

# **Environmental Hearing Board**

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# **Adjudications and Opinions**



# **2001 Volume I**

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**COMMONWEALTH OF PENNSYLVANIA**

**George J. Miller, Chairman**

**MEMBERS  
OF THE  
ENVIRONMENTAL HEARING BOARD**

**2001**

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Environmental Hearing Board Reporter

Thus: 2001 EHB 1

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ISBN NO. 0-8182-0272-6

## FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2001.

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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HARRIMAN COAL CORPORATION :

v. :

COMMONWEALTH OF PENNSYLVANIA, :  
 DEPARTMENT OF ENVIRONMENTAL :  
 PROTECTION :

EHB Docket No. 98-235-C

Issued: January 2, 2001

**OPINION AND ORDER ON  
 PETITION FOR RECONSIDERATION**

By Michelle A. Coleman, Administrative Law Judge

**Synopsis:**

A petition for reconsideration is denied. A mere allegation of Board error, without more, does not warrant reconsideration of an interlocutory order. Furthermore, the Board did not err by denying portions of a motion for partial summary judgment where (1) the movant supported its allegations with evidence concerning settlement negotiations; (2) the non-moving party's response and memorandum in opposition to the motion showed that the evidence fell within Pa. R.E. 408's general rules barring evidence concerning settlement agreements; and (3) the movant's reply failed even to argue that the evidence fell within one of the exceptions to Pa. R.E. 408's general rules barring evidence concerning settlement agreements.

**OPINION**

This consolidated appeal concerns a November 25, 1998, compliance order (compliance order) and a May 10, 1999, inspection report (inspection report) that the Department of Environmental Protection (DEP) issued to Harriman Coal Corporation (Appellant) of Valley

View, Pennsylvania. Both Department actions relate to Appellant's Good Spring South mining operation, in Porter Township, Schuylkill County. The compliance order cited Appellant for exceeding the 1500-foot limit on the length of an open pit; directed Appellant to backfill and regrade the site by December 28, 1998, so that the open pit fell within the 1500-foot limit; and directed Appellant to cease all other mining activities at the site. The inspection report asserted that Appellant failed to comply with the backfilling requirements in the compliance order, reinstated the compliance order, and directed Appellant to immediately cease all active mining and begin backfilling and reclamation.

On December 17, 1998, Appellant filed a notice of appeal challenging the compliance order. The Board docketed the appeal at EHB Docket No. 98-235-C. Later, on May 8, 1999, Appellant filed a notice of appeal challenging the inspection report. The Board docketed that appeal at EHB Docket No. 99-119-C. On June 18, 1999, at the request of the parties, we consolidated both appeals at EHB Docket 98-235-C.

The Board has issued two previous decisions in this appeal. On July 21, 2000, we denied a Department motion to dismiss Appellant's objections to the compliance order. *See Harriman Coal Corporation v. DEP*, EHB Docket No. 98-235-C slip op. (opinion issued July 21, 2000). On November 30, 2000, we denied Appellant's motion for partial summary judgment. *See Harriman Coal Corporation v. DEP*, EHB Docket No. 98-235-C slip op. (opinion issued November 30, 2000).

On December 11, 2000, Appellant filed a petition for reconsideration of our decision denying its motion for partial summary judgment. In its petition for reconsideration, Appellant argues that "mistake by the Board" is adequate grounds for reconsideration of an interlocutory order (memorandum in support, pp. 3-4), and that the Board made a mistake when it denied

certain aspects of Appellant's motion for partial summary judgment based on Rule 408 of the Pennsylvania Rules of Evidence, Pa. R.E. 408.

The Department filed its response on December 21, 2000. The Department argues that Board error does not necessarily constitute grounds for reconsideration of an interlocutory order, and that the Board was correct when it denied portions of Appellant's motion for partial summary judgment based on Pa. R. E. 408.

We agree with the Department on both aspects of Appellants' motion.

#### **I. THE STANDARD FOR RECONSIDERATION**

Section 1021.123 of the Board's rules, 25 Pa. Code § 1021.123, governs reconsideration of interlocutory orders. It states that the Board will grant reconsideration only where the petition demonstrates that "extraordinary circumstances" exist. 25 Pa. Code § 1021.123(a). To show that "extraordinary circumstances" exist, petitioners must show that they meet the criteria for reconsideration of a final order, listed at 25 Pa. Code § 1021.124, and, in addition, that special circumstances exist that warrant the Board taking the extraordinary step of revisiting an interlocutory order. *Miller v. DEP*, 1997 EHB 335, 339. Section 1021.124 of the Board's rules provides that "[r]econsideration is within the sound discretion of the Board and will be granted only for compelling and persuasive reasons," 25 Pa. Code § 1021.124(a), and that those reasons may include:

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



25 Pa. Code § 1021.124(a) (1)-(2).

Appellant contends that a mistake by the Board qualifies as an “extraordinary circumstance” justifying reconsideration of an interlocutory order under 25 Pa. Code § 1021.123(a). In support of its position, Appellant points to our decision in *Miller v. DEP*, 1997 EHB 335, 339. But *Miller* does not hold that Board error will ordinarily qualify as an “extraordinary circumstance” justifying reconsideration of an interlocutory order.

*Miller* involved a third-party appeal of a National Pollution Discharge Elimination System (NPDES) sewage discharge permit. The appellants (Millers) raised four objections challenging the permit in their notice of appeal. The Department moved to dismiss only three of the objections in the notice of appeal. But, when the Board ruled on the motion to dismiss, the Board denied the motion, holding that Millers would prevail on the fourth objection, which neither party had raised in their filings concerning the motion to dismiss.

As our analysis in *Miller* makes clear, the decision that the Board reconsidered in *Miller* differed in at least two essential respects from the decision that Appellant asks us to reconsider here: (1) in *Miller*, the opinion we reconsidered turned on an issue that had never been raised by the parties; and, (2) in addition to raising the issue *sua sponte*, in *Miller* the Board also stated that Millers—the nonmoving parties—were entitled to judgment as a matter of law on that issue. We explained:

The circumstances surrounding the motion to dismiss are “extraordinary” for purposes of section 1021.123(a) of our rules.... By disposing of the motion on the basis of the fourth objection, we ruled on a legal ground and aspect of the appeal which had not been proposed by either party. Furthermore, because we intimated that [Millers] were entitled to judgment as a matter of law on the fourth objection, [Millers] could later argue that our determination that the Department erred by reissuing the permit is now “law of the case.” Thus, though our decision on the motion to dismiss was an interlocutory order, it could still have a great impact on the resolution of the ultimate issue in this appeal.

1997 EHB 335, 340.

The decision that Appellant requests that we consider involves neither of the additional factors involved in *Miller*. Instead, Appellants would have us hold that the Board should reconsider interlocutory orders whenever one of the parties feels that the Board has made a mistake. This would require that we go far beyond the standards set forth *Miller* or any of our other reconsideration decisions. Indeed, we would have to abandon the current standard entirely. As noted above, reconsideration of final orders “will be granted only for compelling and persuasive reasons,” 25 Pa. Code § 1021.124(a), and the standard for reconsidering interlocutory orders requires “extraordinary circumstances” as well. 25 Pa. Code § 1021.123. It is by design an “extraordinary” remedy. Yet, if reconsideration were available whenever a party disagreed with the Board’s application of the law, virtually every decision the Board issues would be ripe for reconsideration. In the overwhelming majority of decisions the Board issues, the parties differ on how the law should be applied, and the Board disagrees with at least one of them. Presumably, many of these frustrated parties continue to believe that their interpretation of the law was correct, even after the Board issues its decision. If reconsideration were available whenever a party disagreed with the Board’s application of the law, reconsideration would cease to be an extraordinary remedy and would instead become available as a matter of course.

## **II. THE BOARD DID NOT ERR**

Even assuming that we did reconsider our decision denying Appellant’s motion for partial summary judgment, we would come to the same result. We did not err by refusing to consider certain portions of Appellant’s motion for partial summary judgment based on Pa. R.E. 408.

As noted above, this consolidated appeal involves Appellant's challenges to a November 25, 1998, compliance order (compliance order) and a May 10, 1999, inspection report (inspection report). The compliance order directed Appellant to do two things: backfill and regrade the site by December 28, 1998, so that the open pit was no more than 1500 feet wide, and cease all other mining activities at the site. To resolve certain differences between them concerning the compliance order, the parties entered into a consent order and agreement on December 8, 1998. Among other things, the consent order and agreement provided that the Department would lift the compliance order to the extent that it banned mining, and that the compliance order would be immediately reinstated if Appellant failed to comply with the deadlines in the order. *See Harriman Coal Corporation v. DEP*, EHB Docket No. 98-235-C slip op. at 10 n.3 (opinion issued November 30, 2000).

On April 28, 1999, the Department sent Appellant a proposed amendment to the December 8, 1998, consent order. *See Harriman Coal Corporation v. DEP*, EHB Docket No. 98-235-C slip op. at 10 n.6 (opinion issued November 30, 2000). The cover letter accompanying it stated that the proposed amendment "accurately reflects the terms agreed to at the March 11, 1999, meeting"; and that "continued failure to execute this amendment ... will result in the Department enforcing the terms of the December 8, 1998, [consent order and agreement]" because "the compliance dates in the [consent order and agreement] have long since passed." *Id.* Appellant refused to sign the proposed amendment.

On May 10, 1999, the Department issued an inspection report asserting that Appellant failed to comply with the backfilling deadlines in the compliance order. *Id.* at 2. The inspection

report reinstated the compliance order, and directed Appellant to immediately cease all active mining and begin backfilling and reclamation.<sup>1</sup> *Id.*

Appellant's motion for partial summary judgment contained certain assertions concerning the parties' negotiations regarding the consent order and proposed amendment to the consent order. Paragraphs 58 and 116-117 of Appellant's motion related to negotiations surrounding the issuance of a December 8, 1998, consent order between the parties. Paragraphs 54, 57, 59-63, and 71-73 of the motion involve the parties' negotiations concerning the proposed amendment to the December 8, 1998, consent order, which sought to resolve certain differences between the parties concerning that consent order.

In its answer and memorandum in opposition to Appellant's motion, the Department argued that these paragraphs of the motion improperly relied on evidence concerning settlement negotiations, in violation of Pa. R.E. 408.

In its reply, Appellant mistakenly quoted an obsolete version of Pa. R.E. 408, then argued that the evidence concerning the settlement negotiations was admissible because it was not excluded under this version of the rule. Specifically, Appellant argued that its reliance on evidence concerning the settlement negotiations was appropriate because

Pa. R.E. 408 only precluded evidence concerning settlement negotiations when there was active litigation between the parties at the time of the negotiations;

the plain language of Pa. R.E. 408 states that admissions of fact made during compromise negotiations are not excluded; and,

---

<sup>1</sup> The particulars concerning the compliance order, the consent order, and the proposed amendment to the consent order are set forth in greater detail in our opinion and order on Appellant's motion for partial summary judgment. *See Harriman Coal Corporation v. DEP*, EHB Docket No. 98-235 slip op. (opinion issued November 30, 2000).

none of the statements from the negotiations had been cloaked with the “magic words”—like “off the record,” “without prejudice,” etc.—necessary to render the statements inadmissible under Pa. R.E. 408.

We addressed and rejected these arguments in our opinion and order denying Appellant’s motion for partial summary judgment.

In its petition for reconsideration, Appellant does not contend that we erred with respect to any of the specific arguments that it raised in its reply and that we addressed in our decision denying Appellant’s motion for partial summary judgment. Instead, Appellant raises new arguments concerning Pa. R.E. 408. Appellant maintains that:

by quoting just a portion of Pa. R.E. 408 in our discussion of the rule, “the Board mistakenly implie[d] that the sentence ‘This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations’ was removed from the current version of the rule” (Petition, p. 4, para. 20);

the circumstances surrounding the proposed amendment to the consent order are admissible because the Department mentioned in the inspection report that Appellant failed to agree to the proposed amendment (Petition, p. 4, para. 21, 23); and,

evidence concerning the settlement negotiations is also admissible because Pa. R.E. 408 does not exclude evidence that shows prejudice or bias, and the evidence concerning the settlement negotiations shows prejudice because the consent order is administratively final and no longer reviewable. (Petition, p. 5, para. 24, 25.)

There are a number of problems with Appellant’s arguments. The first is that Appellant failed to make them in its reply to the motion for partial summary judgment. Thus, had we granted Appellant’s motion for partial summary judgment based on these arguments, we would have granted the motion based on issues that neither party raised in their filings—grounds for reconsideration of a final order, under 25 Pa. Code § 1021.124(a)(1)—and to which the Department never had an opportunity to respond.

Second, the Board did not “mistakenly impl[y]” that the current version of Pa. R.E. 408 omits the sentence ‘This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.’ Before quoting from Pa. R.E. 408 in our opinion on the motion for partial summary judgment, we were careful to write, “Pa. R.E. 408 provides, *in pertinent part*....” See *Harriman Coal Corporation v. DEP*, EHB Docket No. 98-235-C slip op. at 8 (opinion issued November 30, 2000) (emphasis added). We did not quote the sentence Appellant refers to because it was not relevant to the arguments that the parties had raised concerning the motion for partial summary judgment: Prior to our ruling on the motion for partial summary judgment, neither Appellant nor the Department raised the issue of whether the evidence Appellant relied upon might have been otherwise discoverable.

It may well be that at the hearing on the merits, Appellant can demonstrate that certain evidence concerning the settlement negotiations is admissible because it falls within an exception to the general rules of inadmissibility set forth in the first two sentences of Pa. R.E. 408.<sup>2</sup> However, once the Department shows that evidence falls within those general rules of inadmissibility, the burden shifts to the proponent of the evidence to show that it is admissible under one of the exceptions to the general rules.

---

<sup>2</sup> Those sentences provide:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

The same rule applies to evaluating evidence supporting a motion for summary judgment. If a party opposing the motion demonstrates that the motion relies on evidence that falls within the general rules of inadmissibility in the first two sentences of Pa. R.E. 408—as the Department did with respect to Appellant’s motion for partial summary judgment—then the burden shifts to the movant to demonstrate that the evidence falls within one of the exceptions to the general rule. Because the evidence is being used to support a motion for summary judgment, when determining whether the movant has met its burden of showing that the evidence falls within one of the exceptions to the general rules of inadmissibility, all doubts are resolved in favor of the non-moving party. Appellant could not have prevailed on this aspect of its motion for partial summary judgment because Appellant never even argued that the evidence that it relied upon fell within one of the exceptions to the general rules, much less established that the evidence fell within those exceptions when all doubts were resolved in favor of the Department.

We have previously held that a party may not use reconsideration to cure a defect in its motion for summary judgment. *See Adams Sanitation Company v. DER*, 1994 EHB 1482, 1487. The same reasoning extends to replies involving a motion for partial summary judgment. Appellant could have raised the issues that it now seeks to raise had it incorporated them in its reply to the motion for partial summary judgment. For one reason or another, it failed to do so. We will not reconsider our decision on the motion simply because Appellant would like to raise those arguments now, after we have denied its motion.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

HARRIMAN COAL CORPORATION :  
 :  
 v. : EHB Docket No. 98-235-C  
 :  
 COMMONWEALTH OF PENNSYLVANIA, :  
 DEPARTMENT OF ENVIRONMENTAL :  
 PROTECTION :

ORDER

AND NOW, this 2<sup>nd</sup> day of January, 2001, it is ordered that Appellant's petition for reconsideration is denied.

ENVIRONMENTAL HEARING BOARD



MICHELLE A. COLEMAN  
Administrative Law Judge  
Member

DATED: January 2, 2001

See following page for service list.



c:

**DEP Bureau of Litigation**

Attention: Brenda Houck, Library

**For the Commonwealth, DEP:**

Charles B. Haws, Esquire

Southcentral Regional Counsel

**For Appellant:**

Charles E. Gutshall, Esquire

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RHOADS & SINON

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Harrisburg, PA 17108-1146



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

LEATHERWOOD, INC.	:	
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION, and JEFFERSON COUNTY,	:	EHB Docket No. 2000-066-C
THE JEFFERSON COUNTY SOLID WASTE	:	(Consolidated with 95-097-C
AUTHORITY, THE CLEARFIELD-	:	and 95-102-C)
JEFFERSON COUNTIES REGIONAL	:	
AIRPORT AUTHORITY, AND PINECREEK	:	Issued: January 2, 2001
TOWNSHIP, Intervenors	:	

**OPINION AND ORDER ON MOTION TO STRIKE  
 CROSS-MOTION FOR SUMMARY JUDGMENT**

By Michelle A. Coleman, Administrative Law Judge

**Synopsis:**

The Board will grant a motion to strike a cross-motion for summary judgment where the Board ordered the movants to file dispositive motions by August 21, 2000, yet the cross-motion was not filed until October 16, 2000. The Board has the power to strike the motion pursuant to its authority to impose sanctions, under 25 Pa. Code § 1021.125.

**OPINION**

This matter was initiated with the June 8, 1995, filing of a notice of appeal by Jefferson County, the Jefferson County Solid Waste Authority, and the Clearfield-Jefferson Counties Regional Airport Authority (collectively, Jefferson). They appealed a permit authorizing the construction and operation of a solid waste landfill (solid waste permit) that the Department of

Environmental Resources (Department) issued to Leatherwood, Inc. (Permittee) on May 12, 1995. The landfill would be located in Pinecreek Township (Pinecreek), Jefferson County. Pinecreek filed a separate appeal to the permit on June 12, 1995. The Board consolidated the appeals filed by Jefferson and Pinecreek Township at EHB Docket 95-097-C.

On March 20, 2000, the Department issued an order expressly superseding the October 21, 1996, order. The order suspended the solid waste permit and related NPDES permits, alleging that operation of the landfill might increase the likelihood of birds striking aircraft using the airport. Permittee appealed the March 20, 2000, order on the same day the order was issued. The Board docketed the appeal at EHB Docket No. 2000-066-C.

On June 13, 2000, we consolidated the appeals of the solid waste permit at EHB Docket No. 95-097-C with the appeal of the Department's March 20, 2000, order, at EHB Docket No. 2000-066-C. The appeals were consolidated at EHB Docket No. 2000-066-C, after the Board had issued several decisions concerning the appeals of the solid waste permit.<sup>1</sup>

The motion currently before the Board is a Leatherwood motion to strike, filed on October 30, 2000. In its motion, Leatherwood asks that the Board strike a cross-motion for summary judgment filed by Jefferson and Pinecreek on October 16, 2000. Among other things, Leatherwood argues that striking the cross-motion for summary judgment is appropriate because the deadline for Leatherwood and Jefferson to file dispositive motions expired on August 21, 2000, significantly before the cross-motion was filed.<sup>2</sup>

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<sup>1</sup> On September 27, 1995, we denied a motion to dismiss in EHB Docket No. 95-097-C; on November 27, 1995, we denied a motion for a protective order in EHB Docket No. 95-097-C; on August 21, 1996, we granted in part one motion for summary judgment but denied another; and, on March 24, 2000, we denied a petition to supersede the appeal.

<sup>2</sup> Motion, paragraphs 5, 6, and 24.

On November 13, Jefferson and Pinecreek filed a response to Leatherwood's motion to strike their cross-motion for summary judgment. The response argues that the motion to strike fails to explain why the cross-motion is untimely,<sup>3</sup> and that the cross-motion is not in fact untimely because neither section 1021.73 of the Board's rules, 25 Pa. Code § 1021.73, nor Pa. R.C.P. 1035.1-1035.4 set deadlines for the filing of motions for summary judgment.

We will grant Leatherwood's motion to strike. The cross-motion for summary judgment was not timely filed. On June 13, 2000, the Board issued an order in this appeal that stated, "The new date for filing dispositive motions in the consolidated appeal shall be **August 21, 2000.**" (Emphasis in original.) Although the Board extended Leatherwood's deadline for filing dispositive motions to September 22, 2000—in a September 15, 2000, order—we never extended Jefferson or Pinecreek's deadline. Thus, by filing their cross-motion on October 16, 2000, Jefferson and Pinecreek were 56 days late. (And, even assuming the Board had extended their deadline to September 22, 2000, as the Board had extended Leatherwood's, their cross-motion would still have been 27 days late.)

