erosive conditions (and presumably excess sedimentation) (T. 70-72), but these statements fall well outside of her area of expertise (*see* T. 90-92) and fall short of a professional opinion given with a reasonable degree of certainty.[3] Thus, BMPA has failed to show us that the project as it is now designed will result in any changes in the pre-construction discharges from the site. It has also not shown us that there will be any change affecting on-site waters (i.e. the tributaries and wetlands).

BMPA's case regarding a diminution in flow (which theoretically could impact the receiving waters) is even weaker, which is not surprising given its lack of hydrogeological evidence. BMPA's Proposed Finding of Fact 32 in its post hearing brief alleges that Adam's posited overflow amounts from the infiltration beds "will flow on the surface of the Subject Property and be discharged as surface flow instead of as base flow or interflow from the Subject Property." Curiously, BMPA only cites pages 17-19 of Alpine's expert report, but that report stands for exactly the opposite of BMPA proposed finding. Other key BMPA proposed findings of fact on these key points contain no citations to the record at all. This is not an oversight because BMPA's brief is otherwise very thorough and well written. Rather, there is no citation to the record because there is nothing in the record to cite.

We cannot simply assume that there will be erosion, or if there is, whether any of this supposed erosion will result in excess sedimentation of any waters. Indeed, we found in *Blue*

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[3] Contrary to the implication in BMPA's briefs, Blechschmidt did *not* testify that any new post-construction discharges will alter the pre-construction hydrologic budget. (*See* T. 414-15.)

Mountain I that Alpine's system satisfied the Department's E&S requirements, even without the infiltration trenches. (*Blue Mountain I*, FOF 32, 33.) The fact that water runs downhill in and of itself proves nothing.

BMPA argues that it should not be its responsibility to show that off-site discharges or a diminution in baseflow will degrade water quality; it is Alpine's responsibility. This may or may not be true, but we never reach that question here because BMPA has not shown that there will be *any* new discharges or that there will be *any* diminution in flow as a result of the project. In *Crum Creek Neighbors*, *supra*, there was no question that there would in fact be new post-construction discharges into an EV stream. 2009 EHB at 564. The Department's error was its failure to evaluate the effect of those discharges on the stream. The critical difference here is that BMPA has failed to show that there will be any such new or changed discharges given Alpine's new site design. Similarly, in *Crum Creek Neighbors* neither the permittee nor the Department paid adequate attention to whether the hydrologic balance of the EV stream would be protected as a result of the construction project and its stormwater management system.[4] Here, the permittee and the Department gave considerable attention to that very issue.

We are disappointed to see that the Department also did not perform a hydrogeological assessment of Alpine's project, even after our remand. In fact, the Department's reviewing engineer specifically requested that a hydrogeologist be assigned to review the project as a necessary supplement to his review as an engineer. That request was denied. (T. 488.) More to the point, no hydrogeologist testified on behalf of the Department.

We need not speculate on how this case would have turned out had Alpine failed to fill the gap left by the Department's failure to bring appropriate expertise to bear. As it happens,

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[4] The appellants in *Crum Creek* raised a credible threat based on expert testimony that the permittee's attempt to divert all discharges from the EV stream would have had the unintended consequence of drying up all or parts of that stream.

Alpine, undoubtedly at considerable expense, did *exactly* what we asked it to do in *Blue Mountain I.* Alpine presented the testimony of Thomas D. Gillespie, P.G., a highly qualified, licensed Professional Geologist expert in hydrogeology and engineering geology. (T. 221.) Gillespie participated in a nearly three-year antidegradation design and review process that included more than 16 site visits, direct observation of a storm event of an approximate magnitude close to a hundred-year storm, numerous submissions, review meetings, and comment letters. (DEP Ex. 13, 15, 21.) Gillespie's work complemented the work of Alpine's engineering consultants in implementing the antidegradation analysis and creating a new design with features to ensure replication of existing conditions. Among other things, Gillespie performed a "stream base flow separation analysis" which determined how much groundwater flows into the stream, how much direct runoff goes into the stream, and how much comes through the soil following the one to two week period after a rainfall. (T. 230.) The results of his stream base flow separation analysis were corroborated by the results of a similar study performed by the United States Geological Survey that same year. (T. 230.) Using the base flow separation analysis and the location of water resource features on the property, and by mapping those out and overlaying them onto the topography, Gillespie was able to describe surface and groundwater flow on the site. (T. 237; A. Ex. 9.) Based upon this extensive study, Gillespie credibly testified that there will be no new or changed discharges as a result of the project, and the pre-construction hydrogeological balance will be maintained. (T. 246, 249-50, 298-99, 322-24, 331-32, 335-40, 345, 351-52, 385-90; A. Ex. 2, 9.) Pre-construction conditions will be replicated. In other words, the regulatory requirement that water quality be maintained and protected will be met.

Gillespie's opinion comports well with the record facts. While one might get the impression from BMPA's presentation that there is only one BMP at this site, the infiltration

beds that so dominated its attention are only one part of an integrated stormwater management system. We have already found that that system will adequately control erosion and prevent sedimentation. *Blue Mountain I*, FOF 32. It also must be remembered that Alpine's project is a relatively low impact project with respect to stormwater. Large sections of the property will be left untouched. All parties agree that the natural sections of the site act like a sponge. Overflows from any one infiltration bed can be absorbed by other beds, the other portions of the management system, and undisturbed areas. Of course, existing on-site flow must and will be preserved as well. And we have seen nothing that gives us cause for concern that too much or too little infiltration will occur in a way that harms on-site or off-site waters. In sum, Gillespie's testimony gives us comfort that the HQ and EV waters will receive the special protection that they deserve. Alpine has undertaken the requisite antidegradation analysis and made the requisite antidegradation showing.

CONCLUSIONS OF LAW

1. When considering whether and on what terms to issue an NPDES permit for a project with discharges to High Quality or Exceptional Value Waters of the Commonwealth, the Department must ensure that existing water quality will be maintained and protected. 25 Pa. Code § 93.4a.

2. Alpine's project as it is now designed will maintain and protect existing water quality in the Aquashicola watershed.

3. The Department's issuance of a revised NPDES to Alpine was lawful and reasonable in light of the facts.

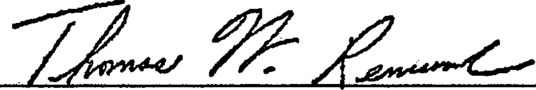
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BLUE MOUNTAIN PRESERVATION ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2009-080-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ALPINE ROSE RESORTS, INC., Permittee	:	

ORDER

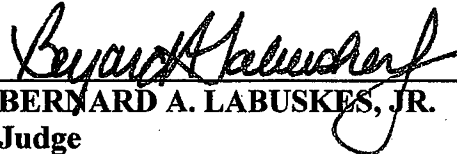
AND NOW, this 25th day of August, 2011, it is hereby ordered that this appeal is **dismissed.**

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

Judge Richard P. Mather, Sr., did not participate in this Adjudication.

DATED: August 25, 2011

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONSOL PENNSYLVANIA COAL COMPANY, LLC and CONSOL ENERGY INC.	:	
v.	:	**EHB Docket No. 2010-030-R (Consolidated with 2010-184-R, 2011-017-R and 2011-089-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CONSERVATION NATURAL RESOURCES, and CENTER FOR COALFIELD JUSTICE, Intervenors	:	**Issued: August 26, 2011**

OPINION AND ORDER ON
MOTIONS TO DISMISS AND SUMMARY JUDGMENT

By Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

The Board denies Motions to Dismiss and Summary Judgment filed by Appellants. Once an Appeal is before the Pennsylvania Environmental Hearing Board, it is the Board's responsibility to determine the effect, if any, of any subsequent action by the Pennsylvania Department of Environmental Protection on the Appeal. The Board finds that the DEP actions at issue in these Motions did not result in the withdrawal of the November 3, 2010 Order under Appeal.

OPINION

Presently before the Pennsylvania Environmental Hearing Board are Motions to Dismiss and for Summary Judgment filed by Consol Pennsylvania Coal Company and Consol Energy, Inc. (Consol). The Motions were filed after the Pennsylvania Department of Environmental

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Protection (Department or DEP) took two actions. On March 31, 2011 the DEP District Mining Manager in a letter to counsel declared that "the Department withdraws the November 3, 2010 Order…." That Order was one of three Department actions appealed by Consol. After Consol filed its Motions to Dismiss and to Stay Appeal, the Department issued an Order on May 18, 2011. That Order (which was also appealed by Consol), among other things, withdrew the March 31, 2011 letter and stated that "[t]he Order dated November 3, 2010, shall remain in full force and effect."

Consol cries foul. The coal company argues that these actions of the Department are highly irregular and have denied it due process of law. Consol contends that once the District Mining Manager issued the March 31, 2011 letter, the November 3, 2010 Order disappeared and all appeals based on that Order became Moot. Likewise, Consol argues that since the November 3, 2010 Order is dead, Consol's twenty million dollar deposit held in a bank account created by the Department should be immediately returned to the company and the Department's failure to do so violates its due process rights. Consol claims that the May 18, 2011 Order is defective because the Order can not legally reinstate or resurrect the November 3, 2010 Order. In addition, Consol argues that the Bituminous Mine Subsidence Act requires any Order issued on this subject to set forth detailed factual findings or other explanation supporting the action ordered.

The Pennsylvania Department of Environmental Protection and the Pennsylvania Department of Conservation and Natural Resources (DCNR) oppose the Motions. They contend that the March 31, 2011 letter was not a final agency action and that it was never the Department's intent to terminate the process or retreat from its liability determination. Evidently after obtaining further information from DCNR's expert consultants the Department determined

that the site was sufficiently stable and that repairs could proceed. Moreover, "to dispel any doubt created by the confusing March 31st letter,"[1] DEP issued the May 18, 2011 Order.

The Intervenor, Center for Coalfield Justice, sides with DEP and DCNR, and argues that issues of material fact prevent the Board from granting the Motion for Summary Judgment. The Board held oral argument in Pittsburgh on Wednesday, August 24, 2011 where the parties passionately and effectively argued their respective points.

DISCUSSION

As stated at Oral Argument, the Board is empathetic to Consol's position on these specific issues. However, even though these actions of the Department are unusual, Consol is not legally entitled to the relief it presently seeks. Actions before the Board are heard *de novo*. In the oft-cited and seminal case of *Smedley v. DEP*, 2001 EHB 131, 156, then Chief Judge Krancer succinctly explained what that means.

> The Board conducts its trials *de novo*. We must fully consider the case anew and we are not bound by prior determinations made by DEP. Indeed, we are charged to redecide the case based on our *de novo* scope of review. The Commonwealth Court has stated that '*de novo* review involves full consideration of the case anew. The EHB, as reviewing body, is substituted for the prior decision maker, the Department, and redecides the case.' *Young v. Department of Environmental Resources,* 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *O'Relly v. DEP*, 2001 EHB 19, 32. Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it. *See, e.g., Westinghouse Electric Corporation v. DEP,* 1999 EHB 98, 120 n. 19.

We are not dependent on a record developed by the Department nor are we especially interested in what the Department reviewed to reach its decision. Moreover, we are not limited to the information the Department reviewed or developed to reach its decision. *See S.H.C. Inc. v.*

[1] DEP and DCNR's Joint Memorandum at page 6.

DEP, 2010 EHB 619, 664. Instead, we can consider all relevant and admissible evidence duly presented and admitted at a hearing before the Board. *S.H.C.* at 699. A corollary to this concept applicable here is that it is the Pennsylvania Environmental Hearing Board's responsibility and indeed duty to decide what legal effect the actions of any party have on proceedings before us. *Warren Sand & Gravel Company v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975). Of course, parties are free to argue that certain actions or facts will have a legal effect on the viability of a Department action under appeal, but whether it has that effect or not is determined by the Board. *Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998); *Shippensburg Township P.L.A.N. v. DEP*, 2004 EHB 548, 551.

We agree with all the parties that the March 31, 2011 letter raises questions. We also agree that the May 18, 2011 Order cleared up at least some of this confusion. In considering these two actions together, which we must, we find that the November 3, 2010 Order is still a viable Order which was and still is timely appealed by Consol. Therefore, Consol's twenty million dollar deposit was always legally required to perfect its December 2010 appeal to the November 3, 2010 Order. Stated another way, the November 3, 2010 Order was not "dead" (to use Consol's description) when the March 31, 2011 letter was issued because we never said it was. We thus reject Consol's argument which incorrectly posits that as soon as the March 31, 2011 letter was issued the November 3, 2010 Order had no further viability.

Based on the above analysis and decision, we also reject Consol's argument that the May 18, 2011 Order was defective because it did not contain necessary facts that it argues is specifically required by provisions of the Bituminous Mine Subsidence Act, 52 P.S. § 1406.1, *et seq.* (Mine Subsidence Act). Since the November 3, 2010 Order does indeed contain those facts

and other information and was and is still in effect, that satisfies those requirements set forth in the Mine Subsidence Act. *See* Section 5.5e of the Mine Subsidence Act, 52 P.S. § 1406.5e(e).

The Environmental Hearing Board Act provides that no action of the Department is final if appealed to the Board until the Board decides the objections raised by the party. 35 P.S. § 7514. Due Process is provided by the Pennsylvania Environmental Hearing Board; not the Department of Environmental Protection. *See Einsig v. Pennsylvania Mines Corp.*, 452 A.2d 558 (Pa. Cmwlth. 1982). As a matter of law, the opportunity to appeal a DEP action to the Environmental Hearing Board, which Consol has done, satisfies due process requirements regarding the Department's actions. *See Commonwealth of Pennsylvania v. Derry Township*, 351 A.2d 606 (Pa. 1976).

Parties before the Board are afforded prehearing discovery which is broader than even the discovery provided by federal courts under the Federal Rules of Civil Procedure. 25 Pa. Code § 1021.102. It is this Board which issues Adjudications after a hearing replete with the full panoply of due process guarantees such as the presentation of witnesses who must testify under oath, cross examination, subpoena power, site views, and extensive opportunities for argument and briefing. Indeed, no other tribunal in Pennsylvania, state or federal, provides the parties with as many opportunities to file briefs on the facts and law as the Pennsylvania Environmental Hearing Board. Our Rules of Practice and Procedure not only require the parties to file extensive and detailed Pre-hearing Memoranda but after the parties obtain the transcript of the trial they then *must* file Post Hearing Briefs. *See* 25 Pa. Code §§ 1021.104 and 1021.131. This requires that they can cite to the Board the specific testimony or evidence which in turn assures that the Board's Adjudication will be specifically grounded in the official record and not someone's notes or memory of the testimony and evidence. Our Adjudications must contain detailed

findings of fact and conclusions of law to legally support any decisions of the Board. 25 Pa. Code § 1021.134.

The issuance of the March 31, 2011 letter and the May 18, 2011 Order may have annoyed or frustrated Consol and others. But it certainly did not violate Consol's due process rights. Those rights have been protected since the minute their first appeal was docketed and continue to be guaranteed by this Board. *UMCO Energy, Inc. v. DEP*, 2006 EHB 489, 582.

We also emphasize that practice before the Board is not a giant game of "gotcha." *Shuey v. DEP & Quality Aggregates*, 2005 EHB 657, 712. Nor is it a legal minefield where a technical error or misstep will destroy a party's case. We decide cases on their merits after a hearing and after the parties have had ample opportunity to fully brief and argue their respective positions. These due process protections extend to all parties; which necessarily includes the Department. We only dismiss cases or grant summary judgment in the clearest of cases. 25 Pa. Code § 1021.94(b); Pa. R.C.P. 1035.2; *PDG Land Development, Inc. v. DEP & PennFuture*, 2009 EHB 268, 271.

We find that the Department actions at issue in these Motions did not result in the withdrawal of the November 3, 2010 Order and Consol is not legally entitled to the relief it requests. We will issue an Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

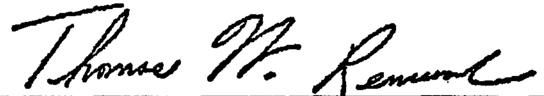
CONSOL PENNSYLVANIA COAL COMPANY, LLC and CONSOL ENERGY INC.	:	
v.	:	**EHB Docket No. 2010-030-R (Consolidated with 2010-184-R, 2011-017-R and 2011-089-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF CONSERVATION NATURAL RESOURCES, and CENTER FOR COALFIELD JUSTICE, Intervenors	:	

ORDER

AND NOW, this 26th day of August, 2011, after review of the Motions, Responses, Briefs, and following oral argument before the Board in Pittsburgh on August 24, 2011, it is ordered as follows:

1) Consol's Motions to Dismiss, to Stay Appeal, and for Summary Judgment are **denied.**

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

DATED: August 26, 2011

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2009-168-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DISTRICT TOWNSHIP SUPERVISORS, Permittee, JEFFREY LIPTON, LOUISE MOYER, BRIAN MOYER, JACQUELINE MOYER, RICHARD HOBBS, DOUGLAS LITCHERT and DANELLE LITCHERT, Intervenors	:	**Issued: August 30, 2011**

OPINION IN SUPPORT OF ORDER ON PETITION TO REOPEN THE RECORD

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board grants the Appellant's petition to reopen the record based on information discovered after the hearing but prior to the adjudication. The apparent discovery of two bog turtles at the project site is at least potentially a material fact of the case, is not cumulative to the evidence already in the record, and is not the result of a lack of prior due diligence.

OPINION

Before us is Pine Creek Valley Watershed Association's ("Pine Creek's") appeal from the Department of Environmental Protection's (the "Department's") approval of District Township's Official Plan revision relating to an eight-lot subdivision known as Fredericksville Farms. The Plan Revision provides that the new homes in the subdivision are to be served by

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individual on-lot sewage disposal systems. There are approximately ten acres of wetlands on the site. The wetlands surround headwater tributaries of Pine Creek. The wetlands and the creek are designated as Exceptional Value (EV) waters of the Commonwealth. There seems to be no dispute that effluent groundwater plumes from the proposed on-lot systems will reach the wetlands and the stream. The Department and the Intervenors say the water quality of the stream and functions and values of the wetlands will be maintained and protected. Pine Creek says that they will not, or at least that there has not been enough studies to verify that there will in fact be no degradation.

Pine Creek now seeks to reopen the record prior to the Board issuing its adjudication. The hearing on the merits was concluded in March 2011 followed by a period for the parties to file post-hearing briefs. The Board issued an Order on August 25, 2011 granting Pine Creek's petition over the opposition of the other parties. This Opinion is issued in support of that August 25, 2011 Order.

The Board's rule governing a petition to reopen the record provides:

> (a) After the conclusion of the hearing on the merits of the matter pending before the Board and before the Board issues an adjudication, the Board, upon its own motion or upon a petition filed by a party, may reopen the record as provided in this section.
>
> (b) The record may be reopened based up on the basis of recently discovered evidence when all of the following circumstances are present:
>
> (1) Evidence has been discovered which would conclusively establish a material fact of the case or would contradict a material fact which had been assumed or stipulated by the parties to be true.
>
> (2) The evidence discovered after the close of the record and could not have been discovered earlier with the exercise of due diligence.
>
> (3) The evidence is not cumulative.

25 Pa. Code § 1021.133.

One of the functions and values of EV wetlands is to provide wildlife habitat. In addition, the Department is required to protect endangered or threatened species and their critical habitat. 25 Pa. Code § 93.4c(a)(2); 25 Pa. Code § 71.21(a)(5)(J). The Department states in its post-hearing brief that,

> In this case, there is no direct evidence that endangered or threatened species are present at the site. There is also no "critical habitat" confirmed at the site. Nonetheless, the Department, in response to information received by the Pennsylvania Fish and Boat Commission and the United States Fish and Wildlife Service, pursuant to Section 93.4c(a)(2) and 71.21(a)(5(J) established a 50-foot buffer around the wetlands on the site and provided for no alteration of that buffer area. (T. 444 - 447, Department Exhibit 1, page 1.)

(Department's Post Hearing Brief, p. 60.) Brandon Ruhe, Pine Creek's expert herpetologist, identified bog turtle habitat on the site in several locations, but he did not see any bog turtles. (*See* transcript p. 38-44.)

On July 5, 2011, after the record was closed in this matter, Bonnie Dershem of the U.S. Fish and Wildlife Service sent a letter to the Department. (Pine Creek's Petition, Exhibit 1.) The letter provides that two bog turtles were found at the Fredericksville Farm site by U.S. Fish and Wildlife on June 29, 2011. *Id.* Pine Creek's petition to have the record reopened is based on this discovery. The letter states,

> Our initial clearance was based on a Phase 1 bog turtle habitat survey that was conducted on August 1, 2006, by Scott Bush of Conestoga Rovers. He determined that it would be 'unlikely that bog turtles would inhabit this area.' We gave a 50-foot upland 'travel corridor' buffer based on this information. I found two bog turtles during my site visit. . . . At this point, we need to re-evaluate the project to determine if this project will adversely affect the bog turtle.

(Pine Creek's Petition, Exhibit 1.)

During a conference call on August 29, 2011, all of the parties indicated that they did not dispute the fact that bog turtles have been found on the site. This is different from the evidence we have in the record that there is "no direct evidence that endangered or threatened species are present at the site." (DEP Brief at 60.) The Department argues that, even though no bog turtles were found at the site, it instituted a 50-foot buffer to protect the bog turtles that might be found at the "site – either traveling through or colonizing this area." (Department's Response to Petition, p. 4.) Still, the discovery of bog turtles at the site is unlike the evidence we have in the record.

We readily admit that we do not as yet have a complete understanding of the Department's position in this case regarding the bog turtle. With that caveat in mind, it appears at this point that the Department issued its approval based upon its understanding that the site contains habitat conducive to bog turtles, and bog turtles have been seen in the general area, but no bog turtles have actually been found at the site in question. Apparently, because it thought there was bog turtle habitat but no actual turtles, the Department established a 50-foot buffer around the wetlands on the site as an integral condition of the approval.[1] The Department argues that this buffer requirement is mandatory and enforceable under the Clean Streams Law.

The Department did not do an independent evaluation to determine whether a 50-foot buffer was appropriate. Rather, it imposed the requirement in response to information obtained from the Pennsylvania Fish and Boat Commission and the U.S. Fish and Wildlife Service. Ruhe, Pine Creek's bog turtle expert, testified that, had turtles been found on the site, either a 300-foot buffer or at least a more thorough bog turtle study would have been required by those agencies.

---

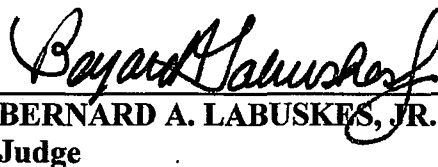
[1] The parties dispute whether wetlands have been properly delineated on the site and there appears to be no agreement on where this 50-foot buffer should start and end.

If those agencies would likely require a 300-foot buffer now that it appears turtles actually colonize the site, it is not clear why the Department would not also adopt a revised buffer in continuing deference to those agencies. At a minimum, it would seem to require explanation if the Department decided otherwise without an independent analysis. In any event, this is all about as clear to us as the mud that the bog turtles apparently like to live in.

We must take the protection of species endangered or threatened with extinction very seriously. We will err on the side of caution and reopen the record to address this new development. The criteria for reopening the record have been met. The discovery of the bog turtles occurred after the close of the evidence at the hearing, but prior to the issuance of the adjudication. The recent discovery was not for want of prior due diligence on Pine Creek's part. The Department's argument that Pine Creek did not demonstrate due diligence to discover the existence of bog turtles at the site because it could have conducted a phase II bog turtle survey or returned to the site on more occasions to search for bog turtles is not convincing. Pine Creek not conducting the phase II study or visiting the site more often does not demonstrate a lack of due diligence to the point it would deny reopening the record. Lastly, the evidence of bog turtles is obviously not cumulative to the evidence already in the record.

The Department and Intervenor make arguments that the letter revealing the presence of bog turtles is hearsay because it contains out-of-court statements being offered to prove the truth of the matter asserted. The point seems academic after our conference call wherein all parties said they do not dispute the finding. In any event, we are not ruling on the admissibility of the letter at this time. Instead, we are limiting our determination to whether or not the information warrants reopening the record. We think it does.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: August 30, 2011

c: **DEP Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.

v.

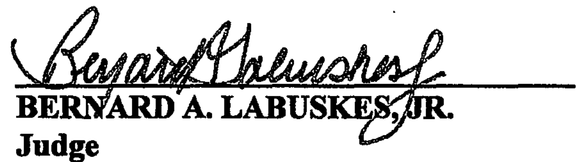
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DISTRICT TOWNSHIP SUPERVISORS, Permittee, JEFFREY LIPTON, LOUISE MOYER, BRIAN MOYER, JACQUELINE MOYER, RICHARD HOBBS, DOUGLAS LITCHERT and DANELLE LITCHERT, Intervenors

EHB Docket No. 2009-168-L

ORDER

AND NOW, this 25th day of August, 2011, it is hereby ordered that the Appellant's petition to reopen the record is **granted.** An Opinion in support of this Order will follow. The parties shall be prepared to discuss further proceedings in the case during the conference call previously scheduled for August 29, 2011.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: August 25, 2011

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2009-119-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 12, 2011**
	:	

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board dismisses an appeal of a Department letter that advised a permittee that the Department would not move forward with a request for a one-year extension of a compliance schedule in his NPDES permit. In the applicable regulatory context, a request for a one-year extension is a major modification of an NPDES permit and the permittee is required to do more than submit a letter. The Department's response was not a final action on a request for a major modification of the NPDES permit. Therefore, the Board lacks jurisdiction.

FINDINGS OF FACT

1. Frank T. Perano ("Perano") owns and operates the Cedar Manor Mobile Home Park ("Cedar Manor") in Londonderry Township, Dauphin County. (Perano Exhibit ("P.Ex.") 2.)

2. Sewage generated within Cedar Manor is conveyed to an on-site sewage treatment plant, also owned and operated by Perano. (P.Ex. 2.)

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http://ehb.courtapps.com

3. Perano is authorized by NPDES Permit No. PA0080721 to discharge treated effluent from the sewage treatment plant into an unnamed tributary of the Conewago Creek. The NPDES permit was effective October 1, 2006 and expires September 30, 2011. (P. Ex. 2.)

4. Perano's permit contains a compliance schedule related to his required remediation of the collection system at Cedar Manor. (T.[1] 8; P.Ex. 2.)

5. Part C. II. of Perano's Cedar Manor NPDES permit provides as follows:

> A. The Permittee shall remediate the facility's collection system with the objective of reducing I/I relative to plant capacity and available flow equalization in accordance with the following schedule:
>
> 1. Complete I/I study and submit report to [the Department] <u>December 31, 2006</u>
> 2. Submit scope of work for remediation to [the Department] <u>April 30, 2007</u>
> 3. Complete remediation work <u>December 31, 2009</u>
>
> B. No later than 14 calendar days following a date identified in the above schedule of compliance, the permittee shall submit to the Department a written notice of compliance or noncompliance with the specific schedule requirement(s). Each notice of noncompliance shall include the following information:
>
> 1. A short description of the noncompliance.
> 2. A description of any actions taken or proposed by the permittee to comply with the elapsed schedule requirement.
> 3. A description of any factors which tend to explain or mitigate the noncompliance.
> 4. An estimate of the date that compliance with the elapsed schedule requirement will be achieved and an assessment of the probability that the next scheduled requirement will be met on time.

---

[1] References to the hearing transcript will be cited as "T."

(P.Ex. 2.)

6. On May 21, 2009, James Perano, brother of Frank Perano, sent a letter to the Department on Frank's behalf requesting an extension of the compliance schedule set forth in the NPDES permit for completion of work described in the remediation plan. (P.Ex. 29.)

7. The Department offered to meet with Perano to discuss his interest in an extension, but Perano refused to meet. (Department Exhibit ("DEP Ex.") 3, 4; T. 61, 75, 115-16,126, 136-38.)

8. By letter dated August 3, 2009 the Department informed Perano that it was unwilling to reconsider the compliance schedule in the Cedar Manor NPDES permit. (P.Ex. 30.)

9. The August 3, 2009 letter states:

> This letter is in response to your May 21, 2009 letter to me in which you requested an extension of time to conduct certain activities required under the above referenced NPDES permit.
>
> . . . .
>
> Following receipt of your letter, I called your office and left a message that, before acting on your request for an extension of time, the Department would like to meet with you to discuss the request, as well as any other issues that you would like to raise with the Department. . . . Therefore, the Department did not believe it was prudent for the Department to take a position on your request until such time that the proposed meeting occurred.
>
> By letter dated June 26, 2009 from your attorney Mr. Bryan Salzmann to Mr. Martin Sokolow of the Department, Mr. Salzmann informed the Department that you were unwilling to meet with the Department to discuss your own request. . . .
>
> Following Mr. Salzmann's June 26, 2009 letter, the Department has continued to encourage you to accept the Department's offer to meet to discuss your own request. For example, by letter dated July 2, 2009 from Mr. Sokolow to your attorneys Mr. Salzmann and Mr. Jonathan Hugg, Mr. Sokolow stated that I remained open to meet with you to discuss your extension request. Mr. Sokolow requested that you contact me by July 18, 2009 if you were willing to reconsider your rejection of the Department's efforts to address your concerns.

> To the Department's surprise, its request to meet with you was not met with an acceptance, but rather a mandamus action filed in Commonwealth Court on July 23, 2009 asking the Court, among other things, to require the Department to act upon your request. . . .
>
> The Department remains willing, as it has been, to meet with you to discuss your request with you and to attempt to address your legitimate concerns in a substantive way. Nonetheless, you have elected to pursue baseless litigation instead. While you may think this is the preferable path to take, the Department does not.
>
> Accordingly, in order to avoid the wasteful expenditure of time and resources by the parties and the Court on this needless litigation, I inform you that at this time, the Department is unwilling to reconsider the legally enforceable schedule included in the Cedar Manor NPDES permit. Failure to comply with that schedule may lead to appropriate action in the future.

(P.Ex. 30.) This appeal is from the Department's August 3, 2009 letter.

10. Perano did not follow any of the procedures applicable to a request for a major permit modification. Among other things, he did not submit his request for a one-year extension of the compliance schedule on a formal application form. (T. 130.)

11. Perano's May 21, 2009 letter did not identify his request as a major modification or contain a permit application fee and municipal notification. (T. 129-30.)

DISCUSSION

After Perano filed his appeal of the Department's August 3, 2009 letter, the Department moved to dismiss the appeal, asserting that the August 3, 2009 letter was not a final action of the Department. In our Opinion and Order dated May 26, 2010, we stated that Perano's May 21 letter essentially embodied a request for a NPDES permit modification, and:

> [i]f a person wants an NPDES permit modification, the person needs to apply for one in accordance with applicable regulations. It is not enough for the person to send the Department a letter saying, 'I want a permit.' A negative response from the Department to

> such a letter would not be something that this Board would be likely to review.

Perano v. DEP, 2010 EHB 432, 445. Although we held that a person applying for an NPDES permit must apply for one in accordance with the applicable regulations, and if such a person does not follow those regulations, then any Department action denying that request would not be a final action of the Department reviewable by the Board, we nevertheless decided that we could not determine *in the context of a motion to dismiss* whether the Department's letter stating it would not reconsider Perano's compliance deadlines constituted a final, appealable action. We noted that all facts must be viewed in the light most favorable to the nonmoving party (Perano) in the context of a motion to dismiss, and that neither party had provided any particularly helpful insight on the statutory and regulatory context in which the parties' exchange of correspondence took place. The statutory and regulatory context in which the Department sends a letter is one of the key factors that we consider when deciding whether the letter constitutes a final, appealable action. *Langeloth Metallurgical Co. v. DEP*, 2007 EHB 373, 376, *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121-24. Accordingly, we held the matter over for an evidentiary hearing.

Now that we have held that hearing, we are quite comfortable in concluding that the Department's letter was not a final, appealable action.[2] Actually, on reflection, this matter is relatively straightforward. Perano requested a one-year extension of the compliance schedule that was set forth as a condition in his permit. That condition had previously undergone all of the procedures applicable to NPDES permit reviews, including public notice and opportunity to comment. Perano's proposal to significantly modify the end result of all of that work was

---

[2] Remarkably, Perano did not address the Department's jurisdictional argument in his responsive post-hearing brief, despite the fact that this issue was our primary basis for holding the matter over for hearing. Although this would ordinarily be considered a waiver of the issue, 25 Pa. Code § 1021.131(c), we will not treat it as such.

contained in nothing more than a letter. That is not an acceptable practice and could not under any circumstances have resulted in a final Departmental action.

The law is very clear. In order to obtain a one-year extension of a compliance schedule set forth as a condition in a NPDES permit, a permittee must apply for a major modification from the Department. 40 CFR § 122.63 (incorporated by reference in 25 Pa. Code § 92a.73) provides:

> [t]he Director may modify a permit to make corrections or allowances for changes in the permitted activity listed in this section, without following the procedures of part 124. Any permit modification not processed as a minor modification under this section must be made for cause and with part 124 draft permit and public notice as required in § 122.62. Minor modifications may only;
>
> . . .
>
> (c) change an interim compliance date in a schedule of compliance, provided that new dates are not more than 120 days after the date specified in the exiting permit and does not interfere with the attainment of the final compliance date requirement.

(40 CFR § 122.63.) Perano's May 21 letter sought to extend the date of compliance more than 120 days and would obviously have interfered with the attainment of the final compliance date since he sought to extend that date. Accordingly, under the above regulation his request did not constitute a request for a minor modification.

40 CFR § 122.62 states:

> [W]hen the Director receives any information (for example, . . . receives a request for modification . . .) he or she may determine whether or not one of more of the causes listed in paragraphs (a) and (b) of this section for modification . . . exist. If a permit modification satisfies the criteria in § 122.63 for "minor modifications" the permit may be modified without a draft permit or public review. **Otherwise, a draft permit must be prepared and other procedures in part 124 (or procedures of an approved State program) followed.**
>
> (a) Causes of modification . . .

. . .

> (4) Compliance Schedules. The Director determines good cause exists for modification of a compliance schedule . . . .

(40 CFR § 122.62, incorporated by reference in 25 Pa. Code § 92a.72; *see also* 40 CFR § 124.51 (Part 124 requires that changes in permits conditions be decided through the same notice-and-comment and hearing procedures as basic permits.))

Since Perano's request did not fit under the description of a minor modification pursuant to Section 40 CFR § 122.63, Section 122.62 required the preparation of a draft permit and, among other things, provision for public notice and comment.[3] Since Perano's request was a major modification, under the regulatory context he was required to do more then simply send a letter requesting an extension for a one-year period. As we said in our earlier Opinion, "[i]t is not enough for the person to send the Department a letter saying, 'I want a permit.'"

The Department does not have the authority to waive these procedures. Not only were they a condition for the Commonwealth obtaining primacy to administer the NPDES program, they are designed in part to protect the right of the host municipality and the public to not have the Department make major permit modifications behind closed doors. If the Department and permittee could make major modifications with nothing more than an exchange of correspondence, these goals and objectives would be thwarted. Further, these procedures keep the playing field level for all permittees by preventing the Department from being able to pick and choose who must submit an application and who can merely submit a letter. It would be

---

[3] Consistent with federal regulations requiring major changes to permits to be done through the same procedures as basic permits, Perano was to file, among other things, a permit application (*see* 25 Pa. Code § 92a.21) that included a permit application fee (*see* 25 Pa. Code § 92a.26(f), major amendment fee (same as reissuance permit fee), notice to the municipality (section 92a.21(c)(3)), and proof of public notice of the application (section 92a.21(c)(4)); *see also* DEP Ex. 6; T. 128-30.

equally inappropriate for this Board to jump to a substantive consideration of a proposed major modification on the merits without these mandatory application procedures having been followed. Thus, Perano and the Department's exchange of correspondence in a situation where formal procedures must be followed does not provide a basis for this Board to exercise jurisdiction and does not in any way substitute for a final, appealable action of the Department.[4]

We think the Department's August 3, 2009 letter is best viewed, not as a final decision, but as a statement that the Department would not "take a position" on Perano's request absent a meeting to discuss the details. The Department did not appear to be waiving applicable procedural requirements, and in any event, such a waiver would clearly have been illegal. As the Department's water quality manager explained, a meeting would not have resulted in a permit modification in any event. (T. 128). Rather, Perano would still have needed to follow appropriate procedures. Again, it would not have been appropriate for this Board to step in until those procedures were implemented. *See Tri-County Landfill, Inc. v. DEP*, 2010 EHB 747, 750 ("We have consistently held that we will not review the many interim decisions made by the Department during the processing of a permit application."); *Corco Chemical Corp. v. DEP*, 2005 EHB 733, 740; *County of Berks v. DEP*, 2003 EHB 77, 87 n. 5; *Smithtown Creek Watershed Assoc. v. DEP*, 2002 EHB 713, 717; *United Refining Co. v. DEP*, 2000 EHB 132, 133.

In conclusion, we only review final actions of the Department. 35 P.S. § 7514(c); 25 Pa. Code § 1021.2(a). Considering the regulatory context of the Department's letter, the Department did not take any final action on a request for a major modification of Perano's NPDES permit

---

[4] Nothing herein precludes Perano from following proper procedures in applying for a major modification, but we suspect that issue may be academic given the expiration of Perano's permit in a matter of days (September 30, 2011).

because one was never submitted. We, therefore, do not have jurisdiction to review the August 3, 2009 letter.[5]

CONCLUSIONS OF LAW

1. A one-year extension of a compliance schedule in an NPDES permit is a major modification. 40 CFR §§ 122.62(a)(4) and 122.63(c), incorporated by reference at 25 Pa. Code §§ 92a.72 and 92a.73.

2. In order to obtain a one-year extension of a compliance schedule in an NPDES permit, a permittee must apply for a major modification from the Department. 40 CFR §§ 122.62(a)(4) and 122.63(c), incorporated by reference at 25 Pa. Code §§ 92a.72 and 92a.73.

3. A major modification requires a draft permit and compliance with the procedures in part 124 of the federal regulations, incorporated into the state program.

4. An application for a major permit modification must be submitted on a formal permit application form and must be accompanied by a fee and municipal notification. 25 Pa. Code §§ 92a.21 and 92a.26.

5. Perano's request for a major modification of the compliance schedule in the NPDES permit was not submitted on a formal application form, and it did not contain a permit application fee or proper notification.

6. The Department's August 3, 2009 letter stating that it was unwilling to reconsider the extension of the compliance schedule included in the Cedar Manor NPDES permit is not a final action by the Department on a request for a major modification.

---

[5] There was a lot of discussion about why the Department denied the request. We view this discussion as irrelevant to the jurisdictional inquiry. The Department's motives do not convert an unappealable exchange of correspondence into a situation in which the Board can or should insert itself prematurely into the mandatory regulatory review process.

7. The Board does not have jurisdiction to review the August 3, 2009 letter.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2009-119-L**
	:	**(Consolidated with 2010-001-L,**
COMMONWEALTH OF PENNSYLVANIA,	:	**2010-016-L, 2010-025-L, and**
DEPARTMENT OF ENVIRONMENTAL	:	**2010-028-L)**
PROTECTION	:	

ORDER

AND NOW, this 12th day of September, 2011 it is hereby ordered that the appeal at EHB Docket No. 2009-119-L is unconsolidated from 2010-001-L, 2010-016-L, 2010-025-L, and 2010-028-L. The new caption, shall be as follows:

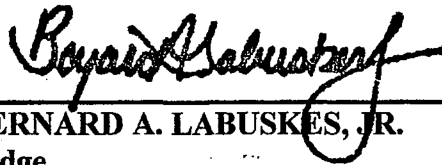
FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2009-119-L**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

It is further ordered that the above appeal at EHB Docket No. 2009-119-L is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

DATED: September 12, 2011

c: **DEP Bureau of Litigation:**
Connie Luckadoo, Library

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2010-028-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 13, 2011**

OPINION AND ORDER
ON SUBJECT MATTER JURISDICTION

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board raises the issue of whether or not it has subject matter jurisdiction over the pending appeal and requires the parties to submit additional briefing on that issue.

OPINION

On March 4, 2010, Frank T. Perano ('Perano") filed a notice of appeal of the Department of Environmental Protection's (the "Department's") February 23, 2010 letter. The February 23 letter provided:

> This is in response to your December 31, 2009 letter to me in which you, on behalf of Mr. Frank T. Perano, submitted a Supplemental Remediation Plan dated December 23, 2009.
>
> . . . .
>
> Mr. Perano was obligated under his NPDES permit to implement the measures he set forth in his April 16, 2007 Remediation Plan by December 31, 2009. It is our understanding that all of these measures have yet to be implemented.

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. . . .

> The Department views your December 23, 2009 Supplemental Remediation Plan as a supplement to, not a replacement of, the April 16, 2007 Remediation Plan. I emphasize again that Mr. Perano is legally obligated to implement the measures set forth in his April 16, 2007 Remediation Plan.

Perano Exhibit 38.

On March 7, 2011, the Board held a hearing on the merits of the appeal. The Department and Perano both filed post-hearing briefs. In the Department's post-hearing brief it stated, "Mr. McDonnell did not consider his February 23, 2010 letter to be a final action by the Department." Department's Post-Hearing Brief, p. 40, ¶ 250. The Department does not provide any further discussion on that point. As well, there was no discussion in Perano's post-hearing brief regarding the Board's jurisdiction over the February 23 letter.

As the Board stated in the past, "the EHB Act expressly grants the Board jurisdiction over the Department's 'orders, permits, licenses or decisions,' 35 P.S. § 7514(a), as well as any Department action 'adversely affecting' a person's 'personal or property rights, privileges, immunities, duties, liabilities or obligations.' 35 P.S. § 7514(c); 25 Pa. Code § 1021.2(a)." *David Dobbin v. DEP*, 2010 EHB 852, 858. Subject matter jurisdiction is not a waiveable issue[1] and may be raised *sua sponte. See Commonwealth of Pennsylvania, Office of Attorney General v. Locust Township, et al.*, 968 A.2d 1263, 1269 (Pa. 2009) ("whether a court has subject matter jurisdiction over an action is a fundamental issue of law which may be raised at any time in the course of the proceedings, including by a reviewing court *sua sponte*. *Mazur v. Trinity Area School Dist.*, 961 A.2d 96, 101 (Pa. 2008)."); *Ronald Blount v. Philadelphia Parking Authority*,

---

[1] "If the Board lacks jurisdiction, it *must* dismiss an appeal." *Sayreville Seaport Associates Acquisition Co. v. DEP*, EHB Docket No. 2010-127-L (Opinion and Order issued April 5, 2011), slip op. 9.

965 A.2d 226 (Pa. 2008); *Kim Heath v. Workers' Compensation Appeal Board*, 860 A.2d 25, 28 (Pa. 2004) ("well established principle that subject matter jurisdiction is a question that is not waiveable and may be raised by a court on its own motion."); *County of Allegheny v. Commonwealth*, 490 A.2d 402, 406 (Pa. 1985) (jurisdiction may be raised *sua sponte* by the court); *Charles Jackson v. Pennsylvania Board of Probation and Parole*, 885 A.2d 598, 599 (Cmwlth. 2005) ("subject matter jurisdiction is an issue that is not waiveable, and in fact may be raised by a court on its own motion."); *Solebury Township v. DEP*, 2006 EHB 256, 259 (the Board may address questions related to jurisdiction *sua sponte*.); *Bentley v. DEP*, 1999 EHB 447, 455; *Costanza v. DER*, 1991 EHB 1132.

The parties have not fully addressed the Board's jurisdiction over the Department's February 23 letter. Since jurisdiction is not waiveable and needs to be addressed, the Board raises the issue on its own motion and will allow the parties to fully brief the jurisdictional issue.

We enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2010-028-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

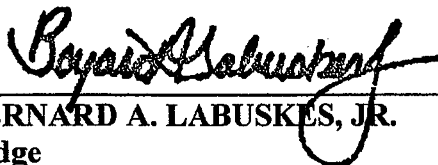
ORDER

AND NOW, this 13th day of September, 2011 it is hereby ordered that the appeal at EHB Docket No. 2010-028-L is unconsolidated from 2010-001-L, 2010-016-CP-L, and 2010-025-L. The new caption, shall be as follows:

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2010-028-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

It is further ordered that the each party shall file a brief addressing the jurisdictional issue raised in the Board's Opinion on or before **October 16, 2011.**

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: September 13, 2011

c: **DEP Litigation:**
Connie Luckadoo, Library

For the Commonwealth of PA, DEP:
Martin R. Siegel, Esquire
Office of Chief Counsel – Southcentral Region

For Appellant:
Daniel F. Schranghamer, Esquire
GSP Management Company
800 West 4th Street, Suite 200
Williamsport, PA 17701

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2010-001-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 15, 2011**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board upholds the requirements in a compliance order issued to the owner of a sewage treatment plant to submit within five days a structural evaluation of a leaking, above-ground 376,000-gallon holding tank for raw sewage and an emergency overflow management plan. The requirement in the order to submit an interim high flow management plan is lengthened from five days to 30 days due to the lack of urgency. The Board also upholds the Department's legal authority to order the permittee to take a composite sample each time the facility implements unpermitted treatment system bypasses.

FINDINGS OF FACT

1. Frank T. Perano ("Perano") owns and operates the Cedar Manor Mobile Home Park ("Cedar Manor") in Londonderry Township, Dauphin County. (Department Exhibit ("D. Ex.") 1.)

2. Sewage generated within Cedar Manor is conveyed to an on-site sewage treatment plant, also owned and operated by Perano. (D. Ex. 1.)

2nd Floor - Rachel Carson State Office Building | 400 Market Street, P.O. Box 8457 | Harrisburg, PA 17105-8457 | 717.787.3483 | Fax 717.783.4738 | http://ehb.courtapps.com

3. Perano is authorized by NPDES Permit No. PA0080721 to discharge treated effluent from the sewage treatment plant into an unnamed tributary of the Conewago Creek which is protected as a trout stocked fishery. (T. 340; D. Ex. 1.)

4. The permit expires on September 30, 2011. (D. Ex. 1.)

5. The plant's influent is collected from Cedar Manor's 316 lots. Cedar Manor includes an older section built in the 1960s and 1970s which is piped with primarily eight inch terra cotta pipe. (T. 8, 12 (119).[1]) After collection, the wastewater is supposed to be processed by the plant as follows:

a. Wastewater enters the plant through a bar screen comminuter, a grinder which is intended to break up hard materials in the wastewater. (T. 7.)

b. The wastewater is then pumped into a 376,000 gallon equalization tank. (T. 9 (119); T. 7, 458.)

c. Wastewater in the equalization tank is then pumped into the oxidation ditch, or moves to the ditch as a result of an overflow pipe in the equalization tank, even if the pump is off. (T. 8.)

d. The oxidation ditch is where most of the wastewater treatment occurs. Brushes mix wastewater into contact with microorganisms and oxygen, creating mixed liquor that acts on the sewage by degrading and treating it. (T. 6, 8.)

e. From there, the flow moves into another point where additional solids can be removed, and then continues on into a small chemical mixing tank where various chemicals can be added. (T. 8.)

---

[1] The parties agreed to incorporate the record from EHB Docket No. 2009-119-L into this appeal. *See* T. 4. Citations made to this record (as opposed to the record generated in this appeal) will be identified by the last three numerical digits in the docket number. *e.g.*, T. 8 (119).

f. The flow is then separated into two clarifiers where the solids are settled out, and floatable materials can be separated to prevent them from being discharged into the receiving stream. (T. 8.)

g. From the clarifier, the resulting liquid is pumped into the rapid sand filters. (T. 15-16 (119); T. 8-9.)

h. After the sand filters, flow moves into the chlorine contact tank for the final phases of treatment for disinfection, before finally being discharged into the receiving stream. (T. 8-9.)

6. The purpose of the 376,000-gallon above-ground tank known as the flow equalization tank or EQ tank at Perano's sewage treatment facility is to hold raw sewage in excess of what the plant can treat at any one time. (T. 9, 15 (119); T. 16.)

7. The EQ tank is constructed with precast concrete panels that are held in place by a series of post-tensioned steel bands. The joints between the panels are sealed with a pliable electrometric sealant that is designed to allow expansion and contraction of the concrete panels while maintaining a watertight joint. (Perano Exhibit ("P. Ex.") 10.)

8. The Department inspected Cedar Manor on December 3, 2009. (T. 14; D. Ex. 2.)

9. The inspection revealed that the EQ tank was leaking in nine separate places. (T. 18, 118; D. Ex. 2.)

10. It was raw sewage that was leaking from the tank leaks. (T. 18, 30; D. Ex. 2.)

11. When the tank is full, the raw sewage that it contains tends to be diluted with stormwater. (T. 314, 458-59.)

12. One of the leaks was discharging 282 gallons per hour. (T. 173; D. Ex. 15.)

13. No one knows how long the leaks had been ongoing. (T. 173-74.)

14. The Department's inspection report contains numerous photographs of the leaks and other conditions at the facility on December 3. (D. Ex. 2.)

15. As confirmed by a dye test, at least some of the raw sewage leaking from the EQ tank was finding its way into the receiving stream. (T. 20-21, 46-47, 129; D. Ex. 2, 11.)

16. George Krichten, Perano's certified operator for the facility, accompanied the Department's inspector on the inspection. (T. 118.)

17. Krichten was "shocked" when he saw the leaks. (T. 118.)

18. Krichten took steps to immediately lower the level of raw sewage being held in the tank to reduce pressure on its sidewalls. He then climbed the steps to the top of the tank and discovered a large crack. He told the Department inspectors that he was concerned based upon his years as a certified operator that the tank might not be structurally sound and that, if it failed, people living as close as 50 feet away might be killed. (T. 118-20.) (*See also* D. Ex. 2 (aerial photo showing proximity of residences).

19. The Department's inspector, Joseph Roth, also observed cracks on the top of the tank's sidewalls. (T. 21-22; D. Ex. 2.)

20. Roth shared Krichten's apprehension regarding the integrity of the tank. (T. 54.)

21. Although their concerns were justified by their years of experience, neither Krichten nor Roth is an engineer. (T. 54.)

22. James Cieri, P.E., Perano's engineer, was immediately summoned to the facility. When he got there, the contents of the tank had already been reduced. Cieri observed that six leaks were still ongoing. (T. 165, 203; P. Ex. 10.)

23. As the level of raw sewage in the tank continued to drop, the leaks subsided. (T. 130, 178, 206, 466-67; P. Ex. 10.)

24. Cieri met with a masonry contractor and instructed him to seal the leaks. He also recommended that sewage in the tank not exceed half the tank's maximum level pending a structural evaluation by the tank's manufacturer. (T. 206-07; P. Ex. 10.)

25. The Department was aware that Cieri would be in contact with the tank manufacturer (Mack Industries) to further investigate the integrity of the tank. (T. 97.)

26. Cieri was comfortable after his initial inspection that the tank would not collapse if kept at half level. (T. 168-69, 200-03.)

27. Cieri was not comfortable, however, concluding that the tank would hold up if filled. (T. 203-04.)

28. Cieri agrees that it was prudent to require a structural evaluation of the tank. (T. 170-71, 459; P. Ex. 10.)

29. Cieri's report certifying that the tank is safe was dated January 4, 2010 and submitted to the Department on or about January 12, 2010. (T. 264, 365, 522; P. Ex. 10.) In the report, Cieri relied in part on the inspection by a sales representative of Mack Industries who "showed pictures of the cracks in the top and edge to [Mack's] engineering department." (P. Ex. 10.)

30. Cieri's investigation leading up to the report included research into the size and construction of the tank and the post-tension cables holding it together. (T. 213-14, 216.)

31. The December 3, 2009 inspection also revealed that grease and sewage related plastics were discharging into the receiving stream from the plant. (T. 21, 24, 34; D. Ex. 2.)

32. The inspection revealed that the plant was not being operated properly. Less than fully treated sewage was being discharged into the stream because the sand filters were being bypassed and the clarifiers were hydraulically overloaded. (T. 24; D. Ex. 2.)

33. The plant has historically been unable to handle the amount of inflow into the plant after as little as a one-half inch of rain, which requires the plant operator to bypass parts of the treatment train in order to avoid even greater problems. (T. 115.)

34. The December 3, 2009 inspection revealed that the facility was operating in "storm mode." This is a euphemism for a bypass allowing sewage influent to pass through the plant with some of the components of the treatment train (e.g. oxidation ditch rotor brushes, sand filters) turned off (bypassed). (T. 6, 10, 23-24, 115-16, 211, 241-42; D. Ex. 2.)

35. Operating in "storm mode" prevents even greater problems that might occur due to the plant's inability to handle the amount of inflow. (T. 116, 128, 161.)

36. Cedar Manor received about one inch of rain prior to the December 3 inspection. (T. 14, 92.)

37. Operating in "storm mode" allows inadequately treated sewage, including solids, to enter the receiving stream. (T. 16, 23-24, 116; D. Ex. 21.)

38. The Department has been aware of, albeit never explicitly approved, the plant's operation in "storm mode" for years. (T. 71, 84-85, 88, 124, 164, 241-44, 484; P. Ex. 11, 13; D. Ex. 6.)

39. The facility operated in "storm mode" on 105 separate days in 2006, 165 separate days in 2007, 93 separate days in 2008, and 69 separate days in 2009. (T. 15, 54.)

40. Operating in "storm mode" is not authorized under the terms of Perano's permit. (T. 10, 13, 135.)

41. The parties believe that the Cedar Manor facility is overloaded and forced to go into "storm mode" primarily because of excessive inflow and infiltration (I&I) into the park's sewage collection system. (T. 15, 514.)

42. Perano typically does not notify the Department every time that the facility is operating in "storm mode." (T. 243, 456-57.)

43. Perano's permit requires him to sample effluent twice a month. (D. Ex. 1.)

44. Perano has historically avoided taking samples when the facility is operating in "storm mode." (T. 262, 559.)

45. On December 3, the facility was discharging a cloudy effluent with visible solids. (T. 23; D. Ex. 2.)

46. Sampling of the effluent showed total suspended solids (TSS) of 40 mg/l, twice the permit limit of 20 mg/l. (T. 26; D. Ex. 1, 2.)

47. In response to the December 3 inspection, the Department's attorney sent Perano's attorney an email on December 4 at 2:12 p.m., which asked Perano to do the following:

> 1) Have an engineer evaluate the structural integrity of the flow equalization tank and provide a report. This report must be sealed by a professional engineer. If the equalization tank is deemed to be structurally sound the report must contain a plan to fix the problems. If the tank is not structurally sound an alternative plan to handle the influent flows must be identified.
>
> 2) An emergency overflow management plan must be put in place immediately so there are no more raw sewage discharges. (tanker trucks and pumping equipment on standby with a predetermined disposal location could accomplish this).
>
> 3) Write up an interim high flow management plan that provides the operators instructions on how to deal with high flows and what treatment adjustments must be made to maximize flow and treatment through the facility. Implement this plan immediately.
>
> The Department expects confirmation that these activities will be carried out in a voluntary manner by close of business today, 12/4/2009. The Department expects items one through three above to be completed by noon on 12/9/2009.

(D. Ex. 7.)

48. Perano's attorney responded as follows at 5:07 p.m.:

> I haven't been able to get a specific response from Mr. Perano about your requests, but I know that you are awaiting some reply this afternoon. I hope you understand that 2½ hours isn't the longest lead time you could have given me to get a response.
>
> Here is what I do know:
>
> The engineer did look at the tank yesterday. He noted what was leaking and Mr. Perano has scheduled repairs of those leaks for Monday and Tuesday of next week.
>
> Apparently, someone from DEP (which would have to have been Roth or Bowen) expressed some concern with a crack in concrete of the top ring collar. The engineer did not believe these to be due to stress and recommended that the manufacturer have a rep inspect this to see if they have encountered this problem before. Mac Industries, the tank manufacturer, is being scheduled to come out and evaluate the overall integrity of the tank and to look at the cracks.
>
> That is all I can tell you right now. It is not exactly what the Department requested, but does accomplish the same end.
>
> I'll have to get back to you on Monday with a response to the specific requests that you made.
>
> When you ask for tanker trucks and pumping equipment to be on standby, what do you mean? On site, or arrangements to be made to have someone in reasonably close proximity ready to come out on short notice?

(P. Ex. 6.)

49. The Department did not respond to Perano's attorney's email. (T. 464.)

50. The Department conducted a follow-up inspection on December 9, 2009. (D. Ex. 3.)

51. The December 9 inspection revealed that (1) untreated sewage had overflowed from the oxidation ditch, (2) the facility was discharging solids to the stream, (3) the facility was

operating in "storm mode," (4) the flow chart recorder had maxed out, and (5) the baffles and weir in the clarifiers were overtopped with water. (T. 33-35, 76-77; D. Ex. 3, 10.)

52. As of the December 9 inspection, the EQ tank had been pumped down, some repairs had been made, and the tank did not appear to be leaking. (T. 64, 90, 460-61, 466-67; D. Ex. 3.)

53. On December 10, 2009, the Department issued the order that is the subject of this appeal. The order required Perano to do the following:

> 1) Perano shall immediately cease all unauthorized discharges to the UNT Conewago Creek.
>
> 2) On or before December 15, 2009, Perano shall submit to the Department, a professional engineering evaluation of the structural integrity of the equalization tank, along with a report of the findings, and any alternatives to using the equalization tank if repairs are necessary. This report shall contain the stamp of a professional engineer.
>
> 3) On or before December 15, 2009, Perano shall submit, to the Department, an emergency overflow management plan that addresses ceasing any discharges of inadequately treated sewage from the Plant. This plan shall be implemented immediately upon notice of approval by the Department.
>
> 4) On or before December 15, 2009, Perano shall submit, to the Department, an interim high flow management plan that provides standard operating procedures on maximizing flow and treatment through the facility during high flow events. This plan shall be implemented immediately upon notice of approval by the Department.
>
> 5) On or before December 15, 2009, Perano shall remove all sewage solids, grease accumulations, and sewage related plastics from the UNT Conewago Creek.
>
> 6) At any time a facility or system of treatment or control is bypassed, or partially bypassed, a 24-hour flow proportioned, composite, effluent sample shall be taken for all monitoring parameters listed in PART A I of the NPDES Permit, analyzed by

> an accredited laboratory, and recorded on the monthly Discharge Monitoring Reports.

(D. Ex. 5.)

54. When it was submitted approximately one month later on January 12, 2010, Perano's emergency overflow management plan read in its entirety as follows:

> This plan has been prepared solely based upon past experience with operations of wastewater treatment facilities since no guidance was provided to GSP Management by PADEP, nor was any reference found on-line regarding guidelines for submittal of an Emergency Overflow Plan.
>
> The following procedures shall be implemented in the event of leakage of the flow equalization (EQ) tank, or upon overflow of the Oxidation Ditch:
>
> 1) Contact Kline's Septic Service, Harrisburg, PA to remove sewage from the EQ tank. Contact Number: 717-657-3839 or www.klineservices.com.
>
> 2) Contact Walters Septic Service, Harrisburg, PA to remove sewage from EQ tank. Contact Number: 1-866-423-4545 or 717-238-4545.
>
> 3) Contract haulers shall pump out EQ tank until flow stabilizes or leaks have stopped. Withdrawn sewage shall be hauled to PADEP licensed site for ultimate disposal.
>
> 4) Upon cessation of leakage of the EQ tank or overflow of the Oxidation Ditch, hauling operations shall be terminated.