While neither 25 Pa. Code § 1021.73 nor Pa. R.C.P. 1035.1-1035.4 address when a motion for summary judgment must be filed, section 1021.125 of the Board's rules of practice and procedure, 25 Pa. Code § 1021.125, provides, "The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure." Under the circumstances, striking the cross-motion is an appropriate sanction for Jefferson and Pinecreek's failure to conform to the filing deadline set in the Board's June 13, 2000, order. The cross-motion was filed long after the August 22, 2000, deadline set in that order, and neither Jefferson

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<sup>3</sup> Response, paragraph 2.

nor Pinecreek requested an extension of that deadline or reconsideration of the Board order setting the deadline.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

LEATHERWOOD, INC. :

v. :

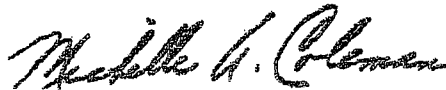
COMMONWEALTH OF PENNSYLVANIA, :  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION, and JEFFERSON COUNTY, :  
THE JEFFERSON COUNTY SOLID WASTE :  
AUTHORITY, THE CLEARFIELD- :  
JEFFERSON COUNTIES REGIONAL :  
AIRPORT AUTHORITY, AND PINECREEK :  
TOWNSHIP, Intervenors :

EHB Docket No. 2000-066-C  
(Consolidated with 95-097-C  
and 95-102-C)

ORDER

AND NOW, this 2<sup>nd</sup> day of January, 2001, it is ordered that Leatherwood's motion to strike is granted, and the Board strikes Jefferson and Pinecreek's cross-motion for summary judgment.

ENVIRONMENTAL HEARING BOARD



MICHELLE A. COLEMAN  
Administrative Law Judge  
Member

DATED: January 2, 2001

See following page for service list.

c:

**DEP Litigation, Library:**  
Attention: Brenda Houck

**For the Commonwealth, DEP:**  
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and  
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agency of the Commonwealth with the duty and authority to administer and enforce an erosion and sedimentation (“E&S”) control program under the authority of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.1 *et seq.* (“Clean Streams Law”), and the rules and regulations promulgated at Title 25 of the Pennsylvania Code. (Joint Stipulation, [hereinafter “Stip.”] 1.)

2. The appellant is Philip O’Reilly, an individual person that resides in Wescosville, Pennsylvania. (Stip. 2.)

3. The permittee is JDN Development Company, Inc. (“JDN”). JDN is a corporation registered to conduct business in Pennsylvania with its principal place of business in Atlanta, Georgia. (Stip. 3.)

4. The Department has delegated nonexclusive authority to the Lehigh County Conservation District (the “Conservation District”) to implement the E&S control program in Lehigh County. (Stip. 8.)

5. The Conservation District has accepted responsibility for receiving National Pollutant Discharge Elimination System (“NPDES”) permit applications for storm water discharges associated with construction activities, performing completeness reviews of the applications, reviewing the applications (primarily the E&S control plans) from a technical point of view, and making recommendations to the Department on whether the permits should be issued. (Transcript of Proceedings [hereinafter “T.”] 49-50, 56.)

6. JDN owns a 48-acre tract of land situated on the southern side of S.R. 0222 (Hamilton Boulevard) approximately 0.5 miles east of the intersection with S.R. 2012 (Lower Macungie Road) in Lower Macungie Township, Lehigh County (the “Site”). (Stip. 4.)

7. On June 11, 1998, JDN submitted an application for an NPDES permit to the

Conservation District for a discharge of storm water associated with construction activities at the Site. The permit application included a proposed E&S control plan and proposed the discharge of storm water from construction activities at the Site to the Little Lehigh Creek. (Stip. 5.)

8. The downstream edge of the Site is approximately 2,500 feet from the Little Lehigh Creek. (Stip. 6.)

9. The Little Lehigh Creek is designated as a high quality water. 25 Pa. Code § 93.9d. (Stip. 7.)

10. JDN proposed to construct a retail shopping complex on the Site. (Stip. 5.)

11. Although there was no record evidence that Wal-Mart Stores, Inc. (“Wal-Mart”) was contractually bound to become a tenant at the retail complex, JDN followed Wal-Mart specifications in designing and building the shopping center. (T. 327-328; Appellant’s Exhibit [hereinafter “A. Ex.”] 4; Permittee’s Exhibit [hereinafter “P. Ex.”] 19.) Those specifications included specifications for E&S controls. (T. 328; A. Ex. 4; P. Ex. 19.)

12. The Department was aware that the Site was being developed to include a Wal-Mart store. (T. 32, 112, 239; A. Ex. 5, 8.)

13. The Department and the Conservation District conducted their review of the permit application with the assumption and understanding that Wal-Mart was likely to be a major tenant at the Site. (T. 32; A. Ex. 8; P. Ex. 19.)

14. JDN or its affiliated entities have developed or assisted with the development of more than 150 Wal-Mart stores since the late 1970s. (T.128.)

15. Due to the involvement of Wal-Mart, the project was controversial from the start. (T. 410-411.)

16. Although Wal-Mart was likely to be a major tenant at the site, JDN was the sole

permittee for the project during the application process because it was both the owner and developer of the Site. (T. 114.)

17. The Department issues permits to the parties who have operational control over a site, which are typically the owners and/or developers of construction sites, not future tenants of the sites. (T. 196, 239; A. Ex. 5.) The Department also requires a contractor engaged in or having control over earthmoving activities on the site to become at least a copermitee. (T. 239; A. Ex. 5.)

18. The earthmoving contractor at the Site, Lehigh Valley Site Contractors, would later become a copermitee. (T. 404; A. Ex. 16.)

19. Although Wal-Mart was not a copermitee, its prior development background in Pennsylvania became relevant during the review process due in part to E&S problems that had occurred at a construction site for a Wal-Mart store near Honesdale in Wayne County. As a result of those problems, the Department had entered into a consent order and agreement with Wal-Mart on February 3, 1999. (T. 28, 103; A. Ex. 5, 9.)

20. The Wal-Mart consent order and agreement not only addressed the Honesdale site, but future Wal-Mart construction projects in Pennsylvania as well. (T. 28, 112; A. Ex. 9.)

21. The Wal-Mart consent order and agreement required Wal-Mart to incorporate several provisions in its contracts relating to the construction of future Wal-Mart stores in Pennsylvania that were designed to reduce the likelihood of future environmental violations. (T. 44, 111-112; A. Ex. 9.) Wal-Mart was also required to ensure that the protective provisions were incorporated into contracts between site owners/developers and their contractors. (A. Ex. 9, paragraph 3.) For example, Wal-Mart's contractors were required to warrant their understanding of and strict compliance with all applicable laws, hold preconstruction meetings to discuss all

storm water control requirements, have all required E&S controls installed and certified by a professional engineer or other person approved by the Department, and carefully inspect and repair all E&S controls. (A. Ex. 9.)

22. In the context of this case, Wal-Mart was required by the consent order and agreement to ensure that its contract with JDN and JDN's contract with contractors included the protective provisions. (A. Ex. 5, 9.)

23. The Department concluded that the Wal-Mart consent order and agreement applied to JDN's development of the Site. (T. 32; A. Ex. 5, 8.)

24. JDN's contract with its site contractor contains the environmental provisions mandated by the Wal-Mart consent order and agreement. (T. 453, 455.)

25. Wal-Mart has passed on its obligations under the consent order and agreement to JDN. (A. Ex. 4.)

26. There is no condition or other reference in JDN's permit regarding the Wal-Mart consent order and agreement. (A. Ex. 6.)

27. John D. Harris, Jr., a vice-president of JDN, signed and certified JDN's permit application. (T. 124-125; A. Ex. 1, 3.)

28. Harris has no specific recollection of the permit application. He generally speaks to corporate employees familiar with a project before signing such documents, but there is no evidence whether he did so in this case. (T. 126-127.)

29. The Department's NPDES storm water permit system has two components that are relevant here: Permits are required for certain construction activities. These permits require owner/operators to utilize best management practices ("BMPs") during construction activity to prevent excessive erosion and sedimentation of receiving waters. (T. 501.) The permits

terminate at the conclusion of the construction activity, i.e., when the site is permanently stabilized. (A. Ex. 6.)

30. A BMP is an activity, requirement, plan, device, or structure that prevents or reduces polluted runoff from the construction activity site. (T. 477-478; A. Ex. 6.) Silt fences, matting, temporary vegetation, detention basins, and stilling basins are examples of BMPs. (T. 477-478.)

31. The second type of storm water permit is issued for certain classifications of industrial activity on an ongoing, post-construction basis. These permits are not so much concerned with erosion and sedimentation because they cover sites that have already been stabilized. They are more concerned with pollutants that rainfall might pick up on the site and carry off in the storm water. (T. 501-502.)

32. The JDN site is a commercial shopping center, which does not fall within an industrial classification that requires a post-construction NPDES permit. (T. 147-148.)

33. The local municipality may also regulate storm water flow control measures pursuant to a local ordinance. (T. 146, 264-265, 502.)

34. JDN complied with local storm water design requirements for the Site. (T. 146, 265, 306, 324, 441; A. Ex. 5; P. Ex. 13.)

35. The permit at issue in this appeal falls within the first category of NPDES storm water permits; i.e., it is a permit for the discharge of storm water associated with construction activities. (A. Ex. 6.)

36. JDN's permit application underwent a lengthy, extensive, and detailed review process that included multiple application submissions, comment letters and responses thereto, as well as correspondence from and to, and meetings with, interested citizens. (A. Ex. 2, 4; P. Ex. 1-

19.)

37. For example, on December 8, 1998, representatives of the Conservation District met with Mr. O'Reilly to discuss his initial concerns regarding JDN's application. (Stip. 9.) Mr. O'Reilly met with Conservation District personnel on a number of occasions. (T. 396.)

38. On February 16, 1999, the Conservation District recommended approval of JDN's NPDES permit application to the Department. (Stip. 10.)

39. On July 26, 1999, the Department issued NPDES Permit No. PAS10Q157 (the "Permit") to JDN, which authorized the discharge of storm water from construction activities at the Site. (Stip. 15.)

40. The Permit and the authorization to discharge that it entailed commenced on July 26, 1999 and it will expire on July 26, 2004. (A. Ex. 6.) However, the permit will be terminated sooner if construction activities are completed and permanent stabilization of the Site is attained prior to the expiration date. (T. 150; A. Ex. 6.)

41. The Site was used as a cultivated farm field prior to development. (P. Ex. 13.)

42. A natural drainage swale ran through the middle of the Site prior to development. (T. 435.) Runoff originating upslope of and on the Site collected in the swale and discharged at an area on the southeast corner of the site, flowed across a corner of an adjacent golf course, and then flowed onto property now owned by the local school district. (T. 439.)

43. To the extent that there was a preexisting sinkhole on the site, little or no water from the Site or from upslope of the Site flowed into that sinkhole. Filling in that presumed sinkhole will have no discernable effect on the discharge from the Site during construction activities. (T. 205, 308-312, 469; A. Ex. 5.)

44. The general direction of storm water flow associated with the Site is the same

during construction activities as it was on the farm field, except that it is collected, controlled, and treated by several BMPs. (T. 438-439; Commonwealth's Exhibit ["C. Ex."] 1.)

45. The Permit provides that upslope flow that would have passed across the Site is diverted around the perimeter of the Site during construction activities by means of a diversion swale with velocity controls. The object of the swale is to prevent nonimpacted upslope waters from contributing to erosion on the Site while it is disturbed. (T. 435-436, 439-440, 483-484, 503.)

46. The Site has been designed to ensure that the controlled storm water runoff originating upslope from the Site will not cause excessive erosion or sedimentation. (T. 378, 386-387.)

47. The permit requires the installation of numerous on-site BMPs designed to restrict the discharge of sediment from the Site. (T. 165-166; A. Ex. 6; P. Ex. 21; C. Ex. 1.)

48. The on-site BMPs include siltation fencing, stabilized construction entrances, numerous swales and ditches, sediment basins, a stilling basin, a level spreader, and a vegetative filter strip. (T. 184, 252, 282-283; A. Ex. 5; P. Ex. 13; C. Ex. 1.)

49. The permitted BMPs are adequately designed to control and prevent excess sedimentation from discharging from the Site. (T. 219, 307, 440, 478, 482, 485.)

50. JDN properly designed construction activities and sequencing of the project in such a way as to minimize the threat of a sediment-laden discharge from the Site. (T. 435-436; A. Ex. 5.)

51. The Site has been adequately designed to ensure that construction activities on the Site conducted in accordance with the permitted BMPs will be unlikely to result in actual or potential pollution caused by waters leaving the Site. (T. 368-370, 434-436.)

52. The Department and the Conservation District (hereinafter collectively referred to as the Department unless otherwise noted) also evaluated an area within approximately 110 feet downslope of the Site's discharge point to ensure that it is resistant to erosion and will not itself result in excess sedimentation of receiving waters. (T. 221-223, 503.)

53. The permitted discharge exits the Site at the same general area as preconstruction flow, crosses a golf course, enters a drainage swale on the local school's property, flows underneath a road, flows across a farmer's field, under or over another road (depending upon how much flow is involved), through a grassy area, and into the Little Lehigh Creek. (T. 153, 240-242, 282-283, 485-488, 490; C. Ex. 1.)

54. The Site discharges directly to an area that has historically carried storm water runoff from the Site, and which constitutes a preexisting, natural waterway. (T. 438-439.)

55. There is no indication that areas downslope of JDN's discharge are prone to accelerated erosion or will cause excess sedimentation of receiving waters. (T. 223, 482, 504; A. Ex. 5; P. Ex. 9, 13.)

56. It would not have been preferable to conduct storm water discharges from the Site via a pipe or swale the entire distance to the Little Lehigh Creek. Doing so would have been more likely to have had an adverse impact on the water quality of the stream than allowing diffuse flow over a wider area. A lengthy pipe or swale would have concentrated flow, reduced infiltration, and increased the velocity of the discharge, all to the detriment of the stream. (T. 475-477.)

57. The velocity and rate of storm water runoff will not be greater during development of the Site than it was before development of the Site. (T. 267, 275, 287, 468.) There is no indication that the velocity of the discharge will be unacceptably high. (T. 377.)



58. The volume of storm water runoff from the Site will be somewhat larger during development than prior to development, but not enough to have a significant impact. (T. 318.)

59. The Department did not specifically consider the quality of water discharged from the Site except for its sediment content. (T. 377.)

60. Designation of a stream such as the Little Lehigh Creek as high quality means that there may be no degradation of existing quality unless a permit applicant demonstrates that there is a social or economic justification for that degradation. (T. 67.)

61. In reviewing applications for permits for storm water discharges associated with construction projects, the Department assumes that no degradation of receiving waters will occur so long as BMPs are properly designed, installed, and maintained. (T. 71.)

62. The Department did not require a socio-economic justification ("SEJ") for the JDN development before issuing the Permit. (T. 140.)

63. The Department did not require an SEJ because it concluded that there would be no degradation of the receiving stream so long as JDN complied with its permit. (T. 71, 140.) No SEJ is required if there will be no reduction in the existing water quality. (T. 143-144.)

64. There is no indication that the permitted discharge from the Site will have an adverse impact on the water quality of the Little Lehigh Creek. (T. 475, 482, 485.)

65. The permitted discharge from the Site will have no adverse impact on a drinking water facility approximately eight to ten miles downstream from the Site on the Lehigh River. (T. 481-482.)

66. JDN's permit application did not contain a Preparedness, Prevention and Contingency Plan ("PPC Plan"). (Stip. 16.)

67. A PPC Plan is a document that describes how an entity will respond to an

environmental emergency (e.g., a spill). (T. 58-60, 432; A. Ex. 9.)

68. A design engineer involved in the preparation of the E&S control plan will not normally be in the best position to prepare a PPC Plan. Rather, the site contractor, often selected at a later time, is in the best position to prepare a PPC Plan, because it is the contractor who will be able to address what potential hazards could be presented and then dealt with in the course of actual site construction activities. (T. 432-434, 470-471, 474-475.)

69. The Department does not require that a PPC Plan be prepared prior to the issuance of a permit. (T. 202.) However, the permit by its terms states that the permittee must prepare a PPC Plan if the potential exists for accidental pollution. (A. Ex. 6.) A PPC Plan need not be submitted to the Department for approval. (T. 243; A. Ex. 9.)

70. JDN required its site contractor to prepare and maintain a PPC Plan for the project. (A. Ex. 4; P. Ex. 18, 19.)

71. The Department does not require an applicant for a permit for storm water discharges associated with construction activities to provide a compliance history. (T. 64; A. Ex. 2, 3.)

72. The Department investigated JDN's compliance history as part of its review of the JDN's permit application. (A. Ex. 5.) The Department used a shared data base that listed compliance and enforcement actions initiated by the Department's regional offices and county conservation districts. (T. 121, 138, 232, 246, 498-501.) The compliance and enforcement actions were limited to matters relating to erosion and sediment control, NPDES construction sites, and water obstructions and encroachments permits. (T. 120, 499.) The Department no longer uses that system. (T. 500-501.)

73. The Department's investigation of JDN prior to permit issuance did not yield any

compliance history information. (T. 500.)

74. The Department rechecked JDN's compliance history after permit issuance using a subsequently developed, more advanced data base system known as the Environmental Facility Application Compliance Tracking System, or "eFACTS." (T. 118-119, 246-247.)

75. The Department's follow-up investigation revealed that JDN had received a notice of violation (NOV) for air quality violations that occurred at a site in Beaver County. (T. 138-139, 159, 246-249.)

76. The Department would not have withheld issuance of the Permit because of the violations uncovered by the follow-up investigation even if those violations had been uncovered prior to the Permit's issuance. (T. 157.)

77. JDN's Beaver County NOV resulted from a project that required demolition of seven residential properties, some with asbestos-containing materials in them. (T. 449.)

78. According to JDN's witness, JDN made provisions to have the asbestos removed. Asbestos was in fact removed in one of the houses. (T. 449-450.) JDN gave the local fire company approval to burn the house where asbestos had been removed in a training exercise. The fire company burned that house, but without approval also started to burn a second house. When the mistake was caught, the second house was bulldozed to stop the fire. Asbestos had not at that point been removed from the second house. JDN and the site contractor received an NOV for the demolition of the second house. (T. 451-452.)

79. The notice of violation itself lists several air quality violations associated with the demolition of the residential properties, including six counts of failure to notify of demolition, two counts of failing to remove asbestos-containing materials before thermal demolition, failure to take reasonable actions to prevent particulate matter from becoming airborne, and others. (A.

Ex. 10.)

80. The Department did not assess a penalty against JDN for the Beaver County violations. (T. 160, 454.)

81. The Department did not extensively investigate Wal-Mart's compliance history in connection with JDN's permit application because Wal-Mart is neither the owner nor the developer of the Site. (T. 122; A. Ex. 5.)

82. Mr. O'Reilly's investigation of Wal-Mart's compliance history revealed a series of inspection reports, a Departmental letter, and a response thereto that related to a Wal-Mart development in Cranberry Township, Venango County that was being built by copermittees Miles Developing and Contracting, Inc. and Cranberry Development Group, L.P. (Wal-Mart was not a permittee.) (T. 399; A. Ex. 11.)

83. The Venango County documents described various deficiencies with erosion and sedimentation controls. They did not include any evidence that notices of violation, orders, or penalty assessments were issued. (A. Ex. 11.)

84. The Department has directed JDN to make some repairs at the Site since construction activities began, such as repair silt fences and install additional rock filters and temporary matting. (T. 296-299.)

85. There is no record evidence that excess sediment has been discharged from the Site. (T. 315.)

86. A substantial amount of site development, including much of the earthmoving activity, had been completed at the Site at the time of the hearing. (T. 322.)

87. Administrative Law Judge Labuskes conducted a site view with all parties in attendance on December 21, 2000.

## DISCUSSION

Our responsibility in this appeal is to make *de novo* determination of whether JDN should have been issued an NPDES permit. *Warren Sand & Gravel, Inc. v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975). “De novo review involves full consideration of the case anew. The [EHB], as a reviewing body, is substituted for the prior decision maker, DER, and redecides the case.” *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991). We assess whether the issuance of the permit is consistent with the law and is otherwise appropriate. *Cf. Thomas F. Wagner, Inc. v. DEP*, EHB Docket No. 98-184 MG (Adjudication issued August 29, 2000) (review of permit suspension). As the party challenging the permit issuance, Mr. O’Reilly bears the burden of proving by a preponderance of the evidence that issuing a permit to JDN was an error of law or unreasonable and inappropriate. 25 Pa. Code § 1021.101(c)(2).