(P. Ex. 8.)

55. When it was submitted approximately one month later on January 12, 2010, Perano's interim high flow management plan read in its entirety as follows:

> This plan has been prepared solely based upon past experience with operations of wastewater treatment facilities since no guidance was provided to GSP Management by PADEP, nor was any reference found on-line regarding guidelines for submittal of a High Flow Management Plan.

> In the event of high flow that exceeds 100 gpm, the following procedures shall be implemented to retain adequate biomass in the treatment facility:
>
> 1) When the flow equalization (EQ) tank reached full capacity, further flow to the EQ tank shall be diverted to the Oxidation Ditch.
>
> 2) The paddles in the oxidation ditch shall be turned off to allow solids to settle in the aeration zone and prevent said solids from being discharged to the stream.
>
> 3) The filter influent pumps shall be turned off to prevent flow to the filter beds and prevent clogging of the filter beds.
>
> 4) The flow proportional chlorinator shall remain in normal service to maintain adequate chlorine residuals prior to release of flow to the stream.
>
> 5) When flow return to 100 gpm or less, the normal operational sequence shall be resumed.
>
> 6) During the period of high flow, the WWTF shall be checked twice per day; once by a certified operator and once by park maintenance personnel.

(P. Ex. 9.) This plan basically describes "storm mode." (T. 287, 493.)

56. The purpose for requiring composite sampling while the facility was operating in bypass mode was to determine what effect the bypasses were having on effluent quality. (T. 262.)

57. The Department approved Perano's structural evaluation report, emergency overflow management plan, and high flow management plan. (T. 281-82.)

58. It took the Department 41 days to approve Perano's submissions (February 23, 2010). (P. Ex. 11.)

59. Cieri charged Perano for 29 hours of work in preparing the structural evaluation, the emergency overflow management plan, and the interim high flow management plan. (T. 229-30, 472.)

60. Cieri work stretched out over several weeks, doing "a little here and there." (T. 221.)

61. James Perano chided Cieri at least twice to get him to focus on completing the reports. (T. 225.)

62. Cieri could have prepared his structural evaluation with greater urgency had he believed from his initial inspection that there was a risk of possible collapse. (T. 228.)

63. The Board conducted a site view.

64. The December 10, 2009 order was reasonable in all respects except for the requirement that an interim high flow management plan be submitted in five days.

DISCUSSION

In order to prevail in an appeal from an order, the Department has the burden of proving by a preponderance of the evidence that the order was lawful, reasonable, and supported by the facts. *GSP Management*, 2010 EHB 456, 474-75; *Rockwood Borough v. DEP*, 2005 EHB 376, 384. Perano raises two objections to the Department's December 10, 2009 order. First, he argues that the five-day deadlines set forth in the order for submitting the reports were unreasonably short. Second, he argues that the Department lacked the legal authority to require composite sampling during bypass events (Paragraph 6 of the order).

Deadlines

As with every other aspect of an order, the Department's compliance deadlines in an order must be reasonable. *Whitemarsh Disposal Corp. v. DEP*, 2000 EHB 300, 327-329; *202*

Island Car Wash v. DEP, 1998 EHB 443, 458. Whether a particular deadline is reasonable turns on such factors as the amount and difficulty of the work required to be performed and the urgency presented by the underlying situation.

The five-day deadline in the order for submitting a professional engineering evaluation of the structural integrity of the EQ tank was entirely reasonable. One has to see the tank to appreciate how large it is.[2] It holds 376,000 gallons of raw sewage. It is only a few dozen feet away from occupied homes, not to mention the receiving stream. To discover such a tank leaking in nine places, with one of the leaks emitting 282 gallons per hour, was cause for immediate and grave concern. It was enough to "shock" the facility's experienced certified operator.

Perano argues that the urgency of the situation was alleviated when his engineer, James Cieri, P.E., came out to the site on December 3 and orally opined that the tank would not immediately collapse if operated half full. Of course, this guarded and qualified opinion was not cause for celebratory relief. Putting that aside, Perano himself admits in his brief, correctly, that an engineering opinion based upon a quick walk-through is woefully incomplete and does not provide grounds for comfort. Indeed, Cieri testified:

> Well, if this tank started to leak, plus I didn't see it when it was full—put it this way, when nearly full. I didn't see it in that mode. I don't know how much separation there was at that point. So, at that point, I was comfortable as long as the tank wasn't more than half full, we were okay. If it was up at full height, then I wasn't really comfortable with not knowing what—how much tension was on those cables and what they were supposed to be tensioned at. I didn't know that. I was just not comfortable with that, and I wanted somebody with more expertise than I had to make that determination for me.

(T. 203.)

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[2] The Board conducted a site view and there are several photographs in the record.

Perano argues that the order deadline was not reasonable because "the Department knew that Mr. Cieri was already working on preparing an engineering report" when it issued the order. Putting aside what the Department "knew," the Department reasonably could not count on the fact that an engineer was already "working on" a report. As it turned out, it took over a month to receive the report, even after the issuance of an order. Furthermore, Perano's concession that Cieri had already begun working on a report as early as December 4, if anything, provides further support for our conclusion that December 15 deadline set forth in the order was reasonable. *See 202 Island Car Wash*, 1998 EHB at 458 (time following request for voluntary compliance included in assessing reasonableness of deadline).

Perano says that the Department's inspectors did not seem too worried about the tank. For example, one of them climbed to the top of the tank to take pictures. The record does not support Perano's characterization of the inspectors' level of concern. (T. 209.) Even if it did, the inspectors' purported lack of worry provides no comfort given their lack of training in structural engineering. If a walk-through by a professional engineer is not enough, an inspection by nonengineers is hardly the basis for concluding that a casual approach could be taken regarding a proper evaluation by competent engineers.

Turning to the other side of the equation, the work required to prepare all three reports required by the order ultimately took Cieri 29 hours to complete. Cieri did not identify any other projects more demanding of his attention than the evaluation of a leaking 376,000-gallon tank containing raw sewage in close proximity to homes. The report that was prepared was far from complex, and indeed strikes us as somewhat superficial. (Findings of Fact 29, 59-62.) In short, given the serious threat posed and the moderate level of effort that apparently sufficed, we

cannot say that requiring an engineering evaluation that was begun on December 4 to be completed by December 15 was an unreasonable exercise of the Department's discretion.

The emergency overflow management plan was required to explain how Perano would prevent or at least address the overflows of untreated sewage that were occurring on the site. Although not nearly as pressing as the safety evaluation of the leaking 376,000-gallon raw sewage tank, raw sewage overflows are worthy of immediate attention. It should be recalled that raw sewage was finding its way directly into the receiving stream on December 3. On the other side of the equation, the effort required to meet the requirement was, to say the least, minimal. The Department said in its December 4 email that "tanker trucks and pumping equipment on standby with a predetermined disposal location" would satisfy this requirement, and that is exactly what Cieri put in the plan. Perano's plan in its entirety says septic services will be called to pump out the EQ tank until flow stabilizes or leaks have stopped. As James Perano correctly recognized, this report should have taken about "45 seconds." (T. 525-26; D. Ex. 14.) Allowing for this understandable hyperbole, five days was not unreasonable.[3]

The interim high flow management plan is a different story. While the effort required was also minimal--all Cieri did was describe on one page what was already occurring at the facility during "storm mode"--the Department has not adequately explained why it needed a report in five days to cover a situation that had been ongoing, with its knowledge, for decades. Requiring this report in five days seems excessive and unnecessary in light of this history. Accordingly, we will modify the order to provide that the interim high flow management plan should have been due in thirty, not five, days.[4]

---

[3] The fact that it took the Department 41 days to review and approve Perano's reports is inexcusable, but the Department's lack of attention does not persuade *us* that the reports were any less urgent. The Department mistakenly assumed that Perano would implement the plan pending its review. (T. 322.)
[4] This modification may have continuing relevance to the Department's compliant for civil penalties.

Composite sampling requirement

Perano does not argue that the requirement in Paragraph 6 of the order to perform composite sampling during bypass events was unreasonable or that it was not supported by the facts. Rather, he only argues that the Department lacked the legal authority to impose the requirement by way of an order as opposed to a permit modification. Absent his consent to the monitoring requirement, he argues that the Department was required to follow procedures applicable to NPDES permit modifications.

Perano would have raised an interesting argument had the composite sampling requirement in the December 10 order constituted a permit modification. There is clearly some tension between Section 610 of the Clean Streams Law, 35 P.S. § 691.610, which authorizes permit modifications by order, and the Department's regulations at 25 Pa. Code Chapter 92a, which establish procedures that must be followed before a permit may be modified. *Cf. Perano v. DEP*, EHB Docket No. 2009-119-L (Adjudication, September 12, 2011) (failure to follow procedures applicable to major modifications precludes Board review of a Department letter). We do not believe, however, that the composite sampling requirement in the Department's December 10 order can be fairly characterized as a permit modification. The order does not modify the permit. The monitoring requirements set forth in the permit remain in effect. Those monitoring requirements by their own terms apply based on the anticipated wastewater characteristics and flows described in the permit application. (D. Ex. 5 part A.1.) In contrast, the composite sampling requirement in the order creates a separate obligation that only applies to Perano's illegal bypass events.

Perano's permit prohibits bypassing (absent certain exceptions not shown to be applicable here). (Part B.I.F) The permit expressly provides that the Department may take

enforcement action against the permittee for bypassing. (Part B.I.F.2) Enforcement action in this context includes the issuance of a compliance order mandating sampling of the effluent that bypassed complete treatment. The Department had the legal authority to issue an order prohibiting bypasses altogether. Requiring the lesser action of taking a sample during such events fell well within its legal authority. The Department had the authority to impose the requirement by order under the unique circumstances presented in this case.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this appeal.

2. In an appeal from a compliance order, the Department has the burden of proving by a preponderance of the evidence that the order, including the compliance deadlines set forth therein, is a lawful and reasonable exercise of the Department's discretion that is supported by the facts.

3. The Department satisfied its burden in this case in all respects except as to the five-day deadline for submitting an interim high flow management plan. Thirty days was reasonable under the circumstances and the order will be modified accordingly.

4. The Department had the legal authority in this case to require the permittee to take composite samples of the effluent discharged during illegal bypass events.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

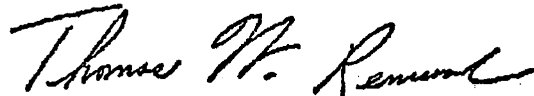
FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2010-001-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 15th day of September, 2011, it is hereby ordered as follows:

1. This appeal is unconsolidated from the consolidated appeal formerly docketed at EHB Docket No. 2009-119-L (formerly consolidated with 2010-001-L, 2010-016-CP-L, 2010-025-L and 2010-028-L);
2. Paragraph 4 of the Department's December 10, 2009 order is modified to provide that the interim high flow management plan was due on or before January 10, 2010; and
3. The appeal is in all other respects dismissed.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

DATED: September 15, 2011

c: **DEP Bureau of Litigation:**
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Williamsport, PA 17701

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2010-025-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 15, 2011**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board finds that the Department's issuance of an order pursuant to the Clean Streams Law requiring a permittee to turn over information regarding the permittee's operation of its sewage treatment plant was a lawful and reasonable exercise of the Department's discretion that was supported by the facts.

FINDINGS OF FACT

1. Frank T. Perano ("Perano") owns and operates the Cedar Manor Mobile Home Park ("Cedar Manor") in Londonderry Township, Dauphin County. (Department Exhibit ("D. Ex.") 1.)

2. Sewage generated within Cedar Manor is conveyed to an on-site sewage treatment plant, also owned and operated by Perano. (D. Ex. 1.)

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3. Perano is authorized by NPDES Permit No. PA0080721 to discharge treated effluent from the sewage treatment plant into an unnamed tributary of the Conewago Creek, which is protected as a trout stocked fishery. (T. 340 (119)[1]; D. Ex. 1.)

4. The permit expires on September 30, 2011. (D. Ex. 1.)

5. The plant's influent is collected from Cedar Manor's 316 lots. Cedar Manor includes an older section built in the 1960s and 1970s, which is piped with primarily eight inch terra cotta pipe. (Notes of Transcript page ("T.") 8, 12 (119).) After collection, the wastewater is permitted to be processed by the plant as follows:

a. Wastewater enters the plant through a bar screen comminuter, a grinder which is intended to break up hard materials in the wastewater. (T. 7 (001).)

b. The wastewater is then pumped into a 376,000 gallon equalization tank. (T. 9 (119); T. 7, 458 (001).)

c. Wastewater in the equalization tank is then pumped into the oxidation ditch, or moves to the ditch as a result of an overflow pipe in the equalization tank, even if the pump is off. (T. 8 (001).)

d. The oxidation ditch is where most of the wastewater treatment occurs. Brushes mix wastewater into contact with microorganisms and oxygen, creating "mixed liquor" that acts on the sewage by degrading and treating it. (T. 6, 8 (001).)

e. From there, the flow moves into another point where additional solids can be removed, and then continues on into a small chemical mixing tank where various chemicals can be added. (T. 8 (001).)

[1] The parties agreed to incorporate the records from EHB Docket Nos. 2009-119-L, 2010-001-L, and 2010-028-L into this appeal. *See* T. 135. Citations made to these records (as opposed to the record generated in this appeal) will be identified by the last three numerical digits in the respective docket number. *e.g.*, T. 8 (119).

f. The flow is then separated into two clarifiers where the solids are settled out, and floatable materials can be separated to prevent them from being discharged into the receiving stream. (T. 8 (001).)

g. From the clarifier, the resulting liquid is pumped into the sand filters. (T. 8-9 (001).)

h. After the sand filters, flow moves into the chlorine contact tank for the final phases of treatment for disinfection before finally being discharged into the receiving stream. (T. 8-9 (001).)

6. The plant since at least 1989 has had significant problems with handling the amount of inflow that it is required to treat, which the parties believe is largely the result of inflow and infiltration ("I & I") into the conveyance system leading to the plant. (T. 514-15 (001).)

7. In 1994, the Department and Perano entered into a consent order and agreement ("CO&A") wherein Perano agreed to implement remedial actions at Cedar Manor. He acknowledged numerous mechanical breakdowns at the plant and exceedances of hydraulic capacity that resulted in the discharge, deposition, and accumulation of sewage sludge solids in the receiving stream. (D. Ex. 19 (001).)

8. In 2001, the Department and Perano entered into another CO&A wherein Perano agreed to implement a number of corrective actions and acknowledged that the plant had allowed in excess of twenty thousand gallons of biosolids to be unaccounted for over a fourteen month period. (D. Ex. 20 (001).)

9. Continuing to the present, when the plant experiences too much inflow it frequently operates in what Perano has dubbed "storm mode." As little as one-half inch of rain is likely to cause the plant to go into "storm mode." (T. 6, 115-16 (001).)

10. During "storm mode," the brushes that mix air into the mixed liquor in the oxidation ditch are turned off, as are the pumps leading into the sand filters at the end of treatment. The hope is that the ditch will catch as many solids as possible before they are discharged to the receiving stream. (T. 6-7, 116 (001).)

11. The plant is not operating as it was permitted by the Department or as it was designed when it is operating in "storm mode." (T. 164 (001); T. 71 (119).)

12. The release of sewage solids and other violations are likely to occur while the plant is in "storm mode." (T. 54; D. Ex. 21 (001).)

13. The plant operated in "storm mode" on 105 separate days in 2006, 165 separate days in 2007, 93 separate days in 2008 and 69 separate days in 2009. The plant was also operating in "storm mode" on two days in March 2011 during some of the hearing dates in these matters before the Board. (T. 54; T. 15, 164 (001); T. 59 (028).)

14. Part C.II.A of Perano's Cedar Manor NPDES permit provides as follows:

> A. The Permittee shall remediate the facility's collection system with the objective of reducing I/I relative to plant capacity and available flow equalization in accordance with the following schedule:
>
> 1. Complete I/I study and submit report to [the Department] — December 31, 2006
> 2. Submit scope of work for remediation to [the Department] — April 30, 2007
> 3. Complete remediation work — December 31, 2009

(D. Ex. 1.)

15. Perano conducted an I & I study and submitted a scope of work for remediation to the Department according to the schedule set forth in his permit. (T. 17-21 (119).)

16. In August 2008, the Department sent Perano a settlement offer involving several of his treatment plants in the form of a draft CO&A. The proposed CO&A included suggested work plans for Cedar Manor that would have been more extensive than what was previously included in his scope of work. (T. 52-53 (119); P. Ex. 27 (119).)

17. Perano understood that the proposed draft CO&A did not amend his NPDES permit for Cedar Manor. (T. 79 (119).)

18. Nevertheless, Perano used the Department's settlement proposal as a basis for stopping the work set out in his remediation plan. He halted remediation work after receiving the proposed CO&A until at least December 2009. (T. 52 (119); P. Ex. 27 (119).)

19. The Department conducted an inspection on December 3, 2009, which revealed several operational problems with the plant including:

- The 376,000-gallon above-ground equalization tank was leaking from nine points on the sides of the tank. (T. 18 (001); T. 118 (001); D. Ex. 2 (001).)
- Untreated sewage was leaking from one hole at a rate of approximately 282 gallons per hour. (T. 173 (001).)
- Perano's operator was concerned with the structural soundness of the equalization tank. (T. 118-119 (001).).
- The plant was operating in storm mode. (T. 117 (001).)
- The plant was discharging a cloudy effluent and solids including condoms, tampons and grease balls. (T. 23 (001).)

20. On December 4, 2009, the Department requested that Perano, within five days, have an engineer evaluate the structural integrity of the equalization tank and prepare a plan to fix the problems, prepare a emergency overflow management plan to address the discharge of raw sewage, and prepare an interim high flow management plan to provide operators instructions on how to deal with high flows to maximize both flow and treatment through the facility. (D. Ex. 7 (001).)

21. During a follow up inspection on December 9, 2009 the Department again discovered operational problems with the plant, which among other things resulted in an overflow of untreated sewage from the oxidation ditch. (T. 33 (001); D. Ex. 3 (001).)

22. By the time of the Department's inspection on December 9, 2009, Perano had conducted some repairs, stopped further leaking from the equalization tank, and pumped the tank to a lower water level. (T. 64, 90, 460-61, 466-67 (001); D. Ex. 3 (001).)

23. On December 10, 2009, the Department issued an order to Perano that required him to cease all unauthorized discharges to the receiving stream, demanded that he prepare the plans requested in the December 4, 2009 email, required him to clean up any sewage solids, plastics and grease accumulations from the receiving stream, and imposed a requirement that he collect a 24-hour flow proportioned, composite, effluent sample any time any portion of treatment was bypassed at the plant. (D. Ex. 5 (001).)

24. On December 14, 2009, the Department sent Perano a letter that read as follows:

> The Department requests copies of the following information from December 14, 2006 through December 14, 2009, for the Cedar Manor Mobile Home Park:
>
> - Flow chart recordings and flow measurement calibration records
> - Daily log books and daily log sheets
> - Sludge and Wastewater removal records
> - Maintenance records

> In addition, we request all correspondence from the certified operator to the system owner describing the status of the wastewater treatment plant and any known conditions that may be causing violations of any Department permit or regulation. ...
>
> We request all of these documents for the past three years to be submitted to the Department within fifteen (15) days of the date of this letter. Please be advised that NPDES Permit No. PA0080721 requires furnishing copies of records required to be kept by the permit to the Department upon request.

(D. Ex. 2.)

25. By letter dated January 5, 2010, James Perano requested an additional fifteen days to respond to the Department's December 14, 2009 information request. (T. 44; P. Ex. 1.)

26. By an email dated January 5, 2010, the Department informed Perano that he had an extension until January 25, 2010 to respond to its December 14, 2009 information request. (T. 44-45; P. Ex. 2.)

27. James Perano responded to the Department's December 14, 2009 information request by letter dated January 20, 2010 as follows:

> I am writing in response to your letter dated December 14, 2009 . . . Pursuant to that request, I respond as follows:
>
> - Flow Charts Recordings, daily logbooks and daily log sheets are located on site. It is my understanding that the Department has at its disposal portable copiers suited for this purpose. You may therefore schedule an appointment to review the records, and copy the records you want using the Department copier. In the alternative, we can copy the records for you at a cost of $.25/page, payable to GSP Management Co.. . .
> - Flow meter calibration records are enclosed.
> - Sludge and Waste Removal Records are already in the possession of the Department; disposal manifests are attached to our monthly DMRs.
> - Maintenance Records Dec 2006-Dec 2009. In order to provide a comprehensive list of maintenance and repair records for the facility, we would have to review individual annual vender files for some 40 venders used at Cedar Manor; this equates to approximately 160 files and perhaps thousands of invoices. This is no small undertaking, and due to the time involved, we would have to be compensated for copying services at the cost of $.25/page. Please advise us if you want us to proceed.

(T. 45; D. Ex. 4.)

28. The Department issued the Order that is the subject of this appeal to Perano on or about February 12, 2010. The Order cited Perano for violating his legal obligation to supply the information requested in the Department's December 14, 2009 letter and directed Perano as follows:

> 1. Perano shall, within 30 days of the date of this Order, submit copies of the following documents and information to the Department for Cedar Manor sewage treatment plant for the period of December 14, 2006 through the date of this Order:
>
> > a. Any and all records, receipts, and correspondence from the certified and non-certified operators at the sewage treatment plant.
> > b. Any and all flow measurement recordings including flow chart recordings at the sewage treatment plant.
> > c. Any and all daily log books and log sheets at the sewage treatment plant.
> > d. Any and all maintenance records and receipts at the sewage treatment plant.
> > e. Any and all sampling records including dates, person sampling, times, analyses, analyses results, and sampling locations at the sewage treatment plant.
> > f. Any and all sludge and wastewater removal records including sludge removed from a stream or treatment unit, wastewater removed from a stream or treatment unit, and disposal locations for sludge and wastewater removed. This information shall include the name of the hauler and a copy of all receipts.
>
> 2. Perano shall, within 30 days of the date of this Order, submit a notarized statement to the Department containing an individual accounting of the number of lots connected to the sewage treatment plant.
>
> 3. Perano shall, within 30 days of the date of this Order, submit a notarized statement to the Department containing an individual accounting of the number of occupied lots connected to the sewage treatment plant.

(D. Ex. 3.)

29. On March 17, 2010, the Board denied a petition for supersedeas filed by Perano seeking a stay of his obligation to comply with the Department's order of February 12, 2010. *Perano v. DEP*, 2010 EHB 204.

30. The information requested by the Department in its December 14, 2009 letter, and February 12, 2010 order was necessary to implement the provisions of the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, aid in its enforcement, help the Department determine whether there is good cause to modify or terminate the permit, and otherwise assess Perano's compliance with the permit. (T. 64, 70-71, 117-18.)

31. Among other things, the Department needed the requested information to help it assess the following:

- Whether Perano was properly calibrating the flow meter on an annual basis. (T. 60);
- Whether high flows were peaking out on the flow charts to understand flows resulting from I & I problems at Cedar Manor. (T. 60);
- The accuracy and reliability of the Discharge Monitoring Reports (DMRs) that had been submitted by Perano (T. 61, 68-69);
- The reason for and extent of ongoing compliance problems at the facility (T. 61);
- Sludge removal activity at the facility (T. 62);
- Sludge removal from the receiving stream (T. 62);
- The amount and timeliness of maintenance being performed at the facility (T. 63);

- Whether correspondence from the Cedar Manor operators indicated the presence of any issues with the facility of which the Department was not aware (T. 63-64);
- Whether the plant is supporting a number of lots which is supported by the permit and whether the there are any future anticipated flows. (T. 69-70.)

32. Part B.I.C of Perano's Cedar Manor NPDES permit provides as follows:

C. Duty to Provide Information

1. The permittee shall furnish to DEP, within a reasonable time, any information which DEP may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit.
2. The permittee shall furnish to DEP, upon request, copies of records required to be kept by this permit.
3. Other information – Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to DEP, it shall promptly submit the correct and complete facts or information.

(D. Ex. 1.)

33. Part A.III.A.2 of the permit reads as follows:

Records Retention

Except for records of monitoring information required by this permit related to the permittee's sludge use and disposal activities which shall be retained for a period of at least five years, all records of monitoring activities and results (including all original strip chart recordings for continuous monitoring instrumentation and calibration and maintenance records), copies of all reports required by this permit, and records of all data used to complete the application for this permit shall be retained by the permittee for three years from the date of the sample measurement, report, or application. The three-year period shall be extended as requested by DEP or the EPA Regional Administrator.

(D. Ex. 1.)

34. Part B.III.C of the permit reads as follows:

Property Rights

> The issuance of this permit does not convey any property rights of any sort, or any exclusive privilege.

(D. Ex. 1.)

DISCUSSION

Before the Board is a dispute over whether an order that the Department issued to Perano requesting information about his plant at Cedar Manor was a lawful and reasonable exercise of the Department's discretion that is supported by the facts. *See GSP Mgmt. v. DEP*, 2010 EHB 456, 475 (Board's standard of review of an order); *Rockwood Borough v. DEP*, 2005 EHB 376, 384. The Department bears the burden of proof. 25 Pa. Code § 1021.122(b)(4).

Before turning to Perano's specific objections, some context is in order. Perano says that the question presented by this appeal "primarily revolves around which party – the Department or the permittee – bears the cost of copying documents held by the permittee." As we said in our Opinion and Order denying Perano's petition for a supersedeas in this matter, "Perano is somewhat vague on the number of pages involved, but assuming there were 500 pages, the amount in dispute is $125." *Perano v. DEP*, 2010 EHB 204, 206. Secondly, Cedar Manor has been operating in violation of its permit by, among other things, discharging inadequately treated sewage, since at least 1989. The fact that this facility often cannot handle the amount of flow that it receives and operates in "storm mode" as a result on a regular basis is not disputed. In fact, the Department's order came fast on the heels of an inspection that revealed that, not only was the plant continuing to operate in "storm mode" and discharging inadequately treated sewage, the facility's 376,000 gallon above-ground holding tank for holding raw sewage prior to treatment was leaking in nine places. Thirdly, we recently adjudicated another appeal in which Perano challenged a very similar information-request order regarding his Pleasant Hills facility.

Perano v. DEP, EHB Docket No. 2009-118-L, (Adjudication issued May 10, 2011) ("*Perano 118*"). A $125 copying charge was not the issue in that case. Rather, Perano's primary basis for refusing to respond to the order in that case was that the Department did not send the order directly to his attorneys. Nevertheless, Perano raised many of the same challenges in this case that he raised in that case.

Turning now to the question foremost on Perano's list of objections, namely, who should bear the burden of copying documents, it is important to remember that this appeal concerns the validity of the order, not whether Perano has complied therewith. The payment of copying charges as a condition for turning over the documents seems to relate more to the question of what constitutes compliance with the order than the order's validity, which is our narrow focus in this appeal. *See Ramey Borough v. DEP*, 351 A.2d 613, 615 (Pa. 1976); *M&M Stone Co. v. DEP*, 2008 EHB 24, 67. As far as we can tell from Perano's brief, the issue is relevant here for two possible reasons. First, to the extent the order is interpreted to mean that Perano must pay copying charges, *that aspect* of the order is invalid.[2] Second, Perano contends that the order's validity depends on whether he had an obligation to comply with the Department's December 14, 2010 *letter* request for the information, which preceded issuance of the order. (*See* FOF 24.) He claims that, by offering up the documents for copying at the Department's expense in response to that letter he complied with that letter's request and, therefore, the order need not have been issued.

We find that Perano was required to copy the documents at his own expense. Part B.I.C of Perano's permit reads as follows:

[2] Although the order is silent on its face, both parties interpret the order to mean that Perano must pay to copy the documents requested.

C. Duty to Provide Information

1. The permittee shall furnish to DEP, within a reasonable time, any information which DEP may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit.
2. The permittee shall furnish to DEP, upon request, copies of records required to be kept by this permit.
3. Other information – Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to DEP, it shall promptly submit the correct and complete facts or information.

Perano argues that this language should be interpreted to mean that the permittee must make documents available for copying, but the permit does not say that. Rather, it says that the permittee shall furnish or provide *copies* of records. Perano refers us to regulations and policy manuals describing the practices that inspectors should follow while on site conducting an inspection, *see, e.g.* 40 CFR 122.41(i) (incorporated by reference at 25 Pa. Code § 92a.41(a)), but a different regulation applies to the permittee's separate, independent obligation to provide *copies* of records upon request: 40 CFR 122.41(h). In other words, as we said when we denied Perano's petition for supersedeas, different regulations relate to on-site inspection activities and, what is applicable here, the separate, independent duty to provide copies of records upon request. *Perano*, 2010 EHB at 207-08. We read the language in the permit and the regulation that applies to mean that the permittee must copy the records and provide them to the agency, not merely make them available for copying at the agency's expense.

We hesitate, however, to pay too much attention to the wording of the permit. As we said in our Opinion denying Perano's petition for supersedeas,

> the ultimate resolution of this case will not turn on the dissection and explanation of the word "furnish." When asked who *should* bear the costs of copying documents, Perano or the Commonwealth's taxpayers, the answer would seem to be obvious. An NPDES permit, like any other permit, is a privilege, not a right. *See Tri-State Transfer Co., Inc. v. DEP*, 722 A.2d 1129, 1133, n.3 (Pa. Cmwlth.

> 1999); *Sedat, Inc. et al. v. DEP*, 2000 EHB 927, 934. Perano is benefiting from the privilege of discharging into the waters of the Commonwealth. There is no obvious benefit to the public at large such that it should subsidize Perano's cost of doing business. Perano accepted his permit, with all its conditions, including a clear obligation to furnish copies of records. *Cf.* 1 Pa. C.S.A. § 1922 (in ascertaining legislative intent, it is to be presumed that the General Assembly favors the public interest as against any private interest). Permittees must routinely supply a wide variety of documents to the Department, including discharge monitoring reports, notice of physical alterations of the facility, notice of anticipated noncompliance, and notice of bypasses, for example. Taken to its logical extreme, under Perano's argument, he would be relieved of these obligations if the Department refused to pay for copies of these submissions. The Department must administer hundreds of NPDES permits. When the choice comes down to requiring Perano to pay roughly $125 or creating a precedent that would require the citizens of the Commonwealth to subsidize hundreds of permittees' business expenses, we have little doubt that Perano's likelihood of success is, in any event, somewhat less than "likely."

2010 EHB at 208-09.

Interestingly, Perano only seeks reimbursement for copying. If his argument were correct, why stop there? Why not bill the Department for his employees' time gathering the documents? Or the notary fee for obtaining a notarized statement? Then of course there is postage, or if the documents were delivered by hand, a mileage charge. We continue to believe that a permittee, not the public, bears the cost of complying with his permit. In the same way that Perano could not bill the Department for his upgrades or maintenance in order to achieve compliance with his permit, he also cannot charge the Department for his duplication expenses to meet the obligations to provide the Department with the information and documentation that it requires.

Thus, the Department's order is not invalid to the extent it required Perano to pay for copying the information requested. Circling back to Perano's contention that the order should not have been issued because he complied with the information request *letter* when he offered to make documents available rather than provide copies to the Department, we find the contention

also lacks merit. First, as just discussed, offering to make documents available for copying did not constitute compliance. Secondly, Perano's underlying premise is wrong. Although Perano's failure to comply with his permit by responding properly to the Department's letter adds an additional basis for issuing the order, the validity of the order did not turn exclusively on Perano's violation. The Department could have issued the order without Perano's preexisting violation. In other words, the Department could have gone straight to an order. In fact, it did so in some respects by asking for information in the order that it had not asked for in the letter. Under Perano's reasoning, the Department needed to send another letter and have it rejected before asking for this additional information. That is simply not true.

We rejected in *Perano 118* Perano's argument that the information requested in the order is limited to information previously requested in a letter:

> Perano cites no legal support for his novel theory that the Department must ask for information by some means other than an order. The argument is ironic given Perano's protracted disregard of the Department's letters and NOV, but putting that aside, the argument is simply incorrect. The Department, while certainly encouraged to seek voluntary compliance as it did here, is not required by any law that we are aware of to do so. Nor does the Department need to "indicate" that it is unclear about a fact or raise a question in its inspections as a prerequisite to an information-request order.
>
> By the same token, the Department had the authority and acted reasonably by asking for more information in the order than it asked for in previous correspondence. The situation at the plant was hardly static. The information obtainable is not frozen in time by attempts to achieve voluntary compliance. The additional information requested in the order (e.g. disposal locations for sludge and wastewater removal, sampling records) was pertinent to the Department's ongoing investigation. Sending more letters and NOVs as a precursor to requesting the additional items in the order would have been a waste of time and resources and the Department reasonably declined to do so.

Perano 118, slip op. at 14.

Perano also argues that the information requested in the order is limited by the terms of his permit. We rejected that argument as well in *Perano 118*:

> Perano argues that the Department exceeded its statutory authority by requiring Perano to provide information regarding the operation of his permitted plant that goes beyond what Perano was required to furnish pursuant to the terms of the permit. Perano is incorrect. First, under Sections 5 and 610 of the Clean Streams Law, the Department is authorized to ask a permittee for whatever information is necessary to implement the provisions of the act or aid in the enforcement of the act. 35 P.S. §§ 691.5, 691.610. These provisions do not depend upon the terms of the permit. The Department may not be able to ask a permittee to provide his bowling score, but it may certainly ask him to provide log books, maintenance records, sludge data, information regarding the number of connections to a permitted facility, and all of the other data requested in the Department's order, regardless of what the permit says. Whatever limit there is on the Department's authority to request information, the Department has not exceeded it here.[ ]
>
> As it happens, Perano's permit in fact covers all of the information listed in the Department's order, which makes Perano's argument that the Department's authority is limited by the terms of the permit rather academic. Perano's permit specifically provides that the permittee *shall* furnish *any* information which the Department may request to, among other things, assess the permittee's compliance with his permit. ([D. Ex. 1].) This language is designed to provide the Department with the broad investigative authority that it needs to monitor hundreds of permitted facilities throughout the Commonwealth with limited staff and resources. Indeed, the entire NPDES program is heavily dependent on self-reporting. *DEP v. Kennedy*, 2007 EHB 15, 27; *Whitemarsh Disposal Corporation v. DEP*, 2000 EHB 300, 353; *DER v. East Penn Manufacturing*, 1995 EHB 259, 271; *DER v. Wawa*, 1992 EHB 1095, 1202. The permit condition at issue here is simply one aspect of that system. All of the information in the Department's order was without any doubt necessary to aid the Department in determining to what extent Perano was complying with his permit. The order did nothing more than require Perano to do exactly what he was already required to do by his permit.

Id., slip op. at 10-11. Precisely the same reasoning applies here.

On a similar note, we adopt the following reasoning from *Perano 118* here regarding Perano's argument to the same effect here:

> Perano questions the Department's statutory authority to demand production of documents that he is not required to keep pursuant to his permit. For example, monitoring results are to be retained for three years from the date of measurement ([D. Ex. 1]), but the order asks for documents going back longer than that. To repeat, the Department's statutory authority is not defined by the permit, but there are other problems with Perano's argument as well. Perano repeatedly cites to the provision in his permit that requires him to provide "copies of records *required to be kept* by the permit." ([D. Ex. 1], Part B.I.C.2 (emphasis added).) That section,

> however, is in addition to the more general requirement contained in Section B.I.C.1 that the permittee must provide *any* information needed to assess compliance with the permit. Frankly, Part B.I.C.2 is rather redundant. Part B.I.C.2 does not limit the Department's options under B.I.C.1.

Id., slip op. at 12-13.

Speaking more generally, Perano again argues as he did in *Perano 118* that there is no statutory authority for the information-request order.[3] The Department has the authority to issue orders under Section 5(b)(7) of the Clean Streams Law. 35 P.S. § 691.5(b)(7). That section authorizes the Department to "[i]ssue such orders as may be necessary to implement the provision of this act and the rules and regulations of the Department." *Id.* Although one statutory provision creating legal authority is enough to support the issuance of an order, *ADK Development Corp. v. DEP*, 2009 EHB 251, 253; *Milco Industries v. DEP*, 2002 EHB 723, 724, here there are several. Section 610 of the Clean Streams Law states that the Department "may issue such orders as are necessary to aid in the enforcement of the provisions of this act." 35 P.S. § 691.610. Section 1917-A of the Administrative Code authorizes the Department to issue orders to abate nuisances, 71 P.S. § 510-17, and the combined operation of Sections 402, 601, 610, and 611 of the Clean Streams Law, 35 P.S. §§ 691.402, 691.601, 691.610, and 691.611, authorizes orders to address unlawful conduct.

The Department had authority under Section B.I.C of Perano's NPDES permit to require Perano to "furnish to [the Department], within a reasonable time, any information which [the Department] may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit . . . [as well as] furnish to [the Department], upon request, copies of records required to be kept by this permit." D. Ex. 1. Perano violated the terms of his permit when the Department, through its December

[3] Perano did not raise this objection in his notice of appeal. The Department, however, has not raised this as a concern.

14, 2009 letter, requested information and copies of documents about various aspects of the operation of the plant and he failed to provide them. Perano's violation of his permit constituted unlawful conduct and a statutory nuisance. 35 P.S. §§ 691.402(b) and 691.611. Therefore, in addition to the Department's more general authority under Sections 5(b)(7) and 610 of the Clean Streams Law, Perano's violation of his permit gave the Department statutory authority under 71 P.S. § 510-17 and 35 P.S. §§ 691.402, 691.601, 691.610, and 691.611 to issue the order as well.

Perano complains that the information requested by the Department was not reasonable.[4] We disagree. Beginning with its December 14, 2009 letter, the Department sought information from Perano days after inspections revealed serious compliance issues at the plant, both with the plant's effluent and with the condition of the plant's equipment, including multiple visible leaks from the plant's very large equalization tank. In light of the status of operations at the plant, Perano's suggestion that the Department did not need the information it requested from Perano borders on the absurd.

The Department directs us to many reasons why it had good cause to seek information from Perano about the operations and condition of the plant. For example, the Department needed to know what maintenance and calibration was being performed on the equipment at the plant, particularly in order to understand the rate of flow and whether it was being accurately measured. It also needed to know what sludge removal activities were going on at the plant and from the receiving stream. It needed to review the correspondence between the operators at the plant to know whether there were additional issues with the facility that the Department was not aware of. The Department needed to know all of this information and more to understand whether Perano had been accurately reporting the conditions and compliance of the plant, and

[4] Perano's arguments regarding the lawfulness, reasonableness, and factual support for the order blend together and in many cases repeat themselves. For the reasons discussed herein we find that the order was lawful, reasonable, *and* supported by the facts.

whether flows were likely to change in the future so that it could assess whether it needed to take action regarding Perano's permit.

It is also reasonable that the Department chose to expand the information it needed from Perano by the time it issued the February 12, 2010 order. Nothing about the condition or performance of the plant was improving. The Department was expending considerable resources and time looking into the situation at Cedar Manor. Asking for additional information that might help the Department understand the problems the plant was having was entirely appropriate.

Perano's final objection to the order is that the short response time set forth in paragraph 1 of the order was unreasonable. The timeline set out in the order, however, is not the entire story. More than eight weeks before the Department issued the order, the Department attempted to achieve Perano's voluntary compliance by letter. At that time, Perano sought an extension for an additional fifteen days, which the Department granted. Ultimately, however, Perano's response appeared to make little use of the extension. Perano's letter of January 20, 2010 only included the requested flow meter calibration records. Thereafter, on February 12, 2010, when the Department issued the order under appeal here, the Department requested much of the same information. Although the order required Perano's compliance within twenty days, Perano had actually been given over ten weeks to provide the much of the information since it had been first requested on December 14, 2009.

We do not doubt that it required some effort on Perano's part to obtain the information required by the Department to meet the schedule laid out in the order. However, the Department's had good cause to want information from Perano quickly. At the time when the Department first requested information from Perano, he had stopped working to remediate the ongoing I & I issues at the plant and the Department had recently discovered through inspections

serious problems with the plant's discharge as well as structural problems with the plant's enormous equalization tank. The Department cannot be expected to provide a long time for a permittee to provide information where the permittee has already resisted voluntary compliance with the Department's requests, and ongoing problems at the plant are having and threaten to continue to have a pollutional effect. Accordingly, we find nothing arbitrary or unreasonable about the timetable laid out by the Department in its February 12, 2010 order.

CONCLUSIONS OF LAW

1. The Department bears the burden of proving by a preponderance of the evidence that the Department's order constitutes a lawful and reasonable exercise of the Department's discretion that is supported by the facts.

2. The Department satisfied its burden of proof.

3. The Department had the statutory authority to issue the order.

4. Perano engaged in unlawful conduct by refusing to respond in substance to the Department's requests for information.

5. A permittee is not entitled to receive duplication fees in exchange for his compliance with his permit.

6. A permittee must submit information and documents requested by the Department according to the terms of his NPDES permit.

7. Perano did not present a legitimate excuse for his unlawful conduct.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2010-001-L**
	:	**(Consolidated with 2010-016-CP-L**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 2010-025-L)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

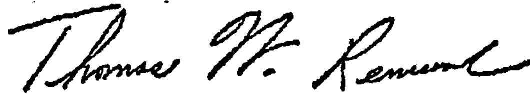
ORDER

AND NOW, this 15th day of September, 2011 it is hereby ordered that the appeal at EHB Docket No. 2010-025-L is unconsolidated from 2010-001-L and 2010-016-CP-L. The new caption shall be as follows:

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2010-025-L**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

It is further ordered that the above appeal at EHB Docket No. 2010-025-L is hereby dismissed.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

Date: September 15, 2011

c: **DEP Bureau of Litigation:**
Connie Luckadoo, Library

For the Commonwealth of PA, DEP:
Martin R. Siegel, Esquire
Office of Chief Counsel – Southcentral Region

For Appellant:
Daniel F. Schranghamer, Esquire
GSP MANAGEMENT CO.
800 West 4th Street, Suite 200
Williamsport, PA 17701

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NEW HANOVER TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2010-063-M**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: September 19, 2011**
PROTECTION and GIBRALTAR ROCK, INC.,	:	
Permittee	:	

ADJUDICATION

By Richard P. Mather, Sr., Judge

Synopsis

The Board dismisses the third party appeal of the Appellant from the Department's action to reissue and renew an NPDES permit for a noncoal coal surface mine. The permittee was not in violation of the terms and conditions of the permit at the time of permit renewal. Moreover, the Department considered and properly relied upon the local zoning requirements and was aware of the outstanding disputes and litigation between the permittee and the appellant regarding these requirements in 2010 when it renewed the NPDES permit. The Department's decision to renew the NPDES permit was a lawful and reasonable exercise of the Department's discretion that was supported by the facts.

Background

On April 15, 2005 the Pennsylvania Department of Environmental Protection ("Department") issued a Noncoal Surface Mining Permit No. 46030301 to Gibraltar Rock, Inc. ("Gibraltar Rock" or "Permittee") for its proposed noncoal surface mine located in New Hanover

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http://ehb.courtapps.com

Township, Montgomery County, Pennsylvania (the "Noncoal Permit"). The Department also issued a National Pollutant Discharge Elimination System ("NPDES") Permit No. PA00224308 to Gibraltar Rock at the same time as Part A of its Noncoal Permit. Under state and federal law, NPDES permits must be renewed every five (5) years. 25 Pa. Code § 92a.7. On October 16, 2009, Gibraltar Rock applied to renew its NPDES permit, and on April 15, 2010, the Department issued a correction and addendum to Gibraltar Rock's Noncoal Permit to reissue and renew its NPDES Permit No. PA00224308 for an additional five (5) years.

On May 14, 2010 New Hanover Township ("Appellant or "New Hanover") filed an appeal with the Board objecting to the Department's decision to reissue and renew Gibraltar Rock's NPDES permit. On May 27, 2010, New Hanover filed its First Amendment Notice of Appeal with the Board.

On July 27, 2010 Gibraltar Rock filed a motion to dismiss. After the other parties responded to Gibraltar Rock's motion, the Board issued an Opinion and Order on October 15, 2010 denying the motion to dismiss.

The parties agreed to submit the appeal to the Board for adjudication on a stipulated record without the need for a hearing. On February 23, 2011, the Parties filed a Joint Stipulation of Facts (hereinafter "Joint Stipulation") which serves as the record for this Adjudication.

FINDINGS OF FACT

Findings of Fact from the Parties Stipulation

1. The Appellant is New Hanover Township, a Township of the Second Class with offices at 2943 North Charlotte Street, Gilbertsville, PA 19525-9718. Joint Stipulation ¶1.

2. The Permittee is Gibraltar Rock, Inc., a Pennsylvania Corporation with offices at 355 Newbold Road, Fairless Hills, PA 19030. Joint Stipulation ¶2.

3. The Appellee is the Pennsylvania Department of Environmental Protection with offices at Third Floor, 909 Elmerton Avenue, Harrisburg, PA 17110-8200. Joint Stipulation ¶3.

4. In March, 2001, Gibraltar Rock, Inc. filed an application to the New Hanover Township Zoning Hearing Board (the "ZHB") seeking zoning relief to operate a quarry on lands situated in the HI and LI industrial zoning districts of New Hanover Township in which it was the legal or equitable owner (the "GR I Zoning Application"). Joint Stipulation ¶4.

5. The GRI Zoning Application eventually encompassed approximately 223 acres. Joint Stipulation ¶5.

6. In January, 2003, Gibraltar Rock filed a second application to the New Hanover Township Zoning Hearing Board seeking zoning relief to operate a quarry on approximately 241 acres of land located in the LI and HI district (the "GR II Zoning Application"). Joint Stipulation ¶6.

7. On April 15, 2005 the Department issued the Noncoal Surface Mining Permit No. 46030301, together with NPDES Permit No. PA00224308 (the "NPDES Permit") for the proposed Gibraltar Rock Quarry (collectively the "Permits") which is attached to the Joint Stipulation as Exhibit A and incorporated herein by reference. Joint Stipulation ¶7.

8. The Permits pertain to 241 acres situate partially in the Light Industrial (LI) and Heavy Industrial (HI) zoning districts which was the subject of the Gibraltar Rock II Zoning Application. Joint Stipulation ¶8.

9. The Mining Permit is subject to certain Special Conditions and Requirements as set forth on Part B thereof, including the following:

Special Condition/Requirement No. 3:

> **"The permittee is responsible for complying with all local ordinances adopted pursuant to the Municipal Planning Code, and all**

zoning ordinances in existence before January 1, 1972 and is also responsible to provide written approval and documentation of that compliance. Nothing in this Surface Mining Permit (hereafter "SMP") shall be construed to relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee may be subject to under federal, state, or local laws."

Special Condition/Requirement No. 4:

"The light industrial zone areas located within the permit boundaries shall be field marked prior to activation of this SMP. There shall be no mining activities within the light or heavy industrial zones unless approved by New Hanover Township or a subsequent court decision. The field marking shall remain as long as it is necessary. In determining whether the permittee has complied with this special condition, before any mining activities commence on the site, the Department will rely upon the legal status of any New Hanover Township Zoning Hearing Board action or any relevant court decision, rather than becoming the enforcer of any local zoning ordinance."

Special Condition/Requirement No. 26:

"The permittee shall install, within thirty days of activation of this SMP, two 60°V-notch weirs at the location shown on Figure WSM1, dated 01/25/04, and begin a weekly flow monitoring program. Monitoring results shall be submitted quarterly within twenty-eight (28) days after the end of the quarter to the Monitoring and Compliance Manager at the Pottsville District Office. The frequency interval of monitoring may be changed by the department if the monitoring data indicates the mining activities are not impacting the flow in any manner."

Special Condition/Requirement No. 27:

"The permittee shall install, within sixty days of activation of this SMP, piezometer transects consisting of five shallow and two deep wells at five locations shown of Exhibit 14.4(c)(1) – Stream & Wetland Monitoring Plan and on Figure WDM1, dated 01/25/04. Static water levels and temperature shall be measured monthly with results submitted quarterly within twenty-eight days after the end of the quarter to the Monitoring and Compliance Manager at the Pottsville District Office. The frequency interval of monitoring may be changed by the Department I the monitoring data indicates the mining activities are not impacting the flow in any manner."

Joint Stipulation ¶9 (emphasis in original.)

10. The Limits of Authorization of the Permit provide in part as follows:

> 3. **"The permittee's failure to comply with the laws of the Commonwealth and the rules and regulations of the Department regarding noncoal mining activities, or failure to comply with the terms and conditions of this permit, may result in an enforcement action, in permit termination, suspension, revocation and reissuance, or modification, or in denial of a permit renewal application. Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee of any responsibilities, liabilities, or penalties to which the permittee is or may be subject to under the Acts pursuant to which this permit is issued or any other applicable provision of law.**
>
> 4. **The permittee is responsible for complying with local ordinances adopted pursuant to the Municipalities Planning Code, and all zoning ordinances in existence before January 1, 1972. Nothing in this permit shall be construed to relieve the permittee from any responsibilities, liabilities or penalties to which the permittee may be subject under federal, state, or local laws."**

Joint Stipulation ¶10.

11. Part C of the Permit, Noncoal Authorization to Mine, Paragraph 5, Subparagraph 2 provides:

> **"there shall be no mining activities within the light or heavy industrial zones unless approved by New Hanover Township or a subsequent court decision".**

Joint Stipulation ¶11.

12. The Mining Permit is valid for the life of the quarry and its reclamations; however, the NPDES permit is valid for five (5) years and then they must be renewed. Joint Stipulation ¶12.

13. In June of 2007, the Zoning Hearing Board issued its decision relative to the GR I Zoning Application denying Gibraltar Rock's request for relief to allow quarrying in both the LI and HI districts, and granting a Special Exception permitting quarrying only on the portion of the property located in the HI district (the "GR I Zoning Decision"), which is attached to the Joint

Stipulation as Exhibit "B" and incorporated herein by reference. Joint Stipulation ¶13.

14. In July, 2007, Gibraltar Rock appealed the denial of its request for relief to allow quarrying in both the LI and HI Districts and the imposition of certain of the conditions imposed by the Zoning Hearing Board to the Special Exception by filing a Notice of Land Use Appeal in the Court of Common Pleas of Montgomery County (*Gibraltar Rock, Inc. v. New Hanover Twp. Zoning Hearing Bd. and New Hanover Twp.*, Docket No. 2007-16658) which is currently pending and has not been disposed of by the Court (the "Gibraltar Rock GR I Land Use Appeal"). Joint Stipulation ¶14.

15. No appeal was taken from the GR I Zoning Decision by the Township or any other party. Joint Stipulation ¶15.

16. On August 13, 2009, Gibraltar Rock began steps to activate the Mining Permit. Joint Stipulation ¶16.

17. On September 11, 2009, New Hanover Township filed a Petition for Preliminary Injunction in the Montgomery County Court of Common Pleas (*New Hanover Twp. v. Gibraltar Rock, Inc.*, Docket No. 2009-28162), seeking to enjoin the activation of the quarry. Joint Stipulation ¶17.

18. On October 2, 2009, the Township provided the Department with written notice, pursuant to Section 3320 of the Noncoal Surface Mining Conservation and Reclamation Act, that it believed that Gibraltar Rock was in violation of the Special Conditions of the Permit. A copy of said notice is attached to the Joint Stipulation as Exhibit C. Joint Stipulation ¶18.

19. On October 16, 2009, a site meeting was conducted with representatives of DEP, Gibraltar Rock, and the Township in response to the Township's written notice. In attendance were Robert L. Brant, Esquire, Special Counsel for New Hanover Township, Wendy Feiss

McKenna, Esquire, Special Counsel for New Hanover Township, Paul A. Bauer, III, Esquire, New Hanover Township Solicitor, two New Hanover Township representatives, Uday Patankar, Gibraltar Rock, Inc., Stephen B. Harris, Esquire, Counsel to Gibraltar Rock, Inc., Michael Menghini, Department Environmental Group Manager, Colleen Stutzman, Department SMCIS, Amiee Bollinger, Department SMCI, and Craig Lambeth, Esquire, Department Counsel. Joint Stipulation ¶19.

20. On November 2, 2009, the Department notified the Township that there were no violations of the Coal or Noncoal Mining Regulations or Requirements observed during the site inspection. *See* Exhibit D which is attached to the Joint Stipulation and incorporated herein by reference. Joint Stipulation ¶20.

21. The Investigation Report prepared by the Department relative to the October 16, 2009 site meeting states "Department counsel Craig Lambeth explained that the Department does not enforce local zoning. New Hanover Township would need to obtain a Court Order against Gibraltar and the Department would review the Order and determine what, if any action would be taken." *See* Exhibit E which is attached to the Joint Stipulation and incorporated herein by reference. Joint Stipulation ¶21.

22. On November 6, 2009, a hearing on the Petition for Preliminary Injunction was held in the Montgomery County Court of Common Pleas before the Honorable Kent H. Albright. Joint Stipulation ¶22.

23. Pursuant to a subpoena to testify issued to Michael Menghini on behalf of the Township, the Department Assistant Counsel Craig S. Lambeth and Department Environmental Group Manager, District Mining Operations of the Pottsville District Office, Michael Menghini, attended the hearing on the Petition for Preliminary Injunction, and Michael Menghini testified at

that hearing. Joint Stipulation ¶23.

24. On January 7, 2010, the Zoning Hearing Board issued its decision relative to the GR II Zoning Application denying Gibraltar Rock's request for relief to permit quarrying in both the LI and HI zoning districts and granting a Special Exception permitting quarrying only on the portion of the site located in the HI Zoning District subject to certain conditions (the "GR II Zoning Decision"). Joint Stipulation ¶24.

25. On February 2, 2010, Gibraltar Rock, Inc. appealed the denial of its request for relief to allow quarrying in both the LI and HI Districts and the imposition of the same conditions imposed by the Zoning Hearing Board on Gibraltar Rock in the GR I Land Use Appeal by filing a Notice of Land Use Appeal in the Montgomery County Court of Common Pleas (*Gibraltar Rock, Inc. v. New Hanover Twp. Zoning Hearing Bd. and New Hanover Twp. Bd. of Supervisors*, Docket No. 2010-02570) (the "Gibraltar Rock GR II Land Use Appeal"). Joint Stipulation ¶25.

26. On February 8, 2010, the Township appealed the GR II Zoning Decision by filing a Notice of Land Use Appeal in the Court of Common Pleas of Montgomery County, (*New Hanover Twp. v. New Hanover Twp. Zoning Hearing Bd. and Gibraltar Rock, Inc.*, Docket No. 2010-02952) (the "Township GR II Land Use Appeal"). Joint Stipulation ¶26.

27. Gibraltar Rock's GR I Land Use Appeal, the Township's GR II Land Use Appeal and Gibraltar Rock's GR II Land Use Appeal are all pending before the Montgomery County Court of Common Pleas. Joint Stipulation ¶27.

28. On September 25, 2009, Gibraltar Rock requested an extension of the time to install the stream monitoring network specified in Special Condition Nos. 26 and 27. *See* Exhibit F attached to the Joint Stipulation and incorporated herein by reference. Joint Stipulation

¶28.

29. On or about October 22, 2009, Gibraltar Rock filed an application to renew its NPDES Permit for another five (5) years. *See* Exhibit G which is attached to the Joint Stipulation and incorporated herein by reference. Joint Stipulation ¶29.

30. On October 27, 2009, the Department granted the extension to comply with Special Condition Nos. 26 and 27 until March 1, 2010. *See* Exhibit H attached to the Joint Stipulation and incorporated herein by reference. Joint Stipulation ¶30.

31. On February 24, 2010, Gibraltar Rock requested a further extension of the time to install the stream monitoring network specified in Special Condition Nos. 26 and 27. *See* Exhibit I attached to the Joint Stipulation and incorporated herein by reference. Joint Stipulation ¶31.

32. On March 1, 2010, the Department extended the time to install the stream monitoring network described in Permit Special Condition Nos. 26 and 27 until May 1, 2010 and stated that "if necessary, additional time extensions can be requested and considered in the future". *See* Exhibit J attached to the Joint Stipulation and incorporated herein by reference. Joint Stipulation ¶32.

33. On April 15, 2010 the Department issued a correction and Addendum to the Permit ("Addendum to Permit") which renewed and extended NPDES Permit No. PA00224308 for an additional five (5) years. *See* Exhibit K attached to the Joint Stipulation and incorporated herein by reference. Joint Stipulation ¶33.

34. On May 17, 2010, the Township filed a Notice of Appeal to the Environmental Hearing Board from the Department's issuance of the correction and Addendum to the Permit. Joint Stipulation ¶34.

35. On May 17, 2010, the Honorable Kent H. Albright entered an Order in the Montgomery County Court of Common Pleas relative to New Hanover Township's Petition for Preliminary Injunction, granting the Petition and providing in part:

> "Gibraltar Rock, Inc. is **ENJOINED** from quarrying or mining the property which is the subject of both the Plaintiff's Petition and the Noncoal Surface Mining Permit No. 46030301, previously issued to the Defendant, being that same premises which is described therein and located in New Hanover Township, Montgomery County, Pennsylvania, within an area bounded generally by Church Road, Colflesh Road, Layfield Road and Big Road and a District zoned HI Heavy Industrial (see "GRI" Application for Special Exception, dated March 23, 2001), pending the following:
>
> a. New Hanover Township's approval of a properly submitted Land Development Application and Plan regarding the property to be mined and which is the subject of the Permit aforementioned issued to Gibraltar Rock, Inc."

A copy of the Order issued by Judge Albright is attached to the Joint Stipulation as Exhibit L and incorporated herein by reference. Joint Stipulation ¶35 (emphasis in original.)

36. On May 28, 2010, the Township filed its First Amended Notice of Appeal to the Environmental Hearing Board incorporating Judge Albright's Opinion. Joint Stipulation ¶36.

37. On October 25, 2010, Gibraltar Rock filed an Application for Land Development with New Hanover Township regarding the quarry site (the "Land Development Application"). Joint Stipulation ¶37.

38. The Land Development Application is pending before New Hanover Township and is currently being reviewed by the New Hanover Township Planning Commission pursuant to the applicable provisions of the Pennsylvania Municipalities Planning Code, 53 P.S. §10101, *et seq*. Joint Stipulation ¶38.

Additional Findings of Fact from the Stipulated Record

39. In 2005, the Department was fully aware of the outstanding issues regarding

zoning requirements applicable to Gibraltar Rock's proposed quarry and its pending applications before the New Hanover Zoning Hearing Board for zoning approval for its quarry.

40. In 2005, when the Department issued the surface mining permit to Gibraltar Rock, the Department considered and relied upon the existences of the outstanding issues and the pending applications for zoning approval to condition Gibraltar Rock surface mining permit.

41. In 2010, the Department was fully aware of and considered the status of the outstanding issues regarding zoning requirements applicable to the zoning approval applications and the existence of litigation between New Hanover and Gibraltar Rock in Montgomery County Court of Common Pleas regarding the applicability of zoning requirements to Gibraltar Rock's proposal quarry.

42. In 2010, when the Department renewed Gibraltar Rock's NPDES permit, the Department did not modify or delete any of the permit conditions it inserted in the 2005 surface mining permit related to local zoning requirements other than renewing the NPDES permit for another five years. The unaffected permit conditions remained in effect in 2010 after the renewal of the NPDES permit.

DISCUSSION

Burden of Proof and Legal Framework

New Hanover has appealed the Department's decision to renew an NPDES permit for Gibraltar Rock's quarry which is located in New Hanover Township. Pursuant to 25 Pa. Code § 1021.122(c)(2), New Hanover, as a third-party appellant, bears the burden of proof and the burden of proceeding. To prevail, New Hanover must show by a preponderance of admissible and credible evidence heard by the Board that the Department's action granting the NPDES permit renewal to Gibraltar was not a lawful or reasonably exercise of the Department's

discretion. *Wilson v. DEP*, 2010 EHB 827, 833; *Smedley v. DEP*, 2001 EHB 131, 155-60.

The Board conducts hearings and reviews *de novo* in appeals from Department actions. *Warren Sand and Gravel Co. v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975). The Board has the duty to determine if the Department's action can be sustained by evidence taken by the Board at its *de novo* hearing. *Warren Sand & Gravel Co.*, 341 A.2d at 565; *Department of Envtl. Prot. v. N. Am. Refractories Co.*, 791 A.2d 461, 466 (Pa. Cmwlth. 2004). If the Department acts pursuant to a mandatory provision of a statue or regulation then the only question is whether to uphold or vacate the Department's action. *Warren Sand & Gravel Co.* at 565. Upon appeal of discretionary Department action, the Board may substitute its discretion for that of the Department only where the EHB has determined that the Department has abused its discretion, and may take evidence and rely upon facts not before the Department. *Browning-Ferris Industries, Inc. v. DEP*, 819 A.2d 148, 153 (Pa. Cmwlth. 2003); *Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998); *Warren Sand & Gravel Co.*

Noncoal Surface Mining Permit

On April 15, 2005, the Department issued a Noncoal Surface Mining Permit No. 46030301 to Gibraltar Rock for its proposed noncoal surface mine located in New Hanover Township. No appeal was filed from this 2005 Department action. This permit was issued in accordance with the requirements of the Noncoal Surface Mining Conservation and Reclamation Act, (hereafter "NSMCRA") 52 P.S. § 3301 *et seq.*; the Clean Streams Law, 35 P.S. §§ 691.1 *et seq.*; and the state Air Pollution Control Act, 35 P.S. §§ 4001 *et seq.* *See* Exhibit A to Joint Stipulation at p. 1. The permit consists of a Title Page; Limits of Authorization; Part A - containing the NPDES Permit No. PA00224308 for Noncoal Surface Mining Permit No. 46030301; Part B – containing Special Conditions or Requirements for Noncoal Surface Mining

Permit No. 46030301; and Part C – containing Noncoal Authorization to Mine No. 6794-46030301-01 under SMP 46030301.

Under NSMCRA the mining permit portion of the permit is valid for the life of the quarry. The NPDES permit portion of the permit, Part A, containing NPDES Permit No. PA00224308, was only valid for five years, and then it had to be renewed under state and federal NPDES regulations. *See* 25 Pa. Code § 92a.7.

Gibraltar Rock did, in fact, file a timely application for renewal of the NPDES portion of its surface mining permit dated October 9, 2009. Exhibit "G" to Joint Stipulation. The Department reviewed the application for renewal and ultimately approved this application by letter dated April 15, 2010. Exhibit "K" to Joint Stipulation. The Department described this action as a correction to the existing surface mining permit No. 46030301, and indicated that the "purpose of this correction is to renew the NPDES Permit No. PA00224308." *Id.*

The correction consists of a new Part A to the surface mining permit and Gibraltar Rock's renewal application. The Department's action to issue the correction to renew the NPDES permit did not amend or delete any of the other portions of the surface mining permit No. 46030301 described above.

Outstanding litigation and disputes between New Hanover and Gibraltar Rock's over applicability of local land use and zoning requirements to proposed quarry

The Joint Stipulation describes in great detail the extensive and pending litigation and ongoing disputes between New Hanover and Gibraltar Rock concerning local land use and zoning requirements that are applicable to Gibraltar Rock's plan to develop a quarry in New Hanover Township. Gibraltar Rock has filed two applications seeking zoning approval to operate a quarry with the New Hanover Township Zoning Hearing Board ("ZHB"). In March 2001, filed the first application ("GRI Zoning Application") and in January, 2003 it filed the

second ("GRII Zoning Application.") Both were pending when the Department issued the noncoal surface mining permit No. 46030301 to Gibraltar Rock on April 15, 2005. In June of 2007, the ZHB issued its decision on the GRI Zoning Application. Gibraltar Rock filed an appeal from the ZHB decision in the Court of Common Pleas of Montgomery County in July 2007 and the appeal is currently pending.

In January 2010, the ZHB issued its decision on the GRII Zoning Application. Gibraltar Rock and New Hanover have both appealed this decision to the Montgomery County Court of Common Pleas. These appeals are currently pending.

After the GRI Zoning Decision was issued by the ZHB, but before the GRII Zoning Decision was issued, Gibraltar Rock began steps to activate its surface mining permit on August 13, 2009. On September 11, 2009, New Hanover filed a Petition for Preliminary Injunction in the Montgomery County Court of Common Pleas seeking to enjoin activation of the quarry. After a hearing on the petition on November 11, 2009, the Montgomery County Court of Common Pleas issued an order dated May 17, 2010 granting New Hanover's petition and enjoining Gibraltar Rock's from mining pending, *inter alia*, New Hanover's approval of Gibraltar Rock's Land Development Application.

On October 25, 2010, Gibraltar Rock filed the Application for Land Development with New Hanover that was referenced in the May 17, 2010 court order. The Land Development Application is currently pending before New Hanover and is being reviewed by the New Hanover Township Planning Commission.

Although Gibraltar Rock began the process of obtaining local zoning or land development approvals in 2001, the two contested ZHB decisions are still pending on appeal and Gibraltar Rock's outstanding land development application is before New Hanover for approval.

There is no indication in the stipulated record that the pending litigation and outstanding zoning and land development disputes will be resolved any time soon.

New Hanover's objections to the Department's decision to renew NPDES Permit No. PA00224308

In this appeal, New Hanover has identified three related objections to the Department's decision to renew Gibraltar Rock's NPDES Permit No. PA00224308. The first two assert that Gibraltar Rock was in violation of specific terms and conditions in its existing surface mining permit at this time it applied to renew its NPDES permit and that these outstanding violations prevented the Department from being able to approve Gibraltar Rock's application for renewal. New Hanover asserts that Gibraltar Rock was in violation of Special Conditions Nos. 26 and 27 that required Gibraltar Rock to install surface or groundwater monitoring devices within specified time periods upon activation of the surface mining permit. New Hanover also asserted that Gibraltar Rock was in violation of various terms and conditions of its surface mining permit that identified Gibraltar Rock's obligation to comply with local zoning requirements. (*See* Exhibit A, Limits of Authorization of Noncoal Permit, paragraphs 3 and 4; Part B – Special Conditions Nos. 3 and 4; Part C – Authorization to Mine – Additional Special Conditions and/or Requirements No. 2). Because there was pending litigation and ongoing disputes between New Hanover and Gibraltar Rock over local land use and zoning requirements, New Hanover asserts that Gibraltar Rock was in violation of its surface mining permit and these violations prevented the Department from approving Gibraltar Rock's application for renewal of its NPDES permit. Finally, New Hanover belatedly asserts that the Department was required to deny or suspend review of Gibraltar Rock's application for renewal under the Act of June 22, 2000 (P.L. 483, No. 67) and the Act of June 22, 2000 (P.L. 940, No. 68) ("Acts 67/68"). New Hanover asserts that the pending litigation and on going disputes between New Hanover and Gibraltar Rock over

local land use and zoning compel the Department to either deny or suspend review of the renewal application in light of the Department's obligation under Acts 67/68.

New Hanover's second and third objection seeks a general common objective. The objective is to compel the Department to take a more active role on New Hanover's side in the ongoing litigation and disputes between New Hanover and Gibraltar Rock over local land use and zoning requirements that are applicable to Gibraltar Rock's proposed quarry.

Alleged violations of surface mining permit related to requirements to install certain stream monitoring devices

New Hanover asserts that Gibraltar Rock violated Special Conditions Nos. 26 and 27 of its surface mining permit (Part B) which required Gibraltar Rock to install certain stream and groundwater monitoring devices within certain time periods of activation of the permit. Although Gibraltar Rock acknowledges that it began steps to activate its permit, thereby triggering its obligation to install the required monitoring devices in August 2009, Gibraltar Rock states and the stipulated record reflects that Gibraltar Rock requested a series of extensions from its obligations that the Department granted. At the time the Department issued the renewal for Gibraltar Rock's NPDES Permit No. PA00224308 on April 15, 2010, the monitoring devices were not yet installed, but the Department had granted Gibraltar Rock extensions to comply with these obligations.

Thus, at the time the Department issued the renewed NPDES permit, Gibraltar Rock was not in violation of Special Condition Nos. 26 or 27. In addition, it should be noted that New Hanover's efforts to obtain an injunction of Gibraltar Rock's mining activities at the site until it received approval from New Hanover of a Land Development Application and Plan also prevent Gibraltar Rock from installing the required surface and groundwater monitoring devices. On September 11, 2009, New Hanover filed a Petition for a Preliminary Injunction to prevent

activation of Gibraltar Rock's quarry. On May 17, 2010, the Court of Common Pleas of Montgomery County entered an order granting the petition and enjoining Gibraltar Rock from mining the site. The injunction effectively prevents installation of the monitoring devices, which are an integral part of Gibraltar Rock's mining operations. The Board has great difficult following New Hanover's argument regarding the alleged failure to install these monitoring devices. The Department has granted extensions to the deadlines in the permit conditions to install these devices, and New Hanover has also obtained an injunction to prevent their installation until after New Hanover approves a Land Development Application and Plan in the future. On this issue, the Department did not err when it approved Gibraltar Rock's application for NPDES renewal, because the record before the Board establishes that Gibraltar Rock was not in violation of Special Conditions 26 or 27 when it approved the renewal application.

Alleged violations of surface mining permit related to Gibraltar Rock's obligation to comply with local land use and zoning requirements

The major thrust of New Hanover's appeal is its assertion that the outstanding and longstanding disputes between New Hanover and Gibraltar Rock over the applicability of various local land development an zoning requirements to Gibraltar Rock's proposed quarry in New Hanover Township prevent the department from renewing Gibraltar Rock's NPDES permit. There are two related parts of this argument. First, New Hanover asserts that Gibraltar Rock's current surface mining permit contains several terms and conditions related to Gibraltar Rock's obligation to comply with local land development and zoning requirements. New Hanover asserts that Gibraltar has violated these terms and conditions thereby preventing the Department from renewing Gibraltar Rock's NPDES permit.

The second part is independent of the terms and conditions of Gibraltar Rock's surface mining permit. New Hanover asserts that the Department violated its obligation under Acts

67/68 when it renewed Gibraltar Rock's NPDES permit when the disputes concerning the local land use and zoning requirements remain unresolved. The Board will address the first part of New Hanover's argument in this portion of the Adjudication and the second part in the following portion of this Adjudication.

The Department and Gibraltar Rock make similar arguments in opposition to New Hanover's assertion that Gibraltar Rock is in violation of its permit terms to comply with local zoning requirements. Both agree that the terms and conditions in the current surface mining permit do not provide a basis for the Department to become the enforcer of local land use and zoning requirements. The Board agrees with Gibraltar Rock and the Department that Gibraltar Rock was not in violation of these terms at the time the Department renewed its NPDES permit. In addition, these terms and conditions serve several useful purposes, but one of the purposes is *not* to make the Department the enforcer of local land use and zoning requirements.

A quick review of the various terms and conditions in question in the surface mining permit reveals that they are not intended to make the Department an enforcer of local land use or zoning requirements. It is important to note that these terms and conditions were initially included in the surface mining permit the Department issued in 2005. These terms and conditions were not changed as part of the 2010 permit correction that renewed the NPDES permit No. PA00224308.

New Hanover references five terms or conditions in connection with its argument. The first two are Special Conditions in Part B of the Surface Mining Permit. Special Condition No. 3 provides notice to the permittee that the permittee is responsible for complying with local ordinances adopted pursuant to the Municipal Planning Code and zoning ordinances adopted

before January 1, 1970.[1] It concludes with the very broad and general statement that the permit does not relieve the permittee from complying with applicable federal, state and local laws. As Gibraltar Rock correctly notes "Special Condition No. 3 is, in part, simply a partial restatement of Section 16 of the Noncoal Surface Mining Conservation and Reclamation Act", 52 P.S. § 3316. Special Condition No. 3 and Section 16 provide notice to permittees, such as Gibraltar Rock, that local land use and zoning requirements are not preempted, but neither of these provisions imposes any obligation on the Department to enforce local land use or zoning requirements.

Special Condition No. 4 is a site specific condition which indicates that the Department was aware of some of the issues regarding the applicability of local land use and zoning requirements to Gibraltar Rock's proposed quarry in 2005 when the Department issued the surface mining permit.[2] The condition imposed an obligation on Gibraltar Rock to field mark certain areas and to prohibit mining in certain areas "unless approved by New Hanover Township or subsequent court decision." The condition set forth specific requirements for determining compliance: "In determining whether the permittee has complied with this special condition, before any mining activities commences on the site, the Department will rely upon the legal status of any New Hanover Township Zoning Hearing Board action or any relevant court decision, rather than becoming the enforcer of any local zoning ordinance." Two important considerations are reflected in the language of Special Condition No. 4. First, the site specific

[1] Paragraph No. 4 of the Limits of Authorization is identical to Special Condition No. 3. The discussions in this opinion about Special Conditions No. 3 also applies to Paragraph No. 4.

[2] Special Condition No. 4 in Part B is identical to Additional Special Condition No. 2 in Part C. Part B contains the Special Conditions for the entire permit. Part C contains the Additional Special Conditions for the initial authorization to mine. Because the language in Special Condition No. 4 is identical to the Additional Special Condition No. 2, the discussion concerning Special Condition No. 4 also applies to Additional Special Condition No. 2.

nature of the condition is evidence of the Department's awareness of the pending issues concerning the applicability of local land use and zoning requirements to Gibraltar Rock's proposed quarry. Second, the condition clearly states the Department's position that it did not want the condition to make it the enforcer of any local zoning ordinances and that it would rely upon the decisions of the New Hanover Zoning Hearing Board or any relevant court decision.

As previously mentioned, the language in Special Conditions 3 and 4 in Part B of the surface mining permit is similar to the language in Paragraph 4 of the Limits of Authorization and in Paragraph 5 of Part C of the permit, Noncoal Authorization to Mine. This accounts for four of the five provisions that New Hanover identified. The fifth provision is Paragraph 3 of the Limits of Authorization which contains two very general and broad statements: Violations of laws, Department regulations or terms or conditions of the permit may result in enforcement action; and nothing in the permit relieves the permittee from compliance with other applicable laws. Neither of these general statements expressly mentions local land development or zoning requirements, but the statements are broad and general enough to include these types of requirements. Neither statement, however, imposes an obligation on the Department to enforce requirements that it does not administer such as local land development and zoning requirements.

Status of local land use disputes and litigation when Department renewed NPDES permit

In 2005 Gibraltar Rock had the GR I Zoning Application and the GR II Zoning Application pending before the New Hanover Zoning Hearing Board. By April 2010 when the Department approved Gibraltar Rock's application for renewal of its NPDES permit, the Zoning Hearing Board had issued its decisions on the two pending application. (GR I Zoning Decision issued in June of 2007; GR II Zoning Decision issued in January of 2010). Both ZHB decisions were similar and denied Gibraltar Rock's request for relief to allow quarrying in both LI and HI

districts, and granted a special exception to permit quarrying in the HI district only. Thus, at the time the Department renewed Gibraltar Rock's NPDES permit on April 15, 2010, Gibraltar Rock had some local zoning approval, in the form of a special exception to conduct mining on the HI district portion of its mine site.

Before the Department renewed the NPDES permit and after the ZHB issued its GR I zoning decision, but before it issued its GR II Zoning Decision, Gibraltar Rock begun steps to activate its mining permit on August 13, 2009. On September 11, 2009, New Hanover filed a petition to enjoin activation of the quarry in the Montgomery County Court of Common Pleas. A hearing was held on the petition on November 16, 2009.

While the petition was pending before the Montgomery County Court of Common Pleas, New Hanover provided the Department with a written notice, pursuant to § 3320 of NSMCRA, 52 P.S. § 3320, that it believed that Gibraltar Rock was in violation of certain Special Conditions, including No. 3 and 4 of Part B. The Department conducted an investigation and site inspection, held a site meeting and ultimately notified New Hanover, by letter dated November 9, 2009 that the Department observed no violations of the "Coal or Noncoal Mining Regulations or Requirements." The Department's investigation report relative to the October 16, 2009 site meeting states, "Department counsel Craig Lambeth explained that the Department does not enforce local zoning. New Hanover would need to obtain a court order against Gibraltar and the Department would review the order and determine what if any action would be taken."

After the Department issued the NPDES renewal on April 15, 2010, New Hanover did obtain a court order from the Montgomery County Court of Common Pleas enjoining Gibraltar Rock until it submitted a land development application to New Hanover Township and obtain

New Hanover's approval. Gibraltar Rock subsequently submitted a land development application to New Hanover and it is currently pending before the New Hanover Township Planning Commission. Gibraltar Rock is awaiting action on its application before continuing to activate its surface mine. The Department has not taken further action regarding Gibraltar Rock's permit since Gibraltar Rock was enjoined and Gibraltar Rock filed its pending land development application. The stipulated record establishes that the Department was fully aware of the disputes and litigation between Gibraltar Rock and New Hanover described above.

Relationship of Section 16 of the Noncoal Surface Mining Conservation and Reclamation Act and Acts 67/68 of 2000

New Hanover's appeal of the Department's renewal of Gibraltar Rock's NPDES permit for its proposed quarry presents the Board with one of the reoccurring issues in environmental regulation in Pennsylvania. That is how does the Department's statewide authority to regulate an activity from an environmental perspective affect or relate to a municipality's authority to regulate that activity from a local perspective. In this appeal, the activity is noncoal surface mining that is regulated under NSMCRA. 52 P.S. §§ 3301 *et seq.*[3]

Section 16 of NSMCRA establish state preemption over the local regulation of noncoal surface mining operations with one major exception. 52 P.S. § 3316. Section 16 provides:

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

Id. Thus, the General Assembly expressly preempted local regulation of noncoal surface mining except with respect to ordinance enacted pursuant to the Municipalities Planning Code (hereafter

[3] Noncoal surface mining is also regulated under other state statutes such as the Clean Streams Law, 35 P.S. § 691.1 *et seq.* These additional state laws tend to focus on a specific aspect of the mining operation.

"MPC"). 53 P.S. §§ 10101 *et seq.*[4] Section 16 was in the NSMCRA since it was initially enacted in 1984, and a similar provision was in SMCRA which regulated noncoal surface mining prior to the enactment of NSMCRA in 1984. *See* 52 P.S. § 1396.17a.

Section 16 does not impose any obligation on the Department to enforce local ordinances that are adopted pursuant to the MPC and are therefore not preempted. The Department has nevertheless included terms and conditions in its noncoal surface mining permits which inform permittees of their continuing obligation under Section 16 of NSMCRA to comply with local ordinances adopted pursuant to the MPC notwithstanding the state preemption of local regulation of noncoal surface mining. The noncoal surface mining permit that the Department issued to Gibraltar Rock in 2005 contains several terms and conditions that provide Gibraltar Rock with notice of its general obligation to comply with zoning ordinances adopted pursuant to the MPC.

Prior to 2000, as a general rule, the Department lacked express statutory authority to consider or rely upon local land development or zoning requirements when making decisions to permit or approve activities under the environmental statutes it administers. The General Assembly recognized that state agencies lacked such express authority and in 2000 the General Assembly provided state agencies with such authority as part of a general update of the Municipalities Planning Code. Act of June 22, 2000 (P.L. 483, No. 67) and Act of June 22, 2000 (P.L. 940 No. 68).[5] Act 67 of 2000 amended 53 P.S. § 11105 of the MPC, and Act 68 of 2000 amended 53 P.S. § 10619.2. Section 11105 provides, in part:

> Legal effect
> (a) Where municipalities have adopted a county plan or a multi-

[4] There are other environmental laws that provide for state preemption of local regulation of certain activities except for local ordinances adopted pursuant to the MPC. *See* 52 P.S. § 1396.17a (surface coal mining); 58 P.S. § 601.602 (Oil and gas);

[5] The General Assembly also enacted Act 127 of 2000 that amended the MPC. Act 127 fixed a cross-reference error in Act 68 that amended Section 10619.2. Act of December 20, 2000 P.L. 940, No. 127; 53 P.S. § 10619.2

> municipal 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:
>
> *   *   *   *   *
>
> (2) State agencies shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructures or facilities.

53 P.S. § 11105(a)(2). Section 10619.2(a) and (c) provides:

> (a) When a county adopts a comprehensive plan in accordance with sections 301 and 302 and any municipalities therein have adopted comprehensive plans and zoning ordinances in accordance with sections 301, 303(d) and 603(j), Commonwealth agencies shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities.
>
> *   *   *   *   *
>
> (c) When municipalities adopt a joint municipal zoning ordinance:
>
> (1) Commonwealth agencies shall consider and may rely upon the joint municipal zoning ordinance for the funding or permitting of infrastructure or facilities.
>
> (2) The municipalities may be agreement share tax revenues and fees remitted to municipalities located within the joint municipal zone.

53 P.S. §§ 10619.2(a) and (c). Under Sections 11105 and 10619.2(a) and (c) state agencies have the duty to consider local land use decisions and plans and may rely upon these local decisions when reviewing applications for funding or permitting of infrastructure or facilities. Section 11105 is applicable where municipalities have adopted a county plan or a multimunicipal plan under Article 11 of the MPC and participating municipalities have conformed their local plan and ordinances to the county or multimunicipal plan by implementing cooperative agreements

and adopting appropriate ordinances and resolutions. Section 10619.2(a) and (c) is applicable when either a county adopts comprehensive plans and zoning ordinances in accordance with applicable requirements or when municipalities adopt a joint municipal zoning ordinance. Thus, Acts 67 and 68 provide agencies with an express statutory duty to consider certain local land use decisions and discretionary authority to rely upon these local decisions in three specific situations when reviewing application for funding or permitting of infrastructures or facilities.

Acts 67 and 68 impose broad obligations on "Commonwealth agencies" that includes the Department. Acts 67 and 68 do not define their terms or provide specific direction to specific Commonwealth agencies regarding implementation of their new duty and authority so several agencies have developed written guidance that describes how the particular agency intends to satisfy its new statutory duty and exercise its new statutory authority. The Department is one of the Commonwealth agencies that has developed such a guidance document that is entitled "Policy for consideration of local comprehensive plans and zoning ordinances in DEP review of authorization for facilities and infrastructure." ("DEP Acts 67/68 Policy"). DEP Document No. 012-0200-001 (October 14, 2009).[6] The purpose of the Department's guidance is to provide direction to DEP staff, applicants and local government for the implementation of DEP's programs and the purpose of Acts 67/68 is to avoid or minimize conflicts between Department permitting decisions and local land use decisions. *See Berks County v. Dep't of Envtl. Prot.*, 894 A.2d 183, 194 (Pa. Cmwlth. 2006), *appeal denied*, 907 A.2d 1104 (Pa. 2006). ("The purpose of the Act 67/68 review in this case was to 'avoid conflicts' between local land use and permits

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[6] The Department developed an interim guidance document shortly after Acts 67/68 became effective in 2000 which was subsequently replaced by a final guidance shortly thereafter. The Department has revised its guidance several times since 2000 and the latest revisions became effective on August 19, 2009. This version of the Department's Acts 67/68 guidance was in effect when the Department renewed the NPDES permit. *Available at* http://www.elibrary.dep.state.pa.us/dsweb/View/Collection-8309.

issued by the [Department].")

Applicability of Acts 67/68 to this appeal

Under Acts 67/68 of 2000 state agencies, such as the Department, have new authority and obligations when reviewing applications for funding or permitting of infrastructure or facilities under certain circumstances. Although New Hanover's briefs are not entirely clear on this point, it appears that New Hanover believes that the Department failed to comply with its obligations under Acts 67/68 when it reissued and renewed the NPDES permit under appeal rather than suspending review of the renewal application or denying the application in light of the outstanding unresolved zoning and land use issues regarding Gibraltar Rock's proposed noncoal surface mine.

The Department and Gibraltar Rock make similar arguments regarding New Hanover's use of Acts 67/68 as a basis for objection. Both assert that New Hanover waived this argument because these acts were not specifically mentioned in New Hanover's notice of appeal. In addition, Gibraltar Rock asserts that even if the argument was not waived, the stipulated record does not contain sufficient evidence to allow the Board to decide whether Acts 67/68 are applicable to the facts of this case. Finally, the Department and Gibraltar Rock assert that the Department took appropriate action under the circumstances of this case and that it was not required to suspend review of Gibraltar Rock's application to renew its NPDES permit under Acts 67/68 and the caselaw developed under it. The Board will address these arguments in order.

The Department and Gibraltar Rock correctly state that the Board's rules require an appellant's notice of appeal to contain specific factual or legal objections to the Department's action. 25 Pa. Code § 1021.51(e). Any issues not raised in the notice of appeal are waived.

Pennsylvania Game Comm'n v. Dep't of Envtl. Res., 509 A.2d 877 (Pa. Cmwlth. 1986). The Board has, however, applied this rule with some discretion as Judge Labuskes stated in *Rhodes et al. v. DEP*, 2009 EHB 325, 327:

> It is a longstanding rule that allegations not raised in the notice of appeal are waived. *See Fuller v. DER*, 599 A.2d 248 (Pa. Cmwlth. 1991); *Halvard Alexander v. DEP*, 2006 EHB 306; *Chippewa Hazardous Waste, Inc. v. DEP*, 2004 EHB 287, *aff'd*, 971 C.D. 2004 (Pa. Cmwlth., October 28, 2004); *Moosic Lakes Club v. DEP*, 2002 EHB 396. However, given the strict requirement to file a notice of appeal within 30 days of receiving notice of the Department's action and our general distaste for trap-door litigation, we have been relatively indulgent when it comes to interpreting less than precise notices of appeal. So long as an issue falls within the scope of a broadly worded objection found in the notice of appeal, or the "genre of the issue" in question was contained in the notice of appeal, we will not readily conclude that there has been a waiver. *Angela Cres Trust v. DEP*, 2007 EHB 595, 600-01; *Ainjar Trust v. DEP*, 2001 EHB 59, 66, *aff'd*, 806 A.2d 402 (Pa. Cmwlth. 2002); *Jefferson County Board of Commissioners v. DEP*, 1996 EHB 997, 1005. *See also Croner, Inc. v. DER*, 598 A.2d 1183, 1187 (Pa. Cmwlth. 1991).

Thus, the Board needs to review New Hanover's notice of appeal to see if its specific Acts 67/68 objection falls within the scope of a broadly worded objection or the "genre of issue" that was contained in the notice of appeal.

New Hanover's notice of appeal contains 28 numbered paragraphs and the vast majority focus on the outstanding zoning and land use disputes between Gibraltar Rock and New Hanover and the Department's failure to recognize or properly appreciate the nature or extent of the ongoing disputes. New Hanover's notice of appeal clearly stated that Department decision to renew the NPDES permit in question was in direct violation of the Township zoning and land use ordinances. Acts 67/68, as described in this opinion, impose an obligation on the Department to consider local land use and zoning disputes when permitting infrastructure or facilities under certain circumstances and they allow the Department to rely upon local land use

and zoning when making permitting decisions. New Hanover's belated Acts 67/68 objection is of the same "genre" as the objections set forth in its notice of appeal, and therefore the Board finds that New Hanover has not waived this objection.

Gibraltar Rock correctly states that Acts 67/68 only apply in certain defined situations. Under Act 67 of 2000, Commonwealth agencies shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities where municipalities have adopted a county plan or multi-municipal plan under Article 11 of the MPC, and 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. 53 P.S. § 11105(a). Under Act 68 of 2000, Commonwealth agencies shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for funding or permitting of infrastructure or facilities when one of two situations arise: when a county adopts a comprehensive plan and municipalities adopt a comprehensive plan and zoning ordinances which are generally consistent; or where municipalities adopt joint municipal zoning ordinances. 53 P.S. § 10619.2 (a) and (c). The Department's statutory obligation to "consider" and new authority to "rely upon" comprehensive plans and zoning ordinances when permitting facilities, such as Gibraltar Rock's quarry, is only applicable under the three situations identified in Sections 619.2 or 1105.

Gibraltar Rock also correctly notes that the Stipulated Record is devoid of evidence to establish any of the three situations in which the Department "shall consider and may rely upon" comprehensive plans and zoning ordinances. New Hanover attempted to "salt" the stipulated record by attaching materials to its reply brief that could trigger the applicability of Acts 67/68

requirements. Gibraltar Rock has filed a motion to strike New Hanover's reply brief because it relies upon materials that are not part of the stipulated record. Gibraltar Rock's motion has some merit, however, the Board does not believe it is necessary to strike New Hanover's reply brief and attached materials because the stipulated record alone provides the evidence to address New Hanover's objections arising under Acts 67/68. The Board will neither strike New Hanover's reply brief nor consider the materials attached to it that attempt to trigger the applicability of Acts 67/68.

Gibraltar Rock suggests that the Board should dismiss New Hanover's Acts 67/68 objections because the record is devoid of any evidence to trigger the applicability of acts 67/68. While the Board agrees with Gibraltar Rock's assessment of the stipulated record, rejection of New Hanover's objection is only one possible outcome to resolve this issue because the Board could, in the alternative, reopen the record to allow the parties to provide evidence to address the applicability of Acts 67/68. This is apparently what New Hanover attempted to do when it belatedly attached materials to its reply brief that were not part of the stipulated record.

Upon review of the stipulated record, the Board finds that it does not need to defer the issue of applicability of Acts 67/68. The stipulated record contains sufficient evidence to decide whether the Department properly considered New Hanover's zoning ordinances and properly exercised its authority to rely upon these ordinances and the related disputes and litigation. For purposes of addressing New Hanover's Acts 67/68 objections, the Board will assume that the Department's mandatory obligation to "consider" and discretionary authority to "rely upon" had been triggered under either Sections 619.2 or 1105 of the MPC. As previously stated, if applicability is triggered by one of the three possible situations, a Commonwealth Agency such as the Department "shall consider and may rely upon" the comprehensive plan or zoning

ordinance when permitting facilities such as Gibraltar Rock's proposed quarry.

The Stipulated Record contains sufficient evidence to evaluate the Department's action under Acts 67/68

To satisfy its mandatory obligation under Acts 67/68, the Department had to "consider" local land use and zoning decisions when reviewing applications for permitting of facilities such as Gibraltar Rock's proposed quarry. In addition, Acts 67/68 provide the Department with discretionary authority to "rely upon" these local requirements when making its permit decisions. Assuming for the sake of discussion, that Acts 67/68 were applicable to the Department's decision to first issue and then renew the NPDES permit, the stipulated record contains sufficient evidence to decide that the Department did consider local zoning requirements in 2005 and again in 2010 when it made its permit decision and that its decision to renew the NPDES permit in 2010 was a lawful and reasonable exercise of the Department's discretion that was supported by the facts.[7]

There are no disputed facts in this appeal. The stipulated record contains all of the evidence that is required to decide this appeal. All of the parties agree that the Department was fully aware of the ongoing and longstanding disputes over the applicability of local land use and zoning requirements to the proposed quarry beginning with the period before the Department issued the Surface Mining Permit No. 4603031 in 2005. The Department was also aware of the more recent developments that occurred while it was reviewing Gibraltar Rock's application for renewal of its NPDES Permit No. PA00224308 and when it renewed the permit on April 15, 2010.

The Department considered these disputes and developments when it issued the initial permit in 2005 when it included terms and conditions in Gibraltar Rock's permit that reflected

[7] The Department's 2005 decision is not before the Board in this appeal. It is important background to the

the status of Gibraltar Rock's efforts to obtain local land use and zoning approval for its quarry. In 2005, Gibraltar Rock had two applications for approval pending before the New Hanover ZHB, and the Department relied upon these developments to condition Gibraltar Rock's mining permit as previously discussed. *See supra* p. 20-21.

The terms and conditions in its permit, informed Gibraltar Rock that, notwithstanding the issuance of the mining permit, no mining activities could occur within the light or heavy industrial zones unless approved by New Hanover Township or subsequent court decision. These site specific terms and conditions are evidence that the Department satisfied its statutory duty to considered New Hanover's local land use and zoning requirements and was aware of the disputes concerning their applicability. The conditions are also evidence that the Department relied upon the outstanding disputes to condition this mining permit.

After 2005 the Department remained fully aware of all of the subsequent developments in Gibraltar Rock's ongoing efforts to obtain local land use approvals for its proposed quarry. *See supra* p. 14, 20-22. When New Hanover contacted the Department in 2009 to assert that Gibraltar Rock was in violation of its surface mining permit condition, the Department conducted an investigation, met with the parties, issued a report documenting its investigation and notified New Hanover that the Department did not believe that Gibraltar Rock was in violation of its permit conditions.

When the Department renewed the NPDES portion of Gibraltar Rock's 2005 surface mining permit in April 2010, the stipulated record establishes that the Department was aware of all of the new developments. When it issued the NPDES permit renewal, the Department did not modify the mining permit conditions discussed above. These permit conditions remain in effect and they continue to serve the same purpose in 2010 that they served in 2005 when the

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Department's 2010 decision to renew the NPDES permit that is before the Board in this appeal.

Department issued Gibraltar Rock surface mining permit. These terms and conditions still inform Gibraltar Rock that notwithstanding the surface mining permit, no mining activities could occur within light or heavy industrial zones unless approved by New Hanover Township or subsequent court decision. Thus, the stipulated record before the Board established that the Department fully considered all of the numerous developments in Gibraltar Rock's ten year odyssey to obtain local land use approval, and the Department relied upon these developments to retain the permit conditions in the 2005 surface mining permit when it renewed the NPDES portion of that permit in 2010.

Permit conditions are one of several regulatory tools that the Department has to exercise its authority to "rely upon" local land use decisions. In its Act 67/68 statement of policy, the Department identifies several options to "rely upon" local land use requirements when a conflict is identified. According to the policy, the Department can, depending upon the facts of a particular case: 1) suspend review; 2) approve the authorization; 3) approve the authorization with conditions; and 4) deny the request. DEP Acts 67/68 Policy at page 7. In this case, the Department decided to issue or renew the mining permit with conditions. The Department's exercise of its authority in this manner in this situation is not an abuse of discretion and is lawful, reasonable and appropriate.

The Department did not abuse its discretion when it decided to renew Gibraltar Rock's NPDES permit in this case

Under Acts 67/68, the Department has discretionary authority to "rely upon" local land use decision when permitting facilities such as Gibraltar Rock's proposed quarry. The Department's brief describes the reasons why it decided to reissue the NPDES permit in the appeal rather than denying it or suspending review of it. The Department described the considerations that support suspensions of permit application review: early stages of permit

review involving large permit application; review is time consuming and resource intensive; review involves coordination with other agencies. The Board agrees that these are appropriate consideration to support suspension of review of an application. The Board also agrees with the Department that these considerations are not present here. A permit renewal involves limited review so it is not time consuming or resource intensive. There is also no indication of the need to coordinate review with other agencies. It was also reasonable and prudent to maintain the status quo of the Department's surface mining permit issued to Gibraltar Rock while the protracted local land use disputes and litigation were addressed at the local level. The Department's decision to renew Gibraltar Rock's NPDES permit was not unreasonable or an abuse of its discretion in light of the facts of this particular case.

New Hanover relies upon the Board's earlier decisions in *HJH, LLC v. DEP*, 2007 EHB 277 and *Tri-County Landfill, Inc. v. DEP*, 2010 EHB 747 to support its position that the Department should have suspended review of Gibraltar Rock's renewal application. Neither decision supports New Hanover's arguments. First, Commonwealth Court vacated the Board's *HJH, LLC* decision granting summary judgment and remanded the case with directions to quash the appeal. *HJH, LLC v. DEP*, 949 A.2d 350 (Pa. Cmwlth. 2008). Commonwealth Court held that the Department's decision to suspend review was not a final action and was not appealable. The Board's more recent *Tri-County Landfill, Inc.* decision applied this rule and dismissed the appeal from the Department's decision to suspend review of an application. Neither of the decisions provide any support for New Hanover's position that the Department should have suspended review of Gibraltar Rock's renewal application. Under these decisions a Department decision to suspend review of an application is not appealable, but under Acts 67/68 the Department has the discretion to decide whether and how to "rely upon" local land use decisions

or disputes when permitting facilities such as Gibraltar Rock's proposed quarry. As discussed above, the Department did not abuse its discretion when it decided to retain certain permit conditions and renew the NPDES permit.

Suspension of Department's review of application for renewal automatically extends term of NPDES permit

There is one additional point that the Board should address about the relief New Hanover requests. New Hanover's position that the Department should have suspended review of Gibraltar Rock's application for renewal of its NPDES permit is a classic hollow gesture based on the legal requirements of the NPDES permit programs. *See* 25 Pa. Code Chapter 92a. Chapter 92a includes specific requirements governing duration and renewal of NPDES permits. 25 Pa. Code §§ 92a.7 and 92a.75. These requirements provide for an automatic administrative extension for any NPDES permit if the permittee has made timely application for renewal until the Department takes final action on the pending permit application. Gibraltar Rock made timely application for renewal, and if the Board sustains New Hanover's appeal and directs the Department to suspend review of the renewal application, Gibraltar Rock's NPDES permit will be automatically extended by operation of law until the Department takes final action on the application. The current NPDES permit would remain in effect and the current status quo would be maintained because Gibraltar Rock would still have a valid NPDES permit during the permit of suspension. If we give New Hanover the relief it requests, the parties will end up in the same place they began by operation of law.

New Hanover's view of the Department's role in enforcing local land use and zoning requirements is fundamentally flawed

New Hanover has a different view of the Department's role regarding enforcement of local zoning requirements than the Department. New Hanover asserts that the various terms and

conditions of Gibraltar Rock's surface mining permit impose obligations on the Department to help New Hanover to achieve compliance with local zoning requirements that are applicable to Gibraltar Rock's proposed quarry. In a larger sense, this is the major bone of contention between the Department and New Hanover. The Department wants to remain on the sidelines while New Hanover and Gibraltar Rock resolve the local land development and zoning disputes that began in 2001 and are still raging. New Hanover wants the Department to leave the sidelines and to support New Hanover's efforts by denying the NPDES renewal application or suspending review of it. It is important to note that New Hanover has not raised a single objection to the actual terms or conditions of the NPDES permit. New Hanover's remains focused on its local land use and zoning disputes and litigation with Gibraltar Rock over the applicability these local requirements to Gibraltar Rock's proposed quarry.

In its reply brief, New Hanover identified the fundamental basis for its objection to the Department's renewal of Gibraltar Rock's NPDES permit. In discussing why New Hanover failed to appeal the issuance of the 2005 noncoal surface mining permit to the brief states: "However, the Township was under the impression that the Department would in fact enforce those very conditions the intention of which the Township believed was to ensure that no mining activity would commence until Gibraltar Rock obtain all requests Township land use approvals." New Hanover believed that the Department would help New Hanover enforce its applicable land use requirements and ensure that Gibraltar Rock obtain all local land use approvals. New Hanover still hopes or expects that the Department will help it enforce its local land use requirements.

The Department has a different view. There is a constant theme that runs through Special Conditions No. 3 and 4 and the Department's communications with New Hanover regarding

Gibraltar Rock's compliance with these conditions. The Department has expressed its position that it does not want to help enforce local zoning requirements that are applicable to Gibraltar Rock's proposed quarry. Special Condition No. 4 provides notice to Gibraltar Rock that it must comply with applicable zoning requirements, notwithstanding the general preemption of the local regulation of surface mining, but is not designed to make the Department the enforcer of local zoning requirements. Neither does Special Condition No. 3.

The Board agrees with the Department and believes that New Hanover's view of the Department's role in enforcing local land use requirement is fundamentally flawed. The Department has no role in enforcing local land use and zoning requirements. While the Department has authority to consider and rely upon local land use decision in limited circumstances when permitting facilities or infrastructure under Acts 67/68, this authority relates to the Department permitting authority, and it does not allow the Department to become an enforcer of local land use and zoning requirements as New Hanover asserts.

CONCLUSIONS OF LAW

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

2. New Hanover bears the burden of proof in this appeal. 25 Pa. Code § 1021.122.

3. The Department has the legal authority to take the action under appeal. 35 P.S. § 691.307.

4. The Department may renew a permit for a facility with conditions even if there are disputes concerning the applicability of local land use requirements to the permitted facility.

5. The Board reviews Department's decisions to ensure that they constitute lawful and reasonable exercises of the Department's discretion that are supported by the facts. *Wilson v. DEP*, 2010 EHB 827, 833.

6. The Department's action under appeal constitute lawful and reasonable exercise of the Department's discretion that are supported by the facts.

7. The Department was fully aware of and considered the disputes and litigation concerning the applicability of local land use requirements to Gibraltar Rock's proposed quarry when it renewed the NPDES permit.

8. The Department properly relied upon the disputes and litigation concerning the applicability of local land use requirements to Gibraltar Rock's proposed quarry when it renewed the NPDES permit portion of Gibraltar Rock's noncoal mining permit.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NEW HANOVER TOWNSHIP	:	
	:	
v.	:	
	:	**EHB Docket No. 2010-063-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GIBRALTAR ROCK, INC., Permittee	:	

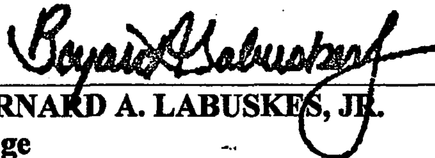
ORDER

AND NOW, this 19th day of September, 2011, it is hereby ordered that New Hanover Township's appeal is **dismissed.**

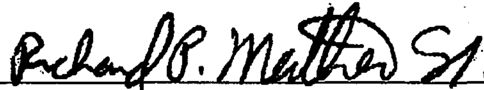
ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: September 19, 2011

c: **DEP Bureau of Litigation**
Attention: Connie Luckadoo, Library

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOCK NATIELLO and JACQUELINE NATIELLO	:	
	:	
v.	:	**EHB Docket No. 2007-217-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 21, 2011**

OPINION AND ORDER ON
PETITION TO REOPEN THE RECORD

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board has no authority to reopen a record after an adjudication is issued in which the Board does not retain jurisdiction. For that and other reasons, a petition to reopen the record filed almost three years after the Board's adjudication was issued is denied.

OPINION

In 1997, Jock and Jacqueline Natiello appealed an August 1, 2007 order of the Department of Environmental Protection that required them, among other things, to perform site characterization and corrective action activities on property formerly known as Jock's Service Station. Although the Natiellos did not dispute that the property is contaminated, they contended that they were no longer responsible for any corrective action, in part because they sold the property and paid some response costs. After a hearing, we issued an adjudication on November 24, 2008 dismissing the appeal. We did not retain jurisdiction. *Natiello v. DEP*, 2008 EHB 640. The Commonwealth Court affirmed the Board's adjudication at *Natiello v. DEP*, 990 A.2d 1196

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(Pa. Cmwlth. 2010), and the Supreme Court denied the Natiello's petition for allowance of appeal by order docketed as 267 MAL 2010 dated March 1, 2011.

The Department thereafter petitioned Commonwealth Court to enforce its 2007 order. The Court issued an order to enforce the Department's order on August 4, 2011. The requirements of the Commonwealth Court's August 4, 2011 order are based on the requirements in the Department's August 1, 2007 order. The Court has retained jurisdiction in the enforcement case.

Nearly three years after our adjudication, the Natiellos have now filed a petition to reopen the record, claiming they have recently found two letters previously buried in their attorney's files regarding settlement discussions. The Department opposes the petition on several grounds, suggesting that the petition has been filed merely in an effort to delay compliance with the Commonwealth Court's pending enforcement order.

We deny the petition to reopen the record. First and foremost, our rules only provide for reopening a record *before* we issue an adjudication. 25 Pa. Code § 1021.133. While we can retain jurisdiction in, for example, an adjudication remanding a matter to the Department, *Dauphin Meadows v. DEP*, 2001 EHB 116, we did not do so in our adjudication of the Natiello's appeal. The Natiellos' petition is approximately three years late.

Even if we had the authority to consider the Natiellos' petition, we would conclude that it is woefully deficient. The petition is not verified or supported by affidavits as required by our rules. 25 Pa. Code § 1021.133(d)(3) and (e). There is no certification by counsel that the petition is filed in good faith and not for the purpose of delay. 25 Pa. Code § 1021.133(d)(3). There is no memorandum in support of the petition, as required. 25 Pa. Code § 1021.95.

In addition to the multiple procedural shortcomings of the petition, it falls short

substantively as well. Disturbingly, at least one of the supposedly newly discovered letters was actually marked as an exhibit during the Board's 2008 proceeding. Further, the letters do not establish or contradict any material fact related to the Department's August 1, 2007 order. Rather, the letters merely evidence certain settlement negotiations which have no obvious relevance or significance. Finally, since the letters were in the attorney's files all along, they with minimal due diligence could have been discovered during the 2008 Board proceedings. Thus, the Natiellos' petition meets none of the substantive prerequisites for reconsideration. 25 Pa. Code § 1021.133.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOCK NATIELLO and JACQUELINE NATIELLO	:	
v.	:	**EHB Docket No. 2007-217-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

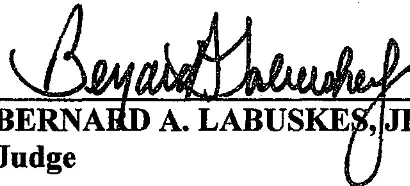
ORDER

AND NOW, this 21st day of September, 2011 it is hereby ordered that the Appellants' petition to reopen the record is **denied.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

DATED: September 21, 2011

c: **DEP, Bureau of Litigation:**
Connie Luckadoo, Library

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MOUNTAIN WATERSHED ASSOCIATION, INC. :
:
v. : **EHB Docket No. 2011-073-R**
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL : **Issued: September 22, 2011**
PROTECTION and AMERIKOHL MINING, :
INC., Permittee :

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board denies a Petition for Supersedeas following a hearing where the evidence does not show that mining operations will adversely impact the hydrologic balance or the watershed. Streams damaged by unknown persons prior to mining will be reconstructed following the completion of mining. Petitioner failed to show irreparable harm to itself or the environment by the mining.

OPINION

Presently before the Pennsylvania Environmental Hearing Board is the Appellant Mountain Watershed Association, Inc.'s (Mountain Watershed) Petition for Supersedeas. Mountain Watershed is requesting that the Environmental Hearing Board issue an Order prohibiting the Permittee, Amerikohl Mining, Inc. (Amerikohl) from conducting surface

coal mining operations pursuant to Surface Mine Permit No. 26090106. The permit was issued by the Pennsylvania Department of Environmental Protection on April 25, 2011. The permit authorized Amerikohl to conduct surface coal mining on a tract of land known as the Nicholson III Site in Springfield Township, Fayette County. Thereafter, Mountain Watershed filed a timely Notice of Appeal followed by a Petition for Supersedeas. The Board conducted a three day Supersedeas Hearing in Pittsburgh which concluded on July 18, 2011. On July 22, 2011, the parties filed briefs arguing their respective positions.

Standards for Granting a Supersedeas

A Supersedeas is an extraordinary remedy which will not be granted absent a clear demonstration of appropriate need. Kennedy v. DEP, 2008 EHB 423, 424; UMCO Energy, Inc. v. DEP, 2004 EHB 797, 802. The standards for granting petitions for supersedeas are set forth in Section 4(d)(1) of the Environmental Hearing Board Act, 35 P.S. Section 7514(d)(1), and Rule 1021.63 of the Board's Rules of Practice and Procedure. Basically the petitioner must prove that it will suffer irreparable harm and has a good chance of prevailing on the merits. In addition, the Board will also consider if there will be injury to the public or other parties, such as the permittee. The Board will not issue a Supersedeas "in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the Supersedeas would be in effect." 25 Pa. Code Section 1021.63(b). As pointed out in Mountain Watershed's Brief, a petitioner must credibly demonstrate each factor but make a strong showing that it is likely to succeed on the merits of its Appeal. *Pennsylvania Mining Corporation v.*

DEP, 1996 EHB 808, 810.

DISCUSSION

The testimony and evidence reveal that Mountain Watershed is a citizen's organization that has done a great deal of good in treating acid mine discharges and greatly improving the environment. Their wise use of limited funds has enabled them to partner with various entities, including the Pennsylvania Department of Environmental Protection, in improving the Indian Creek Watershed. Their involvement in this matter stems from this overarching and fundamental concern for the environment in southwestern Pennsylvania.

Two experienced and credible experts were called by Mountain Watershed, Mr. Phil Getty, a geologist and hydrogeologist, and Mr. Barry Sakal, a professional land surveyor. They testified as to their concerns regarding the mining operations of Amerikohl and its likely effects on various tributaries in the area of this surface mine. In its brief, Mountain Watershed's counsel focuses on the deplorable conditions of several streams which had been severely degraded prior to mining by what appears to be logging operations. However, no party presented evidence as to exactly how these unnamed tributaries were damaged and there certainly was no evidence that Amerikohl was responsible for such damage. Amerikohl presented strong testimony, by Mr. Dennis Noll and Mr. Charles Lightfoot, that once mining is completed the conditions surrounding the streams will be greatly improved and the stream channels will be reconstructed.

The evidence adduced during the three days of hearing point to a permit that was not issued until public comments were taken and addressed, changes were made in the

issued permit to make the mining operations more environmentally friendly, and Amerikohl is an experienced and capable mining company. This case is much different from *PDG v. DEP & Penn Future*, 2009 EHB 268. In that case, we granted summary judgment in favor of the Department of Environmental Protection and Penn Future because the developer was going to permanently destroy over one mile of streams. That is not the case here. Following the completion of mining operations and after the stream beds are reconstructed pursuant to the mining permit, the streams affected should be much better than before Amerikohl began its mining operations.

We hasten to add that we are not adopting or applying a net benefit test in reaching this decision. Instead, we are recognizing the evidence which shows the substantial impairment of some of the unnamed tributaries. We fail to see how these streams would ever "reconstruct themselves" when they are outside their stream banks and blocked by tire ruts and tree trunks. Some of the streams are not even streams in their present conditions.

We are not convinced based on the evidence presented at the Supersedeas Hearing that Mountain Watershed is likely to prevail on the merits. We are not sure based on the evidence presented at the hearing that the slopes in two areas exceed the regulatory standard of twenty degrees. Likewise, we remain unconvinced that Amerikohl's mining will result in adverse impacts to the groundwater. In this respect, we were more persuaded by the testimony of Department employees Paul Cestoni and Bernard Robb.

We also fail to see how Mountain Watershed and the public will be irreparably harmed by Amerikohl's mining. The evidence reflects a mining plan devised, reviewed,

and executed by experienced mining professionals which seems to be in accordance with the applicable regulations. There is nothing in Amerikohl's compliance history which causes us to question whether they can follow the rigorous permit conditions established by the Pennsylvania Department of Environmental Protection. Moreover, Mountain Watershed did not persuade us that the mining would adversely impact Indian Creek or the watershed.

Of course, Mountain Watershed may present evidence at the hearing on the merits that dissuades us from this belief but after three days of hearing these are the conclusions suggested by the evidence. Therefore, we will issue an appropriate Order denying the Petition for Supersedeas.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

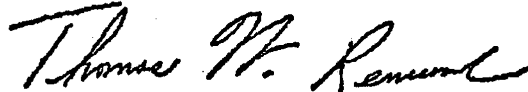
MOUNTAIN WATERSHED ASSOCIATION, INC.	:	
	:	
v.	:	**EHB Docket No. 2011-073-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERIKOHL MINING, INC., Permittee	:	

O R D E R

AND NOW, this 22nd day of September, 2011, following a three day Supersedeas Hearing and a careful review of the Parties' Briefs, it is ordered as follows:

1) The Petition for Supersedeas is **denied.**

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

DATED: September 22, 2011

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THOMAS PECKHAM	:	
	:	
v.	:	**EHB Docket No. 2011-097-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 30, 2011**

OPINION AND ORDER ON
MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board dismisses an untimely appeal for lack of jurisdiction.

OPINION

On April 2, 2010, the Department of Environmental Protection (the "Department") issued an order to Thomas W. Peckham d/b/a Moon Meadows ("Peckham") pursuant to the Storage Tank and Spill Prevention Act, 35 P.S. § 6021.101 *et seq*. Asserting that he received notice of the Department's order on May 27, 2011, Peckham filed a notice of appeal with the Board on June 24, 2011. On August 23, 2011, the Department filed a motion to dismiss on the basis that the Board lacks jurisdiction to hear the appeal because Peckham had in fact received notice of the order more than 30 days before he filed an appeal. Peckham has not responded to the Department's motion.

The Board evaluates motions to dismiss in the light most favorable to the non-moving party and may grant the motion against that party where there are no material facts in dispute and

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the moving party is entitled to judgment as a matter of law. *GEC Enterprises v. DEP*, 2010 EHB 305, 308; *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Michael Butler v. DEP*, 2008 EHB 118, 119. Where, as here, a non-moving party fails to respond to a motion to dismiss filed against it, the Board deems the properly pleaded and supported facts in the motion to be true. 25 Pa. Code § 1021.91(f); *Tanner v. DEP*, 2006 EHB 468, 469; *Gary Berkley Trucking, Inc. v. DEP*, 2006 EHB 330, 332.

The Department's uncontested motion demonstrates that this appeal must be dismissed as untimely. As exhibits to its motion, the Department filed three affidavits attesting to prior instances that it provided Peckham with notice of the order issued by the Department. Two of these affidavits document separate instances that the Department provided personal service of the order to Peckham by hand delivering it to him during other interactions with the Department, the last of these having occurred on May 18, 2011, 38 days before Peckham's notice of appeal was filed with the Board. Under the Board's rules, the recipient of a Departmental action has 30 days to file an appeal with the Board. 25 Pa. Code § 1021.52(a)(1); *Greenridge Reclamation LLC v. DEP*, 2005 EHB 390, 391; *Martz v. DEP*, 2005 EHB 349, 350; *Pikitus v. DEP*, 2005 EHB 354, 357. Where an appeal is filed beyond the 30 day deadline, the Board, absent a limited exception for *nunc pro tunc* appeals not applicable here, is deprived of jurisdiction to hear the appeal. *Rostosky v. DER*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976); *Pikitus*, 2005 EHB at 357; *Burnside Township v. DEP*, 2002 EHB 700, 702; *Sweeney v. DER*, 1995 EHB 544, 546. As a consequence, the Board, lacking jurisdiction over this appeal, must grant the Department's motion to dismiss. *McKissick Trucking v. DEP*, EHB Docket No. 2011-007-M (March 8, 2011); *Spencer v. DEP*, 2008 EHB 573, 575; *Pedler v. DEP*, 2004 EHB 852, 854.

Accordingly, we issue the Order that follows.

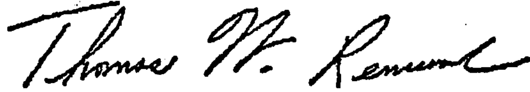
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THOMAS PECKHAM	:	
	:	
v.	:	**EHB Docket No. 2011-097-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 30th day of September, 2011, Department's motion to dismiss is hereby **granted**. This appeal is dismissed.

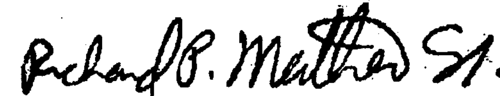
ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: September 30, 2011

c: **DEP Bureau of Litigation:**
Attention: Connie Luckadoo, Library

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WESTMORELAND LAND, LLC	:	
	:	
v.	:	**EHB Docket No. 2011-037-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE BARON GROUP, INC., Permittee	:	**Issued: October 3, 2011**

OPINION AND ORDER
ON PETITION FOR SUPERSEDEAS

By Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board denies a Petition for Supersedeas because Appellant failed to show that it was likely to succeed on the merits or that it would suffer irreparable harm.

OPINION

Presently before the Pennsylvania Environmental Hearing Board is the Appellant's, Westmoreland Land, LLC (Westmoreland Land), Petition for Supersedeas. Westmoreland Land purchased 136 acres of property in Westmoreland County which evidently was subject to an oil and gas lease in favor of the Permittee, The Baron Group, Inc. (The Baron Group). The Baron Group secured an oil and gas permit on February 17, 2011 issued by the Pennsylvania Department of Environmental Protection (DEP, The Department, or Department of Environmental Protection). This permit is the subject of this appeal and the Petition for

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Supersedeas. The Baron Group claims to have entered into an oil and gas lease on January 19, 2005 with the previous owners of the property which we are told is the subject of litigation in the Court of Common Pleas of Westmoreland County between The Baron Group and Westmoreland Land.

Westmoreland Land is a limited liability company with its principal place of business in Omaha, Nebraska. It is engaged in the business of constructing power generation facilities. Westmoreland Land intends to construct a 950-megawatt gas-fired electric power generation plant (Power Plant) on the property. This Power Plant will cost approximately $750 million to construct which will result in 300 construction jobs. It will also provide 30 new permanent jobs once in operation and will also result in upgrades to the local water authority paid for by Westmoreland Land.

Westmoreland Land argues that The Baron's Group gas well will negatively impact their plans for the power plant because it is situated almost in the middle of the "plant's footprint." The Baron Group contends that it has the legal right under its oil and gas lease to extract any natural gas on the property and there is no guarantee that the power plant will ever be built. Moreover, The Baron Group argues that Westmoreland Land bought the property with full knowledge of the Permittee's lease hold interest in the oil and gas rights. The Baron Group maintains that Westmoreland Land cannot now claim irreparable harm where it is simply exercising its rights to extract the natural gas under the property. It further insists that the topography of the site makes it much more difficult to drill in areas not within the proposed power plant's footprint. In addition, The Baron Group points out that it earlier moved the location of one of its wells at Westmoreland Land's request but that the Appellant was slow to reimburse the Permittee for its increased costs in drilling the well under more difficult

conditions.

On August 19, 2011 Westmoreland Land filed a Petition for Supersedeas together with an Application for a Temporary Supersedeas. The Pennsylvania Environmental Hearing Board held a conference with counsel later that afternoon and after hearing extensive argument, denied the Application for a Temporary Supersedeas by Order issued on August 19, 2011. A Supersedeas Hearing was held on September 1, 2011 in the Pennsylvania Environmental Hearing Board's Court Facility located in Piatt Place in Pittsburgh, Pennsylvania.

DISCUSSION

The circumstances affecting the grant or denial of a Supersedeas Petition are set forth at 25 Pa. Code Section 1021.63:

> (a) The Board, in granting or denying a supersedeas, will be guided by relevant judicial precedent and the Board's own precedent. Among the factors to be considered:
>
> (1) Irreparable harm to the petitioner.
> (2) The likelihood of the petitioner prevailing on the merits.
> (3) The likelihood of injury to the public or other parties, such as the permittee in third party appeals.
>
> (b) A supersedeas will not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect.