Mr. O’Reilly’s challenge may be broken into three parts: He first argues that the permit should not have been issued because development of the Site will harm the Little Lehigh Creek. His second argument is that the permit should not have been issued because JDN and/or Wal-Mart’s compliance histories demonstrate that they are unable and unwilling to comply with the law. Thirdly, he argues that the permit should be revoked and remanded to the Department for further consideration because the Department made various regulatory errors.

### A. Harm to the Little Lehigh Creek

The overriding purpose of NPDES permits is to ensure that pollutants in discharges are controlled in the interest of protecting the quality of receiving streams. 25 Pa. Code § 92.3. It would not be practical for any given permit to contain limitations on every conceivable pollutant known to man. Each permit must focus upon pollutants that are likely to be contained in the

discharge considering the nature of the activity that is involved. The regulatory agencies study each discharging activity either as a class or individually to assess what pollutants will typically be discharged by that activity, and permits for discharges associated with that activity will contain limitations on the discharge of those pollutants. *See generally* 25 Pa. Code § 92.31 (effluent standards).

The pollutant of primary concern for construction projects is sediment. 25 Pa. Code § 102.2. On a large project, hundreds or even millions of cubic yards of earthen materials are disturbed. When they are disturbed, they are exposed to the elements. When disturbed earthen materials are exposed to the elements without the protection normally afforded by vegetative cover or pavement, they are prone to wash away, or erode, at a much greater rate than they would when protected. Unless precautions are taken, these eroded earthen materials can then end up as sediment in the waters of the Commonwealth. This excess sedimentation has a deleterious effect on Pennsylvania's streams.

In order to control the discharge of sediment while earthen materials are exposed during construction projects, federal law requires that runoff from construction activity be treated as a point source requiring an NPDES permit. 40 C.F.R. § 122.26; *Valley Creek Coalition v. DEP*, 1999 EHB 935, 949. *See also* 35 P.S. § 691.402 (Department may require permits for activities that create a danger of water pollution). The permits are designed almost exclusively to control the discharge of sediment because that is what has proven to be the potential pollutant at construction sites. *See* 25 Pa. Code Chapter 102 (program is designed to minimize the potential for accelerated erosion and sedimentation). The permits are not specifically designed to control the discharge of any pollutants not associated with sediment (beyond ensuring that spills are managed). Thus, Mr. O'Reilly's intimation that the Permit should have contained limits for

pollutants other than sediment simply has no basis in fact or law. Mr. O'Reilly has not shown that there is anything unique to JDN's construction project or its effect on the receiving stream that would justify the imposition of special permit limitations.

Similarly, because it is the earthmoving activity that causes the potential for severe erosion and sedimentation, a permit is required to regulate that activity. 25 Pa. Code § 102.31. Once the activity is completed, in the sense that the site is permanently stabilized for long-term use, the reason for requiring a permit to control discharge during construction no longer exists. Thus, unlike many NPDES permits, such as a permit for a discharge from a factory that may operate for decades, NPDES permits for storm water discharges associated with construction activities are only in place for a relatively short time.

Of course, problems can be caused by storm water flow wholly apart from sediment loading, and they may occur over the long term. But those problems are addressed by storm water management programs primarily created and administered at the local level. *See* Section 13 of the Storm Water Management Act, 32 P.S. § 680.13 (developers of land who may affect storm water runoff characteristics shall implement measures consistent with the applicable watershed storm water plan to prevent harm). Storm water management concerns exist before, during, and after a construction project. *Id.* As long as there is rain, storm water must be managed. In contrast, the NPDES program is only concerned with the period of time between the start of earthmoving and when the site is permanently stabilized.

On another related front, site runoff may in some cases contain pollutants of concern aside from sediment after construction is completed. For example, a given industrial sector may tend to conduct operations or store materials outside where they are exposed to rain. The rain may pick up pollutants and discharge them to receiving waters. Therefore, certain industrial

classifications have been designated that must obtain long-term NPDES permits for storm water discharges. 40 C.F.R. Part 122. Those permits are intended to address pollutants of concern associated with the industrial, as opposed to construction, activity. 40 C.F.R. § 122.26(b)(14). Excess sedimentation is not normally the primary concern.

Mr. O'Reilly has appealed the NPDES permit issued to JDN for discharges associated with construction activity. The focus of the subject permit and, therefore, this appeal, is sediment generated during construction activity. There is no requirement for a long-term NPDES permit for runoff from a retail complex under current regulations, so that type of permit is not implicated here. *Id.* Accordingly, we are not concerned with questions related to long-term storm water management in Lower Macungie Township regulated pursuant to local ordinance.

It is true that JDN's permit incorporates applicable requirements of storm water management plans created pursuant to local ordinance (A. Ex. 6), but again, those requirements are only relevant in this appeal during the life of the construction activities. Thus, Mr. O'Reilly's extensive effort to unfavorably contrast storm water runoff from the Site "before and after construction" (e.g. Post-Hearing Brief, p. 71) is entirely misplaced. *See Community College of Delaware County v. Fox*, 342 A.2d 468, 479 (Pa. Cmwlth. 1975) (pollution regulated under the Clean Streams Law includes "siltation *during the construction process*." (emphasis added)).

We did not hold otherwise in *Valley Creek Coalition v. DEP*, 1999 EHB 935, a case referenced by Mr. O'Reilly. In that case, we denied the Department's invitation, made at the summary judgment stage, to hold as a matter of law that it can **never** be appropriate to consider post-construction effects of a development project in the context of a permit for construction activities. 1999 EHB at 948, 950. We simply left open that possibility for further consideration after development of a factual record and full legal briefing. The appeal subsequently settled.



The overriding purpose of the permit at issue here is to regulate and control pollution **during** construction activity. Although we are still not willing to hold unequivocally that it can under no circumstances ever be appropriate to consider post-construction (i.e. post-permanent stabilization) effects in reviewing a construction permit application, we do hold that no such post-construction effects are relevant in this appeal.

It is not difficult to understand why the regulatory program directed at controlling sedimentation resulting from construction and the regulatory program directed at long-term storm water management are easily confused. There is a substantial factual and legal overlap between the two programs. Indeed, as previously noted, the form NPDES permit used in this case incorporates the local storm water management ordinance during the life of the construction. Many of the same controls used to control sedimentation during construction will also be used to control storm water on a permanent basis. "Sediment basins" frequently become "storm water management ponds" after construction. It would be the unwise developer who would not try to combine short and long-term controls. But despite the overlap, the programs are separate and it is important to treat them as such.

One example of Mr. O'Reilly's misplaced effort is the evidence that he presented regarding an alleged sinkhole on the Site. Although we are far from convinced that such a sinkhole existed (F.F. 43), even if we assume that it did, Mr. O'Reilly's concern is that paving over the sinkhole will "result in an actual post-construction stormwater flow higher than the actual preconstruction flow." (Post-Hearing Brief, p. 69.) This point illustrates Mr. O'Reilly's mistaken reliance on post-construction conditions in this appeal.

In fact, it is fair to say that the fundamental concern that pervades Mr. O'Reilly's appeal is his belief that the developed Wal-Mart site will generate more runoff (and, thus, cause more

harm to the stream) than the farm field that preceded it. One will search the brief almost entirely in vain for argument that the disturbance of the Site during construction activity will cause any harm. To the contrary, one of the proposed findings of fact in Mr. O'Reilly's post-hearing brief is very telling: "The level spreader in combination with the vegetative filter strip at the southern end of the project and a reduction in the peak flow rates from the earth disturbance activity will not result in accelerated erosion or discharge of sediment from the construction activity." (Post-Hearing Brief, p. 32.)

We could almost end our analysis there. But we recognize that Mr. O'Reilly has proceeded *pro se* throughout most of the course of this appeal,<sup>1</sup> and we are, therefore, inclined to read his arguments liberally in the interest of fairness. Mr. O'Reilly does allude to construction activities at other places in his brief. Accordingly, we will interpret his arguments to relate to the appropriate period of time: the life of earthmoving activities at the site, i.e., the life of the permit under appeal.<sup>2</sup>

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<sup>1</sup> Mr. O'Reilly represented himself until shortly before the hearing. Although counsel has entered an appearance on his behalf and represented him at the hearing, Mr. O'Reilly prepared his own post-hearing brief. JDN complained that these shifting responsibilities have placed it in a difficult position, and it asks us in its brief to disregard future filings by Mr. O'Reilly's attorney. While admittedly irregular, we discern no prejudice that has been suffered by JDN as a result of Mr. O'Reilly's on-again off-again representation.

<sup>2</sup> JDN and the Department have made a similar analytical error by arguing that the discharge from the Site during construction activities will be the same as the discharge under preexisting conditions. (E.g., A. Ex. 5; P. Ex. 13.) This comparison would have more to do with assessing compliance with the local storm water management ordinance than determining whether an NPDES permit should issue. The comparison is not the final standard by which compliance is measured, and the determination is not immediately relevant, particularly when it is made without consideration of what the preexisting conditions were. Thus, a developer would not be excused from minimizing sedimentation because preexisting conditions were such that massive amounts of sediment were flowing to the stream from the site. Predevelopment conditions may have some evidentiary and site planning value, but they are not directly relevant or controlling here. The developer's duty is to minimize excess sedimentation during construction, regardless of pre-development conditions. Although the Department has made the (footnote continued next page)

There are two geographical components to Mr. O'Reilly's challenge: The condition of the permitted discharge as it leaves the Site, which is a function of JDN's on-site activities and the BMPs, and the effect the discharge will have **after** it leaves the Site until the point it reaches the receiving stream. The first component would usually be the sole focus of an NPDES permit appeal, but the second component is clearly implicated in the context of this construction-activities NPDES permit.

Mr. O'Reilly has placed very little emphasis on the Site itself. Indeed, the concession quoted above all but eliminates the on-site conditions as an area of concern. The E&S Plan for the Site was not put into evidence. Had Mr. O'Reilly been concerned with on-site development, he would have needed to show that the Department erred in concluding that the BMPs would sufficiently minimize excess sedimentation. In that site development was well underway by the time of the hearing, and, in fact, most of the earthmoving activity appeared to have been completed, evidence of actual problems could have been helpful, not with regard to whether JDN has complied with the Permit, which is not relevant in this appeal, but with regard to whether the Permit should have been issued in the first instance or needs to be modified now. Instead, Mr. O'Reilly presented no evidence of any actual harm. There was some testimony that the receiving stream's turbidity has increased over the years, but no evidence of any connection between the increased turbidity and the Site development. The absence of any evidence of such pollution despite the near completion of earthmoving is a significant blow to Mr. O'Reilly's effort to prove that the Permit was issued in error.

Mr. O'Reilly alluded to reports of inspections that were conducted during the course of

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statement, our review shows that it did not apply the comparison as the final standard, or use it in lieu of requiring that JDN minimize sedimentation. We discern no error necessitating a remand.

construction, but pointedly, there is no evidence that these inspections revealed any actual or potential pollution. Mr. O'Reilly points out that JDN's engineer testified that the water leaving the Site was "significantly less brown" than the appearance of the water as it was entering the Site. (T. 442.) Mr. O'Reilly argues that "less brown" is still brown, but this one isolated statement taken somewhat out of context is not specific enough to convince us that the Site has been discharging excessive sediment.

Alternatively, and even in the absence of evidence of actual harm, Mr. O'Reilly could have shown through expert testimony or otherwise that the BMPs were inadequate to control sedimentation during construction. O'Reilly failed to present any such credible evidence. Mr. O'Reilly cites the testimony of his expert, Mr. Siegel. Mr. Siegel "expressed concerns" during the application review process regarding the sequencing of construction activities at the Site. He was concerned that improper sequencing could result in difficulties in controlling excess erosion. He was also concerned that cuts and fills of soil at the Site would not balance each other out. (T. 367-371.) The first difficulty with the evidence is that Mr. Siegel never explained whether the concerns expressed in the review process translated into a continuing threat. He never opined that his "concern" amounted to a serious threat of actual or potential pollution. He never testified that Site activities would degrade the stream. In any event, even his vague concerns were adequately rebutted by the testimony of JDN's engineer. (F.F. 50.) Mr. O'Reilly has failed to carry his burden of proving that difficulties associated with sequencing or balancing cut and fill have presented an unacceptable potential for causing pollution, such that the Permit should not have been issued.

Mr. O'Reilly repeatedly argues that the Department "should have evaluated" one unproven hazard, that "no consideration was given" to something else, or the Department

“should not have assumed” that some controls would work. These types of assertions are emblematic of Mr. O’Reilly’s case, but they are simply not enough in *de novo* Board proceedings. Mr. O’Reilly needed to take it one step further and carry his burden of proving that JDN’s permit was issued in error because site development poses an unacceptable risk of harm. This he failed to do.

Rather than address on-site deficiencies, Mr. O’Reilly focused more of his attention in the presentation of his case at the hearing and in his post-hearing brief on the course and effect of the discharge **after** it leaves the Site. His basic concern is that the post-development site will generate more runoff, which will then pick up more sediment after it leaves the Site as it travels along its partially uncontrolled path to the Little Lehigh Creek.

The first fundamental problem, which we have already explained, is that once the Site is developed and permanently stabilized, long-term stormwater management is neither the concern of the Permit nor the proper subject of this appeal. Mr. O’Reilly has never clearly claimed that the Site will generate increased runoff during or as a result of construction activities.

But putting that issue aside, Mr. O’Reilly’s argument raises the question of whether it is appropriate for the Department to consider the effects of a discharge after it leaves the permitted site. The question normally would not arise in an NPDES permit appeal because most permitted discharges are transported directly from a site to a receiving stream. In construction storm water permits, however, the development site might be somewhat removed from the nearest waterway. This appeal involves such a site. After the permitted discharge exits the Site, it travels across a golf course and into a manmade swale on the local school district’s property. It then passes through a culvert under Lower Macungie Road, across a farmer’s field, under or over Spring Creek Road, over a grassy area, and into the Little Lehigh Creek. (F.F. 53.) Mr. O’Reilly’s

primary concern appears to be the farmer's field. (Post-Hearing Brief p. 72.) It is unlikely that the runoff would pick up much sediment on the heavily vegetated golf course property, the manmade swale on school district property, or the grassy area adjacent to the creek.

The Department does not deny that it is appropriate to consider the effects of a permitted storm water discharge after it leaves a site. The Department, however, limits its review to 150 feet downstream of a site. (T. 222-224.) In this case, the water reenters a manmade swale on school district property after traveling about 110 feet, so the Department looked no further than that. (T. 223-225.)

We agree that it is appropriate to consider the effect of a storm water discharge after it leaves the site. If the purpose of the NPDES permit is to minimize sedimentation of receiving waters, and there is a potential for sediment loading of the discharge after crossing the site line, there is every reason to consider that fact in deciding whether to permit the discharge. Such off-site conditions may influence the appropriate location, volume, rate, and velocity of the permitted discharge, which will, in turn, affect the design of the BMPs.

While it may be appropriate to review the course of a discharge for its first 150 feet of travel as a rule of thumb, we do not believe that such a figure should be applied rigidly and without consideration of site-specific conditions. The further the runoff travels from a site, the more difficult it may be to track it. It will be likely to pick up runoff from other sites as well, making it increasingly difficult to tie responsibility to the construction site. The discharge may be more or less likely to cause erosion with distance, depending on site conditions. But these variables will change from site to site, and the Department would be committing an error if it disregarded them in favor of an arbitrary cutoff regardless of site-specific circumstances.

In this case, the Department looked no further than approximately 110 feet downslope

because that is where the discharge enters the school district's manmade swale. We believe that that was a reasonable decision. After that point, the runoff will not only include discharge from the Site, but other upslope storm water flow as well. It will also pick up an increasing contribution of runoff from downsite sources, such as the golf course and the school district property, making it increasingly difficult and inappropriate to assign any legal responsibility to the Site.

Even if we were to hold for purposes of further analysis that the Department should have extended the scope of its consideration to the entire distance to the creek, we would find that Mr. O'Reilly failed to carry his burden of proving that the downslope course of the discharge would harm the stream. Once the runoff leaves the school district's swale and passes through a culvert, it does travel a significant distance across a farmer's field. (C. Ex. 1.) But to repeat our discussion from above, there was no testimony of any actual harm, despite the fact that most earthmoving activity has been completed at the Site. Nor was there any credible testimony of potential harm. In unrebutted testimony, JDN's expert opined that the relatively flat grassy area between the farmer's field and the creek allows sediment to settle out before the runoff enters the stream. (T. 477, 486, 490-491.) Mr. O'Reilly's claim that the farmer's field will contribute unacceptable amounts of sediment to the runoff is a matter of pure speculation with no record support.

Mr. O'Reilly's expert, Mr. Siegel, testified that the Department should have required JDN to install a swale or pipe to transport the discharge from the Site the entire distance to the stream. But Mr. Siegel's argument was based on an interpretation of a now defunct regulation requiring sediment basins to discharge to "natural waterways." (T. 381.) (This issue is discussed below.) Mr. Siegel never testified that building such a conveyance would have

reduced the likelihood of stream degradation. In contrast, JDN's expert, Dr. Browne, testified convincingly and without rebuttal that building such a conveyance would have seriously **increased** the risk of harm to the stream. (F.F. 56.)

Finally, O'Reilly complains that the Department should have required JDN to prepare a social or economic justification (SEJ) before allowing it to discharge to high quality (HQ) waters such as the Little Lehigh Creek. An SEJ is only required, however, where a discharge will result in a reduction of the water quality of the HQ waters. 25 Pa. Code § 93.4c(b)(1)(iii). The focus of the program for issuing construction storm water permits is to insist on BMPs that will prevent any degradation. A permit will not be issued unless the Department is satisfied that there will be no adverse impact on receiving waters. An SEJ never comes into play because no adverse impact is allowed. An SEJ is only required if some impact is to be allowed, but it must be justified.<sup>3</sup>

## **B. Compliance History Issues**

### **1. JDN's Compliance History**

Section 609 of the Clean Streams Law, 35 P.S. § 691.609, provides that the Department should not issue a permit to a person who has shown a lack of ability or intent to

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<sup>3</sup> Mr. O'Reilly also asserts that the Department "gave no consideration to" permitting the off-site discharge to flow "over a sewer line and manholes." (Post-Hearing Brief p. 75.) Mr. O'Reilly gives no further explanation of why this assertion, even if true, should be significant to us in our review. Mr. O'Reilly also states that the Little Lehigh Creek flows next to the Lehigh Parkway Heritage Trail downstream of the point where the Site discharge enters the Creek. He also notes that portions of the Little Lehigh Creek watershed are included on the state's Section 303(d) list of impaired waters. He does not explain the relevance of these facts, and none is readily apparent. If Mr. O'Reilly is implying that storm water permits should not be issued for discharges to this creek, we reject the argument as having no legal basis.



comply with the law.<sup>4</sup> It is now long-accepted practice that one indication of an entity's ability and intent to comply with the law is its compliance history. This does not mean that an entity must have a perfect record to obtain permits in the Commonwealth. It simply means that an entity's past can be one indicator of its future.

Assuming there are no ongoing, unaddressed violations (which may act as a permit block), there are no bright lines of demarcation to be applied in reviewing a compliance history. Instead, the Department and this Board must consider the totality of the party's history, in combination with other possibly relevant factors, to assess whether the party's conduct shows

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<sup>4</sup> Section 609 reads as follows:

The department shall not issue any permit . . . if it finds, after investigation and an opportunity for informal hearing that:

(1) the applicant has failed and continues to fail to comply with any provisions of law which are in any way connected with or related to the regulation of mining or of any relevant rule, regulation, permit or order of the department, or of any of the acts repealed or amended hereby; or

(2) the applicant has shown a lack of ability or intention to comply with such laws as indicated by past or continuing violations. Any person, partnership, association or corporation which has engaged in unlawful conduct as defined in section 611 or which has a partner, associate, officer, parent corporation, subsidiary corporation, contractor or subcontractor which has engaged in such unlawful conduct shall be denied any permit required by this act unless the permit application demonstrates that the unlawful conduct is being corrected to the satisfaction of the department. Persons other than the applicant, including independent subcontractors, who are proposed to operate under the permit shall be listed in the application and those persons shall be subject to approval by the department prior to their engaging in surface mining operations and such persons shall be jointly and severally liable with the permittee for violations of this act with which permittee is charged and in which such persons participate.

that it “cannot be trusted with a discharge permit.” *Belitskus v. DEP*, 1998 EHB 846, 867.