A Supersedeas is an extraordinary remedy which will not be granted absent a clear demonstration of appropriate need. *Kennedy v. DEP,* 2008 EHB 423, 424; *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 802; *Tinicum Township v. DEP*, 2002 EHB 822, 827; *Global Eco-Logical Services v. DEP*, 1999 EHB 649, 651; *Oley Township v. DEP, 1996 EHB 1359, 1361-1362.* Westmoreland Land has the burden of proof. *Eagle Environmental II, L.P. v. DEP,* 2006

EHB 439, 447; *Pennsylvania Fish & Boat Commission v. DEP,* 2004 EHB 797, 802. The issuance of a supersedeas is committed to the Board's discretion based upon a balancing of the regulatory criteria. *Pennsy Supply, Inc. v. DEP & McDermitt Concrete, Inc.,* 2008 EHB 411, 413. Although the Board will not issue a Supersedeas where pollution or injury to the public exists or is threatened we find that there would be no pollution or injury to the public here if we were to issue a Supersedeas. It is important to remember that our ruling on a Supersedeas Petition is merely a prediction about who is likely to prevail at the hearing on the merits. *Neubert v. DEP,* 2005 EHB 598, 608; *UMCO Energy, Inc. v. DEP*, 2004 EHB 832, 839-840.

Mr. Robert Ramaekers, Vice-President of Development for Appellant's parent company, Tenaska, testified extensively about the background and intent to develop the property into the site for a power plant which would provide clean power to the people of Western Pennsylvania. Mr. Ramaekers indicated that once the federal EPA enacts more stringent air pollution regulations it will "drive significant coal retirements in this area" resulting in the replacement of some of the older coal fired plants with gas-fired cycle capacity.

According to Mr. Ramaekers, Westmoreland Land has spent $6 million to date on purchasing and developing the site. Mr. Ramaekers candidly admitted that Westmoreland Land was aware of The Baron Group's oil and gas lease but felt that the parties would be able to accommodate each other's interests in the property. Mr. Ramaekers testified that if The Baron Group's gas well was allowed to develop at its present location it would force Westmoreland Land to redesign its power plant plans at the cost of both time and millions of dollars.

We found the testimony of The Baron Group's President, Mr. Michael Angerman, most persuasive on the issues of both irreparable harm and success on the merits. Mr. Angerman is a licensed professional geologist. He testified as to wells that have been drilled and later capped

which allowed the development of commercial properties including a Mall, the Pittsburgh Mills Development. In addition, the testimony of Department of Environmental Protection employees Alan Eichler and Dennis Stivanson supports the actions of the Department in issuing the Oil & Gas permit. Mr. Stivanson's detailed testimony regarding the "race" The Baron Group and Westmoreland Land engaged in clearly shows that The Baron Group drilled its gas well before the water well was operational.

After listening to the testimony and reviewing the exhibits we conclude that Westmoreland Land did not meet the requisite burden of proof which would convince us to issue a Supersedeas. It appears that The Baron Group has a *prima facie* right to extract natural gas from the subject property. This was basically conceded by Westmoreland Land in its testimony. In addition, we are not convinced that this unbuilt power plant for which a permit has not yet even been applied for is a public resource at least at this stage. Westmoreland Land also lost a race with The Baron Group to construct its water well before The Baron Group drilled its natural gas well. Westmoreland Land drilled a water well to connect to a construction trailer which it claims is used by its land agent approximately ten hours per week. Mr. Stivanson's testimony leads us to believe that this water well was drilled simply to try and impose a legal roadblock to the operation of the gas well as it is within 200 feet of the well. Nevertheless, it is not an existing water well as the gas well was drilled just before the water well was operational. At this stage of the case Westmoreland Land has failed to prove that it will be irreparably harmed or that it will be successful on the merits of its appeal. They have failed to show that the Department erred in issuing an oil and gas permit to The Baron Group.

We heard testimony of gamesmanship and conduct on behalf of both The Baron Group and Westmoreland Land which cost both companies thousands of dollars and resulted in the

utilization of scarce public resources of both the Pennsylvania Department of Environmental Protection and the Pennsylvania Environmental Hearing Board to address and decide this part of the case. Both the Appellant and Permittee are not without fault. The testimony revealed an avalanche of well applications by The Baron Group which tied up Westmoreland Land when only one application was actually filed with the Department. We can only assume that The Baron Group was trying to bury Westmoreland Land in paper and to force them to address fictional well applications. Likewise, Westmoreland Land blocked an earlier well from going forward by placing a work trailer and outhouse directly over the proposed drill site. The Baron Group's current well was sited 201 feet from the Westmoreland Land trailer (it must be at least 200 feet away). We heard testimony of trucks used to block access to the site and wires to generators being cut. Westmoreland Land, despite our consistent and clear rulings in keeping evidence of settlement negotiations between the parties off the record, eventually succeeded in making sure the Board heard an offer of settlement that it evidently made to The Baron Group. Although we sustained an objection to this testimony we are not happy that we heard it.

Although we are critical of these instances of gamesmanship of The Baron Group and Westmoreland Land we need to acknowledge the professionalism of the hard working employees of the Pennsylvania Department of Environmental Protection. Both the program people and counsel have acted fairly and responsibly in their actions and dealings with the parties and in their presentment of the Department's case before the Pennsylvania Environmental Hearing Board. Probably the best thing for all involved would be for the Pennsylvania Environmental Hearing Board (or the Westmoreland Court of Common Pleas) to conduct a settlement conference and attempt to resolve this case to the mutual satisfaction of the parties. In the meantime, we will issue an Order denying the Petition for Supersedeas.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

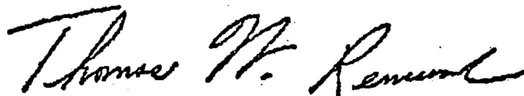
WESTMORELAND LAND, LLC	:	
	:	
v.	:	**EHB Docket No. 2011-037-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE BARON GROUP, INC., Permittee	:	

ORDER

AND NOW, this 3rd day of October, 2011, following a Supersedeas Hearing, it is ordered as follows:

1) Appellant's Petition for Supersedeas is **denied**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

DATED: October 3, 2011

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RAUSCH CREEK LAND, LP	:	
	:	
v.	:	**EHB Docket No. 2011-137-L**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and PORTER ASSOCIATES, INC., Permittee	:	**Issued: October 6, 2011**

OPINION AND ORDER
ON PETITION FOR SUPERSEDEAS

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board supersedes the renewal of a surface mining permit because the petitioner is likely to be able to show that the permit, among other things, unlawfully authorizes ash disposal in abandoned mine lands in excess of approximate original contour and authorizes mining activity in an area where there is a legitimate dispute about the operator's legal right to mine.

OPINION

Rausch Creek Land, LP ("Rausch Creek") has petitioned this Board to supersede the Department of Environmental Protection's (the "Department's") latest renewal of Porter Associates, Inc.'s ("Porter's") Surface Mining Permit (No. 54890105R4) authorizing Porter to fill abandoned mine lands located on Rausch Creek's property in Porter Township, Schuylkill County with coal ash. The renewed permit, which incorporates approval of Porter's Annual Bond Review ("ABR") for 2010, for the first time authorizes Porter to fill what is referred to as the Primrose Pit on the site. Up to this point, Porter was working in the Main Pit area. Although the

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http://ehb.courtapps.com

Main Pit is filled, and indeed overfilled, the renewal authorizes Porter to continue to place ash in that area while the Primrose Pit is prepared for ash placement.

Rausch Creek petitions us to supersede the permit for five reasons. It argues that (1) Porter has no legal right to place ash in the Primrose Pit area, (2) the Department impermissibly approved reclamation grades that are substantially higher than approximate original contour ("AOC"), (3) the permit does not authorize a discharge, so there is no legal means for Porter to pump and treat the accumulated water located in the Primrose Pit, (4) the reclamation bond posted for the site is inadequate, and (5) the erosion and sedimentation (E&S") controls for the site are inadequate.

After a conference call on September 15, 2011, we granted Rausch Creek's petition for a temporary supersedeas. We conducted a site visit on September 16. We extended the temporary supersedeas at the start of our hearing on the petition for supersedeas on September 26. In violation of our order, Porter deposited significant quantities of coal ash on the site on September 26. We concluded the hearing on September 28. For the reasons that follow, we will grant Rausch Creek's petition and enter a supersedeas in this matter pending the hearing on the merits.

A supersedeas is an extraordinary remedy that will not be granted absent a clear demonstration of appropriate need. *UMCO Energy, Inc. v. DEP,* 2004 EHB 797, 802; *Tinicum Township v. DEP,* 2002 EHB 822, 827; *Global Eco-Logical Services v. DEP,* 1999 EHB 649, 651; *Oley Township v. DEP,* 1996 EHB 1359, 1361-1362. Our rules provide that the granting or denying of a supersedeas will be guided by relevant judicial precedent and the Board's own precedent. 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.63(a). Among the factors to be considered are (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties. 35 P.S. § 7514(d); 25 Pa.

Code § 1021.63(a)(1)-(3); *Neubert v. DEP,* 2005 EHB 598, 601. The issuance of a supersedeas is committed to the Board's discretion based upon a balancing of all of the statutory criteria. *UMCO Energy, Inc.,* 2004 EHB at 802; *Global Eco-Logical Services, supra; Svonavec, Inc. v. DEP,* 1998 EHB 417, 420. *See also Pennsylvania PUC v. Process Gas Consumers Group,* 467 A.2d 805, 809 (Pa. 1983). In order for the Board to grant a supersedeas, a petitioner must make a credible showing on each of the three regulatory criteria. *Neubert v. DEP,* 2005 EHB 598, 601; *Pennsylvania Mines Corporation,* 1996 EHB 808, 810; *Lower Providence Township v. DER,* 1986 EHB 395, 397. However, where unlawful activity is occurring or is threatened or there is a violation of express statutory or regulatory provisions, there is irreparable harm *per se*. *Pleasant Hills Construction Co. v. Public Auditorium Authority of Pittsburgh,* 782 A.2d 68, 79 (Pa. Cmwlth. 2001); *Council 13, A.F.S.C.M.E., AFL-CIO v. Casey,* 595 A.2d 670 (Pa. Cmwlth. 1991); *Tinicum Twp. v. DEP*, 2002 EHB 822, 826; *Harriman Coal Corp. v. DEP*, 2001 EHB 234, 252.

Likelihood of Success

The Lease Issue

Rausch Creek's first objection is that the Department erred by allowing Porter to mine in the Primrose Pit because Porter has no right to do so under its lease with Rausch Creek. There is no question that the Department must ensure that a permit applicant has the legal right to enter and commence coal mining activities within a permit area. 52 P.S. § 1396.4(a)(2)(F); 25 Pa. Code § 86.64. *See Pond Reclamation Company v. DEP*, 1997 EHB 468, 474; *Body v. DER,* 1992 EHB 758, 760-61. It is equally well settled, however, that the Department may not actually resolve contract disputes or questions of title. *Chestnut Ridge Conservancy v. DEP*, 1998 EHB 217, 229; *Coolspring Stone Supply v. DEP*, 1998 EHB 209, 213. The question, then, is: What is

the Department supposed to do when it is informed that a dispute exists regarding the applicant's right of access?

The Department is not required to independently search out whether a dispute exists in every case, *Reading Anthracite Co. v. DEP*, 1998 EHB 112, 123, and information that a dispute exists does not in and of itself preclude the Department from issuing the permit as a matter of law, *Columbia Gas Transmission Corporation v. DEP*, 2003 EHB 676, 698; *Coolspring Stone Supply*, 1998 EHB at 213-14; *Chestnut Ridge*, 1998 EHB at 229-30. However, once the Department is advised of a dispute, it has a duty to look beyond the face of the permit application and assess whether the dispute is legitimate, i.e., whether the dispute puts the applicant's right of entry in doubt. If the right to mine is doubtful, the Department must err on the side of caution. It may not issue the permit, or may not issue it without an appropriate condition, until the dispute is resolved. *Empire Coal Mining & Development v. DER*, 678 A.2d 1218, 1222-23 (Pa. Cmwlth. 1996.); *Lucchino v. DER*, 1994 EHB 380, 399.

The Department must err on the side of caution for several reasons. Most obviously, there should be no question that an applicant has the right to mine, or perhaps more importantly from the Commonwealth's perspective reclaim, a particular parcel. Equally as obvious, the Department ought to respect the rights of landowners. Furthermore, because the Department has neither the authority nor the resources and expertise to resolve property disputes, it is appropriate to cut off its responsibility at the point of determining no more than that there is a legitimate dispute. Just as the Department must avoid becoming a statewide zoning hearing board, *New Hanover Township v. DEP*, EHB Docket No. 2010-063-M (Adjudication, September 19, 2011), the Department must avoid becoming a statewide arbiter of property disputes. Still further, allowing the Department to delve into more detailed analyses of property claims and make

permitting decisions based upon those analyses creates a risk of conflicting results between the Department and the fora who should be deciding such matters. Finally, mining is for all intents and purposes irreversible. Doubts should be resolved *before* it is allowed to proceed, not after.

The Department was informed in this case that there is a lease dispute between Rausch Creek, the property owner, and Porter, the lessee. Rausch Creek advised the Department that there are two basic reasons why it believes that Porter has no right to continue operations. First, Rausch Creek claims that Porter has defaulted on the lease and Porter no longer has a right to add ash *anywhere* on the site. Secondly, it disputes Porter's right to extend its activity for the first time into the Primrose Pit. There are four actions pending in the Schuylkill County Court of Common Pleas regarding these claims.

We are not in a position at this juncture to evaluate Rausch Creek's first claim regarding a general default and termination of the lease. We are, however, able to conclude that Rausch Creek is likely to succeed in persuading us that Porter's right to enter the Primrose Pit is doubtful. The lease says that "Lessee [Porter] shall have the exclusive rights to deposit ash and mine anthracite coal by surface mining methods within designated areas of the demised premises … ." The lease says that the demised premises are described in an "Exhibit A." The parties dispute the identity of this Exhibit A. Rausch Creek presented a map marked Exhibit A, which was prepared by Kocher Coal Company, Rausch Creek's predecessor, at the time the lease was being negotiated. The map's legend says, "This map known as Exhibit 'A' is to accompany an agreement between KOCHER COAL COMPANY and PORTER ASSOCIATES, INC. and is acknowledged as being a part to said agreement by the following signatures." Signature blocks follow, but the map is not signed. (Rausch Creek Land Exhibit ("RCL Ex.") 3.) The map depicts a "Lease Area known as Demised Premises." Within that area, a significantly smaller

area is delineated as the "Designated Ash Disposal Area." Pointedly, the "Designated Ash Disposal Area" does not include the Primrose Pit.

Porter says the map is not the real Exhibit A. It has instead shown us a metes and bounds narrative captioned "Exhibit 'A'," and a small schematic captioned "Map of Exhibit A." The schematic shows a large tract marked "property boundary" and a slightly smaller tract marked "Exhibit A boundary." (Porter Exhibit ("P. Ex.") 2, 3.) Although this area includes the Primrose Pit, these exhibits are not particularly helpful because they merely describe the "Demised Premises," and there is no dispute that the demised premises encompass essentially the entire tract. However, the lease does not grant to Porter the right to deposit ash on the entire tract. Rather, it only grants that right within *designated areas* of the Demised Premises. If Rausch Creek's "Exhibit A" is the true Exhibit A, the delineation of a designated area on that map, which very clearly excludes the Primrose Pit, would seem to be rather detrimental to Porter's claim.

Complicating matters further is Paragraph 7 of the lease, which provides in part that,

> Lessor [Kocher Coal, Rausch Creek's predecessor] shall retain the right to deposit coal re[f]use in the Holmes Pit and abandoned Primrose stripping as is described in Surface Mining Permit 54890105.

Rausch Creek says that this language provides further support for its claim that only it may deposit ash in the Primrose Pit. Porter counters that Rausch Creek's reservation is not exclusive. We would not ordinarily expect that two unrelated operators would be allowed to operate in the same pit under the same permit. (Notes of Transcript page ("T.") 357.) This may have been anticipated by Paragraph 7's language that "Lessee [Porter] agrees to grade coal refuse with Lessee's equipment at no charge... ." What is not clear from Paragraph 7's language is whether Porter can *also* deposit *its* ash in the Primrose Pit. In Porter's view, the fact that the lease does

not appear to give Porter the *exclusive* right to use the Primrose Pit does not necessarily mean that it has no right to use that pit.

At this point in the discussion it should be abundantly clear that Porter does not enjoy an "express grant" to go into the Primrose Pit. *Empire Coal,* 678 A.2d at 1223. To the contrary, its grant is clearly the subject of legitimate dispute. This is where the Department's analysis should have ended. The Court of Common Pleas must resolve this dispute, not the Department and not this Board. Porter, as an applicant with a doubtful grant, "is free to seek a declaration in common pleas court concerning the precise nature of the estate it holds." *Empire Coal,* 678 A.2d at 1223.

This case perfectly illustrates the wisdom of the proscription against the Department and the Board getting into the middle of unresolved property disputes. By issuing the permit, the Department inevitably and unavoidably immersed both itself and us in what is essentially a private dispute. No environmental protection objective is being served. For the reasons mentioned above--ensuring the Commonwealth's access to the site and ability to order the operator to remediate the site, respecting the rights of the landowner, avoiding the diversion of the agency's resources, avoiding conflicting results, and halting irreversible activity that may eventually prove to be unauthorized--we discern no reason why the Department would not want to wait for the Court of Common Pleas to act.

The Department[1] argued at the supersedeas hearing that it is not taking sides, but rather, simply moving a permit renewal application along as it must. We view this position as disingenuous, and emblematic of the Department's rather casual approach to the landowner's rights and interests in this matter. As noted above, the Department has not given us any

[1] The Department and Porter made the same arguments at the hearing. When we refer herein to the Department's argument, we include Porter.

environmental reason to rush forward into the Primrose Pit in the face of pending litigation. By issuing the permit, the Department has as a practical matter put Rausch Creek at a disadvantage in the Common Pleas litigation. By issuing the permit, the Department has effectively eliminated Rausch Creek's reservation of rights because the pit, which is not that large, could very well be filled before the Court has an opportunity to act.

We were left at the conclusion of the supersedeas hearing with the sense that the Department discounted Rausch Creek's concerns on the lease issue, and more generally, because Rausch Creek is a competitor of Porter and thus has ulterior motives. The competition between competitors would not seem to be the Department's concern, but putting that aside, Rausch Creek may be a competitor, but it is also the landowner of the site where the ash disposal is occurring. As the landowner, Rausch Creek may have potential liability for future environmental problems at the site long after Porter is gone. *See* 35 P.S. §§ 691.315, 691.316, and 691.401; *Diess v. PennDOT*, 935 A.2d 895, 910-11 (Pa. Cmwlth. 2007); *Ingram v. DER*, 595 A.2d 733, 739 (Pa. Cmwlth. 1991). Rausch Creek is also an adjacent operator and as such may have potential liability for pollutional discharges from its site that are originating from the Porter operation. *North Cambria Fuel Co. v. DER,* 621 A.2d 1155, 1159-60 (Pa. Cmwlth. 1993), *aff'd*, 648 A.2d 775 (Pa. 1994).

In the face of these concerns, the Department has all but ignored Rausch Creek. At one point when Rausch Creek asked to meet with the Department, the Department reluctantly responded that it would give Rausch Creek "thirty minutes" to state its case. The Department complained that Rausch Creek overwhelmed it with its engineering analyses showing the site is overfilled. It has not even afforded Rausch Creek the common courtesy of copying it in on its official correspondence regarding the site. The Department's obligation to consider and respect

the rights of landowners is no less important than its obligation to work with operators. The Department's conduct in this case does not leave us with the impression that it has acted in a neutral manner.

The Department relies heavily upon the consent of landowner that it received from Kocher Coal before issuing the original permit to Porter in 1990. However, the regulations require a consent of landowner *and* documentary proof of a right to mine. 25 Pa. Code § 86.64(a). That is because the consent of landowner does not by itself create a right to mine if such a property right does not otherwise exist, and the landowner consent form "shall not be construed to alter or constrain the contractual agreements and rights of the parties thereto." 52 P.S. § 1396.4(a)(2)(F)(ii). Furthermore, and as previously noted, the Department must go beyond the permit application itself when presented with evidence of a legitimate access dispute. *Coolspring Spring Stone, supra.*

To the extent the Department argues that it may disregard a property dispute that arises after issuance of the original permit, it is wrong. The Department does not have an independent obligation to verify access rights each time a permit is renewed, but if a legitimate property dispute is brought to the Department's attention in connection with a permit renewal, modification, or correction that will expand the operator's ability to mine into a new area, the Department cannot simply ignore it. And to its credit, it did not ignore it in this case.

The Department notes that the Court of Common Pleas decided not to issue a preliminary injunction in Rausch Creek's lawsuit against Porter regarding the Primrose Pit and suggests that we are somehow bound by that ruling. The Court, however, very clearly did not rule that Porter has access to the Primrose Pit. To the contrary, it simply ruled that an equitable remedy was not necessary because an adequate remedy was available in damages if Porter wrongfully fills the

pit. (P. Ex. 5, 6a.) The Court's preliminary injunction ruling obviously does not represent the Court's final resolution. To the extent the Department asserts the preliminary injunction ruling has *res judicata* effect, it is incorrect. As we have previously written:

> *Res judicata* encompasses the effect one judgment has upon a subsequent trial or proceeding. *Fiore v. DEP,* 508 A.2d 371, 374 (Pa. Cmwlth. 1986); *Solomon v. DEP,* 2000 EHB 227, 232. The doctrine bars relitigation of issues previously litigated, *Keystone Building Corp. v. Lincoln Savings & Loan Association,* 360 A.2d 191 (Pa. 1976), and the Board will not hesitate to apply it in the proper situation. *Solomon v. DEP,* 2000 at 233; *Carl L. Kresge & Sons, Inc. v. DEP,* 2000 EHB 30, 51; *Babich v. DER,* 1994 EHB 541, 545; *Dunkard Creek Coal, Inc. v. DER,* 1993 EHB 536. For *res judicata* to apply, four conditions must exist: identity of the thing sued upon or for; identity of the cause of action; identity of the persons or parties to the action; and identity of the quality of or capacity of the parties suing or being sued. *Id.* If these four elements are present, matters which were or could and should have been litigated in a prior proceedings may not be relitigated or litigated in subsequent proceedings. *Bethlehem Steel Corp. v. DER,* 390 A.2d 1383, 1389 (Pa. Cmwlth. 1978).

Solebury Twp., et al v. DEP, 2007 EHB 744, 746-47. Here, *res judicata* does not apply because, among other things, the issue must be litigated to a final judgment, and the Court's decision on a preliminary injunction motion does not constitute a final judgment. *Philadelphia Marine Trade Assoc. v. International Longshoreman's Assoc.*, 453 Pa. 43, 46 (1973); *Croner, Inc. v. DER*, 1993 EHB 271.[2]

Reclamation Grades

Rausch Creek's second objection is that the Department approved improper final reclamation grades in the renewed permit. Rausch Creek is likely to prevail on this argument as well. The key special conditions of the permit read as follows:

> 1. The area authorized by this Surface Mining Permit is being mined on abandoned mine lands. The permittee shall backfill with spoil material and coal ash to approximate original contour (AOC) as outlined on cross-sections (Current and Reclamation Contours) dated June 3, 2011 (updated from September 7, 1995 sections). In the event that coal ash

[2] Porter reports in a status report that the lease issue is ready to list for trial.

placement is terminated, the variance for AOC is still in effect and these contours still apply.

2. The permittee shall grade and re-vegetate spoil on the western portion of the site. Final reclamation slopes should be no more than 35 degrees. If necessary, this spoil may be utilized to achieve the approved final reclamation grades for the main pit areas as specified on cross-sections dated June 3, 2011 (updated from September 7, 1995 sections)... .

(RCL Ex. 9.) Rausch Creek's objection is that, by authorizing reclamation to "cross-sections dated June 3, 2011 (updated from September 7, 1995 sections)," these special conditions authorized Porter to reclaim the site to grades that merely mirror current site conditions rather than true AOC. Rausch Creek points out that the Department has approved no less than four completely different final grades over the life of the permit. Rausch Creek's fundamental complaint is based on its view that a permit applicant should propose clearly depicted final grades when it applies for its permit. 25 Pa. Code § 88.31. AOC should be defined when the permit is issued, not 22 years later. While final contours may need to be slightly adjusted as the mine is developed based upon such factors as after-acquired information, AOC should not be completely and repeatedly changed over the years. It should guide the calculation of bonding liability, and if it is changed, it should be changed with appropriate transparency. An approximation of original contour should precede and guide the reclamation process, not the other way around. Rausch Creek's view has considerable merit.

Surface mines must be reclaimed to approximate original contour (AOC) (unless an alternative to AOC is approved and no such alternative was approved here). 52 P.S.§ 1396.4(a)(2)(E); 25 Pa. Code § 88.115(a). Returning a site to AOC means reclaiming the land so that it closely resembles the general surface configuration of the land prior to mining and blends into and complements the drainage pattern of the surrounding terrain with no highwall, spoil

piles, or depressions to accumulate water and with adequate provision for drainage. 52 P.S. § 1396.3a; 25 Pa. Code § 88.1 (definitions of "contouring").

All parties in this case agree that it can be very difficult to approximate original contours in the heavily mined-out areas of the anthracite coal fields. The lands have been so altered over so many decades that imagining what the "general surface configuration of the land prior to mining" was can be difficult. Given these difficulties, it is one thing to bring best professional judgment to bear in designing AOC for abandoned mine lands. It is quite another to basically ignore the concept altogether, which is what occurred here. The final grades approved in the renewed permit were not selected with an eye toward approximating original contour. Rausch Creek is likely to succeed in proving that the grades that were selected in the renewal permit were selected simply to match conditions as they exist on the site today.

We start with the relatively straightforward inquiry of whether the site in its current state reflects AOC. Terry Schmidt, P.E. of Skelly and Loy, Rausch Creek's engineer, credibly testified that the site does not represent AOC. (T. 41-42, 132, 171.) The fill greatly exceeds original ground levels in places and creates a jarring appearance that does not blend in well with existing features. (*See, e.g.,* RCL Ex. 8, 12, 13.) Theodore Puschak, P.E., Porter's engineer, testified in response to highly leading questions that the site conforms to AOC, but his testimony is less credible because he said that very different final grades would also have conformed to AOC (T. 441-50, 464, 469), which is to say AOC is so flexible a concept that it has no real meaning.

Michael Menghini testified for the Department that the site represents "close to AOC" but, sadly, we do not find that conclusion to be credible. Initially, the testimony is contradictory, with Menghini clearly conceding at one point that the site exceeds AOC. (T. 536-38.) The

Department has approved no less than four different versions of AOC for the site since the permit was issued in 1990. The permit as originally conceived in 1990 contained relatively low final grades approved as a variance to AOC in recognition of the pre-Act status of the mine. (RCL Ex. 1.) However, at least according to the Department, the final grades were dramatically increased in 1995 in connection with a bonding increment. (T. 362, 490-91.) Then in 2002, AOC was again lowered. (RCL Ex. 1, 7.) The 2002 contours are higher than the 1990 contours but lower than the 1995 contours. It is not clear exactly why the Department adjusted the contours in 2002. Although it was done in the context of a bonding adjustment, the Department allowed Porter to bond the site as if the 1990 contours applied anyway, even though the 2002 contours were much higher. (T. 121-23, 366-67, 468-69, 517-19.) The record is not fully developed at this point, but it appears that final grades may have been adjusted at other times as well, not because of a true reassessment of AOC, but as part of a manipulation of the operator's bonding liability. (T. 94-95; RCL Ex. 4.) The Department has acknowledged that there are a lot of "discrepancies" in the file. (T. 556.) Some of the changes to final grades were approved in the context of bond increments and ABR reviews, which were not the subject of public notice and comment.

Even at this early point in the proceedings, it is clear that the Department's continual reassessment of AOC has consistently been adjusted to arrive at a desired end to accommodate the operator's needs without any particular regard for the regulatory objective of approximating original contour. On one occasion in 2002, the Department encouraged the operator to lower his proposed final contours for the purpose of minimizing his bonding obligation. (RCL Ex. 7G: "In this case, for bonding purposes, it would be beneficial for you to return to the grading as approved in Exhibit 18.1 dated 1990.") Yet at the same time, it adjusted AOC to 2002 levels so

that Porter's ability to continue to bring ash to the site would not be constrained by the contours based upon bonding. In off-the-record discussions, the Department simply committed to adjust final grades later as Porter received more ash. (T. 366-67, 517-19.) Although Permittee's counsel characterized the Department's actions as perhaps "less than rigorous" and noble effort to be "lenient" (T. 464), the truth of the matter is that the Department may have been acting in violation of the letter and spirit of not only the regulations regarding reclamation, but a court settlement and applicable law regarding full-cost bonding. The legality of the Department's actions over many years is not our immediate concern. The point that matters at this moment is that the Department's assessment that the current site happens to be "close to AOC" simply lacks credibility.

If the Department had been truly interested in finding documentary support for actual AOC, the 1995 document upon which it so heavily relies might actually be the worst possible choice of the various documents that the Department could have used to justify its actions. First, the record at this point does not provide us with any sense of comfort that the Department actually approved the 1995 grades. In fact, in a letter dated April 1, 2002, the Department said, "We have in our files a map dated 1995 showing the higher elevations of ash fill *but there is no approval given*." (RCL Ex. 7(G) (emphasis added).) The Department attempted to retract the 2002 letter at the hearing in this matter, but that attempt leaves us to wonder whether the Department was bending the truth in 2002 or whether it is doing so now. Saying in 2002 that the 1995 plan was not approved served to keep Porter's bond low. Saying the 1995 plan *was* approved in this case serves to justify Porter's existing site conditions. In either case, we cannot accept the 1995 plan as a credible, legitimate reflection of what AOC actually should be.

The document on its face is not particularly credible. (RCL Ex. 1(5); DEP Ex. 8.) There is no indication on the drawing that it was approved. It was not signed or sealed by Porter's engineer. It is quite rough in appearance. There are only three cross-sections depicted, and they give a very incomplete picture of the site. (RCL Drawing 23A dated May 11, 2011 illustrates the limited areas covered by the 1995 cross-sections.)

In stark contrast to the almost complete lack of record evidence to support use of 1995 contours as a legitimate representation of AOC, there is incontrovertible evidence that the Department concluded that grades prepared in 2002 reflect AOC. (RCL Ex. 1, 7.) In fact, the Department specifically said so in Porter's permit renewals through 2009. (RCL Ex. 1(8) ("The permittee shall backfill with spoil material and coal ash to approximate original contour *as outlined on cross-sections (Current and Reclamation Contours) dated 6/27/02.*") (Emphasis added.)) The 2002 grades are, of course, much different than the 1995 grades. They are much lower.

Schmidt's view is that the 2002 grades reflect AOC more accurately than any of the other drawings. (T. 41-42.) This view has not been contradicted by credible testimony. Drainage patterns as depicted on the 2002 drawings may need to be improved, but in terms of the volume of material currently on the site, Schmidt's analysis leads to the inescapable conclusion that the site is overfilled. Schmidt credibly, in great detail, and without contradiction testified that, if the 2002 contours are used, there is a net overfill (actual overfill minus airspace where fill could be relocated) of as much as 500,000 cubic yards on the site. (T. 82, 154; RCL Ex. 1, 7.) In fact, he showed that, regardless of which final contour map is used--even the 1995 contours--the site is overfilled. (RCL Ex. 5(23b).) For example, the x-x' contour on the 1995 drawing, which extends most of the length of the fill area, has been exceeded over its entire length, at places by

as much as 40 feet. (RCL Ex. 5(23b).) On a site with a total permitted capacity of roughly 1.7 million yards, an overfill of 500,000 is obviously quite significant.

The Department has several rather unsatisfying responses in the face of this evidence of an overfill. In the course of admitting that this site exceeds AOC, it said that other sites exceed AOC as well, and that is acceptable as long as positive drainage is maintained. (T. 536-38.) It says that it cannot be expected to police overfills at every site. (T. 540.) It says overfills of "a few feet" (this site as much as three stories high) are not a problem. (T. 539-40.) It says this is just the way its always been done throughout the region. (T. 536-40.) It proclaims the benefits of filling up abandoned pits, while at the same time acknowledging that the potential risks of placing large quantities of ash in unlined pits continues to be the subject of ongoing study and debate. (T. 367.) And the environmental benefits associated with filling in the pit certainly do not justify creating a new hill of ash above the top of the old pit. Once AOC is exceeded, ash disposal is no longer fairly characterized as mine reclamation. The Department says that complying with the letter of the laws regarding bonding would have put some operators out of business. (T. 516, 519.) It complains that the landowner has overwhelmed it with its complaints. (T. 556.) Although we can sympathize with the Department's difficult responsibilities, none of these explanations justify deviation from the law. Among other things, if a variance from AOC is appropriate, the regulations set forth a process for granting such a variance. 25 Pa. Code § 88.116. That process was not followed here.

The Department tells us that AOC needs to be constantly reevaluated as a mine is developed. Assuming this is true, the point is irrelevant here. The Department has not referenced, let alone relied upon, any new revelations regarding this site. In fact, the Department is relying on contours drawn up in *1995*.

The Department argues that, even if there is shown to be an overfill, there is no need for a supersedeas because the material can simply be pushed around. The Department has not convinced us that such a quick fix would be possible. There is obviously quite a bit of material. Furthermore, the fill already extends very close to the edge of the site. The current grades are steep and unacceptable, and fill has already illegally extended into the Primrose Pit. Moving further ash to the Primrose Pit, which the Department cites as a possible remedy (T. 541), may interfere with Rausch Creek's property right as discussed above. On the other hand, moving the ash off the site altogether may not be practical or sensible. Until this is sorted out, contrary to the Department's contention that there is an easy fix, this site actually cries out for a supersedeas.

Since Rausch Creek is likely to be successful in its effort to convince us that the site has been overfilled, it follows that it is also likely to prevail on its claim that the $313,000 bond currently posted for the site may be too low. (T. 156.) The Department has not disputed this fact. The bond amount does not appear to account for a need to move material around or off site to conform the site with AOC.

Pit Water Discharge

The Primrose Pit is filled with water. In order to deposit ash into the pit, the water would need to be pumped out. Rausch Creek argues that the renewal permit does not authorize Porter to discharge pit water, and that any discharge of pit water without proper planning and permitting poses a risk of environmental harm. Again, we find that Rausch Creek is likely to succeed on the merits of this issue.

The Department was unable to convincingly show us that there are any limitations or sampling requirements in the renewal permit that apply to the proposed pit water discharge. Instead, it argued that the limitations in the permit relating to erosion and sedimentation (E&S)

control facilities (the so called Part B limits) cover the pit water discharge because the water will be routed through one of Porter's E&S ponds. This explanation makes little sense and finds no support in the regulations. A discharge from the pit does not become an E&S discharge simply because it is routed through an E&S pond. The Department conceded as much at the hearing. (T. 268-70, 568.)

The Department says that the pit water only needs to be regulated as pit water if it is in contact with the mine pool or it has been shown to have come into actual contact with acid-forming materials on the surface. (T. 264-68.) Again, we have searched the regulations in vain for any such adjustment to the requirements relating to pit water. Pit water is pit water. Furthermore, the Department's explanation does not even hold up as a factual matter because it is difficult to believe that the water in the pit has not come into contact with acid-forming materials ubiquitous on this site. (T. 262-63.)

Rausch Creek has not shown that the pit water poses an actual threat to water quality, but it is nevertheless likely to succeed on this objection for at least three reasons. First, we are sympathetic to its claim that this is yet another manifestation of the Department's apparent willingness to accommodate the operator's needs at the expense of compliance with applicable regulatory processes and requirements. Pit water should be permitted as a Part A, not a Part B, discharge, and it probably should have been subject to public notice and comment. (T. 568.) Secondly, we credit Rausch Creek's concerns regarding the lack of any controls and any planning regarding the pit water discharges. The permit itself provides no guidance. There are no volume limitations and no showing that Porter's E&S pond--which was not designed for this purpose--is up to the task. (T. 277.) Third, with respect to the Department's statement that there is nothing to worry about because it will tell Porter to be careful in an inspection report, an

inspection report and "discussion" (T. 566) do not substitute for a permit with clear requirements. With respect to its statement that Porter can be trusted to empty the pit in a responsible way even without any permit limits, we must point to the fact that Porter continued to deposit ash on the site in violation of our temporary supersedeas order. (RCL Ex. 12, 13; T. 288-313.)

After basically conceding its error, the Department argues that this issue should nevertheless not form the basis for a supersedeas order because the discharge can be properly managed pursuant to a "plan." Aside from our concern that this would actually happen in light of recent events, a "plan" is not a legally enforceable document. We have no idea what this plan would entail. The lack of public input would not be remedied. The Department's disregard for applicable regulatory requirements would be enabled and perpetuated. The existing E&S pond does not appear to be capable of managing any increased discharge.

E&S Controls

Finally, Rausch Creek is likely to succeed in proving that the approved E&S controls on the site are currently inadequate and will only get worse. As to the present, large portions of the site do not appear to have any significant controls. For example, water that drains to the east is said to be controlled by a pond that is distant from and significantly higher than any likely pathways for runoff. Photographic and testimonial evidence clearly show that the limited controls that are currently in place are not working. (T. 157-63, 196-98, 206.) Ash is actually leaving the site. (T. 157-63, 196-97.) The controls are neither designed in accordance with the regulatory requirements that relate to such facilities, *see* 25 Pa. Code §§ 88.50, nor properly maintained. Indeed, it is difficult to tell that Sediment Pond 2, which is little more than a widened out portion of a runoff channel, even exists. Menghini described the feature as a "low

area" that "in effect acts as a pond." (T. 322.) He conceded that the Department conducted little or no review of the E&S facilities in connection with the permit renewal. (T. 273.)

Correcting current shortfalls might itself be correctable in lieu of a supersedeas. Of greater concern, here, however, is that the Department approved final reclamation plans that show no controls in the key northern area of the site. (T. 163, 324; RCL Ex. 14.) The Department concedes the "minor glitch" (T. 487) that the final reclamation plan shows no Sediment Pond 2. Yet, that pond is the *only* downgradient E&S control for northerly flow. Some control is admittedly required. (T. 327, 363, 456, 487.) Of still greater concern, it does not appear that it will be possible to meet the slope requirements on the downhill side of the fill *and* allow what is generously referred to as a pond to remain in place. Again, expediency appears to have trumped careful review.

It is unlikely that Rausch Creek's objection to Porter's E&S controls will be precluded from our consideration by the doctrine of administrative finality. A permit renewal is an appropriate time to ensure that an operation is being run in accordance with the law. 25 Pa. Code § 86.55. *See generally GSP Management Company v. DEP*, EHB Docket No. 2009-142-M (Opinion and Order, April 1, 2011). Further, there have obviously been significantly changed circumstances regarding ongoing and future operations at this site. Past evaluations of the E&S controls have not accounted for these changes. Alternatively, the Department did actively review the final reclamation plan in connection with this renewal and erred in that review because the plan leaves no room for E&S controls.

Irreparable Harm

As noted above, the Department's unlawful conduct constitutes irreparable harm *per se*. If ever there was a case where unlawful conduct justified a supersedeas irrespective of harm, this

is it. Disregard for the law is the harm. In any event, there is irreparable harm in this case. To allow the operator's overfilling of the site to continue above even the 1995 grades pending a hearing on the merits, as the permit seems to do (RCL Ex. 9, cover letter) with no concept of how that problem will be remedied, if at all, would be intolerable. Every day that the landfilling continues creates a further departure from AOC and increases the Commonwealth's exposure to unbonded reclamation costs. Leaving the permit in place would in effect allow the routing of an uncontrolled discharge of pit water through controls that are not even adequate to control E&S from stormwater. It would allow mining pursuant to a doubtful claim currently subject to legitimate litigation and potentially jeopardize Rausch Creek's property rights.

A supersedeas undeniably results in irreparable harm to Porter, and that weighs heavily on our minds. (T. 369 *et seq.*) For the most part, Porter has only done what the Department has said it could do. We cannot, however, lose sight of the fact that Porter has already benefited tremendously from not only filling most of the site, but overfilling the site. The remaining airspace provided by the Primrose Pit is significantly smaller than the space already filled in the Main Pit. Porter has not been required to put up bonds that reflect actual anticipated reclamation costs. It has not been required to install or maintain proper E&S controls. We have not precluded Porter from future ash disposal; we have simply put the matter on hold pending our adjudication. In the meantime, Porter is free to go to court to clarify its rights, as suggested in *Empire Coal, supra*. Porter has expressed a plan to move onto other pits, of which there is no shortage in the area and which would be necessary in the not-to-distant future anyway due to the limited size of the Primrose Pit. Although this supersedeas might appear to have come on suddenly, in reality the cause for it has been building for years.

Rausch Creek is also suffering irreparable harm. It has been characterized as a gadfly and a bother, but we find its complaints and frustrations to be entirely justified. Moving or removing ash improperly placed on its land would require enforcement action by the Department or, perhaps, injunctive relief from a court, neither of which seems certain. As previously noted, Rausch Creek is exposed to potential future liability by virtue of its landowner status. Not only does it own the property being directly impacted, the testimony showed that the lack of sufficient E&S controls, as excaserbated by the departure from AOC, is also having a deleterious effect on Rausch Creek's down valley operations. (T. 157-63, 196-98, 206.)

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RAUSCH CREEK LAND, LP	:	
	:	
v.	:	**EHB Docket No. 2011-137-L**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and PORTER ASSOCIATES, INC., Permittee	:	

ORDER

AND NOW, this 6th day of October, 2011 it is hereby ordered as follows:

1. Rausch Creek's petition for supersedeas is **granted.**

2. No ash may be brought onto the site from any source pending final adjudication of this appeal.

3. The Primrose Pit area may not be affected.

4. This order does not preclude Porter Associates from cleaning out the sediment ponds and sediment traps and ensuring that they are properly sized, maintained, and functioning in accordance with all applicable permit and regulatory requirements. Material removed from the ponds during cleaning may be placed at a location approved by the Department in advance.

5. Although the Board is receptive to moving forward on an expedited schedule, final adjudication may need to await resolution of the lease issue by the Court of Common Pleas.

6. This order does not preclude Porter from reasonably necessary reclamation and maintenance activities in accordance with permit and regulatory requirements as approved by the Department in advance.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: October 6, 2011

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Connie Luckadoo, Library

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HOPEWELL TOWNSHIP BOARD OF SUPERVISORS	:	
v.	:	**EHB Docket No. 2011-147-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COMMUNITY REFUSE SERVICE, INC., d/b/a CUMBERLAND COUNTY LANDFILL, Permittee	:	**Issued: October 17, 2011**

OPINION AND ORDER
ON MOTION TO DENY SUPERSEDEAS WITHOUT HEARING

By Richard P. Mather, Sr., Judge

Synopsis:

The Board grants the Department's motion to deny a petition for supersedeas without a hearing. The petition for supersedeas did not comply with the Board's Rule at 25 Pa. Code § 1021.62 (a)(1-2) because there were no supporting affidavits for Hopewell Township's alleged harm or an acceptable explanation as to why the affidavits were not attached. The petition also failed to cite with particularity the legal authority for the Board to grant the supersedeas and state grounds sufficient for granting a supersedeas. We dismiss the petition without a hearing in accordance with 25 Pa. Code § 1021.62(c).

OPINION

Hopewell Township Board of Supervisors ("Hopewell Township") filed a notice of appeal and a petition for supersedeas on September 26, 2011 objecting to the Department of

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Environmental Protection's (the "Department's") approval on September 12, 2011 of a major permit modification for increased average daily volume/maximum daily volume at Cumberland County Landfill ("Permittee" or "Landfill"). The permit modification allows the Landfill to accept up to 2500 tons per day as opposed to the previous 1500 tons per day limit.

On September 28, 2011 the Department filed a motion to deny the supersedeas petition without a hearing. The motion points out that Hopewell did not include affidavits, did not cite any legal authority for granting the supersedeas and failed to establish sufficient grounds for granting the supersedeas. The Permittee joined the Department's motion on September 29, 2011. The parties and the Board had a conference call on October 3, 2011 wherein Hopewell Township agreed to provide a response to the Department's motion no later than October 7, 2011. The response was filed with the Board on October 7, 2011.

Hopewell Township's response contained sixteen numbered paragraphs and it was supported by a brief. Again, Hopewell Township failed to include affidavits in support of its petition for supersedeas, but its response did provide an explanation of why it believes it is unable to provide the required affidavits.

A supersedeas is an extraordinary remedy that will not be granted absent a clear demonstration of appropriate need. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 802; *Tinicum Township v. DEP*, 2002 EHB 822, 827; *Global Eco-Logical Services v. DEP*, 1999 EHB 649, 651; *Oley Township v. DEP*, 1996 EHB 1359, 1361-1362. Our rules provide that the granting or denying of a supersedeas will be guided by relevant judicial precedent and the Board's own precedent. 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.63(a). Among the factors to be considered are (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties. 35 P.S. § 7514(d)(1); 25 Pa.

Code § 1021.63(a)(1)-(3); *Neubert v. DEP*, 2005 EHB 598, 601. In order for the Board to grant a supersedeas a petitioner must make a credible showing on each of the three regulatory criteria. *Neubert v. DEP*, 2005 EHB 598, 601; *Pennsylvania Mines Corporation*, 1996 EHB 808, 810; *Lower Providence Township v. DER*, 1986 EHB 395, 397.

In its petition for supersedeas Hopewell Township did not provide affidavits in support of its petition. Even after the Department filed its motion to deny pointing that out, it still did not provide any affidavits in support. The Board's Rules require that:

> (a) A petition for supersedeas shall plead facts with particularity and shall be supported by one of the following:
>
> (1) Affidavits, prepared as specified in Pa.R.C.P. 76 and 1035.4 . . . setting forth facts upon which issuance of the supersedeas may depend.
>
> (2) An explanation of why affidavits have not accompanied the petition if no supporting affidavits are submitted with the petition for supersedeas.

25 Pa. Code § 1021.62. Thus, under the Board's Rules a person who files a petition for supersedeas must file supporting affidavits or provide an adequate explanation of why they are not filed with the petition.

Since it continues to fail to provide affidavits in its response, Hopewell, instead, argues that it did not need to provide supporting affidavits with the petition for supersedeas because the documents attached to the notice of appeal speak for themselves regarding the increased daily volume of garbage. We understand Hopewell Township not providing an affidavit with respect to the documents attached to its notice of appeal that evidences the Department action of granting the permit modification. We do not, however, understand why there are no affidavits to support Hopewell Township's factual assertions to establish the factors at 25 Pa. Code § 1021.63(a)(1)-(3) to be considered by the Board when determining to grant or deny a

supersedeas. For example, we do not have any supporting affidavits or an explanation of why there are no supporting affidavits of the alleged harm to Hopewell Township from that Department action. The increase in the average and maximum daily volumes of garbage that can be taken to the landfill, on its face, does not support Hopewell Township's contention of harm. Although Hopewell Township attempted to provide an explanation of why it did not include affidavits, the Board finds that the explanation is inadequate.

Under our Rules Hopewell Township's petition for supersedeas is deficient. Our rules provide that:

> (a) A petition for supersedeas may be denied upon motion made before a supersedeas hearing or during the proceedings, or sua sponte, without hearing, for one of the following reasons:
>
> (1) Lack of particularity in the facts plead.
>
> (2) Lack of particularity in the legal authority cited as the basis for the grant of supersedeas.
>
> (3) An inadequately explained failure to support factual allegations by affidavits.
>
> (4) A failure to state grounds sufficient for the granting of a supersedeas.

25 Pa. Code § 1021.62. For any of the reasons above we can deny the petition without a hearing as we did in *Timber River Development Corp v. DEP*, 2008 EHB 635. In *Timber River*, we were unclear on what the petitioner was seeking, and the allegations were not properly supported by affidavits. We stated:

> [w]e do not . . . need to go into the substance of the Petition because it fails to comply with 25 Pa. Code § 1021.62. This section requires that the petition for supersedeas be supported by affidavits, setting forth the facts upon which the granting of the supersedeas may depend or an explanation of why there are no supporting affidavits with the petition. . . . Based on this failure to support the Petition with adequate affidavits, and failure to explain

> the absence of affidavits, the Board is unable to grant a supersedeas in this matter.

2008 EHB at 636. Hopewell Township has not provided affidavits to support its petition, and its explanation is inadequate to overlook its failure to support its factual allegations by affidavits. Therefore, the petition for supersedeas before us now is deficient and we grant the Department's motion to dismiss the petition without a hearing.

Even though we dismiss the petition for not being properly supported by affidavits or for providing an inadequate explanation of why there are no affidavits to support the alleged harm from the permit modification, there are additional deficiencies. We will quickly address the other deficiencies the Department points out in its motion.

Under our rules, "[a] petition for supersedeas shall state with particularity the citations of legal authority the petitioner believes form the basis for the grant of supersedeas." 25 Pa. Code § 1021.62(b). The petition does not cite any legal authority that is the basis for the Board to grant a supersedeas. The entire petition is completely silent on any legal authority. The only place we see a citation is in its response to the Department's motion. Hopewell Township's response does nothing more than cite *Giordano v. DEP*, 2001 EHB 844 (The Board rescinded a permit modification granting increased tonnage concluding that the benefit of the increased tonnage did not outweigh the harm of accelerating the landfill capacity.) However, Hopewell Township does not discuss that this Board decision was reversed by the Commonwealth Court on appeal at *Browning-Ferris Industries, Inc. v. Dep't of Envtl. Prot.*, 819 A.2d 148 (Pa. Cmwlth. 2003) and the Pennsylvania Supreme Court affirmed the Commonwealth Court at *Giordano v. Dep't of Envtl. Prot.*, 893 A.2d 67 (Pa. 2006).[1] The citation to this case is nothing more than a citation. It

[1] The Commonwealth Court provided that the Board committed error of law in determining that the increase in host fees did not represent an economic benefit that the Department could consider in its review of Petitioner's application. 819 A.2d at 154. A "mere scintilla" of proof is sufficient to meet the

does not discuss its application to this matter or how this would be authority for the Board to grant a supersedeas in this matter. Our rules require that citations to legal authority shall be stated with "particularity". That was not done here.[2]

The Department also raises in its motion that Hopewell Township has failed to state grounds sufficient for granting a supersedeas. As stated above in the Board's rules, the Board considers irreparable harm to the petitioner, the likelihood of the petitioner to prevail on the merits, and the likelihood of injury to the public or other parties when determining whether to grant or deny a supersedeas. 25 Pa. Code § 1021.62(c). The Board agrees with the Department that Hopewell Township's petition does not meet the high standard required for a supersedeas to be granted before the Board.

In fact, the petition does not discuss irreparable or immediate harm to Hopewell Township. Instead the petition focuses on host fees being withheld from North Newton Township (a neighboring township) until this appeal was resolved, as well as Cumberland County Landfill being unjustly enriched from withholding these fees. There is no mention of harm to Hopewell Township in the petition itself. We do not get a glimpse of an alleged harm to Hopewell Township until it responded to the Department's motion stating:

> . . . [i]f this litigation goes on long enough, the whole issue becomes moot because the landfill has used up its capacity, imposed the harm on Hopewell Township, and I not capable of providing any offsetting benefit to Hopewell Township. This makes the harm which is being imposed upon Hopewell Township

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regulatory requirement that the benefits of paying host municipality fees proposed operation of a municipal waste landfill must be shown by applicant to "clearly outweigh the known and potential environmental harms." *Id.*

[2] Hopewell Township's reliance on *Mazze v. DEP*, 2002 EHB 193 in its response is also misplaced. While the Board did allow a *pro se* appellant to have a supersedeas hearing in this appeal even though she "generally fails to meet any of the requirements for filing of a petition for supersedeas", 2002 EHB at 196, the Board does not find any of the factors that caused the Board to allow a hearing under those exceptional circumstances. Hopewell Township is represented by counsel in this appeal, and it must comply with the Rules governing petitions for supersedeas.

> irreparable. . . . The harm is done by allowing the Cumberland County Landfill to operate at an increased tonnage despite the filing of the Notice of Appeal. Until a supersedeas issues, 45 more semi tractor trailers full of garbage roll through Hopewell Township . . . The impact on Hopewell Township residents as a host community to Cumberland County Landfill dictates that the Board deny the Department request to dismiss the Appellant's Petition for Supersedeas and enter an Order scheduling a supersedeas hearing in this matter.

Hopewell Township's Response to the Motion, p. 2. The discussion is found in Hopewell Township's response to the Department's motion. The alleged harm of "45" trucks traveling through Hopewell Township, which is not supported by any affidavits and is not alleged in the petition for supersedeas, does not provide sufficient grounds granting the supersedeas. The second factor for the Board to consider is the likelihood of the petitioner to prevail on the merits. There is no discussion in the petition of this factor, nor in the response to the motion. We do not need to discuss this factor further. Lastly, Hopewell does not discuss the harm to the public in its petition. There is some discussion of likelihood of injury to the public in the response to the Department's motion, which is the same argument Hopewell Township made for irreparable harm above. Again, not having the factors in its petition discussed or supported by affidavits does not meet the Board's high standard for this extraordinary remedy. The Board will grant the Department's motion to deny Hopewell Township's petition for supersedeas. We enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HOPEWELL TOWNSHIP BOARD OF SUPERVISORS	:	
v.	:	**EHB Docket No. 2011-147-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COMMUNITY REFUSE SERVICE, INC., d/b/a CUMBERLAND COUNTY LANDFILL, Permittee	:	

ORDER

AND NOW, this day of 17th October, 2011, it is hereby ordered that the Department's Motion to deny Hopewell Township's petition for supersedeas without a hearing is **granted**.

ENVIRONMENTAL HEARING BOARD

RICHARD P. MATHER, SR.
Judge

DATED: October 17, 2011

c: **DEP Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ELG METALS, INC.	:	
	:	
v.	:	**EHB Docket No. 2009-091-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 21, 2011**

OPINION AND ORDER ON
<u>MOTION TO DISMISS</u>

By Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

An appeal of an Administrative Order is not dismissed for mootness even though the order that is the subject of the appeal has been withdrawn and will not form the basis for any future civil penalties or compliance history. This matter falls within the exceptions to the mootness doctrine. Specifically, the issue involved in this case is one that is capable of repetition yet likely to evade review by the Board if not decided now. The appeal raises an important question as to the Department's authority to take enforcement action against a riparian landowner under the Clean Streams Law where it discovers contamination in a waterway but is unsure of its source.

OPINION

This matter involves the appeal of an Administrative Order issued by the Department of Environmental Protection (Department) to ELG Metals, Inc. (ELG Metals or ELG). ELG Metals owns and operates a metal recycling facility located along the Youghiogheny River in Port Vue

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and Liberty Boroughs, Allegheny County. An unnamed tributary to the Youghiogheny River flows beneath the ELG facility.

The history of this matter is as follows: On May 28, 2009 the Department issued an Administrative Order to ELG Metals in which it states that on July 8, 2008, the Department responded to a complaint about an oil sheen on the Youghiogheny River which the Department alleged originated from a 72 inch culvert that runs beneath the ELG site. The Department requested that ELG maintain emergency measures and investigate the source of the oil.

According to the Administrative Order, the Department conducted follow up investigations on July 10 and August 13, 2008 and the sheen was still present. On August 19, 2008 the Department sent a letter to ELG Metals requesting a plan and schedule for eliminating the discharge. On September 17, 2008 ELG's consultant submitted a plan and schedule for investigating the discharge. The Department approved the investigation plan and it was implemented by ELG. ELG's investigation determined that its facility was not discharging oil to the unnamed tributary.

On December 29, 2008 the Department again sent a letter to ELG requesting a plan and schedule for eliminating the discharge and also requested a soil and groundwater investigation. On January 15, 2009 representatives of the Department inspected the ELG facility and, according to the Administrative Order, observed the presence of hydraulic oil on the floor of the facility near the sump and waste oil tank. A follow up inspection was conducted on March 18, 2009, at which time the Department alleges that oil staining was present on the floor. The inspections resulted in the issuance of two notices of violation to ELG Metals.

On May 28, 2009 the Department issued the Administrative Order that is the subject of this appeal. In it, the Department ordered ELG Metals to do the following:

1. Maintain emergency measures aimed at capturing any oil leaving the site;
2. Cease the discharge of oil from the ELG site to the river;
3. Identify the names of a licensed professional engineer and licensed professional geologist to conduct an investigation of soil and groundwater contamination at the site;
4. Submit a plan and schedule to determine the source and extent of soil and groundwater contamination at the site and eliminate any unauthorized discharges;
5. Modify or supplement its Site Characterization and Discharge Elimination Plan and Schedule;
6. Submit monthly written progress reports.

In response to the order, ELG again investigated whether its facility was the source of the oil discharges to the unnamed tributary. According to the affidavit of William C. Fisher, ELG's Facilities Manager, the investigation included test pits and analysis which, according to Mr. Fisher, confirmed that oil was not migrating from ELG's facility to the unnamed tributary. (Fisher Affidavit, para. 14) According to Mr. Fisher, ELG's investigation discovered other actual and potential sources of the oil discharges to the unnamed tributary which ELG brought to the attention of the Department. (Fisher Affidavit, para. 15)

On April 21, 2011 the Department withdrew the Administrative Order. According to the affidavit of Sam Harper, the Department's Southwest Regional Program Manager for Water Management, the order was withdrawn because the Department determined that ELG had complied with the order and no further discharges of oil from the culvert had been observed. (Harper Affidavit, para. 6, 7) The Department does not intend to seek civil penalties from ELG Metals, nor will the violations stated in the Administrative Order be included in any compliance

history review for ELG Metals. (Harper Affidavit, para. 8)

Presently before the Board is a motion by the Department to dismiss this appeal on the basis that there is no relief that the Board can afford to ELG since the order has been withdrawn and no civil penalties are pending. We must view the Department's motion in the light most favorable to the non-moving party, ELG Metals. As stated in *Perano v. DEP*, 2010 EHB 449, the Department, as the moving party, "has the difficult burden of showing there are no material facts in dispute, that the matter is otherwise free from doubt, and it is entitled to judgment as a matter of law." *Id.* at 451. The Department relies on the Board's decision in *Kilmer v. DEP*, 1999 EHB 846, in support of its argument that this case should be dismissed as moot. In *Kilmer*, the Department issued an order to the appellant which was subsequently vacated and replaced by a second order. The appellant's appeal of the first order was dismissed as being moot. In a decision authored by Judge Labuskes, the Board explained the mootness doctrine as follows:

> When the Department vacated the order, it deprived the Board of the ability to grant any meaningful relief. The inability to do anything meaningful beyond opining whether the Department made a mistake is the essence of the mootness doctrine. *Magarigal [v. DER]*, 1992 EHB at 456. If we suppose that Kilmer's substantive arguments are all correct and the order was issued in error, what relief could we grant? We cannot overturn an order that does not exist. The Department issuance of the order could have been an egregious error, but there is absolutely nothing we can do about it that has any practical significance.

Kilmer, 1999 EHB at 849.

In the present case, ELG Metals argues that this matter is not moot simply because the Department has withdrawn its order. It is ELG's contention that there is nothing to prevent the Department from engaging in the same enforcement activity against ELG in the future should additional oil sheens appear on the unnamed tributary. ELG's fear is that other sources of the oil

sheens, which it claims to have identified, may cause additional discharges to the unnamed tributary, resulting in the Department issuing another Administrative Order requiring the same remedial measures as the earlier order. ELG Metals argues as follows:

> ELG has an ongoing and substantial interest in clarifying that DEP does not have authority to order ELG to investigate the UNT [unnamed tributary]. DEP contends that oil sheens continue to appear on the UNT [citing the deposition testimony of the Department's Chief of Water Management Operations, Kevin Halloran, p. 29-30, 42, 99]. The Borough of Port Vue, CSX Railroad and possibly others discharge stormwater to the UNT [citing Mr. Fisher's affidavit, para. 3-5]. ELG has identified actual sources of oil contaminants to the UNT within the Borough of Port Vue and DEP does not know what combined sewer overflows or other connections the Borough may also have to the UST [sic] [citing both Mr. Halloran's deposition testimony, p. 71, 75-76, and Mr. Fisher's affidavit, para. 15]. DEP's current enforcement practice is to make ELG identify the source of oil on the UNT [citing Mr. Halloran's deposition, p. 37-38, 54-55, 88]. In effect, ELG is made responsible for discharges from the Borough of Port Vue and others over whom ELG has no authority or control and from whom there is no reason to expect cooperation in any investigation. DEP's enforcement policy unfairly and illegally burdens ELG with responsibility and expense for pollution in the UNT irrespective of whether ELG is responsible for that pollution.

(ELG Response, p. 12-13) ELG goes on to state that it "has spent substantial sums to prove that ELG was not the source of the UNT contamination." (*Id.* at 13) It is concerned that it will be forced to spend additional sums of money to prove it is not the source of any future contamination every time the Department discovers an oil sheen on the tributary.

ELG bases its argument in part on the deposition testimony of Kevin Halloran, the Department's Chief of Water Management Operations. When asked if the Department had any information at the time it issued its August 19, 2008 letter to prove that the sheens were originating from the ELG property, Mr. Halloran answered "Not to prove. No." (Halloran Deposition, p. 37-38) When asked what facts the Department's contention was based on, Mr.

Halloran responded: "The observation of the sheen in several locations along the facility. And the fact that there was [sic] potential sources from the use of oil at the facility." (*Id.*) Mr. Halloran further stated that because the 72 inch culvert is on the property of ELG Metals, they are responsible for reporting any discharges from it. (*Id.* at 91-92)

In opposing the motion to dismiss this appeal, ELG Metals states that it is seeking a ruling from the Board that the Department does not have authority under Section 316 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.316, to order ELG to investigate every incident of contamination in the unnamed tributary merely because they are a riparian landowner. Section 316 states in relevant part:

> Whenever the department finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the department may order the landowner or occupier to correct the condition in a manner satisfactory to the department or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action. . . . .

35 P.S. § 691.316.

The Department does not respond to ELG Metals' argument regarding the extent of the authority granted to it under Section 316, but reiterates its argument that because there is no outstanding order against ELG Metals this matter is moot and any decision the Board may render on this issue would be merely an advisory opinion.

A case becomes moot when an event occurs during the pendency of the appeal which deprives the Board of the ability to provide effective relief. *Lower Milford Twp v. DEP*, 2006 EHB 387. Generally, when the Department withdraws an order which was the subject of an appeal and there is no threat of any future civil penalty, the matter is moot. *See, e.g., Kilmer, supra; Hirsch v. DEP,* 2009 EHB 229. An exception exists to the mootness doctrine where the

Department's conduct is capable of repetition yet likely to evade review, where issues of great public importance are involved, or where a party will suffer a detriment without a decision. *Sierra Club v. PUC*, 703 A.2d 1131, 1134 (Pa. Cmwlth. 1997), *aff'd*, 557 Pa. 11 (1999); *Earthmovers Unlimited, Inc. v. DEP*, 2004 EHB 575, 577.

We understand ELG's argument to be that this matter is capable of repetition if additional oil sheens appear on the unnamed tributary and that it involves a question of great public importance as to whether the Department may proceed under Section 316 simply because a party is a riparian landowner. We agree that this matter should not be dismissed. The statutory provision on which the Department relies states that when the Department finds pollution *resulting from a condition that exists on land*, it may order the landowner or occupier to correct the condition. Here, the Department discovered pollution in a waterway that may or may not have resulted from conditions at the ELG Metals site. However, because ELG Metals is the owner and occupier of the land through which the culvert runs, it was the entity that was required to conduct the investigation as to the source of the pollution. ELG Metals conducted such an investigation and determined that other entities were the likely source, but was given no assurance by the Department that it would investigate the other potential sources should further oil sheens appear. On the contrary, the deposition testimony of the Department witnesses leads us to believe that if future oil sheens appear on the river or unnamed tributary, ELG Metals will be required to take further action, whether in the form of further investigation or an order to cease and desist. As such, we are not convinced that this matter is moot. This appeal raises an important question as to the extent of the Department's authority to take enforcement action against a riparian landowner under Section 316 where it discovers contamination in a waterway but is unsure of the source. Moreover, the issue involved in this case is one that is likely to

evade review by the Board if future orders against ELG are withdrawn before the case may proceed to a hearing on the merits. And, although it is true that ELG Metals can seek a supersedeas hearing in response to any orders requiring it to investigate the presence of future oil sheens on the Youghiogheny River or unnamed tributary, it cannot do so without incurring additional expense. Moreover, in a supersedeas hearing the burden will be on ELG Metals to prove a negative, i.e., that it is not the source of the pollution, whereas in a merits hearing the burden falls on the Department to prove that its order requiring an investigation or a cessation of operations by ELG Metals is warranted.

Therefore, the motion to dismiss this appeal is denied. An order will be issued accordingly.

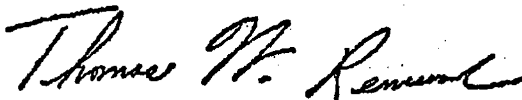
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ELG METALS, INC.	:	
	:	
v.	:	**EHB Docket No. 2009-091-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 21st day of October, 2011, the Department of Environmental Protection's motion to dismiss this matter as moot is denied. A prehearing conference with counsel is scheduled for **Monday, November 7, 2011 at 10:00 a.m.** If counsel are unavailable on that date they should advise our office at mwesdock@pa.gov.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

DATE: October 21, 2011

c: **DEP Bureau of Litigation:**
Attention: Glenda Davidson, Library

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Pittsburgh, PA 15222-3152

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2010-028-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 2, 2011**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board dismisses an appeal for lack of jurisdiction. The Department letter that is the subject of the appeal merely acknowledged that the Department was in receipt of the appellant's supplement to his remediation plan and reminded him of his obligation to complete the work under the original remediation plan. The Department did not take any action or require any action from the appellant.

FINDINGS OF FACT

1. Frank T. Perano ("Perano") owns and operates the Cedar Manor Mobile Home Park ("Cedar Manor") in Londonderry Township, Dauphin County.

2. Perano is authorized by NPDES Permit No. PA 0080721 to discharge treated effluent from the sewage treatment plant into an unnamed tributary of the Conewago Creek, a water of the Commonwealth, under the terms and conditions of the permit. The NPDES permit was effective October 1, 2006 and expired September 30, 2011. (Department Exhibit ("DEP Ex.") 1.)

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3. The permit contains a compliance schedule related to Perano's remediation of the collection system at Cedar Manor with the objective of reducing inflow and infiltration ("I & I") into the system. (DEP Ex. 1.)

4. Part C. II. of the permit provides as follows:

> A. The Permittee shall remediate the facility's collection system with the objective of reducing I & I relative to plant capacity and available flow equalization in accordance with the following schedule:
>
> 1. Complete I & I study and submit report to [the Department] December 31, 2006
>
> 2. Submit scope of work for remediation to [the Department] April 30, 2007
>
> 3. Complete remediation work December 31, 2009

(DEP Ex. 1 (emphasis in original).)

5. Perano submitted his remediation plan to the Department on April 16, 2007. (DEP Ex. 2.)

6. The Department did not provide a response to Perano after receiving the remediation plan, but Perano understood that silence was an acceptance of the remediation plan and he planned to complete the work. (Perano Exhibit ("P. Ex.") 36; Notes of Transcript pages ("T.") 41-42, 58-59.)

7. In August 2008, the Department sent a proposed draft consent order and agreement ("CO&A") to Perano that included suggested work plans for Cedar Manor and other sewage treatment plants owned by Perano. (P. Ex. 33; T. 5, 11.)

8. After Perano received the CO&A he ceased all work to implement the remediation plan through at least December 31, 2009. (T. 44.)

9. In a letter dated May 21, 2009 Perano requested an extension of the deadline for completing the remediation work. *See Perano v. DEP*, EHB Docket No. 2009-119-L, ¶ 6 (Adjudication, September 12, 2011).

10. By letter dated August 3, 2009, the Department's Lee McDonnell informed Perano that it was not willing to reconsider the compliance schedule in the permit unless Perano met with the Department. The letter also reminded Perano that he was still required to comply with the schedule set forth in his NPDES permit. (DEP Ex. 6.)[1]

11. At a meeting on September 16, 2009, the Department again informed Perano that he was obligated to comply with the existing schedule in the NPDES permit. (P. Ex. 32; T. 6, 39.)

12. On the day that he was required under Part C.II.A.2 of his permit to complete remediation work, Perano sent a letter dated December 31, 2009 to the Department attaching what he referred to as a revised remediation plan. (P. Ex. 36, 37.)

13. The December 31, 2009 letter stated:

> As you know, on April 17, 2007 we submitted a Remediation Plan in full accordance with Special Condition No. II.A.2, to which the Department did not respond. Our company deemed that the Department's lack of response constituted approval of that Remediation Plan and began work to complete and/or completed many of the items contained therein. However, the Department has recently taken a seemingly inconsistent position regarding the effect of the Remediation Plan. The Department has also failed to confirm in writing whether the Department approved or disapproved the plan, or did not have to take any action regarding the same.
>
> . . . .
>
> . . . Frank T. Perano is hereby exercising his right and ability to revise the remediation plan at this time. Further, the work as contained in the Revised Remediation Plan has been timely performed as of this date and the same has satisfied the goal as set

[1] We recently dismissed Perano's appeal from the August 3 letter for lack of jurisdiction. *Perano v. DEP*, EHB Docket No. 2009-119-L (Adjudication, September 12, 2011).

forth therein.

(P. Ex. 36.)

14. The "revised remediation plan" documented work that Perano had already completed but did not propose any new or different work to address the I & I problems at Cedar Manor. (T. 54, 77-78.)

15. Work that is required to be performed under Perano's approved remediation plan was not included in his "revised remediation plan." (T. 53, 78, 80.)

16. On February 23, 2010, McDonnell sent a letter to Perano, which read as follows:

> This is in response to your December 31, 2009 letter to me in which you, on behalf of Mr. Frank T. Perano, submitted a Supplemental Remediation Plan dated December 23, 2009.
>
> . . . .
>
> Mr. Perano was obligated under his NPDES permit to implement the measures he set forth in his April 16, 2007 Remediation Plan by December 31, 2009. It is our understanding that all of these measures have yet to be implemented.
>
> . . . .
>
> The Department views your December 23, 2009 Supplemental Remediation Plan as a supplement to, not a replacement of, the April 16, 2007 Remediation Plan. I emphasize again that Mr. Perano is legally obligated to implement the measures set forth in his April 16, 2007 Remediation Plan.

(P. Ex. 38.)

17. Perano filed this appeal of the February 23, 2010 letter on March 4, 2010.

DISCUSSION

On March 7, 2011, the Board held a hearing on the merits of this appeal. The Department and Perano both filed post-hearing briefs. The Department in its post-hearing brief stated, "Mr. McDonnell did not consider his February 23, 2010 letter to be a final action by the Department."

Department's Post-Hearing Brief, p. 40, ¶ 250. After reviewing the record, we ordered the parties to address the Board's subject matter jurisdiction over this appeal, which had not been briefed. *Perano v. DEP*, EHB Docket No. 2010-028-L (Opinion and Order, September 13, 2011). We stated that, "the parties have not fully addressed the Board's jurisdiction over the Department's February 23 letter. Since jurisdiction is not waiveable and needs to be addressed, the Board raises the issue on its own motion and will allow the parties to fully brief the jurisdictional issue." *Id.*, slip op. 3. On October 14, 2011, both parties filed supplemental briefs addressing the question of subject matter jurisdiction.

The Board has the power and duty to hold hearings and issues adjudications on orders, permits, licenses or decisions of the Department. 35 P.S. § 7514(a). The EHB Act states 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's rules define "action" as "an order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification." 25 Pa. Code § 1021.2(a). The Board only has jurisdiction to review final actions of the Department. *Kennedy v. DEP*, 2007 EHB 511, 512. To determine whether an action is appealable, we consider the specific wording of the communication, its apparent finality, the regulatory context in which it was sent, and the relief which the Board can provide. *David Dobbin v. DEP*, 2010 EHB 852; *Langeloth Metallurgical Co. v. DEP*, 2007 EHB 373, 376, *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121-24.

As a general rule, informal Departmental communications such as inspection reports, notices of violation (NOVs), and letters are not appealable. However, such communications may

become subject to Board review in two ways: first, if they are the equivalent of a compliance order, and second, if they are the equivalent of a permit (or similar benefit) denial. A communication is the equivalent of compliance order if it requires the recipient to do something; it is prescriptive or imperative, not merely descriptive or advisory. *See Kutztown v. DEP*, 2001 EHB 1115 (municipality instructed to submit a corrective action plan); *Merit Medals Products v. DER*, 1982 EHB 508 (relied upon by Perano) (appellant directed to submit an acceptable remediation plan); *see generally, Beaver v. DEP*, 2002 EHB 666 (containing an extensive list of examples). Similarly, an informal communication that is nevertheless the equivalent of a permit or benefit denial can also be appealable. *See, e.g., Sayersville Seaport Associates v. DEP*, EHB Docket No. 2020-127-L (January 4, 2011) (letter stating contaminated soil cannot be accepted by any beneficial use facility in Pennsylvania.)

The Department argues in its supplemental brief that the Department's letter of February 23, 2010 is not a final Department action. The Department contends that the letter did not alter Perano's pre-existing obligations or duties or impose any new obligations or duties on him. The Department says that the letter was essentially an acknowledgment of receipt, as well as a reminder that Perano remained obligated to comply with the original remediation plan in his permit. Perano disagrees and states that the letter is appealable because it requires expensive and time-consuming remediation efforts. He says that the Department letter constitutes a *de facto* rejection of his revised remediation plan.

We disagree that the February 23 letter requires "expensive and time-consuming efforts." It does not in and of itself require anything. It imposes no new or different obligations. Whatever obligation Perano had to complete remediation work has not been altered in any way by the February 23 letter.

Nor do we accept that the letter is akin to a rejection of Perano's so-called revised plan. Taking one step back, Perano's December 31, 2009 letter, which gave rise to the Department's February 23 letter, did not ask the Department to take any action or make any decisions. To the contrary, the letter specifically said that Perano was "exercising his right and ability to revise the remediation plan." Accordingly, in response, the Department did not take any action or make any decision. It acknowledged receipt of the revised plan and advised Perano that it continued to believe he remained under an obligation to comply with his original remediation plan. Perano sent a letter saying what he believed his remediation obligations were and the Department responded with a letter saying what it believed Perano's obligations were. Each party put the other party on notice of its legal position regarding Perano's obligation to complete remediation under the permit. This mutual exchange of legal positions does not form the basis of an appealable action. *Polites v. DEP*, 2007 EHB 604, 607 (statement of legal position without more is not appealable); *Beaver, supra.*

The sole purpose of Perano's December 31, 2009 letter was to create a defense to any future enforcement action on the part of the Department based upon failure to comply with the permit. Perano admitted as much at the hearing. (T. 56-57). Perano was obligated by his permit to complete remediation as described in his plan on or before December 31, 2009. Because Perano had not completed the work required under his original plan by December 31, he submitted a "revised plan" on that date. That plan merely described the portion of the earlier plan that he had completed. Now, if the Department ever takes enforcement action against Perano for failing to comply with his permit, Perano believes he has set up a defense that he did in fact comply with his permit because he completed work in accordance with his revised plan by December 31, and it is compliance with the *revised* plan that matters in his view. The

Department's February 23 response signals that it does not buy any such defense. This is legal posturing. It does not provide the makings of an appeal before the Board.

In the past, this Board and the Commonwealth Court have maintained a healthy skepticism when it comes to any effort on the part of a regulated entity to manufacture an appealable action simply by sending the Department what is essentially a request for reconsideration of a prior action, thereby goading the Department into writing a letter denying that request. Unless such an effort is done in an appropriate context such as an application for a permit renewal or modification, *see, e.g., GSP Mgm't Co. v. DEP*, EHB Docket No. 2009-142-M (April 1, 2011); *Wheatland Tube v. DEP*, 2004 EHB 131, 134, using appropriate procedures, *see, e.g., Perano v. DEP*, EHB Docket No. 2009-119-C, slip op. at 6-8 (September 12, 2011), it will not ordinarily lay the foundation for Board jurisdiction. Thus, in *Pickford v. DEP*, 2008 EHB 168, *aff'd,* 967 A.2d 414 (Pa. Cmwlth. 2008), *appeal denied,* 982 A.2d 67 (Pa. 2009), Pickford sought to appeal a letter from the Department that refused to withdraw or put on hold previously issued permits. The Board dismissed the appeal noting that to hold that such Department letters are appealable would mean that any "party could appeal a Department action at any time by simply asking the Department to reconsider its earlier decision. That would completely eviscerate any semblance of administrative finality." 2008 EHB at 171.

Similarly, in *Franklin Township Municipal Authority v. DEP*, 1996 EHB 942, the Department notified Franklin Township of its eligibility for reimbursement funds. Franklin Township did not appeal that letter in a timely manner. It subsequently sent a letter requesting that the Department reconsider its decision. The Department replied by letter that it would not reconsider its determination contained in the previous letter. Franklin Township appealed the second letter. The Board granted the Department's motion to dismiss, stating "where the

Department merely reaffirms or refuses to reconsider an earlier decision, that reaffirmation or refusal does not constitute an appealable action." 1996 EHB at 947. The Board further stated that the "Department correspondence which neither changes the status quo ante nor imposes new obligations on the appellant is not an appealable action." 1996 EHB at 945. *See also Conshohocken Borough Authority v. DER*, 1992 EHB 615 (Department letter is not appealable because it amounted to no more than a refusal to alter its action); *Borough of Lewistown v. DER*, 1985 EHB 903 (Department's refusal to reconsider the appellant's eligibility of participation in a sewage treatment construction plant is not an appealable action). Thus, the February 23 letter is akin to neither a compliance order nor a permit denial. It is at most an unappealable response to a request for reconsideration. It has no legal effect. We lack jurisdiction to review it.[2]

CONCLUSIONS OF LAW

1. The Environmental Hearing Board does not have jurisdiction over the subject matter of this appeal.

2. The February 23, 2010 letter is not a final, appealable Department action.

[2] We are sympathetic to Perano's concern that a party who does not appeal a letter risks losing the ability to challenge a future Department action based on a Department allegation that an appeal from the future action is barred by the doctrine of administrative finality. Here, since we have concluded the February 23 letter had no independent effect, it cannot act as such a bar.

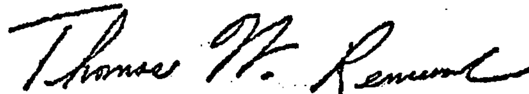
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2010-028-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

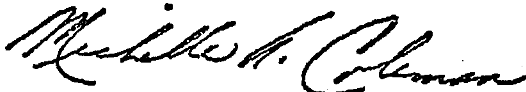
ORDER

AND NOW, this 2nd day of November, 2011, this appeal is hereby dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

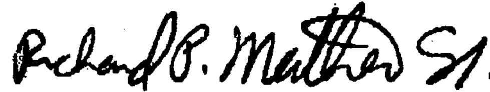


THOMAS W. RENWAND
Chairman and Chief Judge



MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: November 2, 2011

c: **DEP Bureau of Litigation:**
Glenda Davidson, Library

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2009-168-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DISTRICT TOWNSHIP SUPERVISORS, Permittee, JEFFREY LIPTON, LOUISE MOYER, BRIAN MOYER, JACQUELINE MOYER, RICHARD HOBBS, DOUGLAS LITCHERT and DANELLE LITCHERT, Intervenors	:	**Issued: November 10, 2011**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board finds that the Department's approval of a plan revision was not lawful and reasonable in light of the facts. The third-party appellant showed that there is a significant and credible risk that effluent containing nitrate will degrade an Exceptional Value stream on the property, and the Department and project proponents failed to show that the risk will not be realized. The record does not support the Department's theory that a wetland surrounding the stream will denitrify the effluent before it reaches the stream.

FINDINGS OF FACT

1. Pine Creek Valley Watershed Association, Inc. ("Pine Creek") is a non-profit corporation based in Oley, Pennsylvania.

2. The Department of Environmental Protection (the "Department') is the agency with the duty and authority to administer and to enforce the Pennsylvania Sewage Facilities Act, 35 P.S. § 750.1, *et seq.,* the Clean Steams Law, 35 P.S. § 691.1 *et seq.,* Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17, and the rules and regulations promulgated under those statutes.

3. Jeffrey Lipton is the developer of the Fredericksville Farms subdivision.

4. The other Intervenors own lots within the subdivision.

5. The site that is the subject of this appeal is the Fredericksville Farms subdivision, which is primarily located in District Township with a small section in Longswamp Township, both in Berks County. Longswamp Township did not participate in this appeal.

6. The site consists of 74.44 acres divided into 9 residential lots numbered 1, 2, 3, 4A, 4B, 5, 6, 7, and 8. (Notes of Transcript page ("T.") 433, 439, 568-69; Department Exhibit ("DEP Ex.") 1.)[1]

7. Lipton proposes that the residences that will make up the subdivision be served by on-lot septic systems. (DEP Ex. 1.)

8. District Township on behalf of Lipton previously submitted an Act 537 planning module to develop the subdivision, which the Department approved on November 26, 2006. Pine Creek appealed, and ultimately the Department withdrew its approval on January 16, 2008 in order to determine whether the planning module complied with antidegradation regulations. (T. 433, 568; *Lipton v. DEP*, 2008 EHB 223.)

[1] The Department's approval of the planning module for the subdivision that further subdivided Lot 4 into 4A and 4B is the subject of a separate appeal, *Pine Creek Valley Watershed Ass'n v. DEP*, EHB Docket No. 2010-112-L, which has been stayed at the request of the parties pending an adjudication in this matter.

9. This Board upheld the Department's withdrawal of its approval of the planning module, holding that the antidegradation regulations apply to the on-lot system discharges into the EV waters on the site. *Lipton, supra.*

10. Lipton then submitted a new planning module to District Township, which the Township approved on July 16, 2009. (T. 434-36, 440; DEP Ex. 1; DEP Supplemental Exs. ("DEP S. Ex.") 2, 13; I Ex. 1.)

11. The 2009 planning module submitted by District Township/Lipton to the Department was similar to the 2006 submittal except that it included an antidegradation analysis of the anticipated impacts of the proposed development on the EV stream and EV wetland. (T. 434-36; DEP Ex. 1; DEP S. Ex. 2, 13.)

12. On November 19, 2009, the Department approved the official plan revision. (DEP Ex. 1.) The instant appeal is Pine Creek's appeal from the Department's approval of the 2009 plan revision.

13. The site of the proposed development looks like a horseshoe-shaped bowl, or shallow basin, with gentle slopes on all sides (except for a small portion of Lot 8) draining into a wetland roughly at the center of the bowl. (DEP Ex. 13.) Out of the wetland emerge the headwaters of a small unnamed tributary of Pine Creek (the "receiving stream"), which flows down the middle of the wetland gathering flow as it exits the site. (T. 79, 128, 574-75, 596, 604; Pine Creek Exhibit ("PC Ex.") 1, 2; DEP Ex. 13; Intervenors' Exhibit ("I. Ex.") 2.)

14. The remnants of an old, abandoned farm road cut across the wetland in a roughly north-to-south direction. (DEP Ex. 13.)

15. The 11 or so acres of wetland on the site as well as the receiving stream are designated as Exceptional Value (EV) waters of the Commonwealth. (Joint Stipulation of the Parties ("Stip.") 5; T. 79-80, 103. *See also Lipton v. DEP*, 2008 EHB 223.)

16. The wetland is mostly forested. It includes a dense, closed canopy cover, areas with a moderately dense scrub-shrub layer, and areas with a well vegetated herbaceous layer. The three tiers overlap in places. (T. 132, 245, 368, 576, 703, 710-11, 732; PC Ex. 1.)

17. The Department's approval letter requires that the area delineated as a wetland on the site and a 50-foot forested buffer surrounding that wetland not be altered or encroached upon. (T. 98, 462-64; DEP Ex. 1; DEP S. Ex. 10.)

18. The 50-foot buffer was mandated by the Department at the behest of the Pennsylvania Fish and Boat Commission and the US Fish and Wildlife Service in order to protect bog turtle habitat on the site. The selection of a 50-foot buffer was not imposed because of nitrate pollution concerns. (T. 444-47, 462-64, 526, 608; DEP Ex. 1; DEP S. Ex. 10.)

19. The wetland on the site contains bog turtle habitat, and bog turtles have now been found living on the site. (Joint Supplemental Stipulation of the Parties; T. 42-43, 238; PC Ex. 4, 5.)

20. The bog turtle is designated as threatened under the Endangered Species Act. (T. 46.)

21. It has not been shown that development of the site as proposed will have any adverse effect on bog turtles or their habitat. (*See* T. 27-44.)

22. Development of the site as proposed will not interfere with the functions and values of the wetland on the site. (T. 309, 511, 529, 544-45, 561, 600-01, 687, 692, 695-96, 701, 710-11, 719-27.)

23. If the development and its on-lot systems increase the amount of water flowing to the wetland and stream above pre-existing conditions at all, the amount will be imperceptible and immeasurable, and there will be no adverse impact on the wetland or the stream. (T. 380, 624-28.)

24. It has not been shown that any pollutant emerging from the on-lot systems other than nitrate will have any adverse effect on the receiving stream. Nitrate is the only pollutant of concern. (T. 589-93.)

25. Denitrification is a process by which nitrate is transformed into nitrogen gas. (T. 515, 561, 562, 700.)

26. In order for denitrification in wetlands to occur, there must be: (1) a lack of oxygen, i.e. anaerobic conditions, (2) a source of carbon, (3) moderate temperature, and (4) the presence of denitrifying bacteria. (T. 562, 661.)

27. The nitrate-containing effluent from each of the on-lot disposal systems in the Fredericksville development will enter the groundwater below each system. (T. 593-94.) The area of groundwater in which the nitrate concentration exceeds 10 mg/l is referred to as the effluent plume.

28. It is presumed that the concentration of nitrate in the effluent plumes as the effluent enters the groundwater below each lot at the beginning of the plume will average 45 mg/l nitrate. (T. 594.)

29. Shallow groundwater flow on the site mimics the surface topography, with the flow draining toward the wetland and the receiving stream. (T. 574, 580, 583, 604, 705-06; DEP Ex. 13.)

30. The effluent plumes will flow toward the wetland and the receiving stream until the groundwater emerges onto the surface in the wetland or enters directly into the receiving stream. (T. 79, 83, 162, 268, 282-83, 595, 611, 622, 643; PC Ex. 2; DEP S. Ex. 13.)

31. The groundwater nitrate plumes are long and narrow and groundwater will flow slowly toward the wetland. (T. 595, 604; PC Ex. 2; DEP Ex. 13.) Once the plumes are established, they will achieve a steady state. (T. 655.)

32. Nitrate in the groundwater tends to flow near the top of the groundwater. (T. 595-96.)

33. By the time the plumes reach the wetland, the groundwater will be moving at or very near to the ground surface. (T. 646.)

34. When the groundwater in the plumes crosses into the wetland, Pine Creek's expert hydrogeologist, Philip Donmoyer, estimates that it will have the following nitrate concentrations (in mg/l) as a result of dilution:

Lot 1(existing home)	28.7
Lot 2	12.3
Lot 3	18.7
Lot 4	13.2
Lot 5	18.9
Lot 6	15.3
Lot 7	12.5
Lot 8	12.7

(T. 86-88; PC Ex. 2, 6, 7.)

35. Mark Sigouin, the Department's expert hydrogeologist, estimates the plumes will have the following nitrate concentrations (in mg/l) when they cross the wetland border as a result of dilution:

Lot 2	16.56
Lot 3	8.73
Lot 4A	20.09

Lot	
Lot 4B	9.65
Lot 5	8.98
Lot 6	11.06
Lot 7	8.04
Lot 8	13.42

(T. 600.)

36. The plumes for Lots 3, 6, 7, and 8 converge into the same general area near the headwaters of the stream. (T. 90; PC Ex. 2; DEP Ex. 13.)

37. The difference in concentration estimates at the wetland boundary between Donmoyer and Sigouin are not material. (T. 89-90.)

38. The Department approved the Fredericksville Farm plan revision because it believes that the wetland will decrease the concentration of the nitrate in the plumes from a range of about 8 to 20 mg/l down to .84 mg/l, which is the level that must be met in the stream. (T. 595-600, 622-23; DEP Ex. 13.)

39. Although there is no question that the effluent plumes from the on-lot systems proposed for the subdivision will emerge at the surface in the wetland and/or the receiving stream, it is not known exactly where in the wetland or in the stream such discharges will occur. (T. 83.)

40. The wetland is interspersed with myriad springs, seeps, swampy (or "mucky") areas, channels, and standing water, all of which eventually coalesce to varying degrees and feed into the receiving stream. (T. 87-88, 93-94, 103, 136-40, 237-38, 263, 273; PC Ex. 1, 2, 5, 10.)

41. Some of these surface waters, particularly to the west of the old farm road, largely represent stormwater runoff, but the majority of them represent groundwater emerging at the surface. (T. 90, 136-40, 194, 276, 422.)

42. The groundwater containing nitrogen from the proposed on-lot systems will emerge at the surface, sometimes in the stream itself, but as often as not in seeps, springs, swampy areas, and the like located in the wetland short of the stream itself. (T. 83, 87, 93-94, 103, 136-40.)

43. Absent an extraordinarily detailed analysis not performed here, it is impossible to say exactly where the groundwater containing nitrate from the on-lot systems will emerge in the wetland and/or the stream. (T. 87.)

44. Any attempt to delineate the plumes of nitrate-laden groundwater from the on-lot systems by the Department is not likely to be accurate after the plumes cross into the wetland. (T. 89-90; PC Ex. 2; DEP S. Ex. 2.)

45. Once the groundwater emerges at the surface, denitrification in the water that breaks the surface essentially stops. (T. 91.)

46. Groundwater levels in the wetland are very shallow. Although groundwater levels vary significantly over time based in part upon seasonal conditions (wet in the spring, dry in the summer), actual groundwater levels have not been measured. (T. 82-84, 90, 569-73, 714-15, 740-41; DEP S. Ex. 2.)

47. Surface emergence of the groundwater and surface runoff at the site vary considerably over time. (T. 569-73, 596-600, 650-51, 714-15.)

48. There is only one background sample of on-site shallow groundwater quality, which was taken from a seep in the eastern section of the wetland and showed a nitrate level of 2.71 mg/l. (T. 145, 157.)

49. The receiving stream has a water quality goal for total nitrogen of 0.88 mg/l and nitrate-nitrogen of 0.84 mg/l. (T. 295-96, 583-84, 675.) These are the concentration levels that

must be met in the effluent from the on-lot systems before it enters the stream, or at least the point of first use (POFU) in the stream.

50. There is a significant and credible risk that the nitrate in the on-lot systems' effluent plumes as high as 20 mg/l will not be denitrified to the extent necessary to meet the .84 mg/l level that is necessary to protect and maintain the stream. (T. 211-17.)

51. The Department and the Intervenors have four bases for concluding that the risk of harm will not be realized and the wetland will denitrify the effluent plumes to such an extent that there will be no stream degradation: (1) the maintenance of a riparian buffer, (2) a "qualitative analysis" of the wetland, (3) application of equations collectively referred to as the P-k-C model, and (4) use of the carbon equation.

52. The riparian buffer is irrelevant because nitrate concentrations will range from 8 to 20 mg/l *after* groundwater in the plumes crosses the buffer and enters the wetland. (FOF 34, 35.)

53. The "qualitative assessment" relates to harm to the wetland as opposed to the stream. (T. 687-725.)

54. Application of the P-k-C model does not provide a sound basis for concluding that the wetland will adequately denitrify the effluent plumes because:

a. Application of the model for accurately predicting denitrification outcomes in a natural forested wetland is not generally accepted in the scientific community. (T. 141-58, 176, 182, 211-13, 278-79, 299, 360-61, 619, 629-30, 645, 735; PC Ex. 22, 27.)

b. Assuming arguendo that the model could be applied, the Department and

Intervenors have not properly or conservatively applied the model to the Fredericksville site. (T. 38-43, 82-87, 90-94, 103, 145-47, 152-59, 180-87, 193-95, 213-16, 237-38, 282-85, 327, 365, 373-85, 402-13, 420-21, 519, 569, 575, 595-96, 600, 622-23, 642, 645, 646, 650-74, 711, 730-35; PC Ex. 1-5; DEP Ex. 13; I. Ex. 1, 2.)

55. The carbon equation does not independently demonstrate that there will be enough carbon in the wetland to fuel the denitrification process to the point that the stream will not be degraded. (T. 152-57, 194-202, 300-23, 376, 400-01, 561, 661, 678, 700, 711-12, 731-33; PC Ex. 25.)

56. The Department's approval of the plan revision based upon the finding that the stream will not be degraded as a result of denitrification in the wetland is not supported by the facts of record. (FOF 25-55.)

57. The Intervenors/Township did not propose and the Department did not consider any alternatives other than traditional on-lot systems in the plan revision, such as denitrification technology for the reduction of nitrates in the sewage effluent before it reaches the stream. (T. 100-01, 524-27; PC Ex. 8; DEP Ex. 1.)

DISCUSSION

This is Pine Creek's second appeal from a Departmental approval of District Township's Act 537 Official Plan Revision for the Fredericksville Farms development. Pine Creek appealed an earlier plan revision for the same development in 2006. After a hearing but before the adjudication, the Department withdrew its approval of the plan revision because it had failed to require an antidegradation analysis as required by 25 Pa. Code Chapter 93. We upheld that action. *Lipton v. DEP*, 2008 EHB 223. The current plan revision is indistinguishable from the same module approved in 2006 except that it now includes an antidegradation analysis.

There is an eleven-acre Exceptional Value (EV) wetland on the property, as well as an EV tributary to Pine Creek. The approval of the plan revision allows the construction of seven new homes using on-lot septic systems.[2] There is no question that the effluent from these systems will discharge into the EV wetland and/or the stream on the site. The fundamental question in this appeal is whether the sewage effluent will interfere with the functions and values of the EV wetland or degrade the water quality of the EV stream, neither of which is permitted. The Appellant, Pine Creek, says it will do both. The Department and Intervenors[3] say it will do neither. We conclude that the Department's conclusion that the wetland will not be harmed is supported by the facts, but its conclusion that the stream will not be degraded is not.

Pursuant to the Pennsylvania Sewage Facilities Act, 35 P.S. § 750.9, the Clean Streams Law, 35 P.S. § 691.5, and Section 1917-A of the Administrative Code, 71 P.S. § 510-20, and the regulations promulgated thereunder, all municipalities must develop and implement a comprehensive official plan for sewage disposal. Municipalities must revise their official plan when a new subdivision is proposed. 25 Pa. Code § 71.51. When a new development is requested by a private developer, as in this case, the developer or its agent completes a sewage facilities planning module and submits it to the municipality for action. 25 Pa. Code § 71.53(a). If the municipality approves the proposed plan revision, it submits it to the Department for review. Of particular relevance in this case, 25 Pa. Code § 71.21(a)(5)(i)(E) requires that the Department review the revision to ensure that it is consistent with the antidegradation requirements of 25 Pa. Code Chapter 93, and 25 Pa. Code § 71.21(a)(5)(i)(I) requires that the Department review the revision to ensure that it is consistent with the wetland protection requirements of 25 Pa. Code Chapter 105.

[2] There are existing homes on Lots 1 and 4B.

[3] The Department and the Intervenors' positions are aligned. Unless otherwise noted, for the sake of readability, when we refer to the Department we are including the Intervenors as well.

Pennsylvania has an EPA-approved water quality standards program codified at 25 Pa. Code Chapter 93 and portions of Chapter 105, which includes the antidegradation program. The program provides that instream water uses and the level of quality necessary to protect those uses shall be maintained and protected. 25 Pa. Code § 93.4a. This includes protection from nonpoint source discharges, such as effluent from on-lot sewage treatment facilities. *Lipton*, 2008 EHB at 229-33. For Exceptional Value streams, the focus shifts from protection of *uses* to protection of existing *water quality*. The existing water quality of EV streams must be maintained and protected. 25 Pa. Code § 96.4a; *Blue Mt. Pres. Ass'n v. DEP*, EHB Docket No. 2009-080-L (Adjudication, August 25, 2011). For EV wetlands, the Department reviews a project to ensure that there will be no adverse impact to the functions and values of the wetlands. *See* 25 Pa. Code §§ 93.4a(d), 96.3, 105.1, and 105.18a. Thus, the Department was required in this case to ensure that effluent from the proposed on-lot systems at the Fredericksville Farms subdivision would neither (1) interfere with the functions and values of the wetlands, nor (2) reduce the water quality of the EV stream on the site.

Pine Creek as a third party appealing the Department's approval of the Township's Act 537 plan revision bears the burden of proof. 25 Pa. Code § 1021.122(c)(2). In order to prevail, Pine Creek must prove by a preponderance of the evidence that the Department's action was unlawful, unreasonable, or not supported by the facts. *Wilson v. DEP*, 2010 EHB 827, 833. In an appeal such as this one, which involves application of antidegradation requirements to special protection waters, Pine Creek does not necessarily need to show that there *will* be environmental harm in order to meet its burden of proof. Rather, once a challenger such as Pine Creek shows that a project presents a significant and credible risk of harm, it is incumbent upon the Department and the project's proponents to show that the risk will not be realized and the special

protection waters are not likely to be harmed. In other words, the burden of proof effectively shifts to the Department and the project's proponents to show that the functions and values of the special protection wetlands and the existing water quality of the special protection streams will be maintained and protected. *CRY v. DER*, 639 A.2d 1265, 1269 (Pa. Cmwlth. 1994); *Marcon v. DER*, 462 A.2d 969, 971 (Pa. Cmwlth. 1983); *Blue Mt. Pres. Ass'n v. DEP,* EHB Docket No. 2009-080-L, slip op. at 8 and 11 (Adjudication, August 25, 2011); *Crum Creek Neighbors v. DEP*, 2009 EHB 548, 567 and 569-70; *Blue Mt. Preservation Ass'n v. DEP*, 2006 EHB 605-06; *Birdsboro v. DEP*, 2001 EHB 377, 397-98, 401-03; *Lehigh Township v. DEP*, 1995 EHB 1098, 1112.

Pine Creek has not shown with affirmative evidence that there is a significant and credible risk that the effluent plumes from on-lot systems will interfere with the functions and values of the wetland on the Fredericksville site. Pine Creek's expert, Dr. James Schmid, is a highly qualified expert on wetlands, but his testimony regarding any threat posed by pollutants in the plumes to the wetland itself was very limited. (*See, e.g.,* T. 164, 167-68, 218-19, 309-11, 327.) He acknowledged that much more work would need to be done to assess the actual risk of harm to plants and animals and admits he has not done that work.

We also do not share Schmid's concern that on-lot effluent will increase water levels in the wetland. We credit the expert opinion of Mark Sigouin, the Department's hydrogeologist, who is more qualified to give such an opinion, that the development will not result in more than an imperceptible and immeasurable increase in water levels in the wetland. (T. 624-28.) Therefore, Schmid's concern that higher water levels would do harm is not implicated because the evidence does not show there is a significant and credible threat that there will be higher water levels.

Pine Creek also has not shown that there is a significant and credible risk of harm to bog turtles or their habitat. It also has not shown that there is a risk of harm to the wetland or the receiving stream from any pollutants in the effluent plumes other than nitrate. As the Department correctly points out, if it were required to speculate about every substance a future resident may pour down the drain, the approval process would grind to a halt. It is not enough for a third party challenging a Department approval to simply raise an issue and then speculate that unforeseen calamities may occur. *Shuey v. DEP*, 2005 EHB 657, 711.

On the other hand, Pine Creek has successfully shown that there is a significant and credible threat of harm to the receiving stream from nitrate-nitrogen in the effluent plumes. There is no dispute between Pine Creek and the Department that nitrate concentrations will be as high as 20 mg/l in effluent from the new on-lot systems when the effluent crosses into the wetland a relatively short distance away from the stream. The water quality of the stream that must be maintained and protected is .84 mg/l nitrate-nitrogen (or .88 mg/l total nitrogen). The only thing standing in the way of effluent as high as 20 mg/l entering the stream is the wetland itself. This poses a significant and credible threat. (T. 211-17.) Given this threat, it was incumbent upon the Department and the project proponents to show that the plumes are not likely to degrade the water quality of the stream. This they have failed to do.

The Department's decision to approve the plan revision and allow the on-lot systems to be built comes down to its conclusion that the wetland will denitrify effluent plumes so effectively that nitrate concentrations as high as 20 mg/l will be less than .84 mg/l when they merge into the stream. The Department cites four bases for its conclusion that the wetland will sufficiently denitrify the effluent plumes before they reach the receiving stream: (1) the 50-foot riparian buffer that must be left intact around the wetlands will significantly denitrify the plumes

before they reach the wetland; (2) a "qualitative analysis" of the wetland; (3) application of equations collectively referred to as the P-k-C model; and (4) use of the carbon equation. None of these bases persuade us that the wetland is likely to act as the protective barrier envisioned by the Department. Therefore, existing record shows that the stream is likely to be degraded.

Riparian Buffer

For purposes of protecting the bog turtle, the Department insisted that a 50-foot buffer remain untouched around the delineated wetland on the Fredericksville site. A secondary benefit of this buffer, according to Sigouin, the Department's hydrogeologist, is that it will help denitrify the effluent plumes before they reach the wetland. In fact, this is a major component of his opinion that the receiving stream will not be harmed. (T. 619.)

The Department's reliance on this buffer as a vehicle for denitrification is somewhat of a mystery to us. Sigouin calculated the nitrate concentrations that are likely to be in the plumes *after* they cross the buffer zone and just as they enter the wetland. Those concentrations in Sigouin's opinion will range from 8.04 to 20.09 mg/l. Sigouin's calculations are not materially different than the calculations performed by Philip Donmoyer, Pine Creek's expert hydrogeologist, whose calculations ranged from 12.3 to 28.7 mg/l of nitrate. (28.7 is for the existing home on Lot 1.) Jeffrey Warmkessel, the Intervenors' expert hydrogeologist, testified that he did not disagree with Sigouin or Donmoyer's plume analyses. (T. 346, 353.) We credit the calculations of Sigouin and Donmoyer, which both clearly show that plumes with concentrations of up to 20 mg/l will enter the wetland.[4] Therefore, what will happen in the plumes *before* they cross into the wetlands is meaningless in this appeal.

[4] Some of the plumes overlap as they converge near or in the wetlands. (T. 90; DEP 13.) It is not clear how these convergences will affect concentrations, although common sense would suggest that they will not decrease.

It may be that Sigouin is opining that his plume analysis is not really accurate because of the riparian buffer. If that is the case, he has contradicted himself. Why prepare and testify regarding a detailed plume analysis with values as high as 20 mg/l if actual values will approach zero? All three hydrogeologists either opined or admitted that nitrate will be as high as 28 mg/l in the groundwater entering the wetland. There also is no evidence of record to credibly support Sigouin's assertion that denominating a non-wetland area as "riparian buffer" magically renders it a denitrification zone. We very recently and in great detail upheld the Department's conclusion that very little denitrification occurs in non-wetland environments. *S.H.C. v. DEP*, 2010 EHB 619. Sigouin's buffer-zone theory is interesting, but based on the limited existing record produced here we are not willing to credit that part of Sigouin's opinion.

"Qualitative Analysis" of the Wetland

The Department relies upon the testimony of its wetlands expert, Allyson McCollum, for the proposition that the effluent plumes will not have an adverse effect on the function and value of the wetland itself. As previously noted, Pine Creek has failed to raise a credible risk that the effluent plumes will harm the wetland itself. McCollum's opinion does not relate to degradation of the stream itself.

There is, however, one aspect of McCollum's testimony worth mentioning because it is emblematic of a theme that runs through the Department and the Intervenors' presentations. (*See, e.g.,* DEP Brief at 63, 87.) McCollum was comforted by the fact that there is a large area of wetland that will be available to denitrify sewage from a relatively small number of homes. (T. 710, 719-21.) In fact, this view is misleading and can give the false impression that there is little cause for concern at this site. The total size of the wetland on the site is irrelevant. Only those portions of the wetland that are available for denitrification because they come into contact with

the on-lot system plumes before those plumes emerge at the surface are relevant. Our review of the parties' plume analyses shows that surprisingly small portions of the wetland are potentially in play. (DEP Ex. 13; PC Ex. 2; I. Ex. 2.) Under Sigouin's analysis for example, a large majority of the wetland acreage will never come into contact with the plumes. The total wetland on the site could be a thousand acres, but if only a small fraction of those acres have the potential to come into contact with the plumes, only those acres matter.

The P-k-C Model

The Department relied upon a series of equations known as the P-k-C model developed by William Kadlec and Scott Wallace in their textbook entitled TREATMENT WETLANDS (2d ed.) (2008) to predict that the Fredericksville wetland will completely denitrify the sewage plumes before they intersect the receiving stream. Pine Creek argues that the P-k-C model cannot be relied upon to predict denitrification outcomes in a natural forested wetland because that particular application of the model is not generally accepted in the scientific community. Pine Creek is referring to the so-called *Frye* test. When determining whether expert testimony may be offered on a particular scientific subject, Pennsylvania follows the standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. 1923). *See* Pa.R.E. 702 (comment); *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1043-44 (Pa. 2003); *McManamon v. Washko*, 906 A.2d 1259, 1273 (Pa. Super. 2006); *Exeter Citizens Action Committee v. DEP*, 2005 EHB 306, 333-34. The *Frye* standard provides that an expert opinion based on a scientific technique is only admissible if the technique as well as its application to the particular situation at hand are generally accepted as reliable in the relevant scientific community. *Grady*, 839 A.2d at 1044, 1047; *Dennis Groce v. DEP*, 2006 EHB 856, 927. It is up to the proponent of the scientific evidence to demonstrate that the underlying theory upon which the expert testimony will be predicated meets the test of "general

acceptance." *See Grady*, 839 A.2d at 1045; *Groce*, 2006 EHB at 927. Thankfully, the evidentiary screening function served by the *Frye* test is not implicated every time science comes into the hearing room; rather, it applies only to proffered expert testimony involving novel science. *Commonwealth v. Dengler*, 890 A.2d 372, 382 (Pa. 2005); *Commonwealth v. Delbrindge*, 859 A.2d 1254, 1260 (Pa. 2004).

Deciding whether a particular methodology is generally accepted in a scientific community obviously requires us to consider the views of the scientific community. *Grady*, 839 A.2d at 1044-45 ("[r]equiring judges to pay deference to the conclusions of those who are in the best position to evaluate the merits of scientific theory and technique when ruling on admissibility of scientific proof, as the *Frye* rule requires, is the better way of insuring that only reliable expert scientific evidence is admitted at trial.") Although the foundation necessary for admissibility is likely to come from experts in the pertinent scientific community, whether a method is generally accepted or its application in a particular way is accepted in the scientific community is actually a question of fact as much as opinion. There is certainly no prohibition against the expert who is proposing the use of an allegedly novel method testifying that the method is generally accepted. Opposing experts may of course disagree. We evaluate the credibility of the testimony just like any other expert testimony. In the end, however, we need more than evidence of a witness's *personal* acceptance: we must see proof of *general* acceptance.

The *Frye* test is designed to ensure that opinions based upon unaccepted science are not presented to impressionable jurors. *Blum v. Merrell Dow Pharm., Inc.*, 705 A.2d 1314, 1317 (Pa.Super. 1997), *aff'd,* 764 A.2d 1 (Pa. 2000). This Board, of course, operates in a nonjury setting. We deal with scientific theories every day. Although we are, perhaps, not quite as

impressionable as jurors, opinions founded upon scientific theory that is not yet generally accepted tend to waste time and do not aid us much in our search for the truth. Therefore, although we may be less inclined than a judge presiding over a jury trial to exclude expert opinion altogether, we will nevertheless consider the degree of acceptance of the underlying science in deciding how much weight to accord an opinion. The underlying principle that untested theory is not reliable evidence means that we will give little credence to such a theory in our deliberations.

Such is the case here. This case serves as a perfect example of a situation where the scientific methodology, the P-k-C model, is generally accepted for some purposes, but its application to the situation at hand is not.

In order to calculate the area of wetland needed to treat influent to meet a certain effluent standard (or alternatively, to calculate an outlet concentration if the area of wetland is known), a series of equations from Kadlec and Wallace must be used, but the primary equation is:

$$\frac{C - C^*}{C_i - C^*} = \frac{1}{\left(1 + \frac{k}{Pq}\right)^P} = \frac{1}{\left(1 + \frac{k_v \tau}{P}\right)^P}$$

(PC Ex. 22-24; I. Ex. 1.) We will not attempt to describe the entire operation of the model here. Suffice it to say that the modeler is required to plug in values for the concentrations ("C") of background, the influent, and the target effluent, flow rate ("q"), type of wetland ("k"), and a mixing factor ("P"). (T. 663-76.)

The P-k-C model was designed as a tool to help engineers design and build man-made constructed wetlands for use in treating pollutional discharges. Its use for that purpose is not questioned. The model was not designed, however, as a tool for predicting denitrification

outcomes in a natural wetland. (T. 142, 211-13.) The Department and Intervenors' experts nevertheless contend that the model can be used for that purpose.

This case requires us to select among several contradictory expert opinions. As we explained in *UMCO v. DEP*, 2006 EHB 489, *aff'd*, 938 A.2d 530 (Pa. Cmwlth. 2007), the weight to be given an expert's opinion depends upon such factors as the expert's qualifications, presentation and demeanor, preparation, knowledge of the field in general and the facts and circumstances of the case in particular, and the quality of the expert's data and other sources. Perhaps more fundamentally, we look to the opinion itself to assess the extent to which it is coherent, cohesive, objective, persuasive, and well grounded in the relevant facts of the case. *Bethayres Reclamation Corp. v. DER*, 1990 EHB 570, 580-81. *See e.g., Sunoco, Inc. v. DEP*, 2004 EHB 191, 246, 249; *aff'd*, 865 A.2d 960 (Pa. Cmwlth. 2005); *Birdsboro & Birdsboro Municipal Authority v. Dep't of Envtl. Prot.*, 795 A.2d 444, 447-48 (Pa. Cmwlth.); *T.R.A.S.H. Ltd. v. Dep't Envtl. Resources*, 1989 EHB 487, *aff'd*, 710 A.2d 1228 (Pa. Cmwlth. 1998). As the fact finder, weighing credibility and selecting among competing expert testimony is one of our most basic and important duties. *Birdsboro v. Dept. of Envtl. Prot.*, 795 A.2d 444, 447 (Pa. Cmwlth. 2002); *Bethayres*, 1990 EHB at 580.

We credit the testimony of James Schmid, Pine Creek's expert, that using the P-k-C model to make accurate predictions of denitrification outcomes in a natural forested wetland system is not generally accepted in the scientific community. (T. 142-43, 176, 182, 211-13, 278, 299.) Schmid is an eminently qualified wetlands expert and a distinguished member of the pertinent scientific community. His testimony was lucid, learned, and logical. In demeanor, demonstrated knowledge, and substance, we find his opinions to be highly credible. The

testimony of the Department and the Intervenors' experts on the subject did not compare well, and we find their testimony on this foundational question to be less credible.

As Schmid explained, when faced with the need to build an artificial wetland, an engineer must start somewhere. There are numerous variables to consider: depth, length, width, number of cells, flow, local conditions, expense, desired outcome, types of plants to use, type of substrate, etc. (T. 148-49.) Designing an effective treatment wetland can be a notoriously difficult task. Given all of the variables and the sometimes fickle nature of natural processes, designing wetlands for treatment purposes is still a relatively new endeavor, and it has been plagued by difficulties and failures. (T. 149.) Indeed, the Department considers wetlands as "experimental" treatment systems, and the record even suggests that it is currently not approving them for sewage treatment on that basis. (T. 360-61.)[5]

The Kadlec and Wallace work synthesizes dozens of wetland performance studies to help engineers work through the numerous variables and come up with desk-top *approximation* of what might work. (T. 141-50.) The approximation is based upon central data trends, averages, and averages of averages, of often very limited data. Such an approximation may be acceptable from a design perspective partly because the system can be adjusted by, for example, changing the type of plants, adjusting flow and holding times, or adding a cell. If carbon, which is needed for denitrification, is too low, the wetland manager can add potato waste. (T. 154.) Back-up systems are often available, as are, for example, holding ponds to store effluent during cold winter months when denitrification slows or stops in a wetland. The discharge can be tested to make sure the system is working.

[5] Interestingly, the regulatory definition of "surface waters" does not include constructed treatment wetlands. 25 Pa. Code § 95.1.

What the Department has done here is attempt to take highly abstract equations focused on design criteria and use them to predict actual results in an uncontrolled, natural system. (T. 148, 279.) Although the consequences are high and the water quality of the stream *must* be protected as a matter of law, there are no controls and no opportunities for adjustment, indeed, no likely way to know if the system is even working. A rough approximation to guide design choices is not yet generally accepted as an appropriate tool for this purpose.

The model is not supported by adequate study of forested wetlands. Kadlec and Wallace's work is based almost exclusively on studies of herbaceous (i.e. cattails, reeds, grasses) wetlands. (T. 141-43.) Very little data has been generated regarding forested or mixed systems such as the Fredericksville system, for the obvious reason that no one is likely to plant a forest in constructed treatment wetlands. (T. 142-43, 629, 735.) The testimony regarding Kadlec and Wallace's work reveals that there is a huge variation in the performance of one genre of wetland, let alone different genres of wetlands. (T. 142-43.) We credit Schmid's opinion that application of the test to a forested system is unproven.

The Department has not cited a single example of the model having been used to successfully predict results in a natural forested system. Actually, it has not even cited an example of the model having accurately predicted results in a constructed wetland or a natural herbaceous wetland used for treatment. In other words, there is no credible, specific record support for the notion that the model has successfully predicted actual results.

"General acceptance" of a scientific method takes more than utterance of that magical phrase. If the issue is in dispute, we need to see examples, studies, something to show that it has been tested and it works, and therefore, the scientific community has endorsed it. Here we have none of that. This, despite the fact that we put the Department on notice before the hearing that

the burden was on it to prove general acceptance as the advocate of the disputed application of the model. *Pine Creek* (Opinion and Order, February 15, 2011.) The Department is attempting to expand the application of the science in a new way for the first time in a courtroom, and that is exactly what *Frye* is designed to prevent. The fact that the Department is proposing this experiment in a special protection watershed makes it that much more difficult to accept. We have great difficulty reconciling the fact that the Department is reluctant to approve constructed wetlands, calling them "experimental," with its willingness to trust a largely untested theoretical construct in the *hope* that the Fredericksville wetlands will be effective as a treatment system for protecting and maintaining the water quality of an Exceptional Value stream.

Somewhat to our surprise, Mark Sigouin, the Department's expert hydrogeologist, essentially agrees. He testified, "I have seen it [the P-k-C model] used in other contexts but not--but I have never seen it applied in this way." (T. 630.) He further explained, "That's why it's always very--that's one of the ways that somebody should not try to attempt to take a process model and shove it into and treat it as if it's a watershed model... This model is a model of a process. It's not a watershed model." (T. 645.) He did not believe the Fredericksville plan revision should be approved "based upon a riparian buffer and a textbook thing." (T. 619.) (*See also* T. 629 (only a "smattering" of background data on use of natural wetlands for treatment purposes.)

The two expert witnesses who actually applied the P-k-C model were Derron LaBrake for the Intervenors and Sunil Desai for the Department.[6] We do not credit their testimony that the application of the P-k-C for the use to which it was put here is generally accepted. Although

[6] The Department inaccurately claims that Schmid endorsed the model for use here. Schmid repeatedly and vociferously stated that he did not endorse the Department's "gross mis-use" (T. 211) of the model in this setting. He went on to add as further grounds for his opinions that, even (reluctantly) assuming the model could be applied here, the Department and Intervenors did so incorrectly. As discussed below, we agree with that opinion as well.

both witnesses responded affirmatively to a leading question regarding general acceptance, neither backed it up with any explanation or examples of similar prior use. Neither witness was particularly familiar with the test. Desai had no experience with it whatsoever. (T. 658).

It must be said that neither LaBrake nor Desai gave us any confidence that they really had a complete understanding of the model. Both witnesses relied heavily on hearsay conversations with Wallace, the author of the book that contains the models. (*See, e.g.*, T. 374, 385, 402, 663, 675.) LaBrake conceded that Wallace actually changed some of his inputs, although he did not say which ones. (T. 374.) Desai testified that Wallace in some cases simply told him which inputs to use. (T. 663, 675.) While an expert may rely on other experts in forming his own opinion, in the end it must be *his* opinion. *Allegheny Energy Supply Co. v. Greene County*, 788 A.2d 1085, 1096 (Pa. Cmwlth. 2001.) An expert may not simply regurgitate the opinion of another expert, particularly one who does not testify. *Primavera v. Celotex Corp.*, 608 A.2d 515, 521 (Pa. Super. 1992) (expert should not be permitted to simply repeat another's opinion or data without bringing to bear his own expertise or judgment); *Luzerne County Flood Protection Authority v. Reilly*, 825 A.2d 779, 784 (Pa. Cmwlth. 2002) (one expert may not act as a mere conduit for another). *See also Aldridge v. Edmonds*, 750 A.2d, 297-98 (Pa. 2000) (reference to a learned treatise to explain direct testimony acceptable, but it may not be used to bolster credibility of witnesses; treatise itself is not admissible). If the Department wished to rely so heavily on Wallace's views, it should have called him to testify.

Neither witness was particularly confident on the witness stand. This is understandable given their limited prior experience with this model. To the extent they did not rely on conversations with Wallace, both witnesses gave the impression that they were pulling the other numbers to plug into the equations out of the Kadlec and Wallace textbook without a personal

endorsement of a particular input. Anyone with a modicum of training can plug numbers into an equation and do the math. The true added value that an expert brings to bear is a meaningful explanation of the inputs. Here, that explanation tended to be lacking. In short, these witnesses, although otherwise extremely competent in their fields and sincere in their beliefs, did not overcome Schmid's compelling testimony that the model lacks general acceptance as it was applied here.