Unlike some of its other programs, the Department did not appear to have a particularly well defined system in place for reviewing the compliance history of applicants for water quality permits at the time JDN’s permit was issued. Mr. O’Reilly contends that this fact alone justifies a remand in this appeal. Mr. O’Reilly cites the somewhat *ad hoc* nature of the investigation that preceded the permit issuance, whereby the Department used a shared e-mail system (F.F. 72), and the fact that a more thorough check was not completed until after the permit was issued (F.F. 74-75).

Our function in this proceeding is not to critique the Department’s procedures generally or as employed in this case. While an inadequate investigatory process may be evidence of a potentially dispositive finding, it is not dispositive in and of itself. As we held in *Belitskus*, 1998 EHB at 864, it is generally not enough for a third-party appellant to simply argue that there has been an inadequate compliance history investigation and expect a remand. Rather, the appellant must convince this Board acting in its *de novo* capacity that, based on the record evidence developed in the Board proceeding, the permittee’s compliance history is in fact enough of a concern to justify vacating the permit. In other words, a remand for further review of a compliance history will almost never be appropriate, particularly where the Department has conducted some investigation but that investigation is alleged to have been inadequate. Any party who rests on the fact of an inadequate investigation alone does so at its almost certain peril.<sup>5</sup>

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<sup>5</sup> Nor are we persuaded that the legal authorities cited in Mr. O’Reilly’s brief, which include the state and federal Administrative Procedure Acts, 2 Pa.C.S.A. §§ 501-555 and 42 U.S.C. §§ 561-596, as well as the Pennsylvania and United States Constitutions, require the Department to have in place a “systematic process” for reviewing compliance histories as part of its application review process. The *(footnote continued on next page)*

Mr. O'Reilly has failed to show that JDN's compliance history is in fact of enough concern for us to take action regarding its permit. The only violations of record are set forth in a notice of violation that JDN received for air quality violations for demolition work associated with a construction project in Beaver County. (F.F. 77-79.) The violations did not give rise to civil penalties or any other follow-up enforcement activity. (F.F. 80.) Although JDN presented a limited explanation at the hearing of the circumstances surrounding the violations, we nevertheless are not able to conclude based upon the circumstances made known, including the fact that a local fire department was at least partially to blame for one of the violations, the fact that only one set of related violations occurred, the apparently short duration of the violations, the absence of follow-up enforcement activity, and the absence of more than short-term environmental harm, that the Department acted improperly in issuing JDN a permit, notwithstanding its compliance history. The incident in question simply does not rise to the level of justifying a vacation of JDN's permit.

## **2. Wal-Mart's Compliance History and the Wal-Mart Consent Order**

Mr. O'Reilly argues that the Department should have investigated the compliance history of Wal-Mart before issuing the permit to JDN. Although JDN was the owner and developer of the Site, O'Reilly argues that Wal-Mart is the real party in interest because the project was being developed for Wal-Mart's use pursuant to its specifications, including specifications for storm water controls, and under its scrutiny and control. He suggests that JDN has built over 150 stores for Wal-Mart, and that JDN's role as site owner and developer, and, therefore, permittee, is an artifice designed solely to shield Wal-Mart from liability. For these reasons, the

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procedural-rights authorities cited by Mr. O'Reilly govern the review of final agency actions, not the process leading up to the final actions. Again, while the lack of a good system may cast doubt on a result, our concern is with the validity of the result.

Department should have ascertained whether **Wal-Mart** lacked the ability or intent to comply with the law before issuing the permit.

JDN and the Department respond that the compliance history of a mere tenant, which is that Wal-Mart is in this matter, is irrelevant. The Department must ensure that the site owner and/or developer obtain a permit, and its duty is limited to checking their history alone, not the history of every intended occupant of the finished site.

Mr. O'Reilly presents an interesting argument with potentially far-reaching implications. We are not favorably disposed toward the Department's absolutist response that it neither can nor should under any circumstances concern itself with the history of a non-permittee for a construction project. If the Department were correct, the Department could not look past even a mere ruse where, for example, a shell corporation or an individual who is judgment proof assumes apparent responsibility for site development but the project is completely under the strict direction and control of a separate real party in interest. If a party can be shown to be in actual control of site development, it might well be appropriate to insist that that party be made a permittee, which subjects its compliance history to review.

Mr. O'Reilly however, has fallen short of proving by a preponderance of the evidence that Wal-Mart actually controlled site development. We imagine that a contract of some sort between Wal-Mart and JDN might have gone a long way toward resolving the question, but none was produced and there was no testimony of such a contract. Similarly, there was no testimony of actual instances of site control. The Site was developed consistent with Wal-Mart specifications and Wal-Mart was unquestionably in the background at all times, but that evidence alone does not convince us that Wal-Mart was a *de facto* operator.

Even if we assume for purposes of argument that Wal-Mart should have been a permittee

and/or its compliance history should have been investigated, O'Reilly has failed to carry his burden of proving that Wal-Mart's compliance history should cause us to vacate JDN's permit. Mr. O'Reilly refers to two sites. The first site is near Honesdale in Wayne County. That project has actually been the subject of detailed findings by the Board in *Leeward Construction Company v. DEP*, EHB Docket No. 98-048-L (Adjudication issued June 13, 2000). Wal-Mart entered into a consent order and agreement regarding conditions at that site. (F.F. 19.) There was no proof, however, that Wal-Mart is out of compliance with that consent order and agreement.

The second site was a development project in Cranberry Township, Venango County. At that site, like the JDN Site, Wal-Mart was not actually a permittee, and there is no evidence that it was a *de facto* operator. If we assume for purposes of argument that those circumstances are relevant, they do not support Mr. O'Reilly's claim. A series of inspection reports and related letters indicates that Wal-Mart's contractor was directed to make improvements to E&S controls at that project, but it also indicates that the improvements were made in a timely manner. (A. Ex. 11.) There is no evidence that any enforcement action was taken.

Taking these two sites together, even if Wal-Mart's history were relevant, we would not be able to conclude that it has demonstrated such a lack of intent or ability to comply with the law that the JDN permit should be vacated. The lack of enforcement activity and the responsiveness of the contractor to inadequacies pointed out at the Venango County site are significant. Although there were serious violations at the Honesdale site, the violations have been addressed in a consent order, and there is no evidence of violations of that consent order.

In a related argument, Mr. O'Reilly argues that the Department did not do enough at the JDN site to enforce the Wal-Mart consent order from the Honesdale site. In fact, the record

shows that the special conditions in the consent order regarding mandatory environmental protection contract provisions were passed on to JDN and implemented at the Site. (F.F. 24-25.) Although we do not question that the Department had the authority to include a special condition in JDN's permit ensuring compliance with the Wal-Mart consent order, the Department did not err or act unreasonably in failing to do so. The lack of such a condition does not limit the Department's enforcement options against JDN for any problems that emerge at the Site, or against Wal-Mart for failing to comply with the consent order.

### **C. Other Regulatory Violations**

#### **1. Absence of a "Natural Waterway"**

Mr. O'Reilly argues that the regulation in effect at the time JDN's permit was issued required that discharges from sedimentation basins be to a "natural waterway." The regulation in question, 25 Pa. Code § 102.23(d)(4), read: "The discharge from a sedimentation basin shall be to a natural waterway." Mr. O'Reilly argues that the Permit is defective because the Site's sedimentation basins do not discharge to a natural waterway.

Unfortunately, "waterway" is not defined in the regulations. Further, the issue is of somewhat limited ongoing general relevance because the regulation has since been deleted.

Although the term "waterway" is not defined in the regulations, the term "water course" is. That term is defined in the regulations as "[a] channel or conveyance of surface water having defined bed and banks...." 25 Pa. Code § 105.1. "Waterway" is defined in the dictionary as "a way or channel by which water may pass or escape; *often*: a made and often grassed channel that is provided to carry storm water away from a point where it is likely to cause erosion." Webster's 3d New International Dictionary (unabridged) (1986). Taking these two clues together, we take the term waterway to mean a depression in which overland water tends to flow

that does not have a defined bed or banks. *Accord*, General Permit BDWM-GP-9, 25 Pa. Code Chapter 105, Appendix I (“waterway” defined as a “channel that is shaped or graded to required dimensions and established in suitable vegetation or protection for the stable conveyance of surface water runoff which is part of an agricultural operation”).

It just so happens that this description precisely describes the location where the discharge from the basins flows from the Site. (F.F. 54.) The uncontroverted record evidence was that the basins discharge to a natural channel that has been in existence “as long as [one local witness] could remember.” (T. 439.) The Permit is not defective in this respect.

Of course, where basins discharge to a waterway, the Department (and this Board) must exercise heightened caution in ensuring that off-site flow will not cause sedimentation of the receiving stream. For the reasons discussed at length above, we are satisfied that there has been no showing of off-site detriments here.

We take additional comfort in the uncontroverted opinion of Dr. Browne, who testified that the current design is the best approach for protecting the receiving stream, which, after all, is Mr. O’Reilly’s primary concern. (F.F. 51.) Although Mr. O’Reilly’s expert testified that transporting the discharge the entire distance to the stream by way of a swale or a pipe would have been more consistent with the regulations in place at the time, neither he nor Mr. O’Reilly has disputed that doing so would increase the danger to the stream.

## **2. Improper Delegation**

Mr. O’Reilly complains that the Department should not have delegated some shared responsibility for reviewing permit applications for storm water discharges associated with construction activities to the Conservation District, but he cites no authority for the proposition, and there is none of which we are independently aware. We note that such delegation is now

specifically authorized by regulation. 25 Pa. Code § 102.41. We find no merit in Mr. O'Reilly's argument.

### 3. PPC Plan

O'Reilly has placed great stock in the fact that a Pollution, Preparedness, and Contingency (PPC) Plan was not included among the permit application materials as required, Mr. O'Reilly believes, by the regulations. He also contends that the original application was not filled out in such a way as to indicate that a PPC plan would be needed for the project.

The goal of Board proceedings is not to go back through the entire course of permit application procedures to pick out errors that may have been made along the way. Indeed, the very purpose of a deliberative, iterative permit review process is to correct errors and ensure that, in the end, everything has been done correctly. The Board's objective is to determine whether any action needs to be taken regarding the final permit. There will be errors in virtually any permit application review of even modest complexity. If the errors have been corrected, there is no need to dwell upon them. Errors may have been rendered immaterial or moot by subsequent events or even the passage of time. A party who would challenge a permit must show us that errors committed during the application process have some continuing relevance.

We do not accept Mr. O'Reilly's argument that a PPC plan must be prepared before permit issuance. We read nothing in the regulations or permit application instructions that specifically requires plan preparation **prior to** permit issuance. JDN and the Department's argument that it makes more sense for the earthmoving contractor to prepare a plan that addresses the potential hazards of **its** on-site activities is well taken. So long as the PPC plan is in place prior to the commencement of site activities, we see no error.

Even if we were assume that PPC plans must be submitted before permit issuance as Mr.



O'Reilly insists, Mr. O'Reilly cannot prevail. Mr. O'Reilly does not contend that a PPC plan is not currently in place or that the PPC plan that is in place is inadequate. There is no need or basis for a remand so that a PPC plan can be prepared and/or reviewed. There is no practical consequence of Mr. O'Reilly's argument and no meaningful relief we can offer. Mr. O'Reilly's argument that an improper box was checked on the original application form regarding the need for a PPC plan is similarly inconsequential given the reams of correspondence that followed clearly indicating that a PPC plan would be prepared.<sup>6</sup>

#### 4. Signature

Mr. O'Reilly complains that JDN's permit application was not signed by a responsible, knowledgeable corporate official. The record supports Mr. O'Reilly's assertion. John Harris, the JDN officer who signed the application, appeared at the hearing. Mr. Harris did not have any recollection regarding the permit application. Although he testified that he generally discusses documents with knowledgeable corporate employees and agents, he did not remember doing so in this case. (T. 126-127.) In fact, he was not even willing to unequivocally vouch that the signature on the exhibit was his. (T. 124-125.) Mr. Harris is primarily concerned with financial matters, not actual site development. (T. 125.) In response to questions from his own counsel, he speculated that he may have signed the application because the corporate officials who would normally have done so were not immediately available at the time. (T. 135.)

The application on its face provides that, by signing the document, the corporate official certified

under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a

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<sup>6</sup> O'Reilly cites other examples of cases where early permit documents were allegedly incomplete (e.g. no area map; narrative does not describe discharge path; incomplete list of BMPs). None of these alleged deficiencies survived or were left unaddressed at the conclusion of the lengthy application review process. Their early omission is entirely irrelevant at this stage.

system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I certify that all measures described in the attached summation of Best Management Practices (BMPs), including the PPC plan, the E&S plan, other pollution prevention measures being implemented and any other measures or documentation which ensure that water quality standards and effluent limits are attained, have been designed and will be fully implemented to: (1) reduce and prevent pollution on site; (2) ensure that the quantities and rates of pollutants in any stormwater discharge sought to be covered under this permit are eliminated or minimized; and (3) meet the applicable water quality standards and effluent limitations under this NPDES permit. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations and I agree to abide by the terms and conditions of the permit.

(A. Ex. 3.) We are not able to conclude from the record testimony that Mr. Harris was in fact taking the appropriate level of responsibility for submitting the application. Based upon our review of Mr. Harris's testimony taken as a whole, and the absence of any other relevant evidence, Mr. O'Reilly is correct in asserting that the application was not properly signed.

We do not fault the Department for failing to uncover the defective certification at the time of its review. Although Mr. O'Reilly is also correct in pointing out that the Department should have required JDN to fill in the missing printed name and corporate title of the signing official on the application, doing so would have been unlikely to uncover that officer's apparent lack of knowledge, which we view to be the more serious defect. We cannot expect the Department to look past certifications on applications that appear to be legitimate on the face of the document.

Nevertheless, now that the defect has been revealed, we must decide what to do about it. Whether any enforcement action is appropriate is not our decision. In an appeal from a permit

issuance, our review of the permit is not a vehicle for punishment, but a determination of what, if any, changes need to be made to make the permit consistent with the law. We, therefore, reject Mr. O'Reilly's invitation to "terminate the permit for cause."

On this basis we do, however, believe that it is important to correct the defective permit. As of this date, no knowledgeable corporate officer has properly certified the application, which is not necessarily an entirely moot point should future difficulties arise or application inaccuracies be uncovered. Further, we believe that it is important to preserve the integrity of the signatory requirements. Accordingly, we remand the Permit for resubmission of a proper certification pursuant to Part B.1.c(3) (changes in authorization) of the Permit by a responsible, knowledgeable corporate official within ten (10) days.

#### CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this appeal pursuant to Section 7 of the Clean Streams Law, 35 P.S. § 691.7, and Section 4 of the Environmental Hearing Board Act, 35 P.S. §7514.

2. The Department is the agency with the duty and authority to administer and enforce the NPDES permitting program. 35 P.S. § 691.5; 25 Pa. Code §§ 92.1-83.

3. The Board's responsibility in this appeal is to make a *de novo* determination of whether JDN should have been issued an NPDES permit. *Warren Sand & Gravel, Inc. v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975).

4. *De novo* review involves full consideration of the case anew. The Board, as a reviewing body, is substituted for the prior decision maker, DEP, and redecides the case. *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991).

5. The Board assesses whether the issuance of the permit is consistent with the law

and is otherwise appropriate. *Cf. Thomas F. Wagner, Inc. v. DEP*, EHB Docket No. 98-184 MG (Adjudication issued August 29, 2000).

6. Mr. O'Reilly, as a party challenging the issuance of an NPDES permit, bears the burden of proving by a preponderance of the evidence that issuing a permit to JDN constituted an error of law or was unreasonable and inappropriate. 25 Pa. Code §1021.101(c)(2).

7. Runoff from certain construction activity must be treated as a point source requiring an NPDES permit. 40 C.F.R. §122.26; *Valley Creek Coalition v. Department of Environmental Protection* 1999 EHB 935, 949.

8. It is not necessary that JDN's NPDES permit contain limits for pollutants other than sediment. 25 Pa. Code § 102.2.

9. NPDES permits associated with construction activities are normally only concerned with the period of time between the start of earthmoving and when the site is permanently stabilized. *Community College of Delaware County v. Fox*, 342 A.2d 468, 479 Pa. Cmwlth. 1975).

10. There is no requirement under current regulations for a long-term NPDES permit for runoff from a retail complex. 40 C.F.R. Part 122.

11. JDN's duty under current NPDES regulations is to minimize excess sedimentation during construction, regardless of predevelopment conditions. 25 Pa. Code § 102.11.

12. Mr. O'Reilly failed to prove that actual or potential harm would be likely to result from on-site activities.

13. The Department has an obligation, which it met in this case, to consider the downsite impacts of a discharge associated with construction activities to ensure that excess sedimentation will not occur in the receiving stream.

14. A Social or Economic Justification (SEJ) is only required where a discharge will result in a reduction of water quality. 25 Pa. Code §93.4c(b)(1)(iii). This is not such a case.

15. The Department shall not issue a permit to a person who has shown a lack of ability or intent to comply with the law. 35 P.S. §691.609.

16. JDN's compliance history is not enough of a concern to justify vacating the permit.

17. Neither the Pennsylvania Constitution, nor the Administrative Procedure Act, 2 Pa.C.S.A. §§ 501-555, require the Department to have a rigid, written system for reviewing NPDES permit applications.

18. Wal-Mart was not required to apply for an NPDES permit for the Site. The Department was not required to analyze Wal-Mart's compliance history before issuing the Permit.

19. The JDN permitted sedimentation basins discharge to a "natural waterway" within the meaning of 25 Pa. Code § 102.23(d) (deleted January 1, 2000).

20. The Department is authorized to delegate responsibility for reviewing permit applications for storm water discharges associated with construction activities to the Conservation District. *See* 25 Pa. Code §102.41.

21. A Pollution, Preparedness, and Contingency Plan (PPC) is not required to be prepared by the site developer prior to permit issuance.

22. An informed and responsible corporate official must sign a permit application. 25 Pa. Code § 92.23.

COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

PHILIP O'REILLY

v.

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION and JDN DEVELOPMENT  
COMPANY, INC., Permittee

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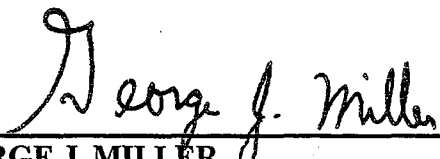
EHB Docket No. 99-166-L

Issued: January 3, 2001

**ORDER**

AND NOW, this 3rd day of January, 2001, Permit No. PAS10Q57 is remanded to the Department with instructions to obtain a properly certified application from JDN Development Company, Inc. within ten (10) days. Failure to do so shall result in a termination of the Permit on the eleventh day. The Department shall notify Mr. O'Reilly and this Board if and when it receives an acceptable new certification, at which point we will mark this appeal closed. Mr. O'Reilly's appeal is in all other respects DISMISSED.

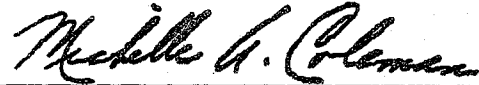
ENVIRONMENTAL HEARING BOARD

  
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GEORGE J. MILLER  
Administrative Law Judge  
Chairman



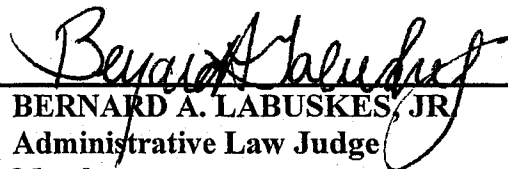
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**THOMAS W. RENWAND**  
Administrative Law Judge  
Member



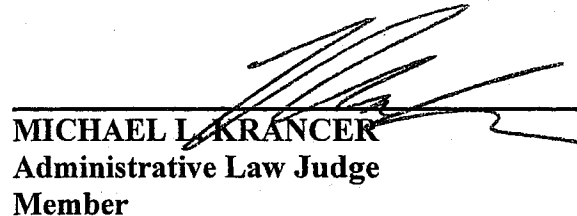
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**MICHELLE A. COLEMAN**  
Administrative Law Judge  
Member



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**BERNARD A. LABUSKES, JR.**  
Administrative Law Judge  
Member



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**MICHAEL L. KRANCER**  
Administrative Law Judge  
Member

**DATED:** January 3, 2001

**c: For the Commonwealth, DEP:**  
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WILLIAM T. PHILLIPY I  
 SECRETARY TO THE BOA

<b>AINJAR TRUST,</b>	:
<b>JOHN O. VARTAN, TRUSTEE</b>	:
	:
<b>v.</b>	<b>: EHB Docket No. 99-248-K</b>
	:
<b>COMMONWEALTH OF PENNSYLVANIA,</b>	:
<b>DEPARTMENT OF ENVIRONMENTAL</b>	:
<b>PROTECTION and SUSQUEHANNA</b>	:
<b>TOWNSHIP and MCNAUGHTON</b>	<b>: Issued: January 5, 2001</b>
<b>COMPANY, INTERVENOR</b>	:

**OPINION AND ORDER ON  
 AINJAR'S MOTION FOR SUMMARY JUDGMENT, DEP'S MOTION TO  
 STRIKE, AND AINJAR'S MOTION TO AMEND**

**By Michael L. Krancer, Administrative Law Judge**

**Synopsis:**

A motion for summary judgment by Appellant argues that an Act 537 Plan revision is unlawful because there was no officially approved Act 537 Plan in the first place. The responses state that this argument was waived because it was not raised in the Notice of Appeal and, in any event, there is a material issue of disputed fact whether there was an underlying official Plan. In addition, DEP filed a Motion to Strike certain paragraphs of the Motion for Summary Judgment as not being supported by the record. Appellant filed a Motion to Amend its Notice of Appeal to specifically add the argument that there was no officially approved Act 537 Plan but which maintains that this argument was fairly within the ambit of the Notice of Appeal. The Board handles all pending



motions in this decision document. The Motion to Strike is denied. The argument that there was no approved Act 537 Plan is within the scope of the Notice of Appeal. Thus, the Motion to Amend is moot. The Motion for Summary Judgment is denied because there is a genuine issue of material fact whether the Township had an underlying officially approved Act 537 Plan. Also, the legal effect in this case, if any, of there not having been an approved underlying Act 537 Plan is still an open question. Thus, Appellant is not entitled to summary judgment.

### **Procedural And Factual Background**

The Ainjar Trust, John Vartan Trustee (Ainjar) initiated this matter on December 13, 1999 by timely filing a notice of appeal with the Board. Ainjar's Notice of Appeal ("Notice" or "Notice of Appeal") challenges the Department of Environmental Protection's (DEP) November 15, 1999 approval of Susquehanna Township's revision to its official sewage facilities plan ("Plan"). See § 5 of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20a (Sewage Facilities Act), 35 P.S. § 750.5.

The Board has issued two previous opinions and orders in this case. The first was issued on January 31, 2000 in which the Board granted McNaughton Company's (McNaughton) Petition To Intervene. See *Ainjar Trust v. DEP*, EHB Docket No. 99-248-K (opinion issued January 31, 2000). McNaughton intends to build a residential development in Susquehanna Township known as Margaret Grove. To proceed with the Margaret Grove development, McNaughton required a revision to Susquehanna

Township's official sewage facilities plan.<sup>1</sup> The Board's second previous opinion and order denied McNaughton's Motion To Dismiss. We held that, although 25 Pa. Code § 1021.51(g)(3) requires a third-party appellant to serve a copy of its Notice of Appeal on the recipient of a government action, the failure of the appellant to effect timely service does not deprive the Board of jurisdiction over the appeal. *Ainjar Trust v. DEP*, EHB Docket No. 99-248-K slip op. at 6-7 (opinion issued April 27, 2000).

Three interrelated motions are now before the Board: Ainjar's Motion For Summary Judgment filed on September 8, 2000; DEP's Motion To Strike certain paragraphs of Ainjar's Motion for Summary Judgment filed on October 6, 2000; and Ainjar's Motion To Amend Appeal filed on November 3, 2000.<sup>2</sup> Ainjar's Motion for Summary Judgment argues that the record demonstrates that there was never an approved Sewage Facilities Plan for Susquehanna Township in the first place so, therefore, as a matter of law, no supposed "revision" could be effective. McNaughton's Response, besides arguing that Ainjar's argument is factually and legally wrong, argues that Ainjar waived the argument because it was not stated as such in the Notice of Appeal. DEP filed a Motion To Strike four paragraphs of Ainjar's Motion because these paragraphs are "not supported by documents in the record before the Board, affidavits or otherwise verified."

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<sup>1</sup> The background of this matter is discussed in more detail in our January 31, 2000 opinion and order granting McNaughton's petition to intervene.

<sup>2</sup> Ainjar's Motion For Summary will be cited as "AMSJ, and its Reply will be cited as "ARSJ". Susquehanna Township's Response to Ainjar's Motion For Summary Judgment will be cited as "STRSJ". DEP's Response to Ainjar's Motion For summary judgment will be cited as "DEPRSJ", and its memorandum of law will be cited as "DEPMLSJ". McNaughton's Response to Ainjar's Motion For summary judgment will be cited as "MRSJ" and its memorandum of law will be cited as "MMLSJ". DEP's Motion To Strike will be cited as "DEPMS".

(DEPMS ¶ 2) Later, Ainjar filed a Motion to allow the amendment of its Notice of Appeal so as to specifically include the allegation that since Susquehanna Township never had an approved Act 537 Plan in the first place, an amendment to a non-existent plan is unlawful. Ainjar, in that Motion, vigorously maintained that the issue was fairly encompassed in its Notice of Appeal but said that the Motion was, in essence, a protective one in response to the waiver argument asserted against it by McNaughton in McNaughton's response to Ainjar's Motion for Summary Judgment.

By Order dated November 7, 2000, the Board, in essence, consolidated all of these motions for disposition at the same time. It was ordered that all response briefs on Appellant's Motion to Amend be filed by November 17, 2000. Briefing on this series of motions was thus closed on that date.

We will discuss DEP's Motion To Strike first because its resolution will determine the parameters of Ainjar's Summary Judgment Motion. Then, we will discuss Ainjar's Motion To Amend and Motion For Summary Judgment together because they are so closely related and they raise virtually the same arguments and issues.

### **Discussion**

#### **1. DEP'S MOTION TO STRIKE**

DEP filed a Motion To Strike paragraphs 7, 9, 10, and 11 of Ainjar's Motion For Summary Judgment alleging that the factual allegations contained in those paragraphs were "not supported by documents in the record before the Board, Affidavits, or otherwise verified." (DEPMS ¶ 2) Paragraph 7 of Ainjar's Motion reads: "Susquehanna Township has been unable to produce a copy of an official plan though a copy of such plan has been requested in discovery directed to Susquehanna Township". Paragraph 9

reads: "Subsequent to [his] deposition, Township Manager Myers acknowledged that the document produced was not an official Sewage Facilities Act Plan." Paragraph 10 reads: "Township Manager Myers, off the record, produced another document which is also not a Sewage Facilities Act Plan, a 1967 Tri-County (Dauphin, Cumberland and Perry) sewage plan." Paragraph 11 reads: "To date, Susquehanna Township has been unable to produce a copy of the plan, and no copy of the plan exists in the Department of Environmental Protection records." None of the parties filed a response to DEP's Motion To Strike.

Recently, in *Harriman Coal Corporation*, the Board issued an opinion and order on a motion to strike. *Harriman Coal Corporation v. DEP*, EHB Docket No. 98-235-C slip op. at 11 (opinion issued November 30, 2000). In *Harriman* the Board held:

We also decline to strike the individual paragraphs that Appellant points to in the Department's response. Striking individual paragraphs of the response for inadequate support will not affect the outcome of Appellant's motion in any way. To prevail against a properly supported motion for summary judgment, the non-moving party must adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that the trier of fact could possibly enter judgment in his favor after a hearing. Pa. R.C.P. 1035.2; *Ertel v. Patriot News Co.*, 674 A.2d 1038 (Pa. 1996). Thus, to the extent that the factual averments in the Department's response are not properly supported, they cannot thwart Appellant's motion for summary judgment—whether we strike those averments or not.

*Id.*

The wisdom of the *Harriman* holding applies here despite some factual dissimilarity between the *Harriman* case and the instant case. In *Harriman*, the movant filed a motion to strike portions of a non-moving-party's response, and in the instant case,

a non-moving-party has filed a motion to strike segments of the movant's motion for summary judgment. Nonetheless, Ainjar, as the movant, has an evidentiary burden to meet as did the non-moving-party in *Harriman*. As the summary judgment movant, Ainjar must show that "there is no genuine issue of material fact as to a necessary element of the cause of action . . . which could be established by additional discovery or expert report." Pa. R.C.P. 1035.2. The Board will thus judge Ainjar's motion to determine if a genuine issue of material fact exists and if there is not whether it is entitled to judgment as a matter of law. If Ainjar did not properly support paragraphs 7, 9, 10, and 11 or these paragraphs do not contribute to meeting Ainjar's burden of demonstrating the absence of a genuine issue of material fact, then it is irrelevant whether we strike the paragraphs targeted by DEP's Motion to Strike. Thus, we decline to strike these paragraphs.

While the Motion to Strike is denied, we do take special note that Paragraph 9 specifically references an *off the record* statement made by a deponent *after a deposition had concluded* and that Paragraph 10 specifically references a "production" of a document by the deponent *after his deposition had concluded* and a characterization of his *off the record* "acknowledgment" of a supposed attribute of that document. We do not believe the Pa. R. C. P. 1035.2 contemplates the use of such allegations in a motion for summary judgment. Thus, although not technically stricken, these particular allegations are meaningless in summary judgment practice and, of course, could contribute nothing to meeting the movant's burden of demonstrating that there is no genuine issue of material fact and that it is entitled to judgment as matter of law.

**2. AINJAR'S MOTION TO AMEND AND MOTION FOR SUMMARY JUDGMENT.**

DEP and McNaughton argue that Ainjar waived the argument it asserts in its Motion for Summary Judgment. DEP and McNaughton point to 25 Pa. Code § 1021.51(e) which provides that a Notice of Appeal:

shall set forth in numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal. An objection not raised by appeal or an amendment thereto . . . shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear the objection.

25 Pa. Code § 1021.51(e). DEP and McNaughton contend that because Ainjar's Notice of Appeal failed to specifically raise an objection to the non-existence of Susquehanna Township's official sewage facilities plan, Ainjar waived that argument. (DEPMLSJ pp. 2-3; MMLSJ pp. 3-4). They cite *Pennsylvania Game Commission v. DER*, 509 A.2d 877 (Pa. Cmwlth. 1986) and a host of Board precedent in support.<sup>3</sup> By contrast, Ainjar maintains that paragraph 22 of its Notice of Appeal does assert this issue. Paragraph 22 states:

Pursuant to Section 5 of the Act of January 24, 1966, P.L. 1535, No. 537, as Amended, and the rules and regulations of the Pennsylvania Department of Environmental Protection adopted thereunder, Chapter 71 of Title 25 of the Pennsylvania Code, the proposed revision of the official sewage facilities plan for new land development by the Developer does not conform to the respective comprehensive program of pollution and water quality management.

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<sup>3</sup> *Pennsylvania Game Commission* holds that "the failure to file specific grounds for appeal within the thirty-day period is a defect going to jurisdiction." *Pennsylvania Game Commission*, 509 A.2d at 886.

Ainjar reasons, in essence, that it is only logical that the DEP has violated Section 5 of the Act by approving a revision to a Plan that never existed and thus could not be revised. Thus, the Notice of Appeal does raise the matter on which it has moved for summary judgment. (ARSJ pp. 2-4).

We agree with Ainjar. While it may be true that the Notice of Appeal does not contain the recitation of the issue in exactly the same words as set forth in the Motion for Summary Judgment, we think that this genre of issue was fairly raised in the Notice. The Board has jurisdiction over issues not specifically recited in a notice of appeal if the issue falls within the scope of a broadly-worded objection found in the notice of appeal. See *Croner, Inc. v. DER*, 598 A.2d 1183, 1187 (Pa. Cmwlth. 1991); *Thomas v. DEP*, 1998 EHB 93, 106 (“We must broadly construe objections raised in notices of appeal.”); *Weiss v. DER*, 1996 EHB 1565, 1570 (“[T]he Commonwealth Court . . . held [in *Croner*] that a broadly[-]worded objection in a notice of appeal is sufficient to preserve a more specific basis of objection.”); *Bradford Coal Company v. DEP*, 1996 EHB 888, 891 (“In determining whether a party has raised an issue in its notice of appeal, we must broadly construe the party’s grounds for appeal.”)

Thus, Ainjar did raise the issue of the non-existence of Susquehanna Township’s sewage facilities plan in paragraph 22 its Notice of Appeal by addressing section 5 of the Sewage Facilities Act and Chapter 71 of DEP’s regulations. Section 5 delineates what each municipality in the Commonwealth must do to obtain or revise an official sewage facilities plan. 35 P.S. § 750.5. Under subsection 5(a) of the Sewage Facilities Act, each municipality must submit to DEP an official sewage facilities plan, and subsection 5(e) authorizes DEP to approve or disapprove official plans within one year of submission. 35

P.S. 750.5(a), (e).<sup>4</sup> Chapter 71 regulates sewage facilities plans as well. For example, 25 Pa. Code § 71.11 requires municipalities to “develop and implement comprehensive official sewage plans.”

We think that DEP’s papers further demonstrate that Ainjar’s summary judgment issue was contained within its Notice of Appeal, albeit in a paragraph different than Ainjar relies on. DEP argues that the closest Ainjar arguably comes to raising an allegation regarding the non-existence of the Township’s Act 537 Plan in its Notice of Appeal is in Paragraph 7 which states that, “[t]he granting of the revision to his (sic) proposed official plan by [DEP] was arbitrary and an abuse of discretion”. DEP proffers that Paragraph 7, because of its reference to the granting of the *revision*, contains the necessary logical presupposition, or even admission, that the Plan at issue being revised was in existence. (DEPMLSJ p. 3) DEP’s characterization of the presupposition to be inferred into Paragraph 7 may very well be a reasonable one, but, importantly, it is not the only one that logic will admit. Indeed, DEP’s discussion of its suggested inference shows that the exact opposite one is equally plausible. Paragraph 7 insofar as it states that the granting of the revision was arbitrary and capricious, could also very well mean that the act of granting the revision was arbitrary and capricious because there was no approved plan in the first place to be revised. Instead of attempting to divine the subjective intent of the drafter of the Notice of Appeal, to the extent that is even relevant for this purpose, we will give Ainjar the benefit of the doubt on this question because the other inference is

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<sup>4</sup> The definition of municipality includes “Township” under both the Sewage Facilities Act and Chapter 71. See 35 P.S. § 750.2; 25 Pa. Code § 71.1.



reasonable and we are not disposed to rule in favor of waiver unless the matter is free from doubt.

Based on the foregoing, Ainjar's Motion To Amend is denied as moot because it is unnecessary.

We will not grant Ainjar's Motion for Summary Judgment. The factual evidence, if one can call it that, Ainjar offers to establish that there was no approved Plan boils down to, basically, that Ainjar was unable to obtain a copy of the Plan through discovery or by searching DEP's files. In their responses, Susquehanna Township, DEP, and McNaughton maintain that there is indeed an official Act 537 Plan of Susquehanna Township. (STRSJ p. 2 ¶ 10; DEPRSJ p.2 ¶ 4; MRSJ p. 2 ¶ 4) Although, Susquehanna Township fails to attach any document to its response that purports to be its official sewage facilities plan, DEP and McNaughton offer evidence of that which they claim is Susquehanna Township's official sewage facilities plan. They argue that Susquehanna Township adopted its official plan by Township Resolution No. 71-R-20, on December 29, 1971, and reaffirmed its official plan by Resolution No. 75-R-1. (Finnegan Affidavit, ¶ 4 and Attachments A, B, C). These Resolutions adopt the "Sewerage Plan" prepared by the Dauphin County Planning Commission as part of the Tri-County Regional Planning Commission in 1969. (Finnegan Affidavit, ¶ 4 and Attachment B). The final paragraph of Resolution 71-R-20 states:

NOW, THEREFORE, BE IT RESOLVED THAT, Susquehanna Township hereby adopts the "Sewerage Plan" prepared by the Dauphin County Planning Commission, being a plan for sewerage systems, to serve Susquehanna Township, copies of which have been submitted to the Pennsylvania Department of Environmental Resources to

assist Susquehanna Township in fulfillment of the planning requirements of Act 537.

Finnegan Affidavit, Attachment A. Further, DEP and McNaughton maintain that DEP policy during the 1970s was not to issue letters explicitly approving official plans adopted by individual municipalities. (Finnegan Affidavit, ¶ 4). According to DEP and McNaughton, under the regulations in place then, DEP's lack of explicit approval resulted in the default approval of the adopted official plan. (Finnegan Affidavit, ¶ 4).

In its Reply, Ainjar maintains that Township Resolutions 71-R-20 and 75-R-1 cannot be Susquehanna Township's official sewage facilities plan because Dauphin County's "Sewerage Plan" is not an official sewage facilities plan under section 5 of the Sewage Facilities Act and Chapter 71 of DEP's regulations. (ARSJ pp. 6-8) According to Ainjar, there is no statutory or regulatory authority for Susquehanna Township to adopt and submit Dauphin County's "Sewerage Plan" to DEP as its official sewage facilities plan, nor is there statutory or regulatory authority for DEP to approve Dauphin County's "Sewerage Plan". (ARSJ p. 8) Furthermore, Ainjar maintains that Susquehanna Township and DEP failed to meet their responsibilities under 25 Pa. Code § 71.12(f) (requiring municipalities to develop a plan), 25 Pa. Code § 71.31 (requiring municipalities to adopt and implement the plan), and 25 Pa. Code § 71.32 (imposing specific responsibilities on DEP respecting the approval of plans). (ARSJ pp. 7-8)

A party may move for summary judgment "after the relevant pleadings are closed, but within such time as not to unreasonably delay trial." Pa. R.C.P. 1035.2. The Board will "grant summary judgment only when the record, which is defined as the pleadings, depositions, answers to interrogatories, admissions, affidavits, and certain expert reports,

show that there is no genuine issue of material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of law.” *County of Adams v. DEP*, 687 A.2d 1222, 1224 n. 4. (Pa. Cmwlth. 1997); Pa. R.C.P. 1035.1. The Board must “view the record in a light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party.” *Papas v. Asbel*, 724 A.2d 889, 891 (Pa. 1999) (citing *Pennsylvania State University v. Centre County*, 656 A.2d 303, 304 (Pa. 1992)). Further, the motion must set forth “with adequate particularity the reasons for summary judgment,” and the Board will not speculate or supply those lacking legal or factual arguments. *Barkman v. DEP*, 1993 EHB 738, 745; see *Grazis v. DEP*, EHB Docket No. 2000-017-K slip op. at 9 (opinion issued September 19, 2000).

At this point, the only solid conclusion that can be reached from reviewing the parties’ respective summary judgment papers is that there is a genuine and hotly contested issue of material fact, or mixed question of fact and law, as to whether there is or is not an underlying official Act 537 Plan for Susquehanna Township to have been revised. The resolution of that issue cannot follow from summary judgment practice. There must be a trial to resolve that contested issue.