The Department also called Edward Corriveau to testify that the model has general acceptance as applied here. Although we have found Corriveau to be a highly credible witness in other cases and in other contexts, we do not credit his testimony regarding general acceptance in this case. Corriveau's main contention was that the P-k-C model accurately describes a chemical/biological process. (T. 518-20.) This, however, is not in dispute and comports will with all of the other experts. Where we think the model has yet to be proven is predicting how that process will unfold in a particular natural forested system. In Sigouin's words, it is not a watershed model. Corriveau had no experience with the model, no reported background with natural wetlands and, as with the other witnesses, could cite no examples where the model has been used successfully to make accurate predictions. (T. 530-31.) He admits that the Department has never used it before, although he believes it "may have been used in other states." (T. 531.) At most, Corriveau's testimony represents *his* personal view that the application of the model has merit. This falls short of testimony that the model has achieved general acceptance in the scientific *community*.

Schmid prepared an exhibit that illustrates how even small variations in the input parameters plugged into the model can produce dramatically different results. (PC Ex. 27.) Desai changed his calculations multiple times (T. 281, 663-76), as did LaBrake (T. 374). The

fact that the same model can result in such a wide range of predictions in and of itself hints that predictions based on that model have limited value and are not currently worthy of acceptance for application in the protection of special protection waters.

Thus, we conclude that the application of the P-k-C model to predict denitrification outcomes in a natural forested wetland is not a generally accepted use. Therefore, LaBrake's and Desai's opinions, which are based on their use of that model, carry very little weight in our deliberations.

We could end our discussion right there. Nevertheless, in the interest of creating a complete record, we should explain that we cannot uphold the Department's decision even if we assume for purposes of discussion that the model can be applied to predict denitrification in a natural forested system. This is because the Department has not properly or conservatively applied the model.

The first and arguably most serious flaw in the Department's application of the model is its assumption that the background concentration of nitrate in the wetland is zero. This assumption essentially invalidates all of the modeling. Background is a critical component of the P-k-C model. It is absolutely essential to know the background concentration or the modeling result is essentially meaningless. (T. 145-47, 180-81, 194-95, 213-15.) LaBrake acknowledged that he would have liked to know background, but he was not paid to find that out. (T. 410.) Desai used zero simply because Wallace apparently told him to do so in the absence of other data. (T. 663.)

The Department routinely requires background nitrate data for developments proposing on-lot systems, even in non-special protection waters. *See, e.g, S.H.C., supra.* Yet it inexplicably did not do so here. Aside from being unsound science, the use of zero for

background is another manifestation of the fact that the model is set up for constructed wetlands. In a constructed wetland, there really is no "background" if all of the water going into the first tank is treatment water. That is obviously not the case in a natural setting.

The choice of zero as the input for background is all the more difficult to justify because there is, in fact, background data. A sample taken from a seep in the eastern portion of the wetland revealed a nitrate concentration of 2.71 mg/l. (T. 642.) Although one sample from a seasonally variable wetland is hardly ideal, it is better than nothing. No expert testified that it was acceptable to ignore this result, and Schmid testified credibly that it was scientifically unforgivable to do so. (T. 145-47, 180-81, 194-95, 213-15.)

Had 2.71 mg/l been plugged into the P-k-C model, it would have been mathematically impossible to make the output concentration come out to less than the .88 mg/l total nitrogen (.84 nitrate nitrogen) required to protect the stream. (T. 410.) That, more than anything else, may explain why actual background was ignored.

A healthy, functioning wetland should have a background concentration of zero. (T. 374.) The fact that the background concentration of nitrogen in this wetland appears to be 2.71 mg/l suggests that the wetland may have already reached its capacity to fully denitrify groundwater flowing into it. (T. 157.) If this were the case, it would not be particularly surprising because the wetlands are currently surrounded by extensive, active farm fields, which have probably been fertilized over the years. (T. 575; I. Ex. 1.) There was also an existing, possibly malfunctioning septic system discharging into the wetlands at the time of the sample. (T. 646.) Since then, another source has been added. (T. 569.) The source of the background level is a matter of conjecture at this point because the Department has failed to perform a proper investigation of background conditions. We simply note the presence of active farming and the

existing septic system as reasons why the one result of 2.71 mg/l should not be dismissed as a mere fluke, but rather, is cause for legitimate inquiry.

The next flaw in the Department's utilization of the model is that it has made unwarranted assumptions regarding the hydrogeology of the site. There is a fundamental and very important disagreement between Donmoyer, Pine Creek's hydrogeologist, and Sigouin, the Department's hydrogeologist. (Warmkassel did not express an opinion on this issue.) Sigouin opines that the nitrate plume from each and every on-lot system will continue unabated in a narrow path and without interruption under the surface of the wetlands and will not emerge until it hits the receiving stream itself. (T. 596; DEP Ex. 13.) Although surface water can be seen at times throughout the wetlands and short of the stream itself, it is all in Sigouin's view mere surface water runoff. (T. 650-61.)

Before going any further with the disagreement regarding hydrogeology, we should pause to explain why the debate is important. In order for the Department's conclusion regarding the P-k-C model (and the carbon equation as well as discussed below) to be valid, it is necessary to assume that the entire portion of wetland that it has concluded will be necessary to treat the effluent will in fact be in contact with the plumes.[7] Once the groundwater breaks to the surface, all witnesses agree that denitrification in that water stops. (T. 83, 87, 91-94, 103, 217.) Sigouin drew the nitrate plumes to extend all the way to the creek. (DEP Ex. 13.) He assumed that no groundwater will break the surface in any plume at any time. Based upon that assumption, he simply calculated the entire surface area bounded by the wetland border, the sides of the plume,

[7] The Department would argue that there is excess area available for most of the plumes. We do not agree, but even if we did, Desai says there is barely enough wetland to denitrify effluent from Lot 8. (T. 676.)

and the stream channel.[8] He then provided the square footages of each plume within the wetland to Desai, who in turn used them to compare against his modeling results and conclude that there is more surface area available than necessary according to the model. (T. 662.)

The problem is that we do not credit Sigouin's opinion that the groundwater plumes will continue unabated from the wetland border to the stream itself, thereby making all of that portion of the wetland, which is already quite small in some cases, available for denitrification. That assumption is simply not realistic based on actual conditions at this site. Donmoyer credibly testified that there is no way that all of the plumes are likely to make it all of the way to the stream itself. Numerous witnesses including Donmoyer testified that there are at times a myriad of small channels, springs, seeps, standing water, and completely saturated ("mucky") areas throughout the wetland in addition, of course, to the stream itself. (*See, e.g.,* T. 38-43, 90, 237, 711; PC Ex. 5.)[9] This is exactly what one would expect. The bog-turtle experts agreed that the site would not have qualified as bog turtle habitat without active *springs* (T. 38-43, 238), and in fact bog turtles have now been found on the site (Jt. Supp. Stip.). The background sample of 2.71 mg/l was taken from a *seep*. (T. 83, 642.) LaBrake agrees that, with the exception of small wetland areas west of the old farm road, the surface water in the wetland represents exposed groundwater. (T. 365, 413, 420-21; I. Ex. 2.) Donmoyer credibly agreed, and concluded that, because the majority of these surface features arise from groundwater flow, it is entirely inappropriate to assume that all of the areas postulated by the Department to be available for

[8] The edges of the plume are ordinarily defined by that area of groundwater affected by on-lot effluent to the point that it exceeds the 10 mg/l drinking water standard for nitrate. (T. 86-88.) This surrogate for actual concentrations is less than ideal in the current context where wells are not the issue and groundwater with a concentration of less than 10 mg/l must be denitrified down to .84 mg/l.

[9] The Board conducted a site visit.

denitrification will in fact be available. (T. 82-87, 90-94, 103; PC Ex. 2, 6, 7.) Thus, for example, if groundwater from Lot 4A breaks the surface in a spring near the edge of the wetland at its concentration of 20.09 mg/l, that water will make it to the stream at that concentration, not the near-zero the Department is imagining.[10]

Another example of how the Department has discounted actual site conditions in its application of the P-k-C model is how it applied the P and k factors in the analysis. P represents the number of "tanks" in the wetland and k represents the presumed flow rate in a given type of wetland. Both inputs attempt to account for the fact that flow in wetlands varies by type of wetland and in any one wetland it tends to be highly irregular. (T. 385.) The porosity of wetland soils is very low, so water will have a tendency to find and indeed create its own preferential pathways. (T. 385, 402, 600, 711.) For example, once the water intersects a bog turtle tunnel or a cavity left by a rotted out tree root, that is where it will go. And it will go much faster than seepage through the soil itself. A spring is evidence of this preferential flow.

In a constructed wetland, there are a series of ponds or "tanks" that progressively treat to lower and lower concentrations. Presumably, no one preferential pathway would be likely to cross from one tank to the next. The tanks will likely be installed with relatively limited varieties of plants and homogenous soils. This is to be compared with the Fredericksville forest, where conditions vary dramatically. One moment the ground is solid and the next the walker may find

[10] The parties argue about where the point of first use (POFU) is located in the stream, but we are not sure why. Although the Department posits that EV protection only begins at the POFU, there is no dispute in this case that denitrification effectively ends once the plumes break out to the surface. Neither the Department nor the Intervenors have shown or even argued that there is enough dilution in the portions of the stream above the alleged POFU to bring the nitrate concentrations down to the required level of .84 mg/l at the POFU. If the point of the discussion is to define where the plumes end, then once again the discussion is misplaced because it is the point where the plumes break the surface that determines where denitrification ends. Whether that point is upstream of the POFU is irrelevant in the denitrification analysis. To the extent the point of the discussion is that the stream above the POFU is only entitled to that protection afforded the wetlands under the functions-and-values test, we need not resolve that precise question here.

himself calf-deep in muck. A walker is required to repeatedly hop over surface water or suffer wet feet. There are three vegetative tiers (trees, shrubs, ground plants), which overlap to varying degrees. There are no "tanks."

LaBrake and Desai nevertheless assumed that the wetland will contain 3 tanks--the P factor. This is an important assumption because, roughly speaking, it reduces the amount of wetland needed for denitrification by a factor of three. Thus, in part because of the operation of the P factor, LaBrake assumes the groundwater will take four months to cross from the edge of the wetland to the stream (40 days per "tank"). (T. 383; I. Ex. 1.)[11] LaBrake used 3 because Wallace apparently told him to. (T. 385.) Desai pulled the number from a chart in the K&W textbook (T. 675). The chart is not in evidence but apparently it is based upon a limited sampling of herbaceous wetlands in places such as Spain, France, Quebec, and Australia. (T. 735.) Lacking is any indication that either witness personally believed 3 was the best choice for this site, and we question whether Desai, who has no background in wetlands, would have been qualified to so opine in any event. Schmid testified that assuming there are three tanks in the Fredericksville wetlands is not warranted. We credit his opinion that, if the model was to be used at all, the Department has not adequately explained or justified the pretense that there are three "tanks." (T. 160-70, 188-192.)

As to the k factor, LaBrake classified the wetland as a free water surface (FWS) wetland (lots of water on the surface--common in treatment wetlands), when in fact it is a horizontal sub-surface flow (HSSF) (most of the water flows *in situ*) wetland. He did so in an effort to be conservative because the average k value for a HSSF wetland is lower (42 m/year) than a FWS wetland (26.5 m/year), which means there is more opportunity for denitrification in an HSSF wetland during a given period of time. (T. 386-91.) Desai also used the value for a FWS

[11] Again, this also assumes the groundwater will not surface anywhere.

wetland in order to be conservative, except when that use did not get him the result he needed to protect the stream for Lot 8, where he switched to the HSSF value. It is either appropriate to assume the wetland is a FWS wetland or it is not. Switching assumptions when the assumption does not give the desired result is unjustified. (T. 666, 669-76.)

We agree with the modelers to the extent that if a model is to be applied at all, given all of the uncertainties and assumptions that need to be made with this model, the experimental nature of the model's application in this context, and the stakes involved, conservative modeling is entirely appropriate. The modelers did conservatively assume influent concentration into the system would be 45 mg/l (Desai) and 39 mg/l (LaBrake) when, as discussed above, it will likely range from 8 to 28 mg/l. However, we disagree with the modelers' assumption that they were being particularly conservative in their selection of the k rate. Both witnesses used the 50th percentile of the FWS wetlands reported in the K&W book. As Schmid explained, using the 50th percentile of a range is not conservative (T. 183) and we do not know how that number compares with a truly conservative value taken from the HSSF chart. In addition, the value incorporates broad swings in seasonal performance because it is an annual average. (T. 283.)[12]

Another area where the modelers thought they were being conservative but they really were not was their use of the trend multiplier. At the risk of being repetitive, the P-k-C model is

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[12] While using an annual average may be appropriate for design purposes, we are not sure that it is appropriate when the goal is to protect and maintain special protection waters of the Commonwealth at all times. There was much debate among the scientists about whether the use of any *annual* averages is appropriate in this context (T. 283-85, 296, 667), but the questions is really a policy and legal one; viz., should wide swings in discharge quality to an EV stream be permitted so long as the *average annual* result is acceptable? Roughly speaking, Pine Creek's expert's position is that discharges to the stream should never exceed .84 mg/l nitrate, even for a day. The Department's expert's opinion appears to be that discharges can exceed .84 so long as the average discharge calculated on an annual basis does not exceed .84. Both positions seem extreme. We have no record of the Department's institutional position on this issue, and its resolution makes no difference in this case because this dispute does not turn on such a fine point. We note in passing, however, that we are not aware of any other situation where, e.g., an NPDES permittee is only required to meet an *annual* average.

the product of averages of averages. In recognition of the wide scatter of actual results, K&W propose the use of a multiplier (2.02) to capture 95 percent of the actual results around the "central trend." (T. 285-91, 668-69, 734.)[13] Thus, LaBrake used the 2.02 multiplier against the target effluent concentration of .88 mg/l to calculate the area of wetlands needed to treat to .44 mg/l (rounded). (I. Ex. 1.) Desai used the multiplier against the modeled effluent concentration using known wetland areas to compare it to the targeted concentration. (T. 663-75.) However, this multiplier does not in fact provide a "margin of safety." (T. 178-79.) In fact, it recognizes that every 20th result on average will be below or above predictions after the multiplier is applied. (See discussion above at footnote 12 whether this is acceptable in an EV watershed.) Other results may bump up against the limit of the prediction. That can be *anticipated.* In contrast, a margin of safety is something that engineers add to a system to deal with completely *unanticipated* results given the fickleness of nature, the limits of man's ingenuity, and the limitations of the model. Therefore, K&W for design purposes recommend a margin of safety of 25 percent *after* the model is employed. (T. 193.) LaBrake and Desai did not do this. (T. 193.) In fact, under Desai's calculations, Lot 8 wetlands will produce an effluent of .808 nitrate as compared to the .84 needed, a margin of just four percent. (T. 676.)

The next major flaw that we see in the Department's analysis is its discounting of seasonal variability at the Fredericksville wetland. The Fredericksville wetland is more accurately visualized as soggy woods than what some might think of as a classic swamp. As the seasons change, so do temperature and precipitation. As to temperature, the site ranges from summer highs to winter lows when the frost zone can extend three feet below the surface. (T. 730.) The bacteria that are responsible for anaerobic denitrification in wetlands work best in

[13] In fact, the 2.02 multiplier is itself the mean of other multipliers derived from a limited sampling of herbaceous wetlands that actually ranged from 1.42 to 3.19. (T. 668-69, 734-35.)

moderate to warm temperatures. (T. 606, 661.) The process will stop altogether at times in the winter. (T. 661.) (Of course, the stream may not be flowing either, which mitigates the risk.) Unlike constructed treatment wetlands where influent can be stored in holding ponds or diverted during winter cold snaps, the on-lot septic systems will flow all year long. We credit Schmid's opinion that the Department did not adequately account for Pennsylvania winters in its analysis. (T. 152-53, 157-59, 213-14, 283-85.)[14]

It is true that deeper groundwater does not change temperature as much as the air temperature changes throughout the year. Sigouin referred to the near constant temperature of groundwater throughout the year based on common knowledge and well logs, but he did not appear to be referring to groundwater one or two feet below the surface in the frost zone. (T. 606.) Deep groundwater is irrelevant in this case. Most denitrification in a wetland occurs when the top foot or so of groundwater coincides with the top foot or so of soils. (T. 152, 596, 645, 651, 733-34.) Not only will this critical zone freeze in the winter, it will dry up in the summer. Sigouin said he could walk through normally wet portions of the site in the summer without leaving footprints. (T. 597-98, 652.) Skunk cabbage was dying once when he was on the site. (*Id.*) McCollum imagined that this site is similar to sites where a vehicle driven across it during a dry spell will leave no ruts. (T. 716.)

Flow in constructed wetlands can be regulated. In contrast, the Fredericksville forest ranges from very dry to very wet. (*See, e.g.*, T. 597, 715-18.)[15] Flow from the on-lot systems will never stop. When the wetlands dry up, there will be no water, and less or no anaerobic

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[14] LaBrake agreed after having it pointed out by Schmid that he used the wrong groundwater temperature for this location. (T. 371-72.)

[15] Although the Intervenors' wetland delineator as well as LaBrake examined soil samples, which might have shed more light on the exact nature of the seasonal shifts in water table elevation, the Department did not use this information for this purpose. Sigouin referred to water seen two feet below the surface in one test pit, but that pit was not in the wetland. (T. 646.) Again, the absence of actual data in this case is striking. (T. 213-17.)

denitrification in the critical zone. (T. 152-53, 733-34.) Summer conditions may dry up the springs and seeps that Donmoyer says will short-circuit the wetland treatment areas making Sigouin's prediction that groundwater will make it to the stream bank more realistic, but the groundwater may be so low at that point that little or no denitrification occurred. The possible combinations of conditions are endless. The point here is the use of the P-k-C model has not been shown to account for the infinite possible variations and combinations at the site at hand.

In sum, not only do we agree that an inadequate foundation was laid for the application of the P-k-C model in this setting, we agree with Schmid that it was not properly and/or conservatively applied. The Department is attempting to use a model in this appeal in a way that it has never been shown to have been used before. It certainly has not been relied upon in Pennsylvania the way it is being used here. It is chasing after an extremely low target, .84 mg/l nitrates, that cannot by law be altered. The Department is counting upon nearly 100 percent removal, which is difficult to imagine in any natural setting. There are thousands of non-exceptional value watersheds where the Department might be able to gain experience and see if the model works. We cannot endorse that experiment here. The Department's P-k-C modeling simply does not support its decision in this case. That leaves the carbon equation as the only remaining basis for its action, but it will find no succor there.

The Carbon Equation

The Department also relied upon "the carbon equation" to show that complete denitrification will occur before the on-lot effluent plumes reach the stream. The presence of carbon is relevant because carbon must be available to "feed" the bacteria in the wetland in order for denitrification to occur. (T. 195, 374, 561, 661, 700.) The carbon in a natural wetland comes

from the breakdown of plant materials. (T. 153.) The carbon equation is a way to calculate how much carbon is likely to be available in a wetland to facilitate denitrification.

The carbon equation provides helpful information, but it only has limited utility. The Department used the carbon equation as a cross-check on the result it derived from the P-k-C model, not as a stand-alone basis for its decision. Indeed, all of the experts approached the equation with that mindset because the equation at best answers how much carbon is theoretically available, not how much is available for actual use in denitrifying a new source based on all site characteristics (e.g. groundwater location, temperature changes, mixing, flow rate, background, etc.). Carbon is only one piece of a much more complicated puzzle.

With that limited purpose in mind, Pine Creek did not argue that the carbon equation lacks general acceptance, although Schmid did point out without contradiction that virtually no study has been done in natural forested wetlands to compare predicted with actual results. (T. 300-05.) As with the P-k-C test, he did not endorse the use of the carbon equation to ensure special protection standards will be met. Nevertheless, he referred to it to show that the equation does not support the Department's conclusion any more than does the P-k-C model. (T. 303.)

The object of the equation is to determine the area of wetland as defined by biomass available that is needed for denitrification, given the mass of nitrate that needs to be denitrified. (Concentrations are irrelevant in the context of the carbon equation. (T. 305, 321.))[16] As with the P-k-C model, the person using the equation must be careful not to put the rabbit in the hat by simply assuming that wetlands shown on a map will be available for denitrification in reality. Thus, Schmid opined that, if all 11 or so acres of wetlands on the site were actually in contact

[16] The focus in the case has otherwise been almost exclusively on maintaining the *concentration* of nitrate in the wetland and the stream with little or no mention of *mass* loading. The reduction in the concentration of nitrate in the groundwater plumes prior to crossing into the wetland is strictly a function of dilution, which does not reduce mass. (T. 613.)

with the plumes, and there was no short-circuiting within the plumes, or a low groundwater table, or frozen conditions, or a possibility that the wetland is already maxed out as shown by the 2.71 background sample, the equation would show there is theoretically enough carbon on the site according to the equation to reduce the nitrate in the plumes. (T. 203-05, 217.) Of course, these underlying assumptions are either unproven or wrong.

Putting that problem aside, Schmid does not agree that proper application of the equation shows that there is enough carbon available in the portions of the wetland that are potentially in contact with plumes to provide denitrification. The difference in expert opinion between LaBrake and Schmid (Desai simply used values provided by LaBrake (T. 677)) is the value that they used to plug into the equation for biomass available on the site. Actual biomass was not investigated. As a surrogate, LaBrake referenced a value derived from a literature search, particularly one result derived from a test that was run on a wetland in western Kentucky close to the Ohio River. (T. 731-33.) He discussed additional biomass available in the root zone in a forest, but it is not entirely clear to us that this biomass should be *added* to the results reported in the literature. Indeed, LaBrake's estimate of biomass has varied over time and his explanations were not consistent or entirely convincing. (T. 375-95.) In the end he stood by his original estimate of about 2,000 grams of biomass of carbon per square meter per year. (T. 380, 395.) Desai used 1598 $g/m^2/y$ for his calculation, again, based on LaBrake's work. (T. 677-78.)

We credit Schmid's opinion--backed by superior qualification and experience and expressed with more certainty--that those values are too high. Again, any error here should be on the side of caution. Although 1500-2000 $g/m^2/y$ may be reasonable for a herbaceous wetland in a warmer climate, 200-1000 $g/m^2/y$ is a more reasonable range for a seasonal wetland in a forest surrounding a small headwater stream in Pennsylvania. (T. 196-98, 217, 301-05, 731-33.)

When the carbon equation is employed using this assumed biomass, it provides no comfort that the stream will be protected from nitrate as a result of carbon available on the site. (T. 217.)

Thus, all four bases relied upon by the Department failed to show that the significant and credible risk of nitrate pollution of the stream will not come to pass. As we recently explained in *Blue Mt. Pres. Ass'n v. DEP*, EHB Docket No. 2009-080-L, slip op. at 8 (Adjudication, August 25, 2011), "the overriding requirement of the antidegradation regulations is that the water quality of HQ and EV waters 'shall be maintained and protected.'" The Department has not met that requirement in this case. The Department has not shown that the stream's water quality will be maintained and protected. To be precise, the method of sewage treatment that was selected pursuant to the alternatives analysis required by 25 Pa. Code § 71.52 has not been shown to be consistent with the antidegradation requirements of 25 Pa. Code Chapter 93, as it must be. 25 Pa. Code § 71.21(a)(5)(i)(E).

We are not suggesting that the development cannot go forward. One of the major problems with the Department's case is its near total reliance on unproven modeling in lieu of field study. Additional study might result in the requisite showing, although it must be said that Sigouin is probably correct that there is no real mystery as to where the groundwater is flowing on this site. In addition or in the alternative, other treatment methods or modifications such as denitrification systems may be available. They were not even considered. *Compare S.H.C.*, 2010 EHB at 695 (DEP indicated willingness to consider denitrification systems). It would not be appropriate for us to speculate about what may suffice at this juncture. In any event, a new or revised planning module will be required if development is to proceed.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this appeal.

2. Pine Creek, as a third party appellant, bears the burden of proving by a preponderance of the evidence that the Department's approval of the Township's Act 537 plan revision was unlawful, unreasonable, or not supported by the facts.

3. The existing water quality of EV streams must be maintained and protected. 25 Pa. Code § 96.4a; *Blue Mt. Pres. Ass'n v. DEP*, EHB Docket No. 2009-080-L (Adjudication, August 25, 2011).

4. If Pine Creek establishes that the project presents a significant and credible risk of harm, the burden shifts to the Department and the project's proponents to show that the functions and values of the Exceptional Value wetland and the existing water quality of the Exceptional Value stream will be maintained and protected. *CRY v. DER*, 639 A.2d 1265, 1269 (Pa. Cmwlth. 1994); *Marcon v. DER*, 462 A.2d 969, 971 (Pa. Cmwlth. 1983); *Blue Mt. Pres. Ass'n v. DEP,* EHB Docket No. 2009-080-L, slip op. at 8 and 11 (Adjudication, August 25, 2011); *Crum Creek Neighbors v. DEP*, 2009 EHB 548, 567 and 569-70; *Blue Mt. Preservation Ass'n v. DEP*, 2006 EHB 605-06; *Birdsboro v. DEP*, 2001 EHB 377, 397-98, 401-03; *Lehigh Township v. DEP*, 1995 EHB 1098, 1112.

5. When determining whether expert testimony may be offered on a particular scientific subject, Pennsylvania follows the standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. 1923). *See* Pa.R.E. 702 (comment); *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1043-44 (Pa. 2003); *McManamon v. Washko*, 906 A.2d 1259, 1273 (Pa. Super. 2006); *Exeter Citizens Action Committee v. DEP*, 2005 EHB 306, 333-34. The *Frye* standard provides that an expert opinion based on a scientific technique is only admissible if the technique as well as its application to the particular situation at hand are generally accepted as reliable in the relevant scientific community. *Grady,* 839 A.2d at 1044, 1047; *Dennis Groce v. DEP,* 2006 EHB 856,

927. It is up to the proponent of the scientific evidence to demonstrate that the underlying theory upon which the expert testimony will be predicated meets the test of "general acceptance." *See Grady*, 839 A.2d at 1045; *Groce*, 2006 EHB at 927.

6. Although this Board may be less inclined than a judge presiding over a jury trial to exclude expert opinion altogether, we will nevertheless consider the degree of acceptance of the underlying science in deciding how much weight to accord an opinion. The underlying principle that untested theory is not reliable evidence means that we will give little credence to such a theory in our deliberations.

7. The P-k-C model does not meet the *Frye* standard and is not generally accepted in the scientific community as a tool for predicting denitrification outcomes in a natural forested wetland.

8. The Department has not shown that the receiving stream's water quality will be maintained and protected.

9. The method of sewage treatment that was selected pursuant to the alternatives analysis required by 25 Pa. Code § 71.52 at the Fredericksville site is not consistent with the antidegradation requirements of 25 Pa. Code Chapter 93.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2009-168-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DISTRICT TOWNSHIP SUPERVISORS, Permittee, JEFFREY LIPTON, LOUISE MOYER, BRIAN MOYER, JACQUELINE MOYER, RICHARD HOBBS, DOUGLAS LITCHERT and DANELLE LITCHERT, Intervenors	:	

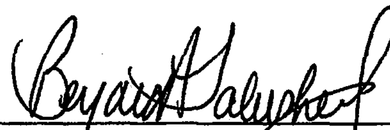
ORDER

AND NOW, this 10th day of November, 2011, it is hereby ordered that this appeal is sustained. The Department's approval of the plan revision for the Fredericksville Farm subdivision is rescinded.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

Judge Mather did not participate in the Adjudication of this appeal.

DATED: November 10, 2011

c: **DEP Bureau of Litigation:**
Attention: Glenda Davidson, Library

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN PICCOLOMINI	:	
	:	
v.	:	**EHB Docket No. 2011-109-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 16, 2011**

OPINION AND ORDER
ON DEPARTMENT'S MOTION TO DISMISS

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants the Department's motion to dismiss and dismisses an appeal that was filed more than thirty days after the Appellant received notice of the Department's action because the Board does not have jurisdiction over an untimely appeal. The Appellant filed a response to the Department's motion, but he did not dispute the Department's assertion that his appeal was not timely. He simply asked for a hearing.

DISCUSSION

On May 4, 2011, the Department of Environmental Protection (the "Department") issued an Assessment of Civil Penalty to John Piccolomini, III in the amount of $10,500.00 for violations of section 315(a) of the Clean Streams Law, 35 P.S. § 691.315(a), and 4(a) of the Surface Mining Conservation and Reclamation Act, 52 P.S. § 1396.4(a). In his Notice of Appeal, Piccolomini states that he received the Assessment on June 20, 2011. On July 26, 2011,

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Piccolomini appealed the Department's penalty assessment to the Board. The Department filed a motion to dismiss the appeal on the basis that the appeal is not timely.

A motion to dismiss will be granted by the Board where the moving party is clearly entitled to judgment as a matter of law and there is no dispute over any issue of material fact. *Spencer v. DEP,* 2008 EHB 573, 574; *Eljen Corp. v. DEP*, 2005 EHB 918. Under our rules, the Board only has jurisdiction over timely appeals. 25 Pa. Code § 1021.52(a); *Rostokosky v. DER*, 364 A.2d 761 (Pa. Cmwlth. 1976) ("[T]he untimeliness of the filing deprives the Board of jurisdiction.") Where the Department has directed or issued its decision to a party, that party must file its appeal within thirty days after it receives written notice of the action, unless a different time period is specified by statute. 25 Pa. Code § 1021.52(a)(1); *Spencer v. DEP*, 2008 EHB 573, 574. Therefore, except in the very rare circumstances where an appeal *nunc pro tunc* will be granted, the Board, lacking jurisdiction over untimely appeals, will grant a motion to dismiss where an appeal in question has in fact been filed after the deadline set by our rules. *See* 25 Pa. Code § 1021.53a; *see also Bass v. Commonwealth*, 401 A.2d 1133 (Pa. 1979).

We find it clear that Piccolomini has filed his appeal more than thirty days after receiving the Department's notice of the action by certified mail. The Department has shown that Piccolomini personally signed a return receipt of the Department's assessment on May 18, 2011, but did not file his appeal until July 26, 2010, seventy days later. Even if, as asserted in his Notice of Appeal, Piccolomini did not actually receive notice of the assessment until June 20, 2011, the Notice of Appeal was not filed until thirty seven days later. Therefore Piccolomini's appeal is untimely and the Board lacks jurisdiction to hear the appeal. *See Pedler v. DEP*, 2004 EHB 852, 854; *Burnside Township v. DEP*, 2002 EHB 700, 703 (An appeal filed even one day late will be dismissed.)

Piccolomini filed a response in the form of a letter. His letter fails to contest any of the factual or legal bases for the Department's motion to dismiss. He did not contest the fact that he filed his appeal more than thirty days after he received notice of the assessment. He did not assert any basis in law for the Board to ignore his failure to appeal within the thirty day appeal period. In his short response Piccolomini simply states that he "would greatly appreciate" if the Board would hear his appeal. Because the Department has demonstrated that Mr. Piccolomini filed his appeal well beyond the thirty day appeal period, and the Board has no reason to ignore this fact, the Board lacks jurisdiction to hear this appeal.

Accordingly, we issue the order that follows.

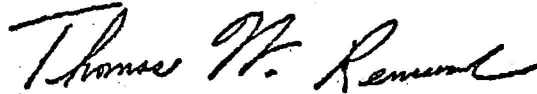
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN PICCOLOMINI	:	
	:	
v.	:	**EHB Docket No. 2011-109-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

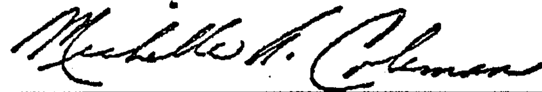
ORDER

AND NOW, this 16th day of November, 2011, it is hereby ordered that the Department's motion to dismiss is **granted** and the appeal is hereby **dismissed**.

ENVIRONMENTAL HEARING BOARD

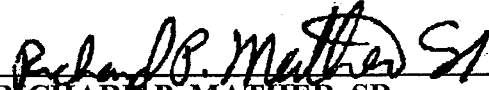


THOMAS W. RENWAND
Chairman and Chief Judge



MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: November 16, 2011

c: **DEP Bureau of Litigation:**
Attention: Glenda Davidson

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL	:
	:
v.	:
	: EHB Docket No. 2011-072-R
COMMONWEALTH OF PENNSYLVANIA,	:
DEPARTMENT OF ENVIRONMENTAL	**: Issued: December 1, 2011**
PROTECTION and MARKWEST LIBERTY	:
MIDSTREAM & RESOURCES LLC	:

OPINION AND ORDER ON
MOTION FOR PROTECTIVE ORDER

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

Pursuant to Pennsylvania Rule of Civil Procedure 4003.1 "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...." A party may seek a protective order if it claims that the discovery sought seeks material which constitutes a trade secret or is otherwise confidential. The Board denies a motion to designate nearly all documents requested by a party as Confidential Business Information simply because they were not part of the Department of Environmental Protection's permit file.

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http://ehb.courtapps.com

OPINION

Presently before the Pennsylvania Environmental Hearing Board is Permittee Mark West Liberty Midstream & Resources, LLC (MarkWest or Permittee) Motion for a Protective Order. MarkWest seeks a very broad Protective Order asking the Board to designate nearly all documents requested by the Appellant Clean Water Action as Confidential Business Information. MarkWest further requests that any documents, testimony, etc., designated as Confidential Business Information be tightly controlled and regulated by this Board. MarkWest contends that any documents not in the Pennsylvania Department of Environmental Protection's permit file constitute Confidential Business Information. If so classified, these documents could not be disclosed to the Public and would be required to be returned to MarkWest within 60 days of the final disposition of this action. The Pennsylvania Department of Environmental Protection does not oppose this request. Clean Water Action contends that MarkWest's request is overly broad and should be limited appropriately.

It is the Pennsylvania Environmental Hearing Board's duty and responsibility to regulate and effectively monitor the discovery process. Discovery before the Board is governed by both the Pennsylvania Rules of Civil Procedure and the Board's own Rules of Practice and Procedure. Thus, the liberal discovery rules applicable to actions in the Pennsylvania Courts of Common Pleas

are equally applicable to matters before the Board. *McGinnis v. DEP*, 2010 EHB 489, 493. Therefore, as set forth in Rule 4003.1, discovery is permitted of "any matter not privileged which is relevant to the subject matter in the present action." Moreover, a party seeking a protective order barring discovery must show good cause for the relief requested. *See Nothstein v. DEP & Mahoning Twp.*, 1990 EHB 1633, 1634-1635.

MarkWest, although acknowledging that it bears the burden of proof in requesting the Board to designate any document, testimony, correspondence, etc., as Confidential Business Information, fails to set forth any specific statements as to why the Board should designate nearly everything in this case as Confidential Business Information. Indeed, its Proposed Protective Order sets forth draconian practices governing not only discovery in this case but how testimony and evidence would be presented at hearing. If anyone in the Public were to request access to this Confidential Business Information (which it seems would encompass all or nearly all of MarkWest's documents and testimony) MarkWest proposes detailed procedures which not only the Parties but this Board would follow.

Cases before the Board are heard *de novo*. In the seminal case of *Smedley v. DEP*, 2001 EHB 131, then Chief Judge Krancer succinctly explained what this means.

> The Board conducts its trials *de novo*. We must fully consider the case anew and we are not bound by prior

> determinations made by the DEP. Indeed, we are charged to redecide the case based on our *de novo* scope of review. The Commonwealth Court has stated that '*de novo* review involves full consideration of the case anew. The EHB, as reviewing body, is substituted for the prior decision maker, the Department, and redecides the case.' *Young v. Department of Environmental Resources*, 600 A.2d 667, (Pa. Cmwlth. 1991); *O'Reilly v. DEP*, 2001 EHB 19, 32. Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it. *See, e.g., Westinghouse Electric Corporation v. DEP*, 1999 EHB 98, 120 n. 19.

2001 EHB at 156.

We are not dependent on a record developed by the Department or the documents they reviewed prior to reaching its decision on the action appealed. Most importantly, we are not limited to the information the Department reviewed to reach its decision. *See S.H.C. Inc. v. DEP*, 2919 EHB 619, 664. Instead, we can consider all relevant and admissible evidence duly presented and admitted at a hearing before the Board.

The due process guarantees set forth under Pennsylvania law are not triggered until an appeal to a Department of Environmental Protection action is taken. The Pennsylvania Environmental Hearing Board Act provides that no action of the Department of Environmental Protection is final if appealed to the Pennsylvania Environmental Hearing Board until the Board decides the objections raised by the party. 35 P.S. § 7514. Due Process is provided by the Pennsylvania

Environmental Hearing Board; not the Department of Environmental Protection which is a party in the case. *See Einsig v. Pennsylvania Mines Corp.*, 452 A.2d 558 (Pa. Cmwlth. 1982).

Full disclosure of a party's case underlies the discovery process before the Board. *Pennsylvania Trout v. DEP*, 2003 EHB 652, 657. The main purposes of discovery are so all sides can acquire necessary information and evidence, plan trial strategy, and discover the strong points and weaknesses of their respective positions. *DEP v. Neville Chemical Company*, 2004 EHB 744, 746. It is the Pennsylvania Environmental Hearing Board's responsibility and duty to oversee discovery and prehearing proceedings. *Cappelli v. DEP & Maple Creek Mining, Inc.*, 2006 EHB 426, 427.

With these principles firmly in mind we deny MarkWest's Motion for a Protective Order. This is without prejudice to MarkWest to prove to us that an individual document or parts of testimony should be classified as Confidential Business Information. If the Board agrees that a document or testimony should be classified as Confidential Business Information the Board will then also decide how it will be handled. Moreover, the Protective Order proposed by Clean Water Action is also too restrictive and would usurp this Board's role in properly regulating not only discovery but the trial of this case.

We will issue an Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL	:	
	:	
v.	:	
	:	**EHB Docket No. 2011-072-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARKWEST LIBERTY MIDSTREAM & RESOURCES LLC	:	

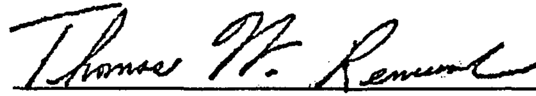
ORDER

AND NOW, this 1st day of December, 2011, following a careful review of the Permittee's Motion for a Protective Order and the respective papers filed by the parties, it is ordered as follows:

1) Permittee's Motion for a Protective Order is **denied.**

2) Appellant's Proposed Order is **denied.**

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

DATED: December 1, 2011

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Glenda Davidson, Library

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SAYREVILLE SEAPORT ASSOCIATES ACQUISITION COMPANY, LLC T/A SAYREVILLE SEAPORT ASSOCIATES, L.P.	:	
v.	:	**EHB Docket No. 2010-127-L (Consolidated with 2011-015-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 1, 2011**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board vacates decisions regarding the disposal or use of an appellant's radioactive waste that were set forth in letters issued by the Department because neither the appellant nor the Department followed procedures that must be adhered to before such decisions are made. In addition, the appellant may not use an appeal from the letters as a vehicle for challenging separate Departmental actions.

FINDINGS OF FACT

1. Sayreville Seaport Associates Acquisition Company, LLC T/A Sayreville Seaport Associates, L.P. ("Sayreville") is the redeveloper of the former NL Industries site located in Sayreville, New Jersey. (Notes of Transcript page ("T.") 42.)

2. In order to redevelop the site, Sayreville needs to excavate and remove for off-site use or disposal approximately 60,000 cubic yards of radioactive soil left behind by National Lead's manufacture of paint pigments at the Sayreville site. (T. 47, 263.)

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http://ehb.courtapps.com

3. The radioactive soil is estimated to contain an average concentration of about 50 picocuries per gram of uranium-238 and 30 picocuries per gram of thorium-232. (T. 603, 646.)

4. The radioactive soil is licensed by the State of New Jersey Department of Environmental Protection as radioactive material under Radioactive Materials License Number RAD100001-518402. (Sayreville Exhibit ("S. Ex.") 5.)

5. Sayreville has engaged in multiple discussions with Commonwealth officials regarding the possible disposal or beneficial use of the radioactive soil in Pennsylvania. (*See, e.g.*, T. 60.)

6. On May 24, 2010, the Department approved Cumberland County Landfill's request to dispose of Sayreville's radioactive soil at its facility in Hopewell Township, Cumberland County pursuant to the Department's Form U process for approving new waste streams at a permitted facility. (T. 450, 454-55, 460-77, 489, 516, 682-83, 729; S. Ex. 12-14, 20.)

7. The approval was a mistake. (T. 456-89, 514-16, 530; S. Ex. 20; DEP Ex. 34.)

8. When the Department realized its mistake, it rescinded its approval of Cumberland's Form U. (T. 461-63, 491-92; S. Ex. 8, 9, 27-29.)

9. On July 14, 2010, the Department's Stephen Socash, Chief of its Division of Municipal and Residual Waste, sent Sayreville a letter, which reads as follows:

> This letter is in response to your June 30, 2010, e-mail to Todd Wallace in follow up to our June 16, 2010 meeting. The e-mail concerned the status of the Form U proposal to send contaminated soil from the Sayreville, NJ site to the Cumberland County Landfill and the potential of sending the contaminated soil to the Hazleton Creek Property (HCP) site for use as regulated fill.
>
> The Department's Southcentral Regional Office considered the Form U proposal submitted by the Cumberland County Landfill and disapproved the proposal. I have attached a copy of the

> disapproval notice that was sent to the Cumberland County Landfill for your information.
>
> Regarding your other request, the Department believes that this contaminated soil cannot be accepted by HCP or any other facility approved to beneficially use waste materials as regulated fill under the Department's residual waste general permit WMGR096 or as clean fill pursuant to the Department's Management of Fill Policy. Environmental due diligence performed on this waste identified (NORM) and technologically enhanced naturally occurring radioactive material (TENORM). The beneficial use of waste with radioactive concerns as regulated fill or clean fill may adversely affect human health or the environment, and therefore the Department's Fill Management policy does not apply.
>
> If you have any further questions or comments concerning this subject, please contact me.

(S. Ex. 9.) The appeal docketed at 2010-127-L is Sayreville's appeal from this letter.

10. On December 23, 2010, the Department's David J. Allard, Director of its Bureau of Radiation Protection, sent Sayreville a letter, which reads as follows:

> We have recently learned that Sayreville's contaminated soil is licensed in New Jersey under Radioactive Materials License Number RAD100001-518402. Such NRC or Agreement State licensed radioactive material is low-level radioactive waste ("LLRW"), as defined in Section 103 of the Low-Level Radioactive Waste Disposal Act ("LLRWDA") (35 P.S. § 7130.103), as well as 25 Pa. Code § 236.2. Pennsylvania statutes and regulations prohibit the disposal of such licensed radioactive material at facilities that are not licensed to accept low-level radioactive waste pursuant to the LLRWDA at 35 P.S. § 7130.102(13) and 25 Pa. Code Chapter 236. This includes municipal waste landfills and other "shallow land burial" scenarios.
>
> Prohibitions for the placement of LLRW are also contained in the Department's municipal and residual waste regulations. Specifically, § 273.201(i) of the municipal waste regulations prohibits LLRW that is controlled under a specific or general license authorized by any Federal, State or other government agency from being disposed in a municipal waste landfill, unless specifically exempted from disposal restrictions by an applicable Pennsylvania or Federal statute or regulation. 25 Pa. Code §

> 273.20L. Additionally, § 287.2(h) of the residual waste regulations provides that the management and disposal of LLRW shall be regulated under Chapter 236 (relating to low-level radioactive waste management and disposal) instead of this article. 25 Pa. Code § 287.2.
>
> Therefore, the contaminated soil, which is LLRW, is barred from disposal or beneficial use in the Commonwealth of Pennsylvania.

(S. Ex. 37.) The appeal docketed at 2011-015-L is Sayreville's appeal from this letter.

11. HCP has not requested approval to use Sayreville's radioactive waste at its facility. (T. 166-70.)

DISCUSSION

Early in this litigation the Department moved to dismiss Sayreville's appeal from the Department's July 14, 2010 letter. It argued that this Board lacked jurisdiction because the letter was not a final action of the Department. It argued that Sayreville, by engaging in meetings and discussions that culminated in correspondence with the Department, and then filing an appeal before this Board from that correspondence, was attempting to circumvent proper procedures for obtaining the Department's approval to dispose of or beneficially use the radioactive waste in Pennsylvania. We held that, "if a regulatory process exists for requesting a Department action, we certainly expect that that process will normally be utilized," but that the Department had failed to convince us that it was clear as a matter of law that Sayreville had bypassed an applicable regulatory process. We noted that, if proper regulatory procedures exist, the Department itself appeared to have ignored them.

The Department argues once again in its post-hearing brief that Sayreville failed to follow proper procedures with respect to the Hazleton site:

> These procedures exist so that a potential applicant can present its proposed beneficial use project to the Department, and the Department can carefully consider the proposal and respond

> accordingly. Sayreville is focusing the Board's attention away from its attempt to skirt the permitting process and instead on what it believes to be the Department's responsibilities. The Board should not be distracted by these arguments. Sayreville failed to provide the information necessary for a proper review of the proposed beneficial use of Contaminated Soil as regulated fill. Sayreville is asking the Board to grant an approval which Sayreville has not properly requested from the Department.

(Brief at 67.)

We continue to believe that the Board has jurisdiction. The Department's letters are the equivalent of a permitting action. *See Perano v. DEP*, EHB Docket No. 2010-028-L, slip op. at 5-6 (Adjudication, November 2, 2011) (DEP's informal communications may be appealable if they are the equivalent of an order or a permitting decision). The letters bar Sayreville's radioactive waste absolutely and permanently under any circumstances from use or disposal at any site within the Commonwealth. They clearly affected Sayreville's rights in a material way and left it with no recourse other than an appeal before this Board.

Having said that, neither the July 14 nor the December 23 letter serves an adequate basis for challenging the Department's actions regarding Cumberland County Landfill's separate request to accept the radioactive waste at its facility made pursuant to the Form U process. The Department's letters under appeal here did not take any action regarding that request. The Department's December 23, 2010 letter (appeal docketed at 2011-015-L) does not reference the landfill but instead speaks generically to all landfills in Pennsylvania. The Department's July 14, 2010 letter (EHB Docket No. 2010-127-L) references a separate disapproval of the landfill's Form U proposal, but the letter itself did not act as that disapproval or incorporate that disapproval. Rather, the letter only directly addressed Sayreville's beneficial use proposal. It is black-letter law that a party may not use an appeal from one Department action as a vehicle for

challenging an entirely separate action. *PA Waste v. DEP*, 2010 EHB 98, 100; *Jai Mai, Inc. v. DEP*, 2003 EHB 349, 350; *Winegardner v. DEP*, 2002 EHB 790, 793.

Sayreville did not mention the Department's actions vis-à-vis Cumberland County Landfill's Form U in its notice of appeal regarding the July 14 letter in EHB Docket No. 2010-127-L. Sayreville does mention the Form U action in its appeal from the Department's December 23 letter in EHB Docket No. 2011-015-L. It said there that the letter was "ineffective to deny the Form U applications" since the Department had previously approved them, and presumably, was precluded as a matter of law from correcting its mistake (the equivalent of a chess player taking his finger off his piece after moving it). This objection does not change the fact that, whatever actions the Department did or did not take in response to Cumberland's Form U, and regardless of whether those actions were proper or improper, the actions predated the December 23 letter. The Department did not take any action with respect to the Form U in the December 23 letter itself. Sayreville is partially correct in that the December 23 letter did not incorporate, affect, or alter in any way the Department's separate, prior actions regarding the Form U. Whatever the status of that process, this appeal has no bearing on it. Neither the landfill nor Sayreville appealed from the Departmental actions regarding the Form U. The actions regarding the Form U are simply not before us in this appeal.

With respect to Sayreville's interest in beneficially using the radioactive waste at the Hazleton site, we find ourselves in agreement with the Department that applicable procedures have been ignored in this case. It is true that Sayreville has "attempted to skirt the permitting process." However, so has the Department. Sayreville's idea is that its radioactive waste can be managed at the Hazleton site under HCP's authorization to operate under the Department's general permit for the beneficial use of residual waste as fill material (GP 096). The problem is

that the applicable procedures established in HCP's general permit regarding a new waste stream have not been followed.

In order to accept a new waste stream such as Sayreville's radioactive soil, HCP must provide to the Department documentation relating to the source location, the physical and chemical description of the regulated fill material, the sampling methodology and summary, the laboratory analytical results, and certification by HCP that the material meets applicable concentration limits. (DEP Ex. 23.) The Department may instruct the permittee that a particular waste is disapproved, or presumably, impose conditions or requirements on its use. It may also require the permittee to obtain an individual permit. (*Id.*) All activities must be capable of being conducted in accordance with the permittee's application and the approval thereof.

Instead of adhering to these permit provisions, Sayreville and the Department have engaged in a series of private meetings and discussions that has resulted in two letters that do little more than express legal opinions. This is not an acceptable substitute for following proper procedures. Logically, if the Department can ignore the permit and deny Sayreville's request by letter outside of the permitting context, it could also ignore the permit and approve the material's use. Either way, the approach is unacceptable. *Cf. Perano v. DEP*, EHB Docket No. 2009-119-L (Adjudication, September 12, 2011) (exchange of correspondence not a proper method for obtaining a permit modification).[1]

[1] To the extent Sayreville contends that the radioactive waste is "clean fill," and therefore, no regulatory procedures apply and the material can be deposited anywhere in Pennsylvania without a permit, the contention has no merit. Sayreville's uranium and thorium contaminated waste does not constitute such unregulated "clean fill."

Critically absent on the record before us is any indication that HCP actually wants the material. It is HCP that must seek approval to use the material, and the Department must review any such request in accordance with the permit. That has not been done.

This is not a matter of elevating form over substance. If the permit requirements had been followed, we would know for sure that our ruling on difficult and potentially precedent-setting issues would have some practical significance. HCP would necessarily have shown it is interested in the material. Absent such an expression of interest, our ruling is merely advisory. Judicial restraint counsels against making a potentially unnecessary decision. We do not issue advisory opinions. *Douglass Township v. DEP*, 2009 EHB 190, 198; *CAUSE v. DEP*, 2006 EHB 717, 718; *Newville Chemical Co. v. DEP*, 2003 EHB 530, 539.

Not only might our ruling prove to be advisory, because we have no permit request before us, any ruling that we would make would not relate to any particular site. This is generally not acceptable. *See ACE v. DEP*, 2006 EHB 698, 701 (preferable to review a general permit in the context of a particular site). *Cf. Concerned Citizens of Chestnut Twp. v. DER*, 632 A.2d 1, 3-4 (Pa. Cmwlth. 1993) (regulations should be reviewed in the context of specific fact patterns). Attempting to address a waste proposal without reference to any details regarding a particular site is a very abstract exercise. The record generated before us is filled with speculation on how the 60,000 cubic yards of radioactive waste would be handled and used. HCP has not made any specific proposals or commitments. There has been no discussion of worker or community safety.[2] Had the Department insisted upon a specific application at a specific site, we would not be dealing in the abstract.

---

[2] Sayreville's radioactive waste contains elevated levels of uranium and thorium. The airborne concentration limits for uranium and thorium are extremely restrictive. (T. 804-06.) There are no institutional controls at the HCP site that are remotely comparably to controls at a low level radioactive waste disposal facility. (T. 600-01.) There are homes immediately outside the border of the HCP site.

We are not in a position to offer any meaningful relief beyond an expression of our legal opinion. Any suggestion that we would simply approve Sayreville's plan to deposit waste at the HCP site based on the existing record is ludicrous. Therefore, the most that we could theoretically imagine having done to the benefit of Sayreville would have been to hold that its radioactive soil is *not* necessarily barred from disposal or beneficial use anywhere under any circumstances at any time in the Commonwealth. By doing so, however, we would be committing the same error as the Department. We would be jumping the gun. We would be disregarding clearly applicable procedures and making an important legal and factual determination in a vacuum.

In *Perano v. DEP*, 2009 EHB 452, 455, we said that it is difficult to imagine a case where a party is aggrieved by a Departmental action and, therefore, we have jurisdiction, and yet the case is not ripe for review. Although the instant appeal is not exactly such a case, it comes close in the sense that a review on the merits of using the material to fill abandoned mine pits would be premature. Although we are now in a position to conclude that the Department erred from a procedural point of view, any slippage into a review on the merits of the proposal is not ripe because the matter has not been adequately developed for judicial review. *See Gardner v. DER*, 658 A.2d 440, 444 (Pa. Cmwlth. 1995) (definition of ripeness). The record will not be adequately developed unless and until the parties pursue appropriate procedures in the context of a particular facility.

Given the fact that, no matter what we ruled here there would be another appealable action, review now would be premature and potentially unnecessary. We have consistently held that piecemeal review of permit applications is not available, yet that is essentially what would occur here. *See, Tri-County Landfill, Inc. v. DEP*, 2010 EHB 747, 750 ("We have consistently

held that we will not review the many interim decisions made by the Department during the processing of a permit application."); *Corco Chemical Corp. v. DEP*, 2005 EHB 733, 740; *County of Berks v. DEP*, 2003 EHB 77, 87 n. 5; *Smithtown Creek Watershed Assoc. v. DEP*, 2002 EHB 713, 717; *United Refining Co. v. DEP*, 2000 EHB 132, 133.

In summary, by setting forth absolute positions on specific legal issues, the Department's letters have impelled Sayreville to seek our review of those legal positions. Our review of those statements of legal position on the merits, however, would be inappropriate because proper procedures have not been followed. Our review would perpetuate and effectuate those procedural errors. Our review would also constitute an advisory opinion. Our review of these particular legal issues might ultimately prove to be unnecessary because, *inter alia*, HCP is not on record as desiring the material, or other issues may supersede these issues. Our review would be conducted in a vacuum, outside the context of any particular site. Our review on the merits would be premature. Therefore, Sayreville's appeals must be sustained, albeit not with the practical result that Sayreville would have hoped for. At the risk of stating the obvious, this Adjudication is not intended to foreshadow in any way what the results of a review properly conducted in accordance with applicable regulatory procedures and criteria might be.

CONCLUSIONS OF LAW

1. The Board has jurisdiction.

2. An appellant may not challenge one Department action in an appeal from an entirely separate action. Sayreville may not challenge the Department's disapproval of Cumberland County Landfill's Form U application in an appeal from a separate letter.

3. A party such as Sayreville, as well as the Department, must follow applicable regulatory procedures in order to gain approval to beneficially use residual waste. The parties' exchange of correspondence does not substitute for such procedures.

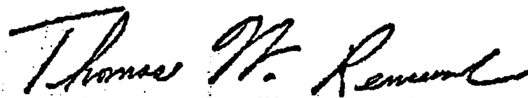
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SAYREVILLE SEAPORT ASSOCIATES ACQUISITION COMPANY, LLC T/A SAYREVILLE SEAPORT ASSOCIATES, L.P.	:	
v.	:	**EHB Docket No. 2010-127-L (Consolidated with 2011-015-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 1st day of December, 2011, it is hereby ordered that Sayreville's appeals are sustained. The Department's decisions it its July 14 and December 23, 2010 letters are vacated as premature and the letters do not bar Sayreville from pursuing proper procedures to secure Department approval for its request under state law . Sayreville's motions in limine to preclude testimony from James Shaw, David Allard, James Barnhart, Andrew Lombardo, and Stephen Socash and its motion for spoliation sanctions are denied as moot.

ENVIRONMENTAL HEARING BOARD



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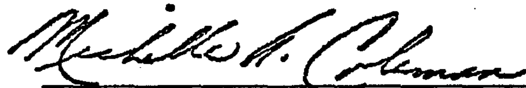
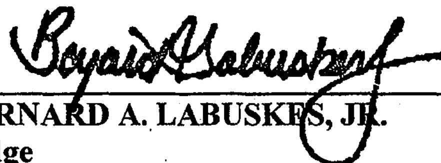
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

DATED: December 1, 2011

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Attention: Glenda Davidson, Library

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SAYREVILLE SEAPORT ASSOCIATES ACQUISITION COMPANY, LLC T/A SAYREVILLE SEAPORT ASSOCIATES, L.P.	:	
v.	:	**EHB Docket No. 2010-127-L (Consolidated with 2011-015-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

CONCURRING OPINION OF
RICHARD P. MATHER, SR.

By Richard P. Mather, Sr.

In this appeal, the Board faces one of the more difficult and reoccurring issues before the Board. When does a Department letter or communication cross a line and become an appealable action. Under the Board's established case law, all Department letters or communications are not appealable. *See, e.g., Perano v. DEP*, EHB Docket No. 2010-028-L (Opinion issued November 2, 2011) (letter that merely acknowledges receipt of supplement to remediation plan and reminds person of existing obligations is not appealable); *Sayreville Seaport Associates v. DEP*, EHB Docket No. 2010-127-L (January 4, 2011) (letter that is the equivalent of a permit denial is appealable); *Pickford v. DEP*, 2008 EHB 168, *aff'd* 967 A.2d 414 (Pa. Cmwlth. 2008); (letter that refuses request to rescind previously issued permits is not appealable); *Kutztown v. DEP*, 2001 EHB 1115 (letter that is equivalent of compliance order is appealable). For the reasons set forth in the majority opinion, I agree that the letters in this appeal constitute

appealable actions.[3] I write this concurring opinion to address several aspects of this appeal and the issues it presents to the Board as a class of difficult and reoccurring appeals.

First, the Board recognizes that this type of appeal often involves Department communications about an aspect of a permitting or approval program that involves complex technical considerations that impose significant costs, resource demands, and lengthy preparation and review delays on both the Department and the interested party. In my opinion, there is a benefit to the Department, the interested party and the public when the Department has communications with the interested parties about its programs in advance of receiving an application, and I would not want the Board's decision to have a chilling effect on such worthwhile communications. Such communications help to avoid confusion and disputes and to direct efforts of all parties in a useful or productive manner. The rub is, as this appeal highlights, how far can the Department go in its communications before an unhappy recipient can appeal the Department's decision contained in the communication.[4] An interested person also has legitimate concerns about the collateral estoppel effect of a Department communication, if it fails to file an appeal from a Department communication that is subsequently determined to be an appealable action.

Second, to a large degree the Department has the opportunity to reduce the number of appeals and to reduce the difficulty of the issues in any remaining appeals before the Board by

[3] The letters are so definitive about the applicability of the Department's Fill Management Policy to the Sayreville contaminated soil (July 14, 2010 letter) and the Department's decision that the Sayreville contaminated soil is barred from the Commonwealth (December 23, 2010 letter) that the letters are appealable for the reasons in the adjudication.

[4] Interest persons, such as the appellant in this matter, have strong financial interests in gauging the Department's level of interest for a proposal to properly manage waste or its likely or possible response to a proposal before the person spends considerable time, effort and money to prepare an application. Testimony at the hearing indicated that a person spent 12 years and about twenty-five million dollars to obtain another state's RCRA C permit that allowed it to manage similar radioactive waste in another state. (Tr. At 816) Andrew Lombardo.

drafting better communications. In the context of a comprehensive permitting program requiring the submission of applications, the Department needs to recognize that it can only go so far in its communications to interested persons about the nature and scope of the requirements and program. If the Department had added language to the two letters under appeal to the effect that in order to evaluate Sayreville's particular proposal, Sayreville would have to submit an application under the applicable requirements that the Department would review and act on in the normal course of business, then neither letter would have been appealable in my opinion. Unfortunately, the Department often has conflicting interests when communicating about permitting requirements, and these conflicting interests push the Department's communications away from such a safe harbor communication. Why should the Department encourage an interested party to file an application that the Department "knows" has no chance of approval? This adjudication illustrates the downside of providing such a short-cut definitive answer to a particular interested person about its particular permitting question that should only be answered after both the interested person and the Department follow applicable procedures and requirements. An appeal will follow that will address the Department's decision to by-pass established permitting procedures without the benefit of a record established following the required procedures and requirements.

If the Department wants to avoid appeals of communications that it believes are not appealable, then it needs to draft its communications with better care to provide general information, but to avoid answering specific applicability questions.[5] If it wants to advance other interests in such communications, the Department will continue to skate on thin ice and should not be surprised when the Board decides that has fallen through into an appealable action.

[5] If the Department wants to signal that it believes its communication is an appealable action, it can include its typical appeal paragraph. While the Board is not bound by the Department's suggestion, it is an indication that the Department believes its decision is appealable.

Finally, as the Boards order set forth, a successful appeal from the Department's decision to by-pass established permitting procedures and requirements is an order vacating that decision. The practical effect of the Board's decision is that Sayreville is now free to pursue those established procedures, and the Department's decision reflected in these letters is no bar to an application that Sayreville can now file. The parties are now back on square one of the requirement procedures.

ENVIRONMENTAL HEARING BOARD

RICHARD P. MATHER, SR.
Judge

DATED: December 1, 2011

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL	:
	:
v.	:
	: **EHB Docket No. 2011-072-R**
COMMONWEALTH OF PENNSYLVANIA,	:
DEPARTMENT OF ENVIRONMENTAL	: **Issued: December 2, 2011**
PROTECTION and MARKWEST LIBERTY	:
MIDSTREAM & RESOURCES LLC	:

*CORRECTED OPINION AND ORDER ON MOTION FOR PROTECTIVE ORDER

By Thomas W. Renwand, Chief Judge and Chairman

Synopsis:

Pursuant to Pennsylvania Rule of Civil Procedure 4003.1 "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action…." A party may seek a protective order if it claims that the discovery sought seeks material which constitutes a trade secret or is otherwise confidential. The Board denies a motion to designate nearly all documents requested by a party as Confidential Business Information simply because they were not part of the Department of Environmental Protection's permit file.

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OPINION

Presently before the Pennsylvania Environmental Hearing Board is Permittee Mark West Liberty Midstream & Resources, LLC (MarkWest or Permittee) Motion for a Protective Order. MarkWest seeks a very broad Protective Order asking the Board to designate nearly all documents requested by the Appellant Clean Air Council as Confidential Business Information. MarkWest further requests that any documents, testimony, etc., designated as Confidential Business Information be tightly controlled and regulated by this Board. MarkWest contends that any documents not in the Pennsylvania Department of Environmental Protection's permit file constitute Confidential Business Information. If so classified, these documents could not be disclosed to the Public and would be required to be returned to MarkWest within 60 days of the final disposition of this action. The Pennsylvania Department of Environmental Protection does not oppose this request. Clean Air Council contends that MarkWest's request is overly broad and should be limited appropriately.

It is the Pennsylvania Environmental Hearing Board's duty and responsibility to regulate and effectively monitor the discovery process. Discovery before the Board is governed by both the Pennsylvania Rules of Civil Procedure and the Board's own Rules of Practice and Procedure. Thus, the liberal discovery rules applicable to actions in the Pennsylvania Courts of Common Pleas

are equally applicable to matters before the Board. *McGinnis v. DEP*, 2010 EHB 489, 493. Therefore, as set forth in Rule 4003.1, discovery is permitted of "any matter not privileged which is relevant to the subject matter in the present action." Moreover, a party seeking a protective order barring discovery must show good cause for the relief requested. *See Nothstein v. DEP & Mahoning Twp.*, 1990 EHB 1633, 1634-1635.

MarkWest, although acknowledging that it bears the burden of proof in requesting the Board to designate any document, testimony, correspondence, etc., as Confidential Business Information, fails to set forth any specific statements as to why the Board should designate nearly everything in this case as Confidential Business Information. Indeed, its Proposed Protective Order sets forth draconian practices governing not only discovery in this case but how testimony and evidence would be presented at hearing. If anyone in the Public were to request access to this Confidential Business Information (which it seems would encompass all or nearly all of MarkWest's documents and testimony) MarkWest proposes detailed procedures which not only the Parties but this Board would follow.

Cases before the Board are heard *de novo*. In the seminal case of *Smedley v. DEP*, 2001 EHB 131, then Chief Judge Krancer succinctly explained what this means.

> The Board conducts its trials *de novo*. We must fully consider the case anew and we are not bound by prior

> determinations made by the DEP. Indeed, we are charged to redecide the case based on our *de novo* scope of review. The Commonwealth Court has stated that '*de novo* review involves full consideration of the case anew. The EHB, as reviewing body, is substituted for the prior decision maker, the Department, and redecides the case.' *Young v. Department of Environmental Resources*, 600 A.2d 667, (Pa. Cmwlth. 1991); *O'Reilly v. DEP*, 2001 EHB 19, 32. Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings, findings based solely on the evidence of record in the case before it. *See, e.g., Westinghouse Electric Corporation v. DEP*, 1999 EHB 98, 120 n. 19.

2001 EHB at 156.

We are not dependent on a record developed by the Department or the documents they reviewed prior to reaching its decision on the action appealed. Most importantly, we are not limited to the information the Department reviewed to reach its decision. *See S.H.C. Inc. v. DEP*, 2919 EHB 619, 664. Instead, we can consider all relevant and admissible evidence duly presented and admitted at a hearing before the Board.

The due process guarantees set forth under Pennsylvania law are not triggered until an appeal to a Department of Environmental Protection action is taken. The Pennsylvania Environmental Hearing Board Act provides that no action of the Department of Environmental Protection is final if appealed to the Pennsylvania Environmental Hearing Board until the Board decides the objections raised by the party. 35 P.S. § 7514. Due Process is provided by the Pennsylvania

Environmental Hearing Board; not the Department of Environmental Protection which is a party in the case. *See Einsig v. Pennsylvania Mines Corp.*, 452 A.2d 558 (Pa. Cmwlth. 1982).

Full disclosure of a party's case underlies the discovery process before the Board. *Pennsylvania Trout v. DEP*, 2003 EHB 652, 657. The main purposes of discovery are so all sides can acquire necessary information and evidence, plan trial strategy, and discover the strong points and weaknesses of their respective positions. *DEP v. Neville Chemical Company*, 2004 EHB 744, 746. It is the Pennsylvania Environmental Hearing Board's responsibility and duty to oversee discovery and prehearing proceedings. *Cappelli v. DEP & Maple Creek Mining, Inc.*, 2006 EHB 426, 427.

With these principles firmly in mind we deny MarkWest's Motion for a Protective Order. This is without prejudice to MarkWest to prove to us that an individual document or parts of testimony should be classified as Confidential Business Information. If the Board agrees that a document or testimony should be classified as Confidential Business Information the Board will then also decide how it will be handled. Moreover, the Protective Order proposed by Clean Air Council is also too restrictive and would usurp this Board's role in properly regulating not only discovery but the trial of this case.

We will issue an Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CLEAN AIR COUNCIL	:
	:
v.	:
	: **EHB Docket No. 2011-072-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARKWEST LIBERTY MIDSTREAM & RESOURCES LLC	:

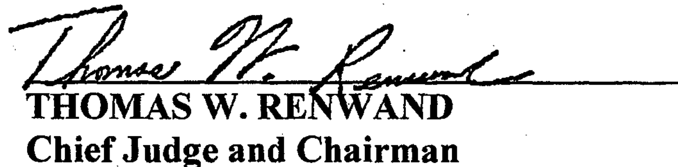
ORDER

AND NOW, this 2nd day of December, 2011, following a careful review of the Permittee's Motion for a Protective Order and the respective papers filed by the parties, it is ordered as follows:

1) Permittee's Motion for a Protective Order is **denied.**

2) Appellant's Proposed Order is **denied.**

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman

***This Opinion corrects the name of the Appellant which was incorrectly stated in the Opinion issued on December 1, 2011.**

DATED: December 2, 2011

c: **DEP Litigation:**
Glenda Davidson, Library

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 2008-051-CP-C**
v.	:	**Issued: December 7, 2011**
MR. KIRK E. DANFELT	:	

OPINION AND ORDER FOR DEFAULT JUDGMENT AS TO AMOUNT OF CIVIL PENALTY

By Michelle A. Coleman, Judge

Synopsis:

In a previous opinion and order by the Board, *DEP v. Danfelt and Giordano*, 2009 EHB 459, the Board granted the Department's motion for default judgment against Danfelt deeming all relevant facts in the complaint admitted as to his liability. The Department now files a motion for default judgment as to the civil penalties set forth in the complaint. Under the Board's new rule, 25 Pa. Code § 1021.76a, the Board grants the Department's motion and assesses the penalty to the amount in the complaint.

OPINION

On February 25, 2008 the Department filed a complaint against Defendant, Kirk E. Danfelt ("Danfelt"),[1] for the assessment of civil penalties in the proposed amount of $41,250 for violations of the Clean Streams Law, 35 P.S. § 691.1, *et seq.*, and the regulations pertaining

[1] The complaint originally included Eva Joy Giordano, however the Department filed a motion to withdraw its complaint against Giordano on September 22, 2011. The Board granted the motion removing Giordano from the complaint with prejudice on September 23, 2011.

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thereto, arising out of activities conducted at three locations: East Corner, Todd Township, Fulton County, Pennsylvania ("Site 1"); between Old Route 30 and Route 30 Bypass east of McConnellsburg, Ayr Township, Pennsylvania ("Site 2"); and East Wood Street, Todd Township, Pennsylvania ("Site 3"). The facts have been set forth previously in *DEP v. Danfelt and Giordano*, 2009 EHB 459 and *DEP v. Danfelt and Giordano*, EHB Docket No. 2008-051-CP-C (Opinion, July 14, 2011).

The Department first filed a motion for default judgment against Danfelt on April 14, 2009. The Board granted the Department's motion deeming the relevant facts in the complaint admitted and establishing Danfelt's liability with respect to the following counts:

a) Count I is the failure of Danfelt to develop an erosion and sedimentation control plan to minimize erosion and sedimentation at Site 1 on January 25, 2007, Site 2 on June 13, June 19, and July 25, 2007 and Site 3 on June 27 and July 25, 2007 in violation of 25 Pa. Code § 102.4 and the Clean Streams Law, 35 P.S. §§ 691.402 and 691.611;

b) Count II is the failure of Danfelt to submit an erosion and sedimentation control plan to effectively minimize accelerated erosion and sedimentation at the points of earth disturbance activities at Site 2 on July 25, 2007 and Site 3 on June 27 and July 25, 2007 in violation of 25 Pa. Code § 102.4 and the Clean Streams Law, 35 P.S. §§ 691.402 and 691.611;

c) Count III is the failure of Danfelt to have an erosion and sedimentation plan available at all times at the sites of the earth disturbance activities at Site 1 on April 25, 2007 and Site 2 on June 13 and June 19, 2007 in violation of 25 Pa. Code §§ 102.2, 102.4, 102.11 and the Clean Streams Law, 35 P.S. §§ 691.402 and

691.611;

d) Count IV is the failure of Danfelt to implement erosion and sedimentation best management practices to effectively minimize accelerated erosion and sedimentation at Site 1 on January 25, March 15, April 25, 2007, at Site 2 on June 13, June 19 and July 15, 2007, and at Site 3 on June 27 and July 25, 2007 in violation of 25 Pa. Code §§ 102.2, 102.4, 102.11 and the Clean Streams Law, 35 P.S. §§ 691.402 and 691.611;

e) Count V is the failure of Danfelt to maintain erosion and sedimentation control best management practices to effectively minimize accelerated erosion and sedimentation at Site 1 on January 25, March 15 and April 25, 2007, Site 2 on June 13, June 19 and July 25, 2007 and Site 3 on June 27 and July 25, 2007 in violation of 25 Pa. Code §§ 102.2, 102.4, 102.11 and the Clean Streams Law, 35 P.S. §§ 691.402 and 691.611;

f) Count VI is the failure of Danfelt to stabilize all areas of the sites upon completion of earth disturbance activities at Site 1 on March 15 and April 25, 2007, Site 2 on June 19 and July 25, 2007 and Site 3 on June 27 and July 25, 2007 in violation of 25 Pa. Code § 102.22 and the Clean Streams Law, 35 P.S. §§ 691.402 and 691.611;

g) Count VII is creating the danger of sediment pollution to waters of the Commonwealth (UNT to Patterson Run at Site 1 and UNT to Big Cover Creek at Site 2 and 3) at Site 1 on January 25, March 15 and April 25, 2007, site 2 June 13, June 19 and July 25, 2007 and Site 3 on June 27 and July 25, 2007 constituting unlawful conduct and public nuisance under the Clean Streams Law, 35 P.S. §

691.402; and

h) Count VIII is causing or allowing accelerated erosion and resulting sedimentation to waters of the Commonwealth by earth disturbing activities at Site 1 on March 15, 2007 constituting unlawful conduct under the Clean Streams Law, 35 P.S. §§ 691.401, 691.402 and 691.611.

The Department filed this second motion for default judgment as to civil penalties on October 28, 2011 against Danfelt. Danfelt has not filed a response to the motion, nor had any communication with the Board since the filing of the complaint in this matter.

The Board's rule on default judgment became effective on October 17, 2009. Pursuant to this new rule on default judgment, 25 Pa. Code § 1021.76a, the Board, upon motion of the plaintiff, may enter a default judgment against the defendant for failure to answer a complaint that contains a notice to defend, and when default judgment is entered, the Board may assess civil penalties in the amount of plaintiff's claim.

Therefore, upon consideration that liability has already been established by the Board's Opinion and Order on August 20, 2009 (*DEP v. Kirk E. Danfelt & Eva Joy Giordano*, 2009 EHB 459) and pursuant to 25 Pa. Code § 1021.76a, which authorizes the Board to assess the amount of the penalty sought in the complaint, the motion for default judgment is granted. *See DEP v. Giglioti Group,* EHB Docket No. 2010-150-CP-C (Order, March 11, 2011); *DEP v. Richard and Helen Wolf,* 2010 EHB 611; *DEP v. Paul Naulty, d/b/a Colonial Sealcoating,* EHB Docket No. 2010-086-CP-K (Order, September 9, 2010). Default judgment having already been entered against Danfelt, the Board hereby assesses the civil penalty in the amount of $41,250.

We issue the following order.

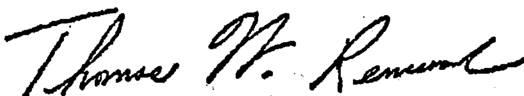
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 2008-051-CP-C**
v.	:	
MR. KIRK E. DANFELT	:	

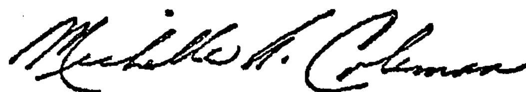
ORDER

AND NOW, this 7th day of December 2011, upon consideration of the Department's unopposed motion for default judgment as to civil penalties, it is hereby **GRANTED**. It is further ordered that the Board hereby assesses the civil penalty in the amount of $41,250.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chief Judge and Chairman



MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

DATED: December 7, 2011

c: **DEP Bureau of Litigation:**
Glenda Davidson, Library

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For Defendant, *Pro Se*:
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RONALD R. CARTER, SR. AND JEAN CARTER, *et al.*	:	
	:	
v.	:	**EHB Docket No. 2011-003-L (Consolidated with 2011-165-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CABOT OIL & GAS CORPORATION, Permittee	:	**Issued: December 9, 2011**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Environmental Hearing Board denies a petition for supersedeas filed by several homeowners in Dimock, Pennsylvania because a supersedeas is only available if a party is threatened with unavoidable, irreparable harm before the case can be resolved, and these parties need not suffer any such harm. Although Cabot terminated temporary water supplies, temporary water deliveries will resume immediately for any Petitioner who simply indicates that he or she is willing to at least try a whole-house gas mitigation device paid for by Cabot and installed by plumbers hired by Cabot. No waiver of rights is required, and there is no cost or obligation of any kind. If Cabot is not able for whatever reason to install an effective treatment device it will be required to continue temporary water deliveries indefinitely. In addition, Cabot has agreed to pay each Petitioner anywhere from $50,000 to $398,872 with no strings attached and no questions asked. Only one Petitioner is due to receive less than $100,000. Six will receive over $200,000. Four more will receive more than $300,000. Again, Cabot has agreed to make these payments immediately with absolutely no obligation on the part of the Petitioners and no waiver of any past, present, or future rights. Indeed, most of the Petitioners have already asked for the funds. These funds will be more than sufficient to meet the Petitioners' water needs pending our final adjudication in this appeal.

OPINION

On December 15, 2010, the Department of Environmental Protection (the "Department") entered into a consent order and settlement agreement ("COSA") with Cabot Oil & Gas Corporation ("Cabot") that addressed certain issues that had arisen in connection with Cabot's drilling of gas wells in Dimock and Springville Townships, Susquehanna County. Among other things, the Department determined that Cabot's activities adversely affected eighteen drinking water supplies that serve nineteen homes in an area denominated as the "Dimock/Carter Road Area," including those supplies owned by Ronald R. Carter, Sr. and Jean Carter, *et al.*, the Petitioners. Paragraph 6 of the COSA reads as follows:

> 6. ***Settlement of Restoration/Replacement Obligation.*** The claims by the Department regarding Cabot's obligations under Section 208 of the Oil and Gas Act, 58 P.S. § 601.208, and 25 Pa. Code § 78.51, including any obligation of Cabot to pay for or restore and/or replace the Water Supplies, or to provide for ongoing operating or maintenance expense shall be satisfied, as follows:
>
> a. Escrow Fund.
>
> i. Within thirty (30) days after the date of this Consent Order and Settlement Agreement, Cabot shall establish nineteen (19) Escrow Funds and each Escrow Fund shall hold an amount equal to, whichever is greater: $50,000; or two times the assessed value by the Susquehanna County Tax Assessor of the property(ies) owned by the Property Owners within the Dimock/Carter Road Area. Such assessed values for each property owned by the Property Owners are listed in chart attached as Exhibit D;
>
> ii. Within ten (10) days after Cabot has established and funded the nineteen (19) Escrow Funds in accordance within Paragraph 6.a.i., above, Cabot shall notify each Property Owner, in writing, of the existence of the funds in the Escrow Fund for that Property Owner, the procedure by which the Property Owner can obtain his/her/their payment from the Escrow Fund.

iii. Cabot shall pay all fees and costs associated with each of the Escrow Funds. The funds in the Escrow Funds shall be paid to Property Owners, their duly authorized attorney or representative or the heirs of the Property Owners in accordance with this Paragraph 6 and the Escrow Agreement attached hereto as Exhibit E. Exhibit E shall be the model of the Escrow Agreement that Cabot shall use for each of the Escrow Funds established under Paragraph 6.a.i., above, and is incorporated herein; and

iv. If the Escrow Agent and Cabot have not received the executed and notarized Receipt provided for in the Escrow Agreement from the Property Owner on or prior to the 45th day after the date that the Property owner has received written notice of the Escrow Fund in accordance with this Consent Order and Settlement Agreement, the Escrow Agent shall continue to hold the Escrow Fund until December 31, 2012. During such time period the Escrow Agent shall deliver all proceeds from the Escrow Fund to the Property Owner if and only if the Escrow Agent receives unqualified and unconditional written instruction to do so from a duly authorized representative of the Department and from a duly authorized representative of Cabot. If as of December 31, 2012, the Property Owner has not claimed and received the Escrow Fund, the Escrow Agent shall deliver all proceeds from the Escrow Fund to Cabot on January 2, 2013, together with all interest and/or earnings attributable to the Escrow Fund.

b. Effect of Notification to Department. After the time has passed for the Escrow Fund to be funded in accordance with Paragraph 6.a.i., above, and upon completion of the restoration activities described below, the Department's claims regarding Cabot's obligations under Section 208 of the Oil and Gas Act, 58 P.S. § 601.208, and 25 Pa. Code § 78.51, to restore and/or replace a Water Supply that serves the property owned by a Property Owner shall be satisfied upon the Department's receipt of information from Cabot that verifies that: the nineteen (19) Escrow Funds have been established and fully funded in accordance with Paragraph 6.a.i., above; each of the Property Owners have received written notice from Cabot of the Escrow Fund and of the procedure by which the Property Owner can obtain his/her/their payment from such Escrow Fund; and each of the Property Owners have received written notice from Cabot that it will install a whole house gas mitigation device at the property as provided for below.

c. For each Property Owner, Cabot shall continue to provide and maintain temporary potable water and, as applicable, shall continue to maintain gas mitigation devices that it had previously installed until Cabot receives written

notice from the Department that it has complied with all of the requirements of Paragraph 6.a.-6.b., above, for that Property Owner.

d. As long as Cabot provides temporary water to the Property Owners under Paragraph 6.c., above, from a water purveyor and/or water hauler, Cabot shall assure that the water purveyor/hauler has all licenses, permits, and/or other authorizations required under Pennsylvania law and Regulations, and that the Property Owners receive water in amounts sufficient to continually satisfy water usage needs until Cabot receives written notice from the Department that it has complied with all of the requirements of paragraphs 6.a.-6.b, above, for that Property Owner.

e. As of the date of this Consent Order and Settlement Agreement, Cabot has purchased whole house gas mitigation devices for residential water supplies within the Dimock/Carter Road Area and it has drilled new drinking water wells to serve other residences within the Dimock/Carter Road Area. Within 30 days of the date of this Consent Order and Settlement Agreement, Cabot shall notify each Property Owner, in writing, that Cabot will install, at Cabot's sole expense, a whole house gas mitigation device at the Property Owner's residence.

f. If the Property Owner notifies Cabot, in writing, within sixty (60) days from the date that the Property Owner received the written notice in accordance with Paragraph 6.e., above, that he/she/they agree(s) to Cabot installing a whole house gas mitigation device at his/her/their residence, Cabot shall complete such action at the residence within ninety (90) days from the date that the Property owner notified Cabot, in writing, of his/her/their agreement.

Twelve of the homeowners filed an appeal from the COSA on January 11, 2011. The appeal is docketed at EHB Docket No. 2011-003-L. The Petitioners object to the COSA for several reasons. Among other things, they allege that the Department erred by substituting treatment devices and monetary payments for a previously approved plan to install a pipeline to connect the homes to public water or some other mechanism for permanently restoring or replacing the water supplies. They also object that the Department entered into the COSA without considering the fact that the property owners' water is alleged to be contaminated with toxic constituents in addition to methane. (The COSA only requires Cabot to offer to install treatment systems to address methane.) After all pre-hearing deadlines set forth in our pre-

hearing order passed and with no motions pending, we scheduled a hearing on the merits in the appeal from the COSA to begin on March 19, 2012. The first pre-hearing memorandum in the case is due on January 17, 2012.

The Department in a letter dated May 9, 2011 to Cabot stated the following:

> As of the date of this letter, the Department has received sufficient information to show that Cabot has now completed the following actions:
>
> > Established the 19 Escrow Funds;
> >
> > Provided each of the 19 families that are served by the 18 Affected Water Supplies with written notice of the Escrow Funds and the procedure by which each of the families can obtain payment. The families of Ed and Becky Burke, Frederick and Jessica Hein, Michael and Suzanne Johnson, Timothy and Deborah Maye, Loren Salsman, Richard and Wendy Seymour, and Richard Stover have accepted payment from their respective Escrow funds. To date, the appellants have not yet accepted payment from their respective Escrow Funds; and
> >
> > Provided each of the 19 families that are served by the 18 Affected Water supplies with written notice that Cabot will install, at its sole expense, a whole house gas mitigation device for each of the 18 Affected Water Supplies. Cabot has installed or will soon install such devices at the seven Affected Water Supplies that serve the families of Ed and Becky Burke, Frederick and Jessica Hein, Michael and Suzanne Johnson, Timothy and Deborah Maye, Loren Salsman, Richard and Wendy Seymour, and Richard Stover. To date, the Appellants have not agreed to the installation of any such devices by Cabot.
>
> Cabot's completion of the actions identified above satisfies the requirements under Paragraphs 6.b. through 6.f. of the 2010 Agreement.

The Department provided counsel for the Petitioners with a copy of the May 9, 2011 letter.

On October 18, 2011, the Department sent Cabot a letter, which reads in part as follows:

> The Department has determined that Cabot has satisfied the terms and conditions of paragraph 6 of the COSA and therefore grants Cabot's request to discontinue providing temporary potable water to the remaining property owners subject to the December COSA. Cabot shall do so under the conditions proposed in its October 17, 2011 letter.[1]

The Petitioners filed the appeal docketed at EHB Docket No. 2011-165-L from the Department's October 18 letter on November 18. Although many of the Petitioners' objections appear to relate more to the COSA than the letter, the Petitioners do assert that the Department erred in its finding in the letter that Cabot had complied with Paragraph 6 of the COSA.

On November 23, the Petitioners filed a petition for temporary supersedeas and a petition for supersedeas in the appeal from the October 18 letter. (A petition for supersedeas had not previously been filed in the appeal from the COSA.) Following a conference call on November 29, we issued an order denying the temporary supersedeas. Thereafter, Cabot stopped deliveries of temporary water.

Following our conference call on the temporary supersedeas, we invited the parties to submit briefs on or before December 7 in support of or in opposition to a longer term supersedeas pending a hearing on the merits. The parties did so. Also on December 7, the Petitioners filed a motion to consolidate the appeal from the COSA and the appeal from the October 18 letter, and asked that their petition for a supersedeas be treated as relating to both appeals. We held oral argument on the supersedeas petition by a conference call, which was transcribed, on December 8, 2011.

---

[1] Cabot stated in the October 17 letter that it remains willing to install whole house methane mitigation water treatment devices. It has offered to pay for a professional plumber to reconnect water well supplies as well as install the methane treatment systems. It committed to continue to provide temporary water while this plumbing work was being completed to any property owner that requested the work before November 30.

In response to our questioning during the conference, Cabot agreed to provide an unequivocal statement of its willingness to continue to comply with its obligations as described in paragraph 6 of the COSA, notwithstanding the fact that some of its obligations arguably expired due to the passage of time. Following the conference, Cabot filed and served a letter, which reads as follows:

> Please accept the following as Cabot Oil & Gas Corporation's ("Cabot") formal position in connection with today's discussion regarding the above-captioned proceeding:
>
> Cabot agrees to provide an instruction to the Escrow Agent for release of the escrow funds to the Appellants, unqualifiedly and unconditionally, as available in the Escrow Account for each Appellant.
>
> Cabot continues to offer the whole house treatment system which it believes is an effective method of remediation.

In consideration of Cabot's letter, the parties' filings, numerous exhibits, and two oral arguments, we are now able to conclude without the need for further hearings that the Petitioners are not entitled to a supersedeas of the Department's actions in this consolidated appeal.[2]

A supersedeas is an extraordinary remedy that will not be granted absent a clear demonstration of appropriate need. *Rausch Creek Land, LP v. DEP*, EHB Docket No. 2011-137-L (Opinion and Order, October 6, 2011); *Mountain Watershed Ass'n v. DEP*, EHB Docket No. 2011-073-R (Opinion and Order, September 22, 2011); *UMCO Energy, Inc. v. DEP,* 2004 EHB 797, 802; *Tinicum Township v. DEP,* 2002 EHB 822, 827; *Global Eco-Logical Services v. DEP,* 1999 EHB 649, 651. The grant or denial of a supersedeas is guided by statutory and regulatory criteria, relevant judicial precedent, and the Board's own precedent. 35 P.S. § 7514(d)(1); 25 Pa.

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[2] Cabot and the Department said during the conference call that they did not object to the Petitioner's motion to consolidate so long as the preexisting hearing schedule in the COSA appeal is not changed. The Petitioners agreed to that condition. Accordingly, we consolidated the two appeals by separate order today. Our ruling on the supersedeas petition applies in both appeals.

Code § 1021.63(a). Among the factors we consider are (1) irreparable harm to the petitioner, (2) the likelihood of the petitioner prevailing on the merits, and (3) the likelihood of injury to the public or other parties. 35 P.S. § 7514(d); 25 Pa. Code § 1021.63(a)(1)-(3); *Hopewell Township v. DEP*, EHB Docket No. 2011-147-M (Opinion and Order, October 17, 2011); *Neubert v. DEP*, 2005 EHB 598, 601; *Westmoreland Land, LLC v. DEP*, EHB Docket No. 2011-037-R (Opinion and Order, October 3, 2011); *Kennedy v. DEP*, 2008 EHB 423, 424; *UMCO Energy, Inc.*, 2004 EHB at 802. The issuance of a supersedeas is committed to the Board's discretion based upon a balancing of all of these criteria. *Hopewell Township, supra*; *UMCO Energy, Inc.*, 2004 EHB at 802; *Global Eco-Logical Services, supra; Svonavec, Inc. v. DEP,* 1998 EHB 417, 420. *See also Pennsylvania PUC v. Process Gas Consumers Group,* 467 A.2d 805, 809 (Pa. 1983). In order for the Board to grant a supersedeas, a petitioner must make a credible showing on each of the three regulatory criteria but make a strong showing that it is likely to succeed on the merits of its appeal. *Mountain Watershed Ass'n, supra*, slip op. at 2; *Jordan v. DEP*, 2010 EHB 51, 53.

Irreparable Harm

The *raison d'etre* of a supersedeas is to prevent a party from suffering irreparable harm during the litigation process. *Jefferson County Commissioners, et. al v. DEP*, 2000 EHB 394, 402-403. Paragraph 6 of the COSA, as amplified by the correspondence of October 17, October 18, and December 8, provides that Cabot will immediately resume deliveries of temporary water to the Petitioners if they simply agree to allow Cabot to install a whole-house gas mitigation device in each of their homes, all expenses paid by Cabot. In addition, all that each Petitioner needs to do is ask and Cabot will immediately pay each property owner the amounts listed in Exhibit D to the COSA with no strings attached. Those amounts are as follows:

Landowner	Escrow Amount
Carter, Ronald R. & Jean E.	$ 196,808
Carter, Ronald R. Sr. & Jean E.	147,752*
Ely, Michael, Sr. & Andrea Ely	193,304
Ely, Nolan Scott & Monica Marta-Ely	153,008
Ely, William T. and Sheila A.	286,160
Fiorentino, Norma J. & Joseph A.	228,928
Hubert Ray, Sr. & Victoria Hubert	50,000
Johnson, Michael A. & Suzanne	156,512
Kemble, Raymond & Lorne Schopperth	185,712
Maye, Timothy J. & Deborah L.	366,752
Roos, Erik B. J. & Susan Roos	146,584
Sautner, Craig A. & Julia Sautner	265,720
Seymour, Richard & Wendy Seymour	217,832
Switzer, Victoria (& Jimmy Lee)	162,352
Teel, Ronald J. & Anne	357,992
Burke, Edward	281,632
Hein, Frederick J., Jr. & Jessica L.	199,728
Salsman, Loren A. & Ruth A.	201,480
Salsman, Loren A.	8,760**
Stover, Richard C. & Sara A.	398,872

*Carter Tracts combined = $344,560
**Salsman Tracts combined = $210,240

No release or waiver of any kind is required from the Petitioners other than a receipt acknowledging payment of the funds. Cabot will pay the Petitioners without prejudice to their past, existing, or future rights in this appeal or in any other litigation. Although this reservation of the Petitioners' rights would have been clear as a matter of law even without Cabot's December 8 letter in our view, that letter removes all doubt. This is only appropriate because, although done for the benefit of the Petitioners, the COSA is only designed to resolve the *Department's* claim against Cabot. The Department did not and could not have bargained away the Petitioners' individual rights, whatever they may be.

So, here is the situation as it now stands: with nothing more than a simple request, each Petitioner can at least try out a treatment device. **Temporary water must then resume immediately**. In addition, Cabot cannot stop delivery of temporary water unless and until it is able to install an *effective* treatment device, which is apparently defined as one that actually reduces methane down to 5 parts per million. If Cabot has trouble installing a successful device, temporary water must continue to be delivered, no matter how long it takes. Agreeing to try the device comes with absolutely no obligation, commitment, waiver, or release on the part of the Petitioners. As far as we can tell, there is no downside whatsoever to accepting this offer.

Some of the Petitioners have expressed a concern that they may not be able to use the water even after methane treatment is installed due to other contaminants in the water. That is where the immediately available and unconditional monetary payments come in. Any Petitioner who is unhappy or unwilling to use the water even after successful methane removal will have as much as $398,872 in the bank to hold them over until the hearing on the merits. In fact, the Petitioners will receive these funds even if they are completely satisfied with the treatment devices and the quality of their water. We are informed as of this morning that almost all of the Petitioners have now asked for the funds, and the Department and Cabot have both instructed the escrow agent that the distribution of the funds is approved.[3]

Given this state of affairs, it is very clear to us that the Petitioners do not need to suffer irreparable harm while this appeal runs its course. The only conceivable irreparable harm relates to loss of temporary water supplies, but that loss need not occur. In evaluating the irreparable harm criterion for issuing a supersedeas, the Board considers the extent to which the harm results from the party's own behavior. *Westmoreland Land, LLC, supra*, slip op. at 5-6. Irreparable

[3] The Petitioners say they might need to pay some of these funds to the IRS. If that is true, the Petitioners will still have many tens of thousands of dollars to meet their interim needs.

harm to petitioners is much less compelling when it is caused in substantial part by the petitioners themselves. *Kennedy v. DEP*, 2008 EHB 423, 426; *UMCO*, 2004 EHB at 819; *Tire Jockey Services v. DEP*, 2001 EHB 1141, 1160; *Nicholas v. DEP*, 1992 EHB 219, 224. Every party appearing before the Board has an obligation to mitigate to the extent reasonably possible whatever irreparable harm that it might otherwise suffer pending a hearing on the merits. *UMCO*, 2004 EHB at 819-20. No party should attempt to maximize its injury for purposes of gaining litigation advantage. *See id.*

The COSA finds that the Petitioners were harmed by Cabot's activities, and that is truly unfortunate. However, in the face of an undeniably bad situation, the Petitioners have a legal duty to mitigate the harm that has been visited upon them. The COSA has created a readily available mechanism for mitigating the harm pending resolution of this case. We will not issue a supersedeas as a substitute for utilization of that mechanism. Given the clear lack of unavoidable, irreparable harm in this case, there is no need for us to evaluate the other supersedeas criteria.

Accordingly, we issue the order that follows.

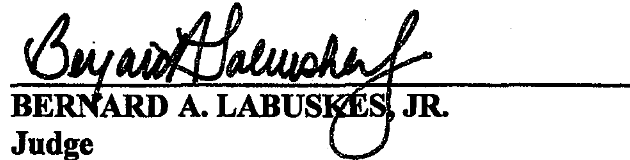
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RONALD R. CARTER, SR. AND JEAN CARTER, *et al.*	:	
	:	
v.	:	**EHB Docket No. 2011-003-L**
	:	**(Consolidated with 2011-165-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CABOT OIL & GAS CORPORATION, Permittee	:	

ORDER

AND NOW, this 9th day of December, 2011, it is hereby ordered that the petition for supersedeas is **denied.**

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: December 9, 2011

c: **DEP Bureau of Litigation:**
Attention: Glenda Davidson

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MICHAEL RANUADO, CHARLES LUCCHETTI	:	
LARRY LAMPARTER, NICK HETMANSKI	:	
AND ROLL RITE TIRE CENTER, INC.	:	
	:	
v.	:	**EHB Docket No. 2010-098- C**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	**Issued: December 13, 2011**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

OPINION AND ORDER
ON MOTION FOR SANCTIONS

By Michelle A. Coleman, Judge

Synopsis:

The Board denies the Department's motions for sanctions against three of the individually named appellants for failing to comply with discovery requests and failing to appear for scheduled depositions.

OPINION

Before the Board are three motions for sanctions filed against three of the appellants for failing to comply with discovery. On January 10, 2011 the Department filed its first motion for sanctions against Michael Ranuado ("Ranuado") and Charles Luchetti ("Luchetti") for failing to appear for their scheduled depositions. The second motion for sanctions was filed on April 13, 2011 against Luchetti for failing to appear for his rescheduled deposition and for failing to provide a response to the Department's request for production of documents. The third motion for sanctions was filed on April 14, 2011 against Nick Hetmanski ("Hetmanski") for failing to appear

for his deposition and for failing to provide a response to the Department's request for production of documents.

Factual Background

January 10, 2011 Motion for Sanctions

The January motion states that the Department sent notices of deposition to Appellants Ranuado, Luchetti, Lamparter and Hetmanski in October 2010 and December 2010. Both sets of depositions were postponed. Subsequently the Department sent its first request for the production of documents to the Appellants. The Department also rescheduled Ranuado's and Luchetti's depositions for January 5, 2011, Lamparter for January 13, 2011 and Hetmanski for January 14, 2011.

On January 5, 2011 the Department counsel, Apellants' counsel, Luchetti and the court reporter were present for the depositions. Ranuado never appeared for his 9:00 a.m. deposition. At approximately 9:30 a.m. Ranuado's counsel was able to contact Ranuado. Ranuado informed him that he had car trouble and would not be at the deposition. Since Luchetti was present, counsel asked the Department to take his deposition, but the Department counsel stated that she was not prepared to take Luchetti's deposition before Ranuado's. Luchetti left without being deposed by the Department. The Department's motion requests that Ranuado and Luchetti be held jointly and severally liable for reimbursing the Department for attorneys fees and costs that include, $90 for the court reporter and $794 for attorneys' fees.

April 13, 2011 Motion for Additional Sanctions

The Department was able to reschedule the depositions of Ranuado and Luchetti after depositions did not occur on January 5, 2011. The depositions were rescheduled to occur on March 29, 2011. Prior to the depositions, the Department filed a motion to compel on March 24,

2011 to compel Ranuado and Luchetti to appear for their rescheduled depositions. The Board granted the Department's motion to compel requiring Ranuado and Luchetti to appear for their depositions on March 29, 2011.

On April 13, 2011 the Board received the Department's second motion for sanctions. This motion was filed only against Luchetti for failing to appear. The motion asserts that Ranuado appeared for his deposition but Luchetti did not appear, violating the Board's Order. In addition, the Department informed the Board that Luchetti had not responded to its request for production of documents submitted to Luchetti in December, 2010. The Department requests the Board to dismiss Luchetti's appeal, as well as require him to pay fees and costs in the amount of $912.52. Luchetti never responded to the motion for sanctions.

April 14, 2011 Motion for Sanctions

On April 14, 2011 the Department filed its third motion for sanctions. Initially the Department had scheduled Hetmanski on January 14, 2011 for his deposition, but cancelled after not being able to depose Ranuado and Luchetti prior to Hetmanski. Hetmanski failed to appear at his rescheduled deposition on March 14, 2011. The Department also stated that Hetmanski did not provide responses to the Department's request for production of documents. The motion requests that the Board sanction Hetmanski for failing to follow Board rules. The Department requests $376.38 in attorneys' fees for the preparation of both the deposition and the motion for sanctions. Hetmanski never responded to the motion for sanctions.

Discussion

The Department asks the Board to sanction the Appellants for their respective discovery violations. The Board has the authority to impose sanctions for failing to follow Board orders and rules. *See* 25 Pa. Code § 1021.161. The sanctions the Board may impose include "dismissing an

appeal, entering an 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)." 25 Pa. Code § 1021.161. Rule 4019(g)(1) of the Pennsylvania Rules of Civil Procedure authorizes the Board to require payment of fees and expenses by a party whose conduct necessitated a discovery motion (ie. motions for compliance) and after hearing both the motion and response, if the Board grants the motion for compliance and there is still no compliance then the moving party may file a motion for sanctions under section 4019 with the court requesting reasonable expenses, including attorney's fees incurred in obtaining the order of compliance and the order for sanctions. The motion will be granted unless the Board finds that the opposition to the motions was substantially justified or other circumstances make an award of expenses unjust. Rule 4019(g)(1).[1]

In *Environmental & Recycling Services, Inc. v. DEP*, 2001 EHB 824, 834, we stated that the Board has wide discretion to fashion an appropriate sanction for discovery violations based on the magnitude of the violation. In fact, we have granted sanctions in the past for parties who fail to fulfill discovery obligations, as well as fail to comply with Board rules and orders. *See Victor*

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[1] Pa.R.C.P. 4019(g)(1), *comment*:

> The first step under subdivision (g)(1) is a motion to compel compliance. If, after a hearing, the motion is granted and depositions or discovery are ordered and the party against whom it is directed complies, that is the end of the matter. . . . If the order is not obeyed, the aggrieved party may file a new motion to impose sanctions. The court, at this 'second step' of the proceedings, may award expenses and counsel fees for either or both steps depending upon how the court views the conduct of the defaulting party . . . . The Rule permits the court to decline any award if the court finds that the opposition to the motion was substantially justified or that other circumstances make an award unjust.

Kennedy v. DEP, 2006 EHB 477, 479, *citing Swistock v. DEP*, 2006 EHB 398 ("[T]he Board dismissed an appeal for failure to file answers to interrogatories or respond to discovery requests."); *Sri Venkateswara Temple v. DEP*, 2005 EHB 54 (The Board dismissed an appeal for failure to comply with Board orders which indicated "an intent not to pursue an appeal.").

In the January 10, 2011 motion, the Department asked the Board to find Ranuado and Luchetti jointly and severally liable for attorney's fees and costs for missing the January 5, 2011 depositions. Ranuado denies that he "intentionally ignored his request to appear for deposition . . . [he] advised that he was coming from Baltimore, MD when he encountered car trouble." Appellant's Response to Department Motion to Compel, ¶ 1. Although we believe that he should have been more prudent in informing his counsel of his inability to attend his deposition rather than waiting for his counsel to call him, we are unable to grant the Department's motion with respect to Ranuado. We find that requiring Ranuado to pay attorney's fees and costs for missing his deposition due to car trouble would be unjust under these circumstances.

The January motion also asks us to sanction Luchetti. A review of the facts indicates that there was a question as to what time on January 5, 2011 Luchetti's deposition was to occur. According to the Department, Luchetti was scheduled for his deposition later that day at 1:00 p.m. In his response to the Department's motion for sanctions, Luchetti contends that his deposition was scheduled at 9:00 a.m. Luchetti points to an email sent from the Department's counsel to his counsel that provides:

> They are now scheduled as follows:
>
> 1-5-11-Ranuado and Luchetti
>
> 1-13-11 at 1:00- Lamparter
>
> 1-14-11 at 9:00- Hetmanski

Appellants' Response, Exhibit A. The email, however, does not necessarily remove the confusion of when Ranuado and Luchetti were scheduled to be deposed on January 5, 2011. The Department requests that Luchetti pay for attorney's fees and costs for leaving prior to his deposition at 1:00 p.m., in spite of the Department counsel's position that she would not take Luchetti's deposition prior to taking Ranuado's even though Luchetti was present and Ranuado was not. Luchetti's deposition not being taken on January 5 was based on an apparent miscommunication in scheduling and the Department's unwillingness to depose him out of order. Asking for fees and costs under these circumstances are not justified against Luchetti.

The second motion for sanctions was filed on April 13, 2011 against Luchetti for failing to provide responses to the Department's discovery requests sent to him in December, 2010, and for not appearing at his rescheduled deposition on March 29, 2011. His failure to appear violated the Board's order of March 28, 2011. Luchetti did not file a response to this motion for sanctions. The Department seeks to have his appeal dismissed and require him to pay attorney's fees and costs. The Department requests $878.22 which is based on the Department counsel's hourly rate and time spent preparing for the deposition, the ensuing motion for sanctions and the unanswered request for production of documents. In addition, the Department requests $34.30 for the expense of the court reporter that attended the deposition Luchetti missed.

Luchetti willfully ignored his court ordered obligation to attend his deposition, he ignored his obligation under our rules to provide discovery responses to the Department's request and ignored his obligation to respond to the motion for sanctions before us. Luchetti's repeated lack of compliance gives an indication to the Board that he does not intend to pursue his appeal. We have said in the past that a sanction that results in dismissal is justified where a party fails to comply with Board orders and rules. *See Miles v. DEP*, 2009 EHB 179, 181 (failure to follow

Board orders and rules indicates a lack of intent to pursue an appeal); *see also KH Real Estate, LLC*, 2010 EHB 151; *Bishop v. DEP*, 2009 EHB 259; *Pearson v. DEP*, 2009 EHB 628; *RJ Rhodes Transit, Inc. v. DEP*, 2007 EHB 260; *Swistock v. DEP*, 2006 EHB 398; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54.

However, in the case at hand there is an indication that there is no communication between the parties. The Board is loathe to impose such a harsh sanction when Luchetti did appear for the first deposition and was told to come back. So the Department's request for dismissal and payment of fees is denied.

Section 1021.161 of the Board's rules, in conjunction with Pa.R.C.P. 4019, allows an additional remedy to the moving party when a motion to compel and motion for sanctions has been imposed. *See* 25 Pa. Code § 1021.161; Pa.R.C.P. 4019(g)(1). This rule allows for the award of counsel fees and expenses associated with discovery after the two step process of filing a motion to compel and then a motion for sanctions. Here, the Department filed a motion to compel Luchetti to attend the deposition and the Board granted the motion. He then did not attend the deposition which prompted the Department to file this motion for sanctions. Under 4019(g)(1), the Board may grant counsel fees and expenses related to that two step process unless the defaulting party's opposition to the motion is substantially justified.

Luchetti did not oppose the April 13, 2011 motion. Although the Department has been diligent in its adherence to the Board rules and the Pennsylvania Rules of Civil Procedure, we find that the circumstances in this case do not permit the granting of fees and expenses. Neither side comes to the table with clean hands, so the Department's motion for sanctions is denied.

The last motion for sanctions filed by the Department on April 14, 2011 was against Hetmanski for failing to appear at his deposition and for failing to provide responses to the

Department's request for production of documents. Hetmanski has not opposed the Department's motion for sanctions requesting $376.38 for the time spent preparing for both depositions (March 14, 2011 and January 14, 2011) and this motion for sanctions that followed. However, the first deposition of Hetmanski was cancelled because the Department wanted to depose Ranuado and Luchetti prior to Hetmanski. For that reason, we cannot sanction Hetmanski for the Department's time spent preparing for the first scheduled deposition when it was later cancelled by the Department. We also cannot grant fees related for Hetmanski's failure to attend his rescheduled deposition because Section 4019(g)(1), the section under which the Department is seeking fees and expenses, is not applicable unless there was a filing of a motion to compel (step 1). There was no motion to compel Hetmanski, nor an order. Therefore, we do not grant attorney's fees and expenses with respect to Hetmanski.

In conclusion, this matter appears to be in a stalemate due to lack of communication and consideration between Appellants and the Commonwealth. Discovery is, therefore, reopened for 60 days. The parties will agree to the exchange of information or sanctions will be imposed on both sides.

We enter the following order.

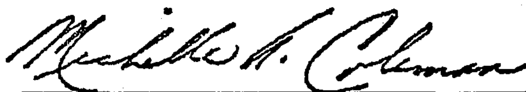
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MICHAEL RANUADO, CHARLES LUCCHETTI LARRY LAMPARTER, NICK HETMANSKI AND ROLL RITE TIRE CENTER, INC.	:	
v.	:	**EHB Docket No. 2010-098- C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 13th day of December, 2011, it is hereby ordered that the Department's Motions for Sanctions filed on January 10, 2011, April 13, 2011 and April 14, 2011 are denied. It is further ordered that discovery in this matter is reopened until **February 15, 2012**.

ENVIRONMENTAL HEARING BOARD



MICHELLE A. COLEMAN
Judge

DATED: December 13, 2011

c: **DEP Bureau of Litigation:**
Glenda Davidson, Library

For the Commonwealth of PA, DEP:
Susana Cortina de Cardenas, Esquire
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	**EHB Docket No. 2010-016-CP-L**
v.	:	
	:	**Issued: December 21, 2011**
FRANK T. PERANO	:	

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board assesses a civil penalty of $78,000 against an owner and operator of an on-site sewage treatment plant serving his mobile home park where the owner's decision not to complete necessary repairs as required by his permit led to a substantial cost savings and numerous violations of the Clean Streams Law.

FINDINGS OF FACT

1. Frank T. Perano ("Perano") owns and operates the Cedar Manor Mobile Home Park ("Cedar Manor") in Londonderry Township, Dauphin County. (Department Exhibit ("D. Ex.") 1.)

2. Sewage generated within Cedar Manor is conveyed to an on-site sewage treatment plant, also owned and operated by Perano. (D. Ex. 1.)

3. Perano is authorized by NPDES Permit No. PA0080721 to discharge treated effluent from the sewage treatment plant into an unnamed tributary of the Conewago Creek which is protected as a trout stocked fishery. (Notes of Testimony ("T.") 340; D. Ex. 1.)

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http://ehb.courtapps.com

4. The plant's influent is collected from Cedar Manor's 316 lots. Cedar Manor includes an older section built in the 1960s and 1970s which is piped with primarily eight inch terra cotta pipe. (T. 8, 12 (119[1]).) After collection, the wastewater is supposed to be processed by the plant as follows:

a. Wastewater enters the plant through a bar screen comminuter, a grinder which is intended to break up hard materials in the wastewater. (T. 7.)

b. The wastewater is then pumped into a 376,000 gallon equalization tank. (T. 9 (119); T. 7, 458.)

c. Wastewater in the equalization tank is then pumped into the oxidation ditch, or moves to the ditch as a result of an overflow pipe in the equalization tank, even if the pump is off. (T. 8.)

d. The oxidation ditch is where most of the wastewater treatment occurs. Brushes mix wastewater into contact with microorganisms and oxygen, creating mixed liquor that acts on the sewage by degrading and treating it. (T. 6, 8.)

e. From there, the flow moves into another point where additional solids can be removed, and then continues on into a small chemical mixing tank where various chemicals can be added. (T. 8.)

f. The flow is then separated into two clarifiers where the solids are settled out, and floatable materials can be separated to prevent them from being discharged into the receiving stream. (T. 8.)

---

[1] The parties agreed to incorporate the record from EHB Docket No. 2009-119-L into this appeal. *See* T. 4. Citations made to that record will be identified by the last three numerical digits in its docket number. *e.g.* T. 8 (119).

g. From the clarifier, the resulting liquid is pumped into the rapid sand filters. (T. 15-16 (119); T. 8-9.)

h. After the sand filters, flow moves into the chlorine contact tank for the final phases of treatment for disinfection, before finally being discharged into the receiving stream. (T. 8-9.)

5. The purpose of the 376,000-gallon above-ground tank known as the flow equalization tank or EQ tank at Perano's sewage treatment facility is to hold raw sewage in excess of what the plant can treat at any one time. (T. 9, 15 (119); T. 16.)

6. The EQ tank is constructed with precast concrete panels that are held in place by a series of post-tensioned steel bands. The joints between the panels are sealed with a pliable electrometric sealant that is designed to allow expansion and contraction of the concrete panels while maintaining a watertight joint. (Perano Exhibit ("P. Ex.") 10.)

7. The plant since at least 1989 has had significant problems with handling the amount of inflow that it is required to treat, which the parties believe is largely the result of inflow and infiltration ("I&I") into the conveyance system leading to the plant. (T. 514-15.)

8. In 1994, the Department and Perano entered into a consent order and agreement ("CO&A") wherein Perano agreed to implement remedial actions at Cedar Manor. He acknowledged numerous mechanical breakdowns at the plant and exceedances of hydraulic capacity that resulted in the discharge, deposition, and accumulation of sewage sludge solids in the receiving stream. (D. Ex. 19.)

9. In 2001, the Department and Perano entered into another CO&A wherein Perano agreed to implement a number of corrective actions and acknowledged that the plant had allowed

in excess of twenty thousand gallons of biosolids to be unaccounted for over a fourteen month period. (D. Ex. 20.)

10. The plant has historically been unable to handle the amount of inflow into the plant after as little as a one-half inch of rain, which requires the plant operator to bypass parts of the treatment train in order to avoid even greater problems. (T. 115.)

11. The plant is frequently operated in "storm mode." This is a euphemism for a bypass allowing sewage influent to pass through the plant with some of the components of the treatment train (e.g. oxidation ditch rotor brushes, sand filters) turned off (bypassed). (T. 6, 10, 23-24, 115-16, 241-42.)

12. Operating in "storm mode" prevents even greater problems that might occur due to the plant's inability to handle the amount of inflow. (T. 116, 128, 161-62.)

13. Operating in "storm mode" allows inadequately treated sewage, including solids, to enter the receiving stream. (T. 23-24, 116; D. Ex. 21.)

14. The facility operated in "storm mode" on 105 separate days in 2006, 165 separate days in 2007, 93 separate days in 2008, and 69 separate days in 2009. (T. 54; *Perano v. DEP*, EHB Docket No. 2010-025-L, slip op. at 4 (Adjudication, September 15, 2011.)

15. Operating in "storm mode" is not authorized under the terms of Perano's permit. (T. 10, 13, 135.)

16. The Department has been aware of, albeit never explicitly approved, the plant's operation in "storm mode" for years. (T. 84-85, 88, 124, 164, 241-44, 484; P. Ex. 11, 13; D. Ex. 6.)

17. The parties believe that the Cedar Manor facility is overloaded and forced to go into "storm mode" primarily because of excessive inflow and infiltration (I&I) into the park's sewage collection system. (T. 15, 514.)

18. One alternative to "storm mode" is using trucks to haul excess inflow to another facility. Perano would need to hire a haulage service that would use 40 to 50 trucks at a cost of $200 to $250 apiece to do so. (T. 245-46, 495-97.)

19. Perano typically does not notify the Department every time that the facility is operating in "storm mode." (T. 243, 456-57.)

20. Perano's permit requires him to sample effluent twice a month. (D. Ex. 1.)

21. Perano has historically avoided taking samples when the facility is operating in "storm mode." (T. 261-62, 559.)

22. Perano's most recent NPDES permit, issued in 2006, contains a compliance schedule related to his required remediation of the collection system at Cedar Manor. (T. 8 (119); D. Ex. 1.)

23. Part C. II. of Perano's Cedar Manor NPDES permit provides as follows:

> A. The Permittee shall remediate the facility's collection system with the objective of reducing I/I relative to plant capacity and available flow equalization in accordance with the following schedule:
>
> 1. Complete I/I study and submit report to [the Department] December 31, 2006
> 2. Submit scope of work for remediation to [the Department] April 30, 2007
> 3. Complete remediation work December 31, 2009

(D. Ex. 1 (emphasis in original).)

24. Perano conducted an I&I study and submitted a scope of work for remediation to the Department according to the schedule set forth in his permit. (T. 17-21 (119).)

25. In August 2008, the Department sent Perano a settlement offer involving several of his treatment plants in the form of a draft CO&A. The proposed CO&A included suggested work plans for Cedar Manor that would have been more extensive than what was previously included in his scope of work. (T. 52-53 (119); P. Ex. 27 (119).)

26. Perano understood that the proposed draft CO&A did not amend his NPDES permit for Cedar Manor. (T. 79 (119).)

27. Nevertheless, Perano used the Department's settlement proposal as the basis for stopping the work set out in his remediation plan. He halted remediation work after receiving the proposed CO&A until at least December 2009. (T. 52 (119); P. Ex. 27 (119).)

28. Perano would have needed to pay contractor's no less than $53,000 to complete the work called for in his remediation plan. (T. 50, 56 (119).)[2]

29. More than eight months after halting work on the remediation plan, on May 21, 2009, James Perano, brother of Frank Perano, sent a letter to the Department on Frank's behalf requesting an extension of the compliance schedule set forth in the NPDES permit for completion of work described in the remediation plan. (P. Ex. 29 (119).)

30. The Department offered to meet with Perano to discuss his interest in an extension, but Perano refused to meet. (T. 61, 75, 115-16,126, 136-38 (119); D. Ex. 3, 4 (119).)

31. By letter dated August 3, 2009 the Department informed Perano that it was unwilling to reconsider the compliance schedule in the Cedar Manor NPDES permit. (P. Ex. 30

[2] In fact, Perano believed he would have spent at least $100,000. (T. 56 (119).)

(119).) *See Perano v. DEP*, EHB Docket No. 2009-119-L (Adjudication, September 12, 2011) (dismissing Perano's appeal of the Department's letter).

32. The Department inspected Cedar Manor on December 3, 2009. (T. 14; D. Ex. 2.)

33. The inspection revealed that the EQ tank was leaking in nine separate places. (T. 18, 118; D. Ex. 2.)

34. It was raw sewage that was leaking from the tank. (T. 18, 30; D. Ex. 2.)

35. When the tank is full, the raw sewage that it contains tends to be diluted with stormwater. (T. 314, 458-59.)

36. One of the leaks was discharging 282 gallons per hour. (T. 173; D. Ex. 15.)

37. No one knows how long the leaks had been ongoing. (T. 173-74.)

38. The Department's inspection report contains numerous photographs of the leaks and other conditions at the facility on December 3. (D. Ex. 2.)

39. As confirmed by a dye test, at least some of the raw sewage leaking from the EQ tank was finding its way into the receiving stream. (T. 20-21, 46-47, 129; D. Ex. 2, 11.)

40. George Krichten, Perano's certified operator for the facility, accompanied the Department's inspector on the inspection. (T. 118.)

41. Krichten was "shocked" when he saw the leaks. (T. 118.)

42. Krichten took steps to immediately lower the level of raw sewage being held in the tank to reduce pressure on its sidewalls. He then climbed the steps to the top of the tank and discovered a large crack. He told the Department inspectors that he was concerned based upon his years as a certified operator that the tank might not be structurally sound and that, if it failed, people living as close as 50 feet away might be killed. (T. 118-20.) (*See also* D. Ex. 2 (aerial photo showing proximity of residences).)

43. The Department's inspector, Joseph Roth, also observed cracks on the top of the tank's sidewalls. (T. 21-22; D. Ex. 2.)

44. Roth shared Krichten's apprehension regarding the integrity of the tank. (T. 54.)

45. Although their concerns were justified by their years of experience, neither Krichten nor Roth is an engineer. (T. 54.)

46. James Cieri, P.E., Perano's engineer, was immediately summoned to the facility. When he got there, the contents of the tank had already been reduced. Cieri observed that six leaks were still ongoing. (T. 165, 203; P. Ex. 10.)

47. As the level of raw sewage in the tank continued to drop, the leaks subsided. (T. 130, 178, 206, 466-67; P. Ex. 10.)

48. Cieri met with a masonry contractor and instructed him to seal the leaks. He also recommended that sewage in the tank not exceed half the tank's maximum level pending a structural evaluation by the tank's manufacturer. (T. 206-07; P. Ex. 10.)

49. The Department was aware that Cieri would be in contact with the tank manufacturer (Mack Industries) to further investigate the integrity of the tank. (T. 97.)

50. Cieri was comfortable after his initial inspection that the tank would not collapse if kept at half level. (T. 168-69, 200-03.)

51. Cieri was not comfortable, however, concluding that the tank would hold up if filled. (T. 203-04.)

52. Cieri agrees that it was prudent to require a structural evaluation of the tank. (T. 170-71, 459; P. Ex. 10.)

53. The December 3, 2009 inspection also revealed that grease and sewage related plastics had at some point discharged into the receiving stream from the plant. (T. 21-23; D. Ex. 2.)