Moreover, the legal consequences in this case, if any, of there having not been a Plan in place to have been revised if there was not one is still an open issue. In this vein, we note and find interesting that all parties agree that, since 1971, Susquehanna Township has had revised what it was believed to be its official Plan, apparently perhaps even at the request of Ainjar itself. (ARSJ p. 6, DEPRSJ p. 4 ¶ 13, STRSJ p. 3, MRSJ p. 2 ¶ 4) Thus, it is not clear, at least at this stage of the proceedings, that Ainjar would be

entitled to judgment as a matter of law even if it had been successful in demonstrating that there was no approved Act 537 Plan.<sup>5</sup>

Based on the forgoing, the Board enters the following Order:

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<sup>5</sup> There are open questions of fact and/or mixed question of fact and law about whether and when the Plan was revised, whether Ainjar participated in any such Plan amendments, and whether if it did, that has any relevance to the contested issues in this case.

COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

AINJAR TRUST,  
JOHN O. VARTAN, TRUSTEE

v.

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION and McNaughton Company

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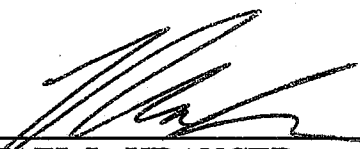
EHB Docket No. 99-248-K

**ORDER**

AND NOW, this 5<sup>th</sup> day of January, 2001 it is hereby **ORDERED THAT:**

- (1) DEP's Motion To Strike is **DENIED**;
- (2) Ainjar's Motion To Amend is **DENIED** as moot; and
- (3) Ainjar's Motion For Summary Judgment is **DENIED**.

ENVIRONMENTAL HEARING BOARD

  
\_\_\_\_\_  
MICHAEL L. KRANCER  
Administrative Law Judge  
Member

**DATED: January 5, 2001**

**Via Telecopy and Regular Mail**

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WILLIAM T. PHILLIPY IV  
 SECRETARY TO THE BOARD

**GLOBAL ECOLOGICAL SERVICES, INC.** :  
**and ATLANTIC COAST DEMOLITION** :  
**AND RECYCLING, INC.** : **EHB Docket No. 2000-128-MG**  
 : **(consolidated with 2000-186-MG)**  
 :  
 v. : **Issued: January 11, 2001**  
 :  
**COMMONWEALTH OF PENNSYLVANIA,** :  
**DEPARTMENT OF ENVIRONMENTAL** :  
**PROTECTION** :

**OPINION AND ORDER ON  
 MOTION TO STRIKE AND MOTION TO AMEND APPEAL**

**By George J. Miller, Administrative Law Judge**

**Synopsis**

The appellants' motion for leave to amend its appeal to assert a new legal theory is granted. Although the motion comes late in the proceeding, the Department has the opportunity to test the appellants' legal argument in dispositive motions. The Department makes no claim that it has changed its position based on the amendment concerning the objections raised in the original appeal. It is therefore not prejudiced by the amendment. Because the appellants' amended appeal also removes the paragraph which is the subject of the Department's motion to strike, that motion is rendered moot.

**OPINION**

Before the Board is the Department of Environmental Protection's motion to strike a paragraph of the notice of appeal of Global Eco-Logical Services, Inc. and

Atlantic Coast Demolition and Recycling Inc. (collectively, Appellants). The Appellants oppose the motion and also motion to amend their notice of appeal pursuant to 25 Pa. Code § 1021.53(b)(3). We will address the Appellants' motion first.

Litigation surrounding the Appellants' waste transfer facility has been before the Board in one form or another since early 1999. The most recent appeals involve the Department's revocation of the Appellants' solid waste permit and subsequent forfeiture of its surety bond. Both actions of the Department are based on a provision of a consent order and agreement which called for the automatic revocation of the permit and forfeiture of the bond in the event the Appellants failed to abide by the terms of the agreement.

The Appellants have moved to amend their notices of appeal in order to supplement their legal basis for objection to the Department's actions revoking their permit and forfeiting their bond. Specifically, in view of the Board's recent decision in *Harriman Coal Corp. v. DEP*, EHB Docket No. 99-072-C (Opinion issued August 22, 2000), holding that an automatic revocation provision in a permit was unlawful, the Appellants wish to add a new argument that the Department's actions were based on what the Appellants believe is an unlawful provision in the consent agreement. The proposed amended appeal would also remove a paragraph of the original appeal which the Department has moved to strike.

The Board's rules provide it with the discretion to permit amendments to appeals which are "alternate or supplemental legal issues, identified in motion, the addition of which will cause no prejudice to any other party or intervener." 25 Pa. Code § 1021.53(b)(3). Since this language was first added to our rules in 1996,<sup>1</sup> the Board has been fairly liberal in allowing amendments which are solely legal in nature, provided that

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<sup>1</sup> 26 Pa. Bull. 4222 (1996).



the opposing parties will not be prejudiced, or to the extent that they may be affected, a remedy is available. *See, e.g., Columbia Gas Transmission Corp. v. DEP*, EHB Docket No. 2000-111-R (Opinion issued November 27, 2000)(any prejudice could be cured with an extension of discovery); *cf. Caernarvon Township Supervisors v. DEP*, 1997 EHB 601 (permittee had an opportunity to cure any prejudice caused by the late filing of answers to interrogatories concerning an expert witness, therefore his testimony will not be precluded).

The Department objects to the amendment on the grounds it would prejudice the Department because discovery has been extended twice and it has already filed a motion for summary judgment. Further, the Department believes that to allow the amendment is simply unfair.

We are not insensitive to the Department's position in this matter. However, we will grant the Appellants' motion to amend its appeals to object to the Department's action based on our decision in *Harriman Coal*. First, even though discovery is nearly at an end, the issue which the Appellants seek to add is purely a legal question, rather than one with a significant factual component. Moreover, both parties have an opportunity to flesh out the issue in dispositive motions.<sup>2</sup> *Cf. Goolsby v. Papanikolau*, 637 A.2d 707 (Pa. Cmwlth. 1994), *petition for allowance of appeal denied*, 657 A.2d 493 (Pa. 1995)(mere delay in filing a motion to amend a complaint is not dispositive of the question of prejudice). Second, while there has been significant pre-hearing activity in this case, we do not believe that that fact alone rises to the level of prejudice to the Department's preparation of its defense. Finally, as we have said in other cases where we have granted

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<sup>2</sup> It is true that the Department has already filed a motion for summary judgment on another issue. Assuming the case is not dismissed by our disposition of the Department's pending motion, there is nothing to preclude it from filing another motion before the appropriate deadline.

motions to amend, to the extent that the Department feels it needs additional time to properly address the application of the principal in *Harriman Coal* to this appeal, it may certainly seek an extension.

The Department cites recent decisions in *Bentley v. DEP*, 1999 EHB 71, and *Columbia Gas Transmission Corp. v. DEP*, EHB Docket No. 2000-111-R (Opinion issued November 27, 2000), in support of its position that we should deny the Appellants' motion. We find that our decision to allow this amendment is consistent with both of those decisions.

*Bentley v. DEP*, 1999 EHB 71, was one of the rare decisions where the Board denied the appellant's motion to amend its appeal. There the appellant had objected to the Department's issuance of a permit for a small hydroelectric dam permit because he believed it to be in violation of the Dam Safety and Encroachments Act.<sup>3</sup> Near the close of discovery the appellant sought to add an objection that the permit also violated the Limited Power Act.<sup>4</sup> The Board ordered the appellant to submit a more specific statement concerning the nature of its objection under the Limited Power Act. The response to the Board's order consisted of a broadly worded, general objection, which did not cite or refer to any specific aspect of the Limited Power Act which he believed was violated. Therefore the Board denied the appellant's motion to amend because it lacked the necessary specificity to enable the Board to determine that there would be no prejudice to the opposing parties. The timing of the motion was not dispositive. Instead, it was the appellant's inability to specify the nature of his objection, rather than the nearness of the end of discovery, which was the basis of the Board's order.

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<sup>3</sup> Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1- 693.27.

<sup>4</sup> Act of June 14, 1923, P.L. 704, *as amended*, 32 P.S. § 591-625.

Similarly, in *Columbia Gas Transmission Corp.*, while the Board was persuaded by the fact that the appellant's motion to amend its appeal to add further legal bases to its objection to the Department's action came relatively early in the proceeding, that fact alone was not dispositive. Rather, the Board found that the new issue would not prejudice the opposing parties. Although the Board did not agree that the new issue was an "amplification" of existing objections, neither the Department nor the Permittee argued that they would have to change their position as a result of the narrow question raised by the amendment. Additionally, dispositive motions had not yet been filed, and at the time of the motion the hearing had not been scheduled.

In this case, the Appellants have been very specific concerning the legal basis for their objection to the Department's action. Although the Department will have to prepare a defense to the Appellants' allegation, there is no suggestion that it has altered its position concerning its interpretation of the consent order and agreement which formed the basis for its revocation of the permit and forfeiture of the bond. *See Goolsby v. Papanikolau*, 637 A.2d 707 (Pa. Cmwlth. 1994), *petition for allowance of appeal denied*, 657 A.2d 493 (Pa. 1995)(a motion to amend a complaint will be allowed where the opposing party did not show prejudice to its substantive position or that a defense was adversely affected).

The Department also argues that the Appellants could have amended their notice of appeal during the twenty-day period in which appeals may be amended as of right. 25 Pa. Code § 1021.53(a). That is, the appeal of the bond forfeiture was filed on August 24, 2000. The *Harriman Coal* decision was filed on August 22, 2000. Therefore, the Department argues, the Appellants should have amended their appeal within the twenty-day amendment period. This is not a basis upon which to deny the Appellants' motion. There is nothing in the Board's rules which requires a new legal issue to be "new" in the

sense that it could not have been developed prior to the expiration of the twenty-day amendment period.

In short, we will grant the Appellants' motion to amend its appeals to challenge the automatic revocation provision of the consent order and agreement and to remove Paragraph 8 of its notice of appeal at EHB Docket No. 2000-186-MG.

In view of our disposition of the Appellant's motion to amend its appeal, we need not address the Department's motion to strike Paragraph 8, as that motion is now moot. We therefore enter the following:


COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

GLOBAL ECOLOGICAL SERVICES, INC. :  
and ATLANTIC COAST DEMOLITION :  
AND RECYCLING, INC. : EHB Docket No. 2000-128-MG  
: (consolidated with 2000-186-MG)  
:  
:  
v. :  
:  
COMMONWEALTH OF PENNSYLVANIA, :  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION :

ORDER

AND NOW, this 11<sup>th</sup> day of January, 2001, the motion for leave to amend the notices of appeal in the above-captioned matters is hereby **GRANTED**. Global Ecological Services, Inc. and Atlantic Coast Demolition and Recycling, Inc. shall file their amended appeals within ten days of this order.

ENVIRONMENTAL HEARING BOARD

  
\_\_\_\_\_  
GEORGE J. MILLER  
Administrative Law Judge  
Chairman

**DATED:** January 11, 2001

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

**EHB Docket No. 2000-128-MG  
(consolidated with 2000-186-MG)**

**For the Commonwealth, DEP:**  
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WILLIAM T. PHILLIPY IV  
 SECRETARY TO THE BOARD

**ORIX-WOODMONT DEER CREEK I  
 VENTURE L.P.**

v.

**COMMONWEALTH OF PENNSYLVANIA,  
 DEPARTMENT OF ENVIRONMENTAL  
 PROTECTION**

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**EHB Docket No. 2000-237-R**

**Issued: January 11, 2001**

**OPINION AND ORDER ON  
 PETITION TO INTERVENE**

**By Thomas W. Renwand, Administrative Law Judge**

**Synopsis:**

The Board allows four organizations, whose members live, hike, fish and observe nature and wildlife in the vicinity of a proposed commercial development, to intervene on the side of the Department of Environmental Protection in an appeal by the proposed developer of the Department's denial of its application for a water obstruction and encroachment permit. The petitioners have sufficiently demonstrated that they have a substantial, direct and immediate interest in the subject of the appeal. The appellant retains a continuing right to challenge the petitioners' standing at the evidentiary hearing.

**OPINION**

On November 13, 2000, Orix-Woodmont Deer Creek I Venture L.P. (Woodmont) filed an appeal from the decision of the Department of Environmental Protection to deny Woodmont's

application for a Water Obstruction and Encroachment Permit under 25 Pa. Code, Chapter 105 (Dam Safety and Encroachment regulations). Woodmont sought the permit in connection with the proposed development of retail, hotel, office and entertainment facilities in Harmar Township, Allegheny County. The proposed project would have involved the relocation of a portion of Deer Creek.

Before the Board is a petition to intervene filed by four organizations: Pennsylvania's Future (PennFuture), Pennsylvania Trout, Inc., Penns Woods West Chapter of Trout Unlimited, and Clean Water Action (hereinafter collectively referred to as "the petitioners.") Woodmont has filed an answer opposing the petition on the grounds that the petitioners lack standing, the petitioners have no greater interest in this matter than that of the general public, the petitioners will not be harmed by the proposed development, and the petition contains factual errors. The Department does not oppose the petition.

The standard for intervention is set forth in Section 4(e) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511 – 7516, which states that "[a]ny interested party may intervene in any matter pending before the board." *Id.* at § 7514(e). The Commonwealth Court has defined "any interested party" in the context of intervention to mean "any person or entity interested, i.e. concerned, in the proceedings before the Board. The interest required...must be more than a general interest in the proceedings; it must be such that the person or entity seeking intervention will either gain or lose by direct operation of the Board's ultimate determination." *Browning Ferris, Inc. v. Department of Environmental Resources*, 598 A.2d 1057, 1060-61 (Pa. Cmwlth. 1991); *Ainjar Trust v. DEP*, EHB Docket No. 99-248-K (Opinion and Order on Petition to Intervene issued January 31, 2000), at 3-4; *Connors v. State Conservation Commn.*, 1999 EHB 669, 670.



A person or entity seeking to intervene has standing if its interest in the matter is substantial, direct and immediate. *Borough of Glendon v. Department of Environmental Resources*, 603 A.2d 226, 231-33 (Pa. Cmwlth. 1992), *petition for allowance of appeal denied*, 608 A.2d 32 (Pa. 1992); *Pennsylvania Game Commn. v. DEP*, EHB Docket No. 2000-067-R (Opinion and Order on Petition to Intervene issued June 19, 2000), at 2; *Ainjar Trust*, *slip op.* at 4; *Connors*, 1999 at 671. For an interest to be “substantial” there must be a discernable adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law.” *Ainjar Trust*, *slip op.* at 4-5. To be “direct” and “immediate” there must be a causal connection between the action at issue and the alleged harm. *Id.* at 5; *Connors*, 1999 EHB at 671.

An organization has standing to intervene if at least one of its members has standing. *P.H. Glatfelter Co. v. DEP*, EHB Docket No. 2000-194-L (Opinion and Order on Petition to Intervene issued October 13, 2000), at 4; *Connors v. DEP*, 1999 EHB at 671; *Rand Am, Inc. v. DEP*, 1995 EHB 998, 1000.

The petitioners describe themselves as “organizations that seek to preserve and protect environmental resources and wildlife habitat in western Pennsylvania and that have been involved in opposing the proposed Deer Creek development during the permitting process.” They claim standing on the grounds that they “all have members who fish in Deer Creek, take walks at the site, observe nature and wildlife at the site, live near the site, or otherwise derive direct enjoyment and benefit from the natural resources that currently exist at the Deer Creek site and that would be imperiled if the proposed development were built.” (Petition to Intervene, p. 2-3)

As to each group’s individual standing, the petition claims the following: Members of

PennFuture live in the vicinity of the proposed development, drive on roads near the site, fish in Deer Creek, and generally enjoy the aesthetic qualities of the area, including the stream, wetlands and wildlife. Petitioner Pennsylvania Trout, Inc. is a council of the national organization, Trout Unlimited. Two of its local chapters, petitioner Penns Woods West Chapter, with over 1000 members in the Allegheny County region, and the Arrowhead Chapter, are within an hour's drive of the proposed development site. Members of both local chapters regularly fish in Deer Creek at the site of and upstream from the proposed development. Finally, members of Clean Water Action live near and drive by the site and observe wildlife near the site. The petitioners contend they will be directly harmed by the proposed development due to the substantial environmental damage they allege it will cause to the stream, wetlands, floodplain, aquatic life and wildlife in the area.

Woodmont opposes intervention on the grounds that the petitioners have no greater interest in this matter than the common interest of all citizens seeking obedience with the law and therefore, they lack a "substantial" interest. Woodmont points out that both the Commonwealth Court and the Board have held that mere ownership of property in the community surrounding a subject site may not be enough by itself to confer standing or justify intervention. *Tessitor v. Department of Environmental Resources*, 682 A.2d 434, 437 (Pa. Cmwlth. 1996), *petition for allowance of appeal denied*, 693 A.2d 591 (Pa. 1997); *Connors*, 1999 EHB at 672. However, as noted in *Connors*, "it is certainly a start." *Id.*

Here, the petitioners have claimed more than mere ownership of property. They fish in Deer Creek, take walks and observe nature and wildlife at the site, and generally enjoy the aesthetic qualities of the area. Woodmont contends that none of these activities gives rise to a substantial interest in the matter sufficient to confer standing. Furthermore, Woodmont asserts

that because the site of the proposed development is private property, any such activities that are being undertaken at that location constitute trespassing. In other words, since the petitioners' members have no legal right to enjoy the site, their interest in it is no greater than that of the general public.

We are satisfied that the petitioners have demonstrated a substantial interest in the subject of this appeal. The petitioners' members live, hike and enjoy nature and wildlife in the vicinity of the proposed development. They fish in Deer Creek at or near the proposed site. The Board has recognized that an aesthetic appreciation for or recreational enjoyment of an environmental resource can confer standing. *Ziviello v. DEP*, EHB Docket No. 99-185-R (Opinion and Order on Motions for Summary Judgment issued July 31, 2000), at 6, n. 9. As for Woodmont's assertion that the petitioners have no legal right to be on the site of the proposed development, we understand the petitioners' claim to be that they take part in these activities in the vicinity of the site and not simply on property owned by Woodmont or another private entity.

Woodmont also contends that the petitioners will suffer no direct or immediate harm as a result of the proposed development. In its response, Woodmont sets forth mitigation measures it will undertake in connection with the proposed development, including the construction of new wetlands and the establishment of a conservancy of wetlands and forest. Woodmont contends that the development plan it has proposed will in fact have a net environmental benefit for the site.

Whether the proposed development will cause environmental harm, as alleged by the petitioners, or have a net environmental benefit, as alleged by Woodmont, is a factual determination that must be made after a hearing on the merits. At this stage of the proceeding, in order to demonstrate standing, a petitioner need only show that there is an objectively reasonable

threat that adverse effects will occur as a result of the challenged action. *Ziviello, slip op.* at 6-7. As stated in *Ziviello*, “[t]he purpose of the standing doctrine is not to evaluate whether a particular claim has merit but rather to determine whether an appellant is the appropriate party to file an appeal from an action of the Department.” *Id.* at 7 (citing *Valley Creek Coalition v. DEP*, 1999 EHB 935, 944).<sup>1</sup> We are satisfied that the petitioners have sufficiently demonstrated in their petition that the likelihood of the alleged adverse effects as a result of the proposed development is more than merely speculative. If such effects do occur, the petitioners’ members stand to suffer as a direct result.

Woodmont further contends that the petition contains numerous factual errors regarding the nature and quality of the resources currently existing at the project site and the potential effects of the project on those resources. Again, these are questions of fact that must be determined after a hearing on the merits.

Finally, in footnote 2 of its response, Woodmont requests that if the Board grants the petition to intervene, Woodmont should be given an opportunity to prove at the merits hearing that the petitioners lack standing. Because Woodmont’s response raises disputed issues of fact, we will allow Woodmont a continuing right to challenge standing at the evidentiary hearing. *Giordano v. DEP*, EHB Docket No. 99-204-L (Opinion and Order on Petition to Intervene issued September 26, 2000), at 4.

Accordingly, we enter the following order:

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<sup>1</sup> Although *Ziviello* dealt with a challenge to whether certain appellants had standing to pursue their appeal, the criteria for demonstrating standing for purposes of intervention (i.e. a substantial, direct and immediate interest) are the same as those required for an appellant to have standing. *Borough of Glendon*, 603 A.2d at 231-32; *Ainjar Trust, slip op.* at 4.



ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND  
Administrative Law Judge  
Member

**DATED:** January 11, 2001

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

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Southwest Region

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**For Intervenors:**

Amy Sinden, Esq.  
Jody Rosenberg, Esq.

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adopt a different sewage collection and treatment system alternative to address the sewage treatment needs of the Township. (Department Exhibit A; Appellant Exhibit D of Exhibit 1) The Township sent a letter dated August 19, 1999 to the Preservation Alliance, rejecting the Preservation Alliance's request since the Township had chosen not to adopt a different sewage treatment alternative and it intended to implement the Sewage Facilities Plan Update Revision to its Official Sewage Facilities Plan (1993 Plan). (Department Exhibit B; Appellant Exhibit E of Exhibit 1) On September 17, 1999, the Preservation Alliance sent a letter purporting to be a private request to the Department of Environmental Protection (Department) requesting it to order the Township to modify the 1993 Plan by adopting a different sewage collection and treatment system alternative. (Department Exhibit C; Appellant Exhibit 1) On October 18, 1999, the Department responded to the Preservation Alliance's letter indicating that the Department will not act on the purported private request because it is beyond the scope authorized by the Sewage Facilities Act and its regulations and the information provided was not sufficient to support such a request. (Department Exhibit D) On November 23, 1999, the Preservation Alliance filed a Notice of Appeal with the Board challenging the Department's October 18, 1999 letter.

This dispute stems from the Department's approval of the Township's 1993 Plan on July 28, 1993. The 1993 Plan proposed the construction of a centralized sewage collection and treatment system to serve portions of Scott Township, a municipality located in Lackawanna County, Pennsylvania. No appeal was filed from that approval within 30 days of the approval as required by the Board's rule at 25 Pa. Code § 1021.52(a).

Three appeals have been filed much later by the Preservation Alliance relating to the Department's approval of the 1993 Plan. On October 22, 1998, the Preservation Alliance filed a



Notice of Appeal challenging a letter from the Department which indicated that the Department was not intending to take any additional action regarding the Township's 1993 Plan. On June 17, 1999, the Board granted the Department's motion to dismiss the appeal at EHB Docket No. 98-209-MG, holding that the Board lacked jurisdiction since the letter was not an appealable action and because the Appellant failed to file a timely appeal from the Department's approval of the 1993 Plan. *Scott Township Environmental Preservation Alliance v. DEP*, 1999 EHB 425.

At the same time the Preservation Alliance filed its first appeal, it also submitted a letter dated October 22, 1998, purporting to be a private request, to the Department requesting it to order the Township to revise the Official Sewage Facilities Plan pursuant to Section 5(b) of the Sewage Facilities Act, 35 P.S. § 750.5(b). On March 5, 1999, the Preservation Alliance filed a Notice of Appeal/Petition for Mandamus challenging the Department's failure to respond to the Appellant's October 22, 1998 letter. The Board granted the Department's motion for summary judgment and dismissed the appeal, holding that the letter was both procedurally and substantively deficient in that the request was not first made to the municipality and the letter did not describe the requested revision. *Scott Township Environmental Preservation Alliance v. DEP*, EHB Docket No. 99-048-MG (Opinion issued February 15, 2000).

Currently before the Board is a motion for summary judgment and supporting memorandum of law filed by the Department on October 30, 2000. The Township filed a letter on November 6, 2000 notifying the Board that it joins in the Department's motion and concurs with the supporting memorandum of law. The Appellant filed a response on December 18, 2000.<sup>3</sup>

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<sup>3</sup> The Department, by letter dated January 2, 2001, informed the Board that it would not be filing a reply to the Preservation Alliance's response to the Department's summary judgment

## DISCUSSION

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions of record, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997). The party moving for summary judgment has the burden of proving the non-existence of any genuine issue of material fact. *Kilgore v. City of Philadelphia*, 717 A.2d 514 (Pa. 1998). The record must be viewed in the light most favorable to the non-moving party and summary judgment may be granted only in cases where the right is clear and free from doubt. *Id.*

In its motion, the Department argues that: (1) a request for a wholesale revision of an official plan does not constitute a private request under the Sewage Facilities Act; and (2) a request to implement a different sewage treatment alternative is beyond the scope authorized under a private request. The Preservation Alliance's response alleges that: (1) the 1993 Plan is inadequate; and (2) the Department erred in rejecting the Preservation Alliance's letter dated September 17, 1999 which requested the Department to order the Township to revise its Sewage Plan in accordance with the Preservation Alliance's request to the municipality dated June 23, 1999.

We previously noted that the Preservation Alliance's letter dated September 17, 1999 at least meets the timing requirements for a private request under the Sewage Facilities Act and the Department's regulations because the Appellant sought satisfaction from the Township prior to making an application to the Department and a copy of the Preservation Alliance's alternative

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motion.

sewage plan was attached to the letter. *See Scott Township Environmental Preservation Alliance v. DEP*, EHB Docket No. 99-048-MG (Opinion issued February 15, 2000). The question remains whether the substance of the September 17, 1999 letter to the Department constitutes a valid private request. We conclude that it does not.

The Act and its corresponding regulations provide a means by which a resident or property owner can have their sewage disposal needs “adequately addressed” if the municipality’s official plan is not being implemented or it is inadequate to meet the resident’s or property owner’s sewage disposal needs.<sup>4</sup> The information provided by the Preservation Alliance in its September 17, 1999 letter is not sufficient to support a private request. No allegation has been made that the official plan is not being implemented or that the plan is inadequate to meet a specific resident’s or property owner’s sewage disposal needs. The Preservation Alliance is not requesting that additional parcels be provided sewage disposal service, but rather that the Township as a whole be provided sewage disposal service by an alternate treatment method. Additionally, the September 17, 1999 letter fails to contain a description of the area of the municipality in question as required by 35 P.S. § 750.5(b) and 25 Pa. Code § 71.14(a).

The Preservation Alliance’s June 23, 1999 letter to the Township states that the “residents and landowners believe that the Township’s Sewage Pan [sic] is inadequate because it is too expensive and it does not adequately protect the environmental well-being of the Township.” (Department Exhibit A; Appellant Exhibit D of Exhibit 1) These sentiments are echoed in the Appellant’s September 17, 1999 letter to the Department. The Act and its regulations provide

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<sup>4</sup> The procedural and content requirements for a private request are set forth at 35 P.S. §§ 750.5(b), 750.5(b.1), 750.5(b.2) and 25 Pa. Code §§ 71.14(a), 71.14(b).

that the Department may only look to one of two standards when reviewing a private request: whether the official plan is being implemented *or* whether the chosen sewage treatment is inadequate to serve the sewage disposal needs of the resident or property owner who made the request. 35 P.S. § 750.5(b); 25 Pa. Code §§ 71.14(a) and 71.14(b). Regarding cost, this Board has held that “it is within a municipality’s discretion to choose a sewage treatment alternative, and the cost of a project is only one of many factors which a municipality considers.” *Scott Township Environmental Preservation Alliance v DEP*, 1999 EHB 425, 431; *see Force v. DEP*, 1998 EHB 179, *aff’d*, 977 C.D. 1998 (Pa. Cmwlth. filed December 30, 1998). Only upon a finding that either the municipality is not implementing the approved official plan *or* the plan is inadequate to serve the sewage disposal needs of the particular resident, may then the Department order the municipality to revise its plan.

The Preservation Alliance also objects to the 1993 Plan because supposedly “it does not adequately protect the environmental well-being of the Township.” The June 23, 1999 letter claims that the 1993 Plan “would cause a continual and ongoing diversion of groundwater from areas that are hydrologically connected to Lake Lackawanna State Park” and the September 17, 1999 letter identifies the Appellant’s environmental concerns in more detail. As the Board has previously recognized, “[i]t is a municipality’s decision to adopt a treatment alternative in accordance with the terms and conditions of the Sewage Facilities Act.” *Scott Township Environmental Preservation Alliance v. DEP*, 1999 EHB 425, 429; *see* 35 P.S. §§ 750.5(a) and 750.5(d). Environmental concerns are to be considered when a township develops and adopts an official sewage facilities plan. *See* 35 P.S. § 750.3 and 25 Pa. Code. § 71.21. Furthermore, water protection is an expressed intent of the laws administered by the Department when regulating the planning, construction and operation of sewage collection and treatment facilities. *See* 35 P.S. §§

691.4 and 750.3. The Preservation Alliance's challenge to the environmental impact associated with the adopted sewage treatment alternative is effectively an appeal of the Department's approval of the Township's chosen sewage treatment alternative adopted in the municipality's 1993 Plan.

As such this appeal is beyond the scope authorized by the Act and the Department's regulations because it requests a wholesale revision to the Township's 1993 Plan and it was not made in a timely manner. Allowing a party to use a private request to reopen Scott Township's sewage facilities planning process at this point in time would have the effect of an appeal of the municipality's original official plan. Neither the Act nor the private request regulations provide a means to challenge a previous Department approval of an official sewage facilities plan. Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

SCOTT TOWNSHIP ENVIRONMENTAL  
PRESERVATION ALLIANCE

v.

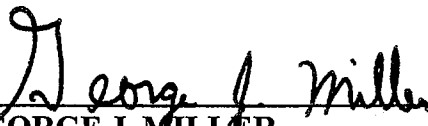
COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION and SCOTT TOWNSHIP  
BOARD OF SUPERVISORS

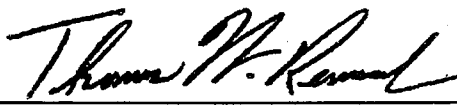
EHB Docket No. 99-239-MG


ORDER

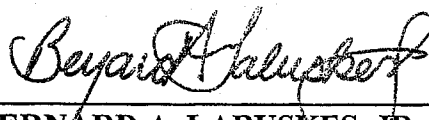
AND NOW, this 31<sup>st</sup> day of January, 2001, IT IS HEREBY ORDERED that the Department's motion for summary judgment is **GRANTED** and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

  
\_\_\_\_\_  
GEORGE J. MILLER  
Administrative Law Judge  
Chairman

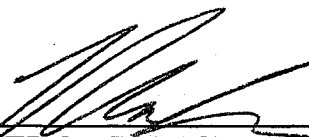
  
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THOMAS W. RENWAND  
Administrative Law Judge  
Member

  
\_\_\_\_\_  
MICHELLE A. COLEMAN  
Administrative Law Judge  
Member



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**BERNARD A. LABUSKES, JR.**  
Administrative Law Judge  
Member



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**MICHAEL L. KRANCER**  
Administrative Law Judge  
Member

**DATED:** January 31, 2001

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

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WILLIAM T. PHILLIPY IV  
 SECRETARY TO THE BOARD

<b>GLOBAL ECO-LOGICAL SERVICES, INC.</b>	:
<b>and ATLANTIC COAST DEMOLITION</b>	:
<b>AND RECYCLING, INC.</b>	: <b>EHB Docket No. 2000-128-MG</b>
	: <b>(consolidated with 2000-186-MG)</b>
	:
	: <b>Issued: February 1, 2001</b>
	:
<b>v.</b>	:
	:
<b>COMMONWEALTH OF PENNSYLVANIA,</b>	:
<b>DEPARTMENT OF ENVIRONMENTAL</b>	:
<b>PROTECTION</b>	:

**OPINION AND ORDER ON  
 MOTION FOR SUMMARY JUDGMENT**

**By George J. Miller, Administrative Law Judge**

**Synopsis**

The Board grants the Department's motion for summary judgment. An automatic revocation provision of a consent order which was negotiated in order to settle litigation related to the appellants' operation of a solid waste transfer facility, is not inherently illegal. The appellants have admitted to failing to make civil penalty payments and turn in an operations report on the schedule agreed to in the consent agreement. Since they have not stated that they did not knowingly agree to the automatic revocation or that the consent agreement was coercive or adhesive, the Board will not set aside the provisions of the agreement which provide for the revocation of the appellants' operating permit and the forfeiture of their surety bond as a result of their admitted failure to comply with the agreed upon terms of the consent agreement.



However, the doctrine of administrative finality does not bar the litigation of the Department's revocation of the permit even though a letter of the Department sent after the filing of the current appeal purported to also revoke the permit.

### OPINION

Before the Board is a motion for summary judgment by the Department of Environmental Protection which seeks dismissal of the appeals of Global Eco-Logical Services, Inc. and Atlantic Coast Demolition and Recycling, Inc. (collectively, Appellants). For the reasons which follow, we will grant the Department's motion.

The undisputed facts are as follows. Atlantic Coast Demolition and Recycling, Inc. is the operator of a waste transfer facility located in Philadelphia. Global Eco-Logical Services, Inc., which is located in Atlanta, Georgia, is the parent company of Atlantic. For reasons which are not important here, the Department commenced enforcement actions which were ultimately resolved by a Consent Order and Agreement (hereinafter, Agreement) between the Appellants and the Department. Among other things, the Agreement provided for the payment of a civil penalty in installments on a designated schedule. (Department Motion, Ex. B) The Agreement further provided:

In the event that [Appellants fail] to pay said civil penalty pursuant to this Paragraph, the Permit shall be deemed revoked by operation of this Consent Order and Agreement. [Appellants] shall surrender [the] Permit to the Department within 2 days of said failure and shall close the facility within 7 days . . . . In addition, the bond associated with the Permit shall be forfeited to the Department.

(Department Motion, Ex. B, ¶ 4). Although the Appellants evidently made the first payment as prescribed by the Agreement, they have not submitted payments which were due May 1, 2000; August 1, 2000; or November 1, 2000. (Department Motion ¶ 11; Appellants' Response ¶ 11). Additionally, the Agreement required the Appellants to

submit an annual operations report and a \$600 administrative fee, which was due on June 30, 2000, and to date has not been submitted to the Department. (Department Motion ¶ 13; Appellants' Response ¶ 13). The Agreement provided that in the event the Appellants failed to submit this report, "the Permit shall be deemed revoked by operation of this Consent Order and Agreement. . . . In addition, the bond associated with the Permit shall be forfeited to the Department." (Department Motion, Ex. B. ¶ 3(d))

By letter dated May 16, 2000, the Department informed the Appellants that the May 1, 2000 civil penalty payment was not received by the Department, and pursuant to the terms of the Agreement, the Appellants' permit was automatically revoked. (Department Motion, Ex. C) By letter dated July 28, 2000, the Department further notified the Appellants of the forfeiture of their bond pursuant to the terms of the Agreement. (Department Motion, Ex. D) Both of these letters were timely appealed to the Board, and were consolidated for disposition.

Finally, by letter dated September 12, 2000, the Department informed the Appellants that because the Department had not received the annual operation report and the administrative fee that the Appellants' permit was revoked. (Department Motion Ex. E) The Appellants did not appeal this letter, (Department Motion ¶ 22; Appellants' Response ¶ 22).

The Department's principal ground for summary judgment is that as a matter of law the Appellants' solid waste permit and surety bond were automatically revoked and forfeited pursuant to the terms of the Agreement. The Appellants counter that the Department is not entitled to judgment in its favor because the automatic revocation terms in the Agreement are illegal and therefore unenforceable under the Board's analysis in *Harriman Coal Corp. v. DEP*, EHB Docket No. 99-072-C (Opinion issued August 22, 2000).

In *Harriman Coal* we ruled that the Department lacks the authority under the surface mining laws to impose a special condition in a mining permit which provided for automatic revocation of the permit in the event that the operator breached the terms of an earlier consent order and agreement. Similarly other decisions of the Board have indicated that in other contexts “automatic” consequences for failure to abide by the terms of permits or conditions of the law are not authorized and that the Department must exercise its enforcement discretion based on the circumstances of each case and consideration of specific factors as provided by law. See *202 Island Car Wash v. DEP*, 1998 EHB 1325; *Wagner v. DEP*, 1999 EHB 681 (automatic civil penalty assessment under the Storage Tank Spill Prevention Act was arbitrary as a matter of law); *Stull v. DEP*, 1999 EHB 728 (automatic civil penalties were not authorized by the Solid Waste Management Act).

We have yet to consider the application of this principle to a consent order and agreement. A negotiated agreement with the Department is somewhat different than a direct action under a statute, such as the issuance of a permit or the assessment of a civil penalty. The contours of the Department’s authority in the latter instances are explicitly defined by statute. In contrast, a consent order and agreement, is “merely an agreement between the parties. It is in essence a contract binding the parties thereto.” *Commonwealth of Pennsylvania v. United States Steel Corp.*, 325 A.2d 324,328 (Pa. Cmwlth. 1974). As such, its enforceability is governed by principles of contract law, *Mazzella v. Koken*, 739 A.2d 531, 536 (Pa. 1999), subject to any applicable statutory or constitutional limits on the enforcement of the contract. Accordingly, we should only modify its terms, which were negotiated by the parties, with great reluctance. See *U.S. Steel Corp.* (a court has no authority to modify or vary the terms of a consent decree absent fraud, accident or mistake).

Although the Board disfavors automatic action by the Department, after reviewing the Agreement, we can divine nothing inherently illegal about the term in a consent agreement which provides for the automatic revocation of the Appellants' permit and surety bond. Permitting decisions or the assessment of civil penalties are essentially unilateral actions on the part of the Department, which is required to consider the unique circumstances of each case in order to reasonably exercise its discretion. In contrast, the terms of the Agreement are mutually assented to by both parties who together decided that the penalty was appropriate in the event the Appellants failed to comply with the civil penalty payment schedule. In reaching these terms, the Department was only constrained by the provisions of Section 602 of the Solid Waste Management Act, which provides that orders of the Department must be "necessary to aid in the enforcement of the act." Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.602. Once the Department exercises its discretion to determine that a consent agreement is the proper enforcement tool to utilize in a certain situation, there is nothing which would preclude it from agreeing with an appellant that certain specific acts will result in the revocation of a permit.

The Appellants do not contend that their assent to the terms of the Agreement was procured unlawfully. There is no suggestion that the Agreement is adhesive or that the Appellants' assent to the automatic revocation provisions was secured through coercion or other improper means. Instead, the terms of the Agreement were negotiated by the Appellants in consideration of the cessation of litigation before the Board and the settlement of an agreeable civil penalty. (*See* Department Motion, Ex. B ¶ V) The Appellants certainly could have abandoned their settlement negotiations and instead continued the litigation before the Board if the Department insisted on terms too onerous for the Appellants to accept.

Finally, the Appellants do not contend that they did not understand the implication of the automatic revocation provision of the Agreement or that they are entitled to some form of pre-determination hearing or right to comment before the permit may be effectively terminated. To the contrary, the Appellants' position is that they missed the first civil penalty payment due to an oversight at Global's headquarters. In addition, the Appellants were represented by able counsel whose signature appears on the Agreement.

The Agreement also contains a *force majeure* provision which enabled the Appellants to request an extension of time from the Department of their performance of the Agreement and thus avoid an automatic revocation of the permit where the Appellants were prevented from complying in a timely manner with any time limit imposed by the Agreement "solely because of a strike, fire, flood, act of God, or other circumstances beyond Atlantic's control and which Atlantic, by exercise of all reasonable diligence, is unable to prevent..." The Agreement further provides that if the Department were to deny an extension request, the Appellants would have the burden of proving in any subsequent litigation that the denial was an abuse of discretion based on the information available to the Department, including that supplied by the Appellants. (Department's Motion, Ex. B. pp. 16-17) Having given the Appellants protection against an arbitrary decision in the event of *force majeure*, we think the Department properly rejected their request for an extension based on their own failure to understand the Agreement and act on a timely basis.

The Department's second basis for summary judgment is that the Appellants failed to appeal the September 12, 2000 letter, therefore the doctrine of administrative finality bars them from disputing their violation of the Agreement and the Department's

conclusion that the permit is thereby revoked. Therefore, it is the Department's position that the prior appeals must be dismissed on this additional ground.

The principle of administrative finality has been often repeated by this Board, but is perhaps best explained by the Commonwealth Court in the seminal case of *Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765, 767 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977):

We agree that an aggrieved party has no duty to appeal but disagree that upon failure to do so, the party so aggrieved preserves to some indefinite *future* time in some indefinite *future* proceedings the right to contest an unappealed order. To conclude otherwise, would postpone indefinitely the vitality of administrative orders and frustrate the orderly operation of administrative law. (Emphasis added.)

The purpose of the doctrine is to prevent potential appellants from sitting on their appeal rights thereby providing the Department with some measure of security concerning the finality of orders after the appeal period has expired. *Tinicum Township v. DEP*, 1996 EHB 816; *see also Reading Anthracite Co. v. DEP*, 1998 EHB 728.