54. The inspection revealed that the plant was not being operated properly. Less than fully treated sewage was being discharged into the stream because the sand filters were being bypassed and the clarifiers were hydraulically overloaded. (T. 24; D. Ex. 2.)

55. Cedar Manor received about one inch of rain prior to the December 3 inspection. (T. 14, 92.)

56. On December 3, the facility was operating in "storm mode" and discharging a cloudy effluent with visible solids. (T. 23; D. Ex. 2.)

57. Sampling of the effluent from the plant's permitted outfall showed total suspended solids (TSS) of 40 mg/l, twice the permit limit of 20 mg/l and sampling of the leaks from the EQ tank showed fecal coliform at 160,000/100 ml, eighty times the permit limit of 2,000/100ml. (T. 26; D. Ex. 1, 2.)

58. The Department conducted a follow-up inspection on December 9, 2009. (D. Ex. 3.)

59. The December 9 inspection revealed that (1) untreated sewage had overflowed from the oxidation ditch, (2) the facility had at some point discharged solids to the stream, (3) the facility was operating in "storm mode," (4) the flow chart recorder had maxed out, and (5) the baffles and weir in the clarifiers were overtopped with water. (T. 33-35, 76-77; D. Ex. 3, 10.)

60. As of the December 9 inspection, the EQ tank had been pumped down, some repairs had been made, and the tank did not appear to be leaking. (T. 64, 90, 460-61, 466-67; D. Ex. 3.)

61. On December 10, 2009, the Department issued an order requiring Perano to do the following:

1) Perano shall immediately cease all unauthorized discharges to the UNT Conewago Creek.

2) On or before December 15, 2009, Perano shall submit to the Department, a professional engineering evaluation of the structural integrity of the equalization tank, along with a report of the findings, and any alternatives to using the equalization tank if repairs are necessary. This report shall contain the stamp of a professional engineer.

3) On or before December 15, 2009, Perano shall submit, to the Department, an emergency overflow management plan that addresses ceasing any discharges of inadequately treated sewage from the Plant. This plan shall be implemented immediately upon notice of approval by the Department.

4) On or before December 15, 2009, Perano shall submit, to the Department, an interim high flow management plan that provides standard operating procedures on maximizing flow and treatment through the facility during high flow events. This plan shall be implemented immediately upon notice of approval by the Department.

5) On or before December 15, 2009, Perano shall remove all sewage solids, grease accumulations, and sewage related plastics from the UNT Conewago Creek.

6) At any time a facility or system of treatment or control is bypassed, or partially bypassed, a 24-hour flow proportioned, composite, effluent sample shall be taken for all monitoring parameters listed in PART A I of the NPDES Permit, analyzed by an accredited laboratory, and recorded on the monthly Discharge Monitoring Reports.

(D. Ex. 5.)

62. The order was lawful and reasonable except that the deadline for submitting the interim high flow management plan should have been thirty days. *Perano v. DEP*, EHB Docket No. 2010-001-L (Adjudication, September 15, 2011.)

63. The Department conducted another inspection on December 14, 2009. (D. Ex. 4.)

64. The Department's December 14, 2009 inspection revealed that (1) the facility was operating in "storm mode," (2) Perano was not conducting a 24-hour flow proportioned composite, effluent sample as required by the December 10 order, (3) the facility had discharged solids into the stream. (D. Ex. 4.)

65. Sampling of the effluent showed total suspended solids (TSS) of 25 mg/l exceeding the permit limit of 20 mg/l, fecal coliform at 35,000/100 ml exceeding the permit limit of 2,000/100 ml, and CBOD5 at 32.1 mg/l exceeding the permit limit of 20 mg/l. (D. Ex. 1, 4.)

66. Perano did not notify the Department of the bypass event taking place on December 14. (T. 353, 475.)

67. The conditions at the plant on December 3 and 14 were causing pollution of the waters of the Commonwealth. (T. 20-21, 24, 26, 34, 38-40 46-47, 61, 129; D. Ex. 2, 4.)

68. Perano failed to take preventative measures while impounding, processing, and disposing sewage to prevent polluting substances from reaching the waters of the Commonwealth through hazards of weather. (T. 52 (119), 245-46, 495-97.)

69. The purpose for requiring composite sampling while the facility was operating in bypass mode in the December 10 order was to determine what effect the bypasses were having on effluent quality. (T. 262.)

70. Perano submitted his structural evaluation report, emergency overflow management plan, and high flow management plan on January 12, 2010, 28 days late. (T. 284; P. Ex. 8, 9, 10.)

71. It took the Department 41 days to approve Perano's submissions (February 23, 2010). (T. 284-85; P. Ex. 11.)

72. Cieri began working on the reports when he was asked to prepare them by James Perano no earlier than December 18, 2009. (T. 231.)

73. Cieri charged Perano for 29 hours of work in preparing the structural evaluation, the emergency overflow management plan, and the interim high flow management plan. (T. 229-30, 472.)

74. Cieri work stretched out over several weeks, doing "a little here and there." (T. 221.)

75. Cieri's investigation leading up to the report included research into the size and construction of the tank and the post-tension cables holding it together. (T. 213-14, 216.)

76. In the structural evaluation report, Cieri relied in part on the inspection by a sales representative of Mack Industries who "showed pictures of the cracks in the top and edge to [Mack's] engineering department." (P. Ex. 10.)

77. The Board conducted a site view.

DISCUSSION

When the Department files a complaint for civil penalties under section 605 of the Clean Streams Law, 35 P.S. § 691.605, the Board's "responsibility is to assess a penalty based upon applicable statutory maxima and criteria, regulatory criteria (if any), and precedent." *DEP v. Weiszer*, EHB Docket No. 2009-014-CP-M, slip op. at 24 (Adjudication, June 7, 2011); *DEP v. Kennedy*, 2007 EHB 15, 25; *DEP v. Hostetler*, 2006 EHB 359, 365; *DEP v. Leeward Constr., Inc.*, 2001 EHB 870, 886. Section 605 of the Clean Streams Law authorizes the Board to issue a penalty of up to $10,000 per day per violation. 35 P.S. § 691.605. To set the amount of the penalty the Board considers "the wilfullness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors." *Id.* Other

relevant factors include the "cost savings to the violator, the size of the violating facility, the volume of the discharge, and the deterrent effect." *Weiszer* at 25; *DEP v. Angino*, 2007 EHB 175, 203; *Kennedy* at 25; *DEP v. Breslin*, 2006 EHB 130, 141-42. Where a party has enjoyed an economic benefit from its violation, the Board's civil penalty should at a minimum be high enough to deprive the violator of any savings or profit achieved through non-compliance with the law. *DEP v. Kennedy*, 2007 EHB 15, 25-26; *DEP v. Angino*, 2007 EHB 175, 203; DEP *v. Breslin*, 2006 EHB 130, 141 n. 6; *DEP v. Hostetler*, 2006 EHB 359, 367-68; *Leeward*, 2001 EHB 870, 910. The penalty proposed in the Department's complaint is purely advisory. *See e.g. Leeward*, 2001 EHB at 885. The Board makes an independent determination of the appropriate penalty in an action commenced by complaint. *Id*; *Westinghouse v. DEP*, 705 A.2d 1349, 1353 (Pa. Cmwlth. 1998); *Weiszer*, slip op. at 24; *DEP v. Whitemarsh Disposal Corp.*, 2000 EHB 300, 346.

Count I – Discharge in violation of Sections 201 and/or 202 of the Clean Streams Law

Count I of the Department's complaint alleges that Perano discharged sewage contrary to the terms of his permit at Cedar Manor in violation of sections 201 and 202 of the Clean Streams Law on December 3, 9, and 14, 2011. 35 P.S. §§ 691.201-202. Section 201 prohibits any person from placing, discharging or allowing the flow of sewage into the waters of the Commonwealth except as provided by the Clean Streams Law. 35 P.S. § 691.201. Section 202 provides, in part, that:

> [a] discharge of sewage without a permit or contrary to the terms and conditions of a permit or contrary to the rules and regulations of the department is hereby declared to be a nuisance.

35 P.S. § 691.202.

Perano violated Sections 201 and 202. The Department's inspection on December 3, 2009 documented that the plant was bypassing some portions of the treatment process as a result

of it being in "storm mode" because the plant was hydraulically overloaded. The effluent exceeded Perano's permit limit for total dissolved solids. (Finding of Fact "FOF" 57.) Visual observation confirmed that partially untreated sewage was being discharged into the receiving stream. Additionally, the EQ tank was also leaking raw sewage in nine places, and the Department confirmed that the sewage was reaching the stream. (FOF 33, 39.) Although the Department did not prove that there were any actual discharges in violation of Perano's permit on December 9, its inspection on December 14 again showed that Perano had exceeded his permit limits due to bypassing a portion of the treatment process as a consequence of the chronic overloading of the plant. (FOF 63, 64.)

Turning to our penalty assessment for the violations set forth in Count I, we begin by considering the cost savings that Perano enjoyed by discharging in excess of his permit limits on December 3 and 14, 2009. James Perano testified that one alternative to the plant being completely overwhelmed by the increased flow during rain events would have been to pump the EQ tank and have it hauled off site at a cost of at least $8,000. (T. 495-97.) We find it appropriate to hold Perano to that. A permittee has a duty to meet the obligations of his permit, even when the obligations are inconvenient. As we have previously written, "it should *never* be cheaper to violate the law than comply with the law. Civil penalties should, at an absolute minimum, recoup any savings or excess profit that resulted from the choice to violate the law." *DEP v. Breslin*, 2006 EHB 130, 141 n. 6 (emphasis in original); *see also DEP v. Kennedy*, 2007 EHB 15, 25; *DEP v. Angino*, 2007 EHB 175, 203; *DEP v. Hostetler*, 2006 EHB 359, 367-68; *DEP v. Leeward*, 2001 EHB 870, 910. In addition to avoiding the cost of this short-term fix, as discussed more fully below, the parties agree that these violations were in substantial part created by the I&I problems with Perano's collection system that he has failed to correct in accordance

with his permit. By stopping this work, Perano has saved many thousands of dollars. In recognition of these cost savings, and in order to adequately deter Perano from future violations, we will assess Perano $10,000 for each of the two days of effluent violations for a total of $20,000.

Count II – Failure to notify the Department of incidents causing or threatening pollution

The Department's second count alleges that Perano failed to notify the Department of the unpermitted discharges that occurred on December 14, 2009 in violation of 25 Pa. Code § 91.33(a), which reads as follows:

> If, because of an accident or other activity or incident, a toxic substance or another substance which would endanger downstream users of the waters of this Commonwealth, would otherwise result in pollution or create a danger of pollution of the waters, or would damage property, is discharged into these waters—including sewers, drains, ditches or other channels of conveyance into the waters—or is placed so that it might discharge, flow, be washed or fall into them, it is the responsibility of the person at the time in charge of the substance or owning or in possession of the premises, facility, vehicle or vessel from or on which the substance is discharged or placed to immediately notify the Department by telephone of the location and nature of the danger and, if reasonably possible to do so, to notify known downstream users of the waters.

Perano argues that he had no obligation to report his operating in "storm mode" because the Department knew that such bypasses would occur almost every time Cedar Manor received as little as one-half inch of precipitation. (FOF 10.) The argument that the Department "knew" that Perano regularly discharged contrary to his permit during rainy conditions, however, does not satisfy or replace his regulatory obligation to report that he was operating in "storm mode" and likely to cause pollution or create a danger of pollution on a particular date. The NPDES program relies heavily on self-reporting. *DEP v. Kennedy*, 2007 EHB 15, 27; *Whitemarsh Disposal Corp. v. DEP*, 2000 EHB 300, 353; *DER v. East Penn Manufacturing*, 1995 EHB 259,

271. The Department does not have the resources to check in on every facility every time it rains. By failing to report the problem, Perano deprived the Department of the opportunity to understand the magnitude of the problem and take appropriate action.

Perano's failure to report is best seen as only one component of a larger pattern and practice of avoiding or at least delaying corrections of the serious long-term problems at Cedar Manor. Perano accepted a permit condition in 2006 that requires him to solve the I&I problem after unfulfilled CO&As going back to 1994 required the same thing. Then, he stopped all remediation work based upon the rather poor excuse that the Department suggested a different scope of work during settlement negotiations. As of the date of our hearing, the I&I problem has continued unabated. In order to deemphasize the severity of the problem, Perano appears to have only sampled during non-storm mode days (T. 559-61; D. Ex. 21), and failed to report the unpermitted bypasses when they do occur. In addition to keeping the Department informed so that it could properly perform its regulatory oversight, the very act of requiring numerous reports of unauthorized discharges might have impelled Perano to address the situation with greater dispatch. In consideration of the need to deter Perano from failing to report future bypasses, the Board assesses a penalty for the violation set forth in Count II of $5,000.

Count III – Failure to prevent pollutants from entering the waters of the Commonwealth

Count III of the Department's complaint alleges that Perano violated 25 Pa. Code 91.34(a) by failing to take necessary measures to prevent pollutants from reaching the waters of the Commonwealth for the unpermitted discharges that occurred on December 3, 9, and 14, 2009. That section provides:

> Persons engaged in an activity which includes the impoundment, production, processing, transportation, storage, use, application or disposal of pollutants shall take necessary measures to prevent the substances from directly or indirectly reaching waters of this

> Commonwealth, through accident, carelessness, maliciousness, hazards of weather or from another cause.

The regulation clearly applies to parties, like Perano, engaged in sewage collection, treatment, and disposal activities. Perano is responsible for the sewage at Cedar Manor from the point where it first enters the park's collection system, its subsequent impoundment in his EQ tank, its processing into compliant water for discharge into the receiving stream, and the storage of the treated, separated solid waste until it can be hauled away by truck. Sewage treatment facility operators, therefore, have a duty under this section to take necessary measures to prevent pollutants from reaching the waters of the Commonwealth.

The specifics of Perano's obligation to prevent polluting substances from reaching the waters of the Commonwealth are defined in part by his NPDES permit. *See* 35 P.S. § 691.202; 25 Pa Code §§ 92a.41 *et. seq.* (Subchapter C. Permits and Permit Conditions.) In addition to the standard requirements imposed on all NPDES permittees and the effluent standards imposed on operators of wastewater treatment plants, Perano's NPDES permit imposes the additional requirement that he take action to reduce the considerable I&I problems at the park to mitigate the considerable effects of weather on his plant. (D. Ex. 1, Part C.II.A; *See* FOF 10, 17, 23.)

Accordingly, Perano conducted a study of the excessive flow issues experienced at the plant and began to implement a number of upgrades and repairs to the park's collection system. Thereafter, however, Perano stopped working on the remediation plan and refused to conduct further work on the collection system. Perano weakly contends that the Department effectively forced him as a reasonable businessman to abandon the remediation plan because the Department *proposed*, as part of a larger settlement of outstanding issues between Perano and the Department at multiple parks, a more extensive work plan for Cedar Manor than the one Perano was working on. However, the proposed settlement offer did not modify his NPDES permit and

did not provide a legitimate excuse for Perano to stop all work.

Perano's defense is emblematic of his fundamental misunderstanding of the Department's and his respective duties under the law. Perano has consistently insisted that the Department tell him that, if he does XYZ, his duty to prevent pollution is satisfied as soon as he does XYZ, regardless of whether it works or not. *See e.g. GSP Management Co. v. DEP,* 2010 EHB 456, 473-74. That is simply not the case. The permit's simple command, which Perano accepted without appeal, is to study Cedar Manor's collection problems *and fix them*. As we consider Count III of the Department's complaint, we cannot help but recognize that Perano was in the position to avoid perhaps all of the December 2009 violations and chose instead to abandon his efforts to correct the I&I problems at Cedar Manor. As a result, the status quo has continued at Cedar Manor and Perano's plant continually goes into "storm mode," bypassing required portions of treatment and frequently exceeding permit effluent limits by discharging inadequately treated sewage into the receiving stream. By December 2009, Perano had less than a month until he was required by his permit to have completed his remediation plan, but instead he had stopped working on it more than eighteen months before. All parties agree that the work would have reduced I&I issues by the time of these violations. (*See e.g.* Perano brief at 88; T. 267-68, 492, 503-04.) Instead, with considerable work not done, Perano enjoyed a great deal of cost savings by halting work on the collection system. Clearly Perano's inaction here, in itself a violation of his permit, constitutes a failure to "take necessary measures to prevent [polluting substances] from directly or indirectly reaching waters of this Commonwealth, through accident, carelessness, maliciousness, hazards of weather or from another cause." 25 Pa. Code § 91.34(a).[3]

[3] Furthermore, as noted above, Perano could have hauled excess sewage away for treatment off site; instead he discharged in violation of his permit *and* failed to fix the problems that overwhelm his plant in

As a result of Perano's failure to take preventative measures, as previously discussed, pollution occurred on December 3, and 14, 2009. Perano enjoyed many tens of thousands of dollars in cost savings by stopping work on the I&I remediation plan. (T. 50, 56 (119).) As we found in assessing our penalty under Count I of the Department's complaint, we begin our assessment of a civil penalty by seeking to ensure that it is never less costly to violate the law than comply with it. *DEP v. Kennedy*, 2007 EHB 15, 25; *DEP v. Angino*, 2007 EHB 175, 203; *DEP v. Breslin*, 2006 EHB 130, 141 n. 6; *DEP v. Hostetler*, 2006 EHB 359, 367-68; *DEP v. Leeward*, 2001 EHB 870, 910; 35 P.S. § 691.605. This is particularly pertinent here where Perano's direct decision to stop work on a remediation plan led directly to the pollution events at issue in this appeal, and in doing so, cancelled a significant amount of work that could have been done on Cedar Manor's collection system. We are, however, limited by the Clean Streams Law to a penalty of $10,000 per violation per day, which we assess in full for Perano's violations of 25 Pa. Code § 91.34(a) on December 3 and 14, 2009, totaling $20,000.

Count IV – Violation of permit condition to operate efficiently

The next count of the Department's complaint alleges that Perano has violated a standard condition contained in his permit as mandated by the Department's regulations that reads as follows:

> [t]he permittee shall maintain in good working order and operate as efficiently as possible facilities or systems of control installed by the permittee to achieve compliance with the terms and conditions of the permit.

(D. Ex. 1; 25 Pa. Code § 92.51(4) (*reserved* October 2010)[4].) Specifically, the Department

the first place.

[4] Chapter 92 of 25 Pa. Code was replaced in October 2010 by Chapter 92a. 25 Pa. Code § 92a.41(a) incorporates 40 CFR 122.41 by reference to contain the provisions which must now appear in all NPDES permits. 40 CFR 122.41(e) reads as follows:

> *Proper operation and maintenance*. The permittee shall at all times

complains that:

> The bypassing of treatment systems by Perano, identified in [preceding paragraphs of the complaint], that occurred on December 3, 2009, December 9, 2009, and December 14, 2009, constitute failure "to operate as efficiently as possible facilities or systems of control installed by the permittee to achieve compliance with the terms and conditions of the permit" in violations of 25 Pa. code § 92.51(4) and the NPDES permit.

(Complaint ¶ 30.)

The Department does not explain why bypassing portions of the treatment system constitutes a violation of this particular requirement in Perano's permit. The bypasses at Cedar Manor result from massive overloading of the plant. They did not result as far as we can tell from malfunctioning equipment or "inefficient" operation. *Compare DEP v. Whitemarsh*, 2000 EHB at 347-48 (liability found under section 92.51(4) where a sewage treatment plant was operated without a functioning blower for three months). Here, the plant as designed could not keep up with the excessive flow.[5] Therefore, we find no violation under Count IV.

Count V – Violation of General Water Quality Criteria

The Department next asks the Board to assess a penalty against Perano for violating water quality standards under 25 Pa. Code § 93.6, which reads as follows:

> (a) Water may not contain substances attributable to point or nonpoint source discharges in concentration or amounts sufficient to be inimical or harmful to the water uses to be protected or to

---

> properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

[5] Although the Department references other possible violations in its post-hearing brief, its complaint did not ask us to consider occurrences at Cedar Manor other than the bypasses (e.g. the operation of the EQ tank or the collection system) under this count. We are, of course, constrained by the Department's complaint.

> human, animal, plant or aquatic life.
>
> (b) In addition to other substances listed within or addressed by this chapter, specific substances to be controlled include, but are not limited to, floating materials, oil, grease, scum and substances that produce color, tastes, odors, turbidity or settle to form deposits.

The Department alleges that Perano has committed a violation of this section because of "the presence of grease and sewage related plastics in the receiving stream at and below the Plant outfall."

Section 93.6 essentially defines pollution; it does not in and of itself prohibit pollution. It describes the general water criteria that bodies of water are expected to attain. It does not identify persons, entities, operators or permittees who are required to conform their conduct in a certain way to achieve compliance with this section. We are unaware of any case where a party has been found to be in violation of this section *per se*. Accordingly, we will not assess any penalty under Count V.

Count VI – Violations of Department Order of December 10, 2009

The final count in the Department's complaint alleges that Perano failed to comply with the Department's order of December 10, 2009 in violation of Section 611 of the Clean Streams Law, which provides that "[i]t shall be unlawful to fail to comply with . . . any order or permit or license of the department." 35 P.S. § 691.611. The order required that:

> 1) Perano shall immediately cease all unauthorized discharges to the UNT Conewago Creek.
>
> 2) On or before December 15, 2009, Perano shall submit to the Department, a professional engineering evaluation of the structural integrity of the equalization tank, along with a report of the findings, and any alternatives to using the equalization tank if repairs are necessary. This report shall contain the stamp of a professional engineer.
>
> 3) On or before December 15, 2009, Perano shall submit, to the

> Department, an emergency overflow management plan that addresses ceasing any discharges of inadequately treated sewage from the Plant. This plan shall be implemented immediately upon notice of approval by the Department.
>
> 4) On or before December 15, 2009, Perano shall submit, to the Department, an interim high flow management plan that provides standard operating procedures on maximizing flow and treatment through the facility during high flow events. This plan shall be implemented immediately upon notice of approval by the Department.
>
> 5) On or before December 15, 2009, Perano shall remove all sewage solids, grease accumulations, and sewage related plastics from the UNT Conewago Creek.
>
> 6) At any time a facility or system of treatment or control is bypassed, or partially bypassed, a 24-hour flow proportioned, composite, effluent sample shall be taken for all monitoring parameters listed in PART A I of the NPDES Permit, analyzed by an accredited laboratory, and recorded on the monthly Discharge Monitoring Reports.

(D. Ex. 5.) The Department asserts that Perano failed to comply with its order by failing to cease unauthorized discharges into the receiving stream,[6] failing to timely submit to the Department an engineer's report on the structural integrity of the EQ tank as well as an interim high flow management plan and an emergency overflow plan, and failing to take a composite effluent sample during a bypass event (a.k.a. "storm mode").

The Department's inspection on December 14, 2009 revealed that Cedar Manor was operating in "storm mode" and consequently bypassing portions of the treatment process. Nevertheless, Perano did not comply with the Department's requirement in the December 10 order that he conduct 24-hour flow proportioned, composite, effluent sampling "any time a facility or system of treatment or control is bypassed[.]" (D. Ex. 5.) As we held in a related

[6] Although we acknowledge that the Department has asked us to assess a penalty for violating this portion of the Department's December 10, 2009 order, the request is somewhat duplicative of the violation of the permit itself on that day and we will not issue a penalty for this aspect of the violation of the order.

appeal, docketed at EHB Docket No. 2010-001-L, the Department had the authority to issue the order and require additional sampling from Perano when the plant is operating in storm mode. *Perano v. DEP*, slip op. at 16-17 (Adjudication, September 15, 2011.) Although this might seem like a minor matter, under the unique circumstances of this case as described above, the Department came to realize that it needed to get a better handle on the quality of Perano's discharges during his frequent operation in "storm mode." Up to the time of the order, Perano generally only took samples when the plant was not in storm mode. It is not hard to interpret Perano's decision not to sample during "storm mode" when specifically ordered to do so as an effort to continue to avoid the Department's scrutiny during a time when the plant is most likely to experience discharge violations. The Department cannot inspect the plant's effluent every time it rains at Cedar Manor, and so it needs to obtain information about the plant's performance through other means. We need to assess a penalty here that is sufficient to deter Perano from avoiding this obligation in the future, which is more than a matter of simply meeting reporting requirements, it may be a matter of avoiding the Department's discovery of his effluent violations. In consideration of the fact that Perano violated a direct order to sample during bypasses, our finding that the Department's order was reasonable, and the Board's need to deter Perano from avoiding this obligation in the future, the Board assesses a penalty of $5,000 for Perano's violation of this aspect of the Department's order on December 14, 2009. (*Compare DEP v. Breslin*, 2006 EHB 131) (a lower penalty for failure to *submit* testing reports is reasonable where the Department does not otherwise assert that the plant is operating improperly.)

The Department also pleads that Perano violated the Department's order by failing to timely submit a professional engineering evaluation of the structural integrity of the EQ tank, an

emergency overflow management plan and an interim high flow management plan in the timeline required by the order. In our Adjudication of Perano's related appeal of the Department's order, we held that the reporting requirements and the timelines imposed by the Department as to the professional engineering evaluation and the emergency overflow management plan were lawful and reasonable.[7] *Perano v. DEP*, EHB Docket No. 2010-001-L (Adjudication, September 15, 2011). We had this to say in that case:

> The five-day deadline in the order for submitting a professional engineering evaluation of the structural integrity of the EQ tank was entirely reasonable. One has to see the tank to appreciate how large it is. It holds 376,000 gallons of raw sewage. It is only a few dozen feet away from occupied homes, not to mention the receiving stream. To discover such a tank leaking in nine places, with one of the leaks emitting 282 gallons per hour, was cause for immediate and grave concern. It was enough to "shock" the facility's experienced certified operator.

Perano v. DEP, EHB Docket No. 2010-001-L, slip op. at 13 (Adjudication, September 15, 2011). Perano ultimately did not submit the structural evaluation until January 12, 2010, twenty-eight days after it was due.

There is no excuse for the delay, and it is clear that Perano did not, in fact, proceed diligently. Perano did not ask his engineer to work on the evaluation and plans required by the order until at least December 18. (T. 231.) Perano's engineer billed him for a total of only 29 hours of work for all three submissions to the Department, and conducted the work "a little here and there." (FOF 74.)

Considering the above, it is clear that when presented with a very serious demand from the Department, which we found to be reasonable in light of the potential public safety risk while

[7] We did hold, however, that it was unreasonable to require Perano to produce the interim high flow management plan in five days, and modified the Department's order to provide that it was due on January 10, 2010 instead.

the structural integrity and safety of the very large tank full of raw sewage was unknown, Perano responded with a less than diligent effort and made very little attempt to timely satisfy the order. This is a serious and negligent violation of the Department's order which merits a significant penalty, and is far more serious than, e.g., preparing a nutrient management plan. *Compare DEP v. Stambaugh*, 2009 EHB 481. We note that Perano also failed to meet the deadlines for the emergency overflow plan, which Cieri and Perano agreed could be put together quickly and easily. In order to help ensure that Perano acts with appropriate dispatch in similar situations going forward, based primarily upon Perano's failure to timely submit the structural evaluation of the EQ tank, the Board assesses a penalty of $1000 for each day that Perano violated the Department's December 10, 2009 order from December 16, 2009 (the sixth day after the order was received) until all three reports were finally submitted on January 12, 2010, totaling $28,000.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction.

2. The Clean Streams Law permits the Board to issue a penalty of up to $10,000 per day, per violation. 35 P.S. § 691.605.

3. The Board makes an independent determination of the appropriate penalty in an action commenced by complaint. *Westinghouse v. DEP*, 705 A.2d 1349, 1353 (Pa. Cmwlth. 1998); *DEP v. Whitemarsh Disposal Corp.*, 2000 EHB 300, 346.

4. When assessing a civil penalty, the Board considers the wilfullness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors including cost savings to the violator, the size of the violating facility, the

volume of the discharge and deterrent effect. 35 P.S. § 691.605; *DEP v. Angino*, 2007 EHB 175, 201; *DEP v. Kennedy*, 2007 EHB 15, 25; *DEP v. Breslin*, 2006 EHB 130, 141-42.

5. Where a party has enjoyed an economic benefit as a result of its violation, the Board's civil penalty should, at minimum, be high enough to deprive the violator of any savings or profit achieved through non-compliance with the law. *DEP v. Kennedy*, 2007 EHB 15, 25-26; *DEP v. Angino*, 2007 EHB 175, 203; *DEP v. Breslin*, 2006 EHB 130, 141 n. 6; *DEP v. Hostetler*, 2006 EHB 359, 367-68; *DEP v. Leeward*, 2001 EHB 870, 910.

6. No party may discharge sewage into the waters of the Commonwealth except in accordance with a permit that authorizes it to do so. 35 P.S. §§ 691.201-202. Perano violated these sections.

7. A party must report to the Department that it is in danger of polluting when it is bypasses portions of the sewage treatment train. 25 Pa. Code § 91.33(a). Perano violated this requirement.

8. A party is obligated to prevent pollution from reaching the waters of the Commonwealth as a result of the effects of weather where that party has a permit obligation to correct the effects of weather on his sewage treatment plant. *See* 25 Pa. Code § 91.34(a). Perano violated this requirement.

9. Failure to comply with a Department order is unlawful. 35 P.S. § 691.611. Perano violated this section.

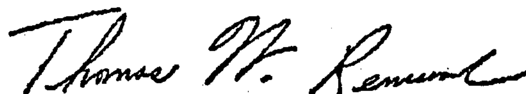
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2010-016-CP-L**
FRANK T. PERANO	:	

O R D E R

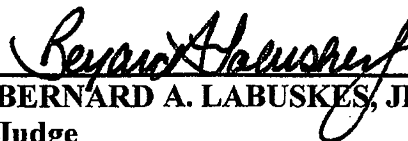
AND NOW, this 21st day of December, 2011, in accordance with the foregoing Opinion, it is hereby ordered that civil penalties are assessed against Frank T. Perano in the amount of $78,000.

ENVIRONMENTAL HEARING BOARD

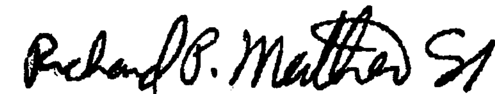


THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: December 21, 2011

c: **DEP Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBINSON COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 2010-186-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 23, 2011**

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

By Richard P. Mather, Sr., Judge

Synopsis:

The Board denies the Department's motion to dismiss and its motion for summary judgment where there are important issues of fact and law remaining before the Board that cannot be resolved without a more developed record.[1]

OPINION

The Department of Environmental Protection ("Department") issued a compliance order to Appellant Robinson Coal Company ("Robinson") on November 17, 2010. The order contained two operative paragraphs that each identified a particular violation. Paragraph One of the order cited Robinson for a discharge from a treatment system at Robinson's Putt Mine because the Department found the discharge exceeded applicable effluent limits. Paragraph One

[1] The Board has issued a single Opinion and Order to address both pending Department dispositive motions because the motions and the Board disposition of the motion are interrelated. The combined effect of the Department's two dispositive motions, if they were granted, would be to dismiss Robinson's appeal. Since the Board has declined to grant either dispositive motion addressing both together in a single Opinion and Order provides a clearer explanation of the Board's reasoning to deny the Department's dispositive motions.

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http://ehb.courtapps.com

directed Robinson to submit a plan and schedule for treating the discharge so that it would meet effluent limits. Paragraph Two of the order cited Robinson for failing to submit quarterly water quality monitoring reports beginning in the first quarter of 2003 and continuing until the date of the order. Paragraph Two directed Robinson to conduct the required ground and surface water monitoring and reporting in the manner previously approved by the Department as specified in the approved plans.

Robinson timely challenged the Department's compliance order and raised three objections in its notice of appeal from the order. The first objection challenges Paragraph One of the order, and asserts that the violation cited in the order was based on the wrong location for sampling. (Notice of Appeal, ¶ 1(a)(e).) The second objection challenges Paragraph Two of the order and asserts that it has not failed to meet its obligations under the law and denied that it was required to perform any corrective action. (Notice of Appeal, ¶ 2(a)(e).) The third general objection raises a broader more fundamental objection to this order and asserts that Department's original determination that a passive treatment system was needed was in error, that subsequent work at the site has abated the discharge, that the discharge is the result of a third party's actions, that water treatment is no longer needed, and that the Department's failure to terminate the Trust was in error. (Notice of Appeal, ¶¶ 3-8.)

The Department has filed two dispositive motions to address all of Robinson's objections. The Department filed a motion to dismiss on the basis that Paragraph One of the order should never have been issued. After issuing the order, the Department realized that it had been sampling at an incorrect point at the site and subsequently vacated Paragraph One of the order. Consequently, the Department asserts that portion of the appeal of the order, related to Paragraph One is now moot because the appeal from a vacated order is moot because the order

no longer exists, is a complete nullity, and cannot serve as the basis for future civil penalties or during permit or license reviews. *See Goetz v. DEP*, 2001 EHB 1127, 1132. Moreover, the Department also asserts that the Board lacks jurisdiction over the objections raised in Paragraphs 3-8 of Robinson's notice of appeal related to the Treatment Trust because the Consent Order and Agreement ("CO&A") between Robinson and the Department limits the Board's jurisdiction to specific decisions not at issue in this appeal. The parties entered into the CO&A in November, 2002.

The Department has also filed a motion for summary judgment on the basis that Paragraph Two of the order does not contain any dispute over which a hearing is required. Paragraph Two cites Robinson for failing to submit quarterly water quality monitoring reports beginning in the first quarter of 2003. The Department asserts that Robinson does not dispute its failure to submit the reports and that it is clearly entitled to judgment as a matter of law. Together, these dispositive motions, if granted, would eliminate every objection raised by Robinson in its notice of appeal resulting in a dismissal of the appeal.

Before going into the merits of the motion and Robinson's responses some additional background is warranted. The CO&A, which the parties executed in November 2002, establishes, among other things, a trust securing Robinson's obligations to build, maintain and operate a passive treatment system at the Putt Mine. According to the terms of the CO&A, treatment would continue at the site secured by trust until such time as "treatment is no longer necessary." (CO&A, ¶ 5a.) Robinson believes that its reclamation efforts, even before the execution of the 2002 CO&A have eliminated the need to continue passive treatment of the Putt Mine discharge and, consequently, has sought to be released from the treatment trust through multiple requests to the Department. To date, Robinson reports that such efforts have been met

with no answer from the Department other than the compliance order at issue in this appeal.

In addition, this CO&A, stipulates that many issues that arise between the parties during the term of the CO&A are not final actions such that the Department's decisions could serve as the basis for an appeal to the Board. Rather these issues are deferred until "the Department enforces this Consent Order & Agreement." (CO&A, ¶ 31.) Thus, under the terms of the CO&A, Robinson has an opportunity to raise any deferred Department decision *if* the Department enforces the CO&A. (*See Id.*) Robinson believes that the order under appeal enforces the CO&A and allows it to raise its additional objections.

In this Opinion, the Board will review the Department's motions to determine whether any of the three issues raised by Robinson in its notice of appeal merits consideration by the Board at a hearing on the merits. We will determine whether it is appropriate to dismiss that portion of the appeal regarding Paragraph One of the order as moot, as the Department asserts. We will also determine whether it is appropriate to issue summary judgment on Paragraph Two of the order by finding whether, as the Department contends, the issue is clear as a matter of fact and the record facts can allow the Board to arrive at judgment as a matter of law. Finally, we will consider the Board's jurisdiction to hear the additional objections raised by Robinson's appeal of the compliance order.

In our review, we are cognizant of the Appellant's apparent responses to the Department's motions. In each, the Appellant concedes, at minimum, that the contents of each paragraph of the order are, alone, hardly grounds for a dispute before the Board. In fact, the Appellant has gone so far as conceding that each dispositive motion ought to be granted in so far as it would dismiss the Appellant's specific objections to Paragraphs One and Two of the Department's order respectively, while asserting that its appeal ought to continue to hear the

remaining objections listed in the Appellant's notice of appeal which speak more to the underlying disputes between the Department and Appellant. We stress, however, that our jurisdiction is limited by the Environmental Hearing Board Act. 35 P.S. § 7514. The Appellant appealed the compliance order. Without the appeal of that Department decision, we struggle to see how this appeal could continue. We accept, therefore, the Appellant's concessions as admissions to the Department's factual allegations that there is no dispute over the status of the vacated Paragraph One and the conduct and liability asserted by Paragraph Two, and we will conduct our review of the Department's dispositive motions to determine whether the appeal of the order may continue for other reasons including, as the Appellant asserts, as an enforcement action extending our jurisdiction over decisions made under the CO&A. In addition, Robinson has clarified its position in its supplemental memorandum which addressed the issue of mootness as the Board requested.

Mootness of Robinson's Objections to Paragraph One

The Board will grant a motion to dismiss where the moving party is clearly entitled to judgment as a matter of law and there is no dispute over any issue of material fact. *Spencer v. DEP,* 2008 EHB 573, 574; *Eljen Corp. v. DEP*, 2005 EHB 918. Frequently, where the Department vacates an order, the Board finds that appeal becomes moot. *See e.g. Goetz v. DE*P, 2001 EHB 1127. As a general rule a vacated order no longer exists, is a complete nullity, and cannot serve as the basis for future civil penalties or during permit or license reviews. *Id.*, 2001 EHB 1127, 1132. Nevertheless, there are exceptions to the mootness doctrine where the conduct complained of is capable of repetition yet likely to evade review, where issues of great public importance are involved, or where a party will suffer a detriment without a decision. *Sierra Club v. Pennsylvania Pub. Util. Comm'n*, 702 A.2d 1131, 1134 (Pa. Cmwlth. 1997), *aff'd* 731 A.2d

133 (Pa. 1999); *Ehmann v. DEP*, 2008 EHB 386, 389; *Solebury Twp.*, 2004 EHB at 29.

Moreover, unlike Federal jurisprudence where finding that a case is moot is the end of the story, as we have previously noted,

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

Ehmann et al. v. DEP, 2008 EHB 386, 388; *Sayreville v. DEP*, EHB Docket No. 2010-127-L, slip op. at 8-9 (Opinion and Order issued April 5, 2011.)

We believe it is prudent to decline to grant the Department's motion to dismiss at this point in litigation because this case meets some of the exceptions to the mootness doctrine and because there are unresolved related disputes in this matter. We believe that the Appellant may both suffer a detriment without our review and that the Department's action may be capable of repetition and evade review. The reason for this is because the Department's efforts to cite the Appellant for the Putt Mine discharge was raised by the Department, found to be based on incorrect sampling, and voluntarily vacated while avoiding making a determination of whether treatment of the discharge is still necessary, the absence of such a determination leaving Robinson with no choice but to accept the status quo of continuing to treat the discharge until the Department takes action on its testing from the proper location. *See ELG Metals, Inc. v. DEP*, EHB Docket No. 2009-091-R, slip op. (Opinion and Order issued October 21, 2011)(The Board denies motion to dismiss where Department vacates an order after finding that it had erroneously believed appellant was the source of pollution but has not cleared the appellant of wrongdoing

and the Department may pursue future enforcement actions.) The *EIG Metals* case is very similar to this appeal because the question of Robinson's continued liability (is treatment under the CO&A still necessary) has not been addressed. The Department is free to issue another order, using the correct sampling point, at any time.

We note, and we will discuss out more fully below, that we do not know at this juncture whether the Board will ultimately have jurisdiction in this appeal to consider all of Robinson's objections in Paragraphs 3-8 of its notice of appeal. We do find, however, that to the extent that the Department's compliance order can be found as an effort to enforce the CO&A thus allowing Robinson to challenge other decisions made by the Department not otherwise considered final actions by the CO&A's terms, we will not allow the Department's decision to vacate a portion of the compliance order as sufficient grounds to find that the appeal is moot.[2] Robinson should not suffer the detriment of an ongoing burden of treatment if it has grounds to challenge it, and nor should it wait for another appealable action where the Department could simply issue an order seeking its compliance and vacate it again while avoiding other issues. Consequently, the Board will deny the Department's motion to dismiss Robinson's objections to Paragraph One of the compliance order to adopt a wait-and-see approach as to whether it will have any relevance to our final adjudication of the issue.

In its motion to dismiss, the Department asserts that the Board has no jurisdiction over Robinson's objections in Paragraph 3-8 of its notice of appeal because the Department's order "did not address in any fashion or by any means the Treatment Trust or the Treatment Trust Consent Order and Agreement." To put the Department's position in its proper context, it is

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[2] Nevertheless, as the Appellant concedes, we recognize that the violations cited in Paragraph One of the order have been vacated and are off the table. The Department agrees that these vacated violations may not be used as the basis for a civil penalty or as part of any future assessment of Robinson's compliance history. *See Goetz*, *supra* at 1132.

useful to recap the series of somewhat one-sided communications between Robinson and the Department regarding Robinson's longstanding position that its obligations under the CO&A are terminated since treatment of the mine discharge is no longer needed.

Exhibits that Robinson attached to its response to the Department's motion to dismiss describe the numerous attempts that Robinson has made to engage the Department in a meaningful discussion over the proper procedures for terminating the CO&A. (*See* Appellant's Exhibits attached to response to Department's Motion to Dismiss ("A. Ex. MTD.") 4-22.) In December, 2005 Robinson sent a letter to the Greensburg District Mining Office requesting information regarding the proper procedure for the termination of the CO&A. (A. Ex. MTD. 4.) The letter indicated that Robinson believed that termination was authorized and warranted under the terms of the CO&A because treatment was no longer necessary. In February, 2006, Robinson sent a follow-up letter to the Greensburg District Mining Office with technical information that Robinson believed supported its interest in terminating the CO&A. (A. Ex. MTD. 5.) In February, 2006, Robinson sent the Greensburg District Mining Office a letter with additional information supporting its request to terminate the CO&A. (A. Ex. MTD. 6.) In March, 2007, Robinson elevated its request and sent a letter to District Mining Operations in which it described earlier efforts and again made its request. (A. Ex. MTD. 7.) In April, 2007, Michael Terretti, Director, District Mining Operations responded to Robinson's request and indicated that the Department believed the information that Robinson presented did not substantiate Robinson's assertion that water treatment is no longer necessary. (A. Ex. MTD. 8.) Terretti directed Robinson to discuss options available to Robinson to determine whether continued treatment is necessary. On June 3, 2007 Robinson sent the Greensburg District Mining Office a letter, in accordance with Terretti's direction. (A. Ex. MTD. 9.) The letter

provided additional information that Robinson believed supported its request and asked that the Department provide the options available to Robinson to determine whether treatment is necessary. In November, 2008 Robinson sent a letter to the Greensburg District Mining Office repeating its request to terminate the CO&A. (A. Ex. MTD. 10.) In September, 2009, Robinson sent another letter to Mr. Terretti regarding Robinson's request to terminate the CO&A, and in September 2009 the Greensburg District Mining Office responded to Robinson on behalf of Mr. Terretti. (A. Ex. MTD. 11.) This letter stated that Robinson had, to date, failed to demonstrate that treatment was no longer necessary. The Department indicated that the Department would not conduct an investigation to validate Robinson's request. The Department did offer to "review and evaluate" the results of a study conducted by Robinson, if Robinson chooses to conduct a study. On October 2, 2009 Robinson sent the Department a letter stating that Robinson would conduct a study. (A. Ex. MTD. 12.) In addition, Robinson requested that the Department provide some guidance regarding the format of the study, the procedures for terminating the CO&A and whether the study has to be authored by a licensed professional geologist ("LPG"). Apparently the Department did not respond to this letter, and in November, 2009 Robinson sent the Department a follow-up letter noting the lack of a Department response to the prior letter and renewing its request to terminate the CO&A. (A. Ex. MTD. 13.) In December, 2009, the Department responded to Robinson's latest letter. (A. Ex. MTD. 14.) The Department repeated its position that it would not terminate the CO&A and it would not conduct a study to determine if it can be terminated. The Department again indicated that Robinson could conduct a study at its expense, but that it need not be authored by a LPG.

In September, 2010 the Department sent Robinson a letter requesting that Robinson submit the annual treatment costs to the Department as required by the CO&A for the last three

years. (A. Ex. MTD. 15.) The letter also scheduled the first annual trust fund meeting, which is also required by the CO&A. In September, 2010 Robinson responded to the Department's request for treatment costs and indicated that it had incurred no cost for the last three years. (A. Ex. MTD. 16.) Robinson also renewed its request to terminate the CO&A.

After the Department's December, 2009 letter, Robinson engaged two professionals to evaluate whether treatment under the CO&A was still necessary. Both prepared individual reports, which were provided to the Department:

1. "Evaluation of the Perpetual Care Needs of the Putt Discharge" prepared by Bruce Leavitt, PE, PG dated November 22, 2010. (A. Ex. MTD. 17.)
2. "Analysis of Perpetual Treatment Needs for the Putt Mine Discharge" prepared by R.A.R. Engineering Group, Inc. dated November, 2010. (A. Ex. MTD. 18.)

Both reports were provided to the Department prior to the Department's decision to issue the compliance order which is at issue in this appeal. Robinson received the compliance order dated November 17, 2010 in late November. In early December, Robinson received a proposed civil penalty assessment for violations at Robinson's Putt Mine by the CO&A. (A. Ex. MTD. 19.) Robinson responded to the Department's proposed civil penalty in December, 2010 and requested a meeting. (A. Ex. MTD. 20.) While it is not clear that a meeting was ever held, Robinson sent the Department two emails in December, 2010 in which Robinson, among other things, contested the sampling point used to support the Department's order and later documented its understanding that the Department intended to vacate a portion of its order. (A. Ex. MTD. 21 - 22.)

This series of communications that began in 2005 documents Robinson's six year odyssey to engage the Department in a meaningful discussion regarding the proper procedures to address Robinson's claim that treatment under the CO&A is no longer necessary. As the discussion above indicates, Robinson was not successful in its efforts to engage the Department in such discussions.[3] Robinson's persistent efforts were not rewarded with an answer to its question, but it appears as if its persistence was rewarded with two enforcement actions to compel Robinson to comply with its obligations under the CO&A. The Department's enforcement order under appeal and its initial efforts to assess civil penalties are the only meaningful response that the Department made to Robinson's request. The order that the Department issued to Robinson in 2010 is directly related to the parties' 2002 CO&A and Robinson's longstanding requests to the Department for procedures and guidance to terminate the CO&A as no longer necessary.

Summary Judgment on Robinson's Objections to Paragraph Two

Turning to the Department's dispositive motion addressing Robinson's appeal of Paragraph Two of the Department's compliance order, 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. *Ehmann v. DEP*, 2008 EHB 325, 326; *Bertothy v. DEP*, 2007 EHB 254, 255. The granting of summary judgment is appropriate when a limited set of material facts are truly undisputed and the appeal presents a clear question of law. *Bertothy v. DEP*, 2007 EHB at 254, 255; *CAUSE v. DEP*, 2007 EHB 101, 106. When deciding summary judgment motions, the Board must view the record in the light most favorable to the nonmoving party and all doubts as

[3] There may be more to this story than is reflected in Robinson's exhibits. The largely one-sided nature of the discussions may not adequately reflect the Department's position or responses. The Department will have an ample opportunity to present its side of the story in this appeal.

to the existence of a genuine issue of fact are to be resolved against the moving party. *Bethenergy Mines, Inc. v. Dept. of Environmental Protection*, 676 A.2d 711, 714 n.7 (Pa. Cmwlth.), *appeal denied*, 546 Pa. 668 (1996); *see also, e.g., Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 1162.

The Department believes that the Board should grant summary judgment because Paragraph Two of the order was issued because Robinson failed to submit quarterly water monitoring reports for several years in violations of its obligations under the Department's regulations, an assertion not disputed by Robinson. The Department contends therefore, that where the violating conduct is not in dispute, the Board is in a position to decide the appeal with respect to Robinson's objections to Paragraph Two of the order as a matter of law in granting summary judgment for the Department. The Board disagrees.

An appeal of an order before the Board, however, is not so simply resolved. Under our rules, the Department bears the burden of proof when it issues an order. 25 Pa. Code § 1021.122(b)(4). In an appeal of an order of the Department, the Board reviews the Department's issuance of an order to determine whether it is a lawful and reasonable exercise of the Department's discretion that is supported by the facts. *GSP Management Company v. DEP*, 2010 EHB 456, 475; *Rockwood Borough v. DEP*, 2005 EHB 376, 384. It is likely that if, as the Department asserts, Robinson's admitted conduct has been in clear violation of the CO&A, the Department had at minimum the legal authority to issue the order, but it's difficult for the Board to see how we are in a position to decide that the order is a reasonable exercise of the Department's discretion without acquiring a more complete record. In particular, if Robinson has rightly asserted that it is appropriate for it to raise its objections that treatment is no longer necessary, the Department's reasonableness could hinge on whether the Department should have

first determined *whether* treatment is still necessary before seeking Robinson's compliance. The obligation to monitor and report under the CO&A is predicated on the obligation to provide treatment which may terminate if treatment is no longer necessary. Robinson's admission that it had not submitted quarterly monitoring reports could, nevertheless, not be an admission of a violation, if Robinson can establish that treatment under the CO&A is no longer necessary.

The Board's Jurisdiction over the remainder of the Appeal

The most significant dispute of material fact that is present in this appeal at this time is that the Department asserts that its order does not concern the CO&A, and has not attempted to enforce the CO&A while Robinson believes that it has. As we have already mentioned, when the Department enforces the CO&A, by the agreement's terms, decisions made by the Department previously, which were not appealable, may become ripe for the Board's review. (CO&A, ¶ 31.)

The Department appears to believe that such efforts to enforce the CO&A may only take the form of a petition to enforce before the Commonwealth Court.[4] We disagree; a petition to enforce is only one of several enforcement tools available to the Department under the law. *See e.g., ELG Metals, supra* (Department's administrative order was an enforcement action against a riparian landowner suspected of pollution.) *Berwick Twp. v. DEP*, 1998 EHB 487, is an example of a situation where the Department enforced a CO&A with terms similar to the CO&A in the present case. In *Berwick*, the Department asked the Board to find that the appellant had waived its rights to appeal a decision made by the Department under the terms of that CO&A because the

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[4] This assertion is wrong-headed for several reasons. Such a construction of the CO&A would insulate the Department from Board review which is by statute established to review final actions of the Department. 35 P.S. § 7514. Under this construction, only Commonwealth Court, in the context of a petition to enforce, would be able to consider challenges to any final Department actions under the agreement. The narrow scope of such an action in Commonwealth Court to enforce a final order of the Department, raises due process concerns regarding challenges to other final Department actions that are deferred until the Department enforces the CO&A. Under this view, the other deferred challenges would escape the Board's *de novo* review with all of its due process protections of appellants' rights. *See e.g. Morcoal Co. v. Dept. of Envtl. Res.*, 459 A.2d 1303 (Pa. Cmwlth. 1983).

appellant had agreed that:

> [a]ny decision which the Department makes under the provisions of [the CO&A] shall not be deemed to be a final action of the department, and shall not be appealable to the Environmental Hearing Board or to any court. Any objection which the [appellant] may have to the decision will be preserved until the Department enforces this [CO&A].

Id at 494; *cf.* CO&A, ¶ 31.) The appellant waited to appeal a decision by the Department under the CO&A until the Department sent it a letter informing it that the appellant was to pay stipulated penalties. The Board accepted the appellant's argument that the Department enforced the CO&A through its assessment of civil penalties, and consequently allowed it to raise objections to the Department's decision underlying the assessment as having been preserved until the Department enforced the CO&A. *Berwick Twp.* at 494.

Not dissimilarly, a compliance order is also among the Department's enforcement powers, and one that if used to enforce the present CO&A should also result in an opportunity for a party to raise previously unappealable decisions under the CO&A. This raises, however, a related question. The Department believes that the CO&A is entirely separate from the issues contained within its compliance order, while Robinson believes the matters are one-in-the-same.

Department's Order Enforced Terms of the CO&A

The parties disagree whether the order that the Department issued to Robinson "enforces" the CO&A. As set forth below, the Department argues that the order or at least the non-vacated portion of the order can not be construed as a Department action to enforce the CO&A. Robinson argues that the order does seek to enforce obligations arising under the CO&A against Robinson. This dispute is important because under the terms of the CO&A Robinson agreed to defer objections, other than those under Paragraphs 7, 12 and 13, "until the Department enforces" the CO&A. CO&A, ¶ 31. Robinson now wants to challenge the

Department's decision that under the terms of the CO&A treatment of the discharge is still necessary. The Board agrees with Robinson that the order enforces the CO&A, and under the terms of the agreement Robinson may now be able to challenge other decisions of the Department under the terms of the CO&A.

The Department asserts that its order "did not address in any fashion or by any means, the Treatment Trust or the Treatment Trust Consent Order and Agreement." Department's Reply Brief at page 2. The Department also asserts that the Board "has no authority to enforce the terms of the" CO&A. *Id.* The Department concludes that the Department "must" file a Petition to Enforce with the Pennsylvania Commonwealth Court to enforce the CO&A. *Id.* In its supplemental memorandum the Department adds that the issue of whether Paragraph One of the order attempts to enforce the CO&A is not before the Board because the Department vacated this portion of the order rendering Robinson's challenge to it moot. (Department Supplemental Memorandum at pages 3-4.) Finally, the Department concludes that Paragraph Two of the order references violations of Department's regulations and that its enforcement of these requirements is "wholly independent" of the CO&A. The Board rejects these misconceived arguments which are based on a misreading of the CO&A.

The Board does not understand how the Department can assert, with a straight face, that the order "did not address in any fashion or by any means" the CO&A. The order on its face references the CO&A.[5] (Department Order of November 17, 2010, ¶ 1.) The Department's attempt to parse its argument by addressing Paragraphs One and Two of the order separately does not advance the Department's arguments in any meaningful way.

[5] As described in detail in this Opinion, the context in which the Department issued the order to respond to Robinson's requests to terminate the CO&A further belittles the Department's misguided claim.

The issue of whether Paragraph One enforces the CO&A is still before the Board because the Board has decided to deny the Department's motion to dismiss. Paragraph One of the order has to be construed together with Paragraph Two of the order. There is no express reference to the CO&A in Paragraph Two, but there is no doubt that the two paragraphs identify related violations arising under the CO&A. The monitoring and reporting required under Paragraph Two is part of Robinson's overall treatment, monitoring, reporting and bonding requirements established by the CO&A. The issue of whether Paragraph Two of the order enforces the CO&A is still before the Board in the same way as Paragraph One. The Board also rejects the Department's argument that the only means to enforce the CO&A is a Petition to Enforce that the Department would file with the Pennsylvania Commonwealth Court for the reasons set forth above.

Meaningful Relief

One of the considerations in evaluating the Department's mootness arguments in support of its motion to dismiss is the question of whether the Board is able to provide Robinson with any meaningful relief in the context of this appeal.[6] *Horsehead Res. Dev. Co. v. DEP*, 780 A.3d 856, 858 (Pa. Cmwlth. 2001). The Department asserts that the Board is unable to provide Robinson with any meaningful relief in the context of this appeal. The Board disagrees.

The Board believes it can provide Robinson with meaningful relief in this appeal from a Department compliance order which sought to enforce Robinson's obligations under a CO&A to treat a mine discharge and to monitor the discharge and to report the monitoring results to the Department on a periodic basis. In the context of an appeal to the Board of the Department's attempt to enforce the CO&A by means of a compliance or enforcement order, the Board is able

[6] This discussion regarding meaningful relief applies equally to the Department's arguments regarding Paragraphs One and Two of the order.

to decide whether Robinson is in violation of its obligations under the CO&A or whether, as Robinson asserts, it is not in violation of its treatment, monitoring, reporting and bonding requirements because under the CO&A treatment is no longer necessary.

In its Supplemental Memorandum, the Department raises a related point. The Department asserts that "there is a remedy available to Robinson" under the CO&A. (Department Supplemental Memorandum at p. 8-9.) The Department believes that Paragraphs 7, 12, and 13 of the CO&A, which provide for adjustments to the amount of collateral required for the Treatment Trust, enable Robinson to raise its argument that the trust is no longer necessary. The Board rejects this argument. Robinson is not claiming that it is entitled to a refund of a portion of the money currently held by the Trust to cover future treatment cost. Robinson wants to demonstrate that treatment is no longer necessary under the CO&A and a return of all of the trust money. The paragraphs in the CO&A that the Department references do not provide Robinson with the overall relief Robinson seeks.

The underlying problem in this appeal is the parties failure in 2002 to include language in their CO&A that establishes agreed to procedures for Robinson to demonstrate that treatment under the CO&A and its related monitoring, reporting, and bonding requirements, are no longer necessary. In the absence of agreed to procedures, Robinson has attempted to work with the Department to make such a demonstration, but in the absence of any meaningful Department response, as set forth above, Robinson has been shooting blindly at a target in the dark. The Board faces a similar problem in this appeal from an order issued by the Department to compel Robinson to comply with its obligations under the CO&A. While it appears that the two specific obligations imposed by the order on Robinson may have been addressed, the underlying issue still remains and Robinson is no further along with the Sisyphean task of getting an answer from

the Department regarding the type of demonstration required to terminate Robinson's obligation under the CO&A. In the absence of agreed to procedures or a meaningful response from the department, this appeal provides Robinson with its only opportunity to challenge whether it is still obligated to treat the mine discharge in question under the CO&A. In the context of this appeal from the order, which attempts to enforce the CO&A, the Board will address the issue the parties failed to addressed in 2002.

There are a few points that the Board should highlight at this stage of the litigation. The Board has not considered, in any way, the merits of Robinson's position that its obligations under the terms of the CO&A are terminated, because treatment is no longer needed. The Board has also not evaluated whether all of Robinson's objections to the Department's order in Paragraphs 3-8 of Robinson's notice of appeal can be addressed in this appeal.[7]

In conclusion, without a more developed record we are unable to grant either motion. The Department has not met its high burden under either motion to show that it is entitled to judgment in the Department's favor when taking the present evidence and averments in the light most favorable to Robinson, the non-moving party. Consequently it would not be prudent for the Board to terminate this appeal without allowing that record to more fully develop. In deciding to deny both of the Department's dispositive motions, the Board is guided by the purpose of such motions. Dispositive motions are useful tools to promote judicial economy by identifying the cases that are truly resolvable as clear factual scenarios by applying the appropriate rules of law. Where we face a set of facts like the ones currently before the Board, we are troubled by what

[7] The Board agrees with the Department that Robinson may not challenge the terms of the CO&A at this late date. Robinson agreed to these terms, and Robinson may not collaterally attack them now. For example, the objection in Paragraph 3 of Robinson's notice of appeal challenges whether Robinson's mining caused the discharge. This issue was addressed by the parties in the CO&A, and the Board does not intend to reopen this issued that Robinson and the Department decided in 2002. Robinson may, however, challenge Department decisions *under* the terms of the CO&A such as the Department's decision that treatment under the CO&A is still necessary in 2011.

appears to be an effort on the part of the Department to dismiss the inquiry of a regulated business trying to evaluate its legal obligations under the Department's programs. As a consequence, at this stage of litigation we will allow the Appellant to pursue its day in court before the Board.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBINSON COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 2010-186-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 23rd day of December, 2011, for the reasons set forth in the preceding opinion, it is hereby ordered that the Department's motion to dismiss and motion for summary judgment are **denied**.

ENVIRONMENTAL HEARING BOARD

RICHARD P. MATHER, SR.
Judge

DATED: December 23, 2011

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