Our research has revealed no case where a *subsequent* action of the Department has been used to bar a *prior* appeal. Rather, administrative finality has been applied where a party aggrieved by a Department action fails to appeal, therefore "neither the content nor validity of the Department action . . . may be attacked in a *subsequent* administrative or judicial proceeding." *Tinicum Township v. DEP*, 1996 EHB 816, 822 (emphasis added); *see also Wheeling-Pittsburgh Steel Corp.* In this case, at the time the Department issued the September letter purporting to revoke the permit, the Appellants' permit was already revoked. That revocation was under appeal. The existing appeal

already called into question the terms of the Agreement revoking the permit. The 'finality' of the Agreement and the Department's revocation of the permit and forfeiture of the bond was already called into question. Accordingly, there was no finality to the Department's action which is necessary to preserve in order to achieve "a measure of order and certainty to the administrative process." *Reading Anthracite Co. v. DEP*, 1998 EHB 728, 738 n.5.

Accordingly, we enter the following:

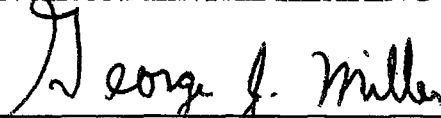
COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

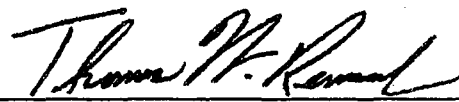
GLOBAL ECO-LOGICAL SERVICES, INC. :  
and ATLANTIC COAST DEMOLITION :  
AND RECYCLING, INC. : EHB Docket No. 2000-128-MG  
 : (consolidated with 2000-186-MG)  
 :  
v. :  
 :  
COMMONWEALTH OF PENNSYLVANIA, :  
DEPARTMENT OF ENVIRONMENTAL :  
PROTECTION :

ORDER

AND NOW, this 1<sup>st</sup> day of February, 2001, the motion for summary judgment filed by the Department of Environmental Protection in the above-captioned matter is hereby **GRANTED**. The appeals in the above-captioned matter are hereby dismissed.

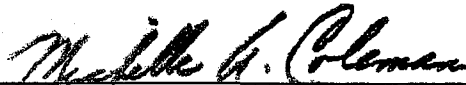
ENVIRONMENTAL HEARING BOARD

  
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GEORGE J. MILLER  
Administrative Law Judge  
Chairman

  
\_\_\_\_\_  
THOMAS W. RENWAND  
Administrative Law Judge  
Member

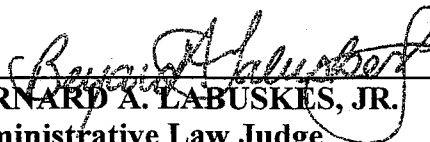


EHB Docket No. 2000-128-MG  
(consolidated with 2000-186-MG)



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MICHELLE A. COLEMAN  
Administrative Law Judge  
Member



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BERNARD A. LABUSKES, JR.  
Administrative Law Judge  
Member

**Administrative Law Judge Krancer is recused and did not participate in the deliberations or disposition of this appeal.**

**DATED:** February 1, 2001

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

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WILLIAM T. PHILLIPY IV  
 SECRETARY TO THE BOARD

**VICTOR KENNEDY, d/b/a  
 KENNEDY'S MOBILE HOME PARK**

v.

**COMMONWEALTH OF PENNSYLVANIA,  
 DEPARTMENT OF ENVIRONMENTAL  
 PROTECTION**

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**EHB Docket No. 2000-168-L**

**Issued: February 6, 2001**

**OPINION AND ORDER ON MOTION  
 TO WITHDRAW ADMISSIONS AND  
 MOTION FOR SUMMARY JUDGMENT**

**By Bernard A. Labuskes, Jr., Administrative Law Judge**

**Synopsis**

Under Pa.R.C.P. 4014(a), an appellant is deemed to have admitted the facts set forth in the Department's request for admissions that he failed to answer in a timely manner. Pursuant to Pa.R.C.P. 4014(d), however, the appellant's motion to withdraw admissions is granted because withdrawal of the deemed admissions will subserve the presentation of this case on its merits and will not prejudice the Department. The Department's motion for summary judgment is denied because it was based on facts in the deemed admissions.

**Background**

On April 17, 2000, the Department of Environmental Protection (the "Department") issued an order to Victor Kennedy d/b/a Kennedy's Mobile Home Park ("Kennedy") requiring him to complete and submit to the Department a public water supply permit application for his mobile home park. Kennedy did not appeal the order. On July 10, 2000, the Department

assessed a civil penalty against Kennedy for failing to comply with the Safe Drinking Water Act, the regulations promulgated thereunder, and an order of the Department. Kennedy appealed the assessment to this Board. On September 7, 2000, the Department served Kennedy by mail with its request for admissions and interrogatories in this matter. Pursuant to Pa.R.C.P. 4014(b), made applicable here by 25 Pa. Code §1021.111(a), Kennedy's responses thereto were due on or before October 8, 2000. The Department did not receive a response to the admissions until October 31, 2000.

On November 9, 2000, the Department filed a motion for summary judgment. The Department relied exclusively upon the failure of Kennedy to timely respond to the Department's request for admissions. It argued that all of the material facts were deemed to be admitted under Pa.R.C.P. 4014 as a result of Kennedy's failure to file timely answers. On December 4, 2000, Kennedy filed a response to the motion for summary judgment as well as a motion to withdraw admissions and substitute objections and answers.

The Board's rules provide that written requests for admissions are governed by Pa.R.C.P. 4014. 25 Pa. Code § 21.111(f). Under Pa.R.C.P. 4014(b), matters addressed in a request for admissions are deemed to be admitted if the request is not answered within 30 days of service. *Downingtown Area Regional Authority v. DER*, 1994 EHB 440, 443. The language in the rule leaves no room for equivocation. *C&K Coal Co. v. DER*, 1991 EHB 1484, 1486. Pa.R.C.P. 4014(b) provides in relevant part:

The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission an answer verified by the party or an objection, signed by the party or by his attorney....

Under this rule's language, admissions are deemed admitted automatically by expiration of the deadline. *C&K Coal Co.* at 1487. Thus, Kennedy's failure to file timely responses means that the matters addressed in the Department's comprehensive request were deemed admitted.

With the admissions admitted, Kennedy now seeks the withdrawal of these deemed admissions and the substitution of actual responses on its behalf, some of which deny the admissions. According to the relevant portion of Pa.R.C.P. 4014(d):

Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 212 governing pre-trial conferences, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

Kennedy's motion to withdraw is supported by *C&K Coal Co. v. DER*, 1991 EHB 1484, and *Downingtown Area Regional Authority*, 1994 EHB 440, which have both interpreted Pa.R.C.P. 4014. In both cases, answers to requests were given late, six days and forty-seven days respectively. In both opinions, the Board construed Rule 4014 to favor the resolution of matters by holding hearings on their merits, and it allowed counsel to withdraw the deemed admissions.

As we discussed in *C&K Coal Co.*, Rule 4014 favors resolution of matters by hearings on their merits rather than through "paper" procedures. *C&K Coal Co.* at 1487. This is evident from the first prong of the test in Rule 4014(d), which asks whether presentation of the case on its merits will be subserved by withdrawal. *Id.* The second prong also displays this intent by requiring the party that obtained the admission, the Department in this case, to show the Board that it will be prejudiced in maintaining its defense on the merits if the Board allows the withdrawal of the admission. *Id.* As used in this rule, prejudice is limited to problems the

Department would face in presenting its case or defending against the Kennedy's case because it relied on the admissions and did not obtain evidence to prove the matters admitted. *Dwight v. Girard Medical Center*, 623 A.2d 913, 916 (Pa. Cmwlth. 1993) (prejudice is determined by whether the party who obtained the admission is rendered less able to obtain the evidence required to prove the matters admitted); *Downingtown Area Regional Authority*, 1994 EHB at 444; *C&K Coal*, 1991 EHB at 1489.

The Department failed to file a response to Kennedy's motion to withdraw and its summary judgment motion states no reason why the Department will be sufficiently prejudiced in presenting its position in a hearing on the issues raised by Kennedy's appeal. It is clear that withdrawal would allow a presentation of the merits to this Board as the trier of fact. Without withdrawal, the factual issues surrounding Kennedy's civil penalty assessment are foreclosed in favor of the Department. Like in *C&K Coal* and *Downingtown Area Regional Authority*, by allowing withdrawal as proscribed by Rule 4014(d), we provide ourselves with the opportunity to hear the evidence offered by both parties.

We do not grant this motion as a reward to Kennedy or in any way approve of Kennedy's untimely actions in responding or the excuses offered therefor. Any party that fails to file timely answers to requests for admissions is taking a serious risk. Nevertheless, under the circumstances presented here, which includes Kennedy's change of counsel during the period in question, and in keeping with the spirit of Rule 4014 and the Board's interpretations of that rule in *C&K Coal Co.* and *Downingtown Area Regional Authority*, we conclude that allowing withdrawal in this instance is justified.

The Department's motion for summary judgment is supported solely by the deemed admissions. With the withdrawal of those admissions, the Department no longer has adequate factual support for its motion.

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

VICTOR KENNEDY, d/b/a  
KENNEDY'S MOBILE HOME PARK

v.

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

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EHB Docket No. 2000-168-L

ORDER

AND NOW, this 6<sup>th</sup> day of February, 2001, Kennedy's motion to withdraw admissions and substitute answers and objections is GRANTED. The Department's motion for summary judgment is DENIED.

ENVIRONMENTAL HEARING BOARD



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BERNARD A. LABUSKES, JR.  
Administrative Law Judge  
Member

DATED: February 6, 2001

See next page for service list

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

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WILLIAM T. PHILLIPY IV  
 SECRETARY TO THE BOARD

**DAUPHIN MEADOWS, INC.**

v.

**COMMONWEALTH OF PENNSYLVANIA,  
 DEPARTMENT OF ENVIRONMENTAL  
 PROTECTION, and UPPER DAUPHIN AREA  
 CITIZENS' ACTION COMMITTEE and  
 SENATOR JEFFREY E. PICCOLA,  
 Intervenors**

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**EHB Docket No. 99-190-L**

**Issued: February 8, 2001**

**OPINION AND ORDER ON  
 MOTION TO DISMISS AND/OR RELINQUISH JURISDICTION**

**By Bernard A. Labuskes, Jr., Administrative Law Judge**

**Synopsis**

The Board has the authority to retain jurisdiction incident to a remand to the Department.

**OPINION**

On August 17, 1999, the Department of Environmental Protection (the "Department") denied Dauphin Meadows, Inc.'s ("Dauphin Meadows") application for a permit modification that would have allowed it to expand its landfill in Upper Paxton and Washington Townships, Dauphin County. The Department denied the application because the Department concluded that the harms associated with the project did not clearly outweigh the benefits. Dauphin Meadows filed this appeal from the denial, alleging in part that the Department had relied improperly on a guidance

document standard that should have been promulgated as a regulation. Although Dauphin Meadows raised several other arguments in support of its appeal, we granted it summary judgment on the guidance document issue and left those other issues unresolved for the time being. On April 27, 2000, we remanded the permit application to the Department for further processing that did not rely upon the guidance document standard. We expressly retained jurisdiction in our remand order. Although the Department filed a “motion for clarification” following our order, no party moved for reconsideration. No party attempted to file a petition for review.

Dauphin Meadows is dissatisfied with the progress of permit review following our remand. It has filed a motion asking us to rescind our remand order because the Department is alleged to be unwilling or unable to perform a good faith review of Dauphin Meadows’ application in accordance with this Board’s order. Dauphin Meadows asks us to exercise our authority to conduct our own *de novo* review of the environmental assessment portion of the permit application and otherwise resolve the several issues that were left pending in the appeal prior to our partial remand.

In order to assess the factual allegations that are set forth in Dauphin Meadows’ motion to rescind, we scheduled a hearing that was to have been held on January 10, 2001. We subsequently granted the parties’ joint request to postpone that hearing pending settlement discussions. In the meantime, the Department has filed a “Motion to Dismiss Appeal and/or Relinquish Jurisdiction.” The Intervenors have joined in the motion. Dauphin Meadows has opposed it.

The Department argues, approximately eight months after our remand order, that this Board did not have the authority to issue a partial remand. Once the Board ruled on one of the arguments presented in the summary judgment motions, it necessarily “vacated” the permit denial, and by automatic operation of law, the Board lost jurisdiction over this appeal. Accordingly, the

Department argues that this Board may not address Dauphin Meadows' motion to rescind. Although captioned in the alternative, the Department does not specify why the Board should relinquish jurisdiction, as opposed to dismiss the appeal for lack of jurisdiction, so we too will focus upon the motion to dismiss. The Department's motion is denied.

In many cases, when this Board, or a court for that matter, remands a case, it will specifically note that it relinquishes jurisdiction. See, e.g., *Pennsylvania Environmental Management Services ("PEMS") v. DER*, 503 A.2d 477, 481 (Pa. Cmwlth. 1986). The reason it is often noted is because jurisdiction does not necessarily end upon a remand. A remand by definition presumes further activity. In some cases, a remanding tribunal will decide that it is appropriate to retain jurisdiction, such as where further factfinding or investigation is required. *Pennsylvania Appellate Practice 2d* § 1551;6; cf. *Kowalick v. Sullivan*, 812 F. Supp. 534 (E.D. Pa. 1993)(remanding court has jurisdiction over agency proceedings to ensure that agency adheres to legal and factual instruction on remand). A retention of jurisdiction suggests that the reviewing body intends to postpone making a decision that will fully and finally end the entire matter until further work is performed and the matter is returned for additional review that will be dependent upon that additional work. Neither the Department's briefs nor our own research has revealed a case where the reviewing tribunal's right to retain jurisdiction has been questioned. Indeed, the Department's briefs do not cite any case law or any other authority in support of the position that this Board cannot retain jurisdiction incident to a remand.

In point of fact, this Board has quite routinely remanded matters to the Department for further action and expressly retained jurisdiction. See, e.g., *Carlson Mining Co. v. DER*, 1993 EHB 777, 782; *Baney Road Assoc. v. DER*, 1992 EHB 441, 449; *Western Pennsylvania Water Co. v.*

*DER*, 1991 EHB 287, 347; *Duquesne Light Co. v. DEP*, 1985 EHB 423, 429; *Toby Creek Watershed Assoc., Inc. v. DER*, 1978 EHB 23, 42. Although the Department was obviously party to all of these appeals, we are not aware that it ever challenged or questioned the Board's retention of jurisdiction. The Department asserts that the lack of challenges means that these cases have no precedential value. We disagree. We find support in the fact that the Board followed a practice in the instant appeal that has been in place and has gone essentially unchallenged for decades.

In addition to the cases where the Board has expressly retained jurisdiction, it has as a matter of course done so in effect without saying so. For example, this Board issued an adjudication a few weeks ago in *O'Reilly v. DEP*, EHB Docket No. 99-166-L (Adjudication issued January 3, 2001), where we found that a permit had been issued correctly in all respects except for obtaining a proper corporate signature. We remanded the permit with instructions to the Department to obtain such a signature within ten days, and provide us with notice when the signature was obtained, at which point we would close the case. Implicit in our order was a retention of jurisdiction pending receipt of a proper signature. Such remands are common and have not been questioned to our knowledge.

*PEMS v. DER*, 503 A.2d 477 (Pa. Cmwlth. 1986), is a case that falls within a hairbreadth of being precisely on point. There, as here, the Department denied a landfill permit. The applicant raised several issues in its appeal to this Board. There, as here, the Board agreed with one of the appellant's contentions and remanded the permit for further processing consistent with the Board's order. The Board expressly retained jurisdiction. *PEMS v. DER*, 1981 EHB 395, 413.

Following further processing, the Department denied the permit again. The applicant did not file a new appeal, as it might have needed to do had the Board relinquished jurisdiction. It simply notified the Board that it wished to renew proceedings in an appeal that had never

terminated. The Board accepted the request over the Department's objection and proceeded toward adjudication. *PEMS v. DER*, 1986 EHB 94, 137 (no new appeal required because the Board retained jurisdiction).

The adjudication was appealed to the Commonwealth Court. There, again as here, the Department argued that this Board lacked jurisdiction when it commenced proceedings the second time around. The Court rejected the Department's argument. The Court, without question or criticism, stated that the Board's retention of jurisdiction after the first round of proceedings meant that there was no need to file a second appeal; the first appeal never ended. The Court ruled as follows:

DER moves to quash PEMS' petition for review because PEMS did not [ ] appeal DER's second denial. We deny this motion because [ ] EHB **retained jurisdiction** of the remand which resulted in the second denial. . . .

503 A.2d at 480 n.7 (emphasis original).

Although it does not appear that the Department articulated a challenge to the Board's retention of jurisdiction *per se*, if the Department did not question that retention, there would have been no basis for arguing that a new appeal was needed. If it was proper to retain jurisdiction, a new appeal regarding the very same Departmental action (the permit denial) would necessarily have been a redundancy. By positing the need for a new appeal, the Department by necessary implication challenged the retention of jurisdiction, i.e., the ongoing nature of the original proceedings. Both the Board and the Court gave short shrift to the Department's argument. If not perfectly on point, *PEMS* certainly lends very strong support to the Board's retention of jurisdiction in this appeal.

The Department's basic argument is that this Board's remand order had the "effect" of

“vacating” the permit denial. (The Department concedes that we never actually said that.) In that our order annulled the denial, there was no longer any Department action in place. When the action ceased to exist, our jurisdiction automatically and necessarily ceased to exist. In other words, our continuing jurisdiction was dependent upon the existence of a continuing Departmental action.

The first problem with the Department’s argument, as already noted, is that it is not directly supported by any authority. In fact, it is inconsistent with *PEMS*. The only authority cited by the Department in support of this argument is the Environmental Hearing Board Act, 35 P.S. §§ 7511-7514. That statute provides that this Board has jurisdiction over appeals from final actions of the Department. 35 P.S. § 7514. The Act, however, describes when the Board’s jurisdiction is triggered. It describes when the jurisdiction starts, but not when it ends. It neither supports nor contradicts the Department’s position.

To the extent that our independent research has uncovered relevant authority, it is inconsistent with the Department’s argument. For example, in *Columbia Gas of Pennsylvania, Inc. et al. v. DEP et al.*, 1996 EHB 1067, certain parties asked this Board to prevent another party from withdrawing its appeal pursuant to a settlement agreement. The Department argued that the Board could not interfere with the withdrawal because the Board has no jurisdiction over the agreement and the Board’s jurisdiction only attaches to actions by the Department. We summarily rejected the Department’s argument, as follows:

It is true that the Board’s jurisdiction over a matter **initially** attaches only when there has been an “action” by the Department, as defined at 25 Pa. Code § 1021.2(a). 35 P.S. § 7514; *Borough of Ford City v. DER*, 1991 EHB 169. However, once that initial action has been taken by the Department and the Board’s jurisdiction has attached, the Board’s jurisdiction then extends to all parties to the appeal and all matters in connection with the appeal. The “action” of the Department here was its issuance of the permit to Eighty-Four Mining

which was timely appealed by Columbia Gas. Our jurisdiction thus attached to the appeal, and as an independent, quasi-judicial agency under the Environmental Hearing Board Act, 35 P.S. § 7511 *et seq.*, we are empowered to resolve all issues between the parties raised during the appeal.

1996 EHB at 1069 (emphasis original).

Similarly, *Horsehead Resource Development Company v. DEP*, 1998 EHB 1101, was an appeal from compliance orders that were subsequently withdrawn. The Department moved to dismiss for mootness and lack of jurisdiction. In rejecting the Department's jurisdictional argument, we stated:

It is a well-settled tenet that once the jurisdiction of a tribunal attaches it is not divested of that jurisdiction by the ordinary occurrence of subsequent events. The jurisdiction is the power of a tribunal to enter upon an inquiry; it is not a question of whether the tribunal is able to grant relief in a particular case. *Get Set Organization v. Philadelphia Federation of Teachers, Local No. 3*, 286 A.2d 633 (Pa. 1971). Therefore, our adjudicatory power is not lost simply because the Department has changed its position and our ability to grant relief may be more limited by the scope of the remaining issues.

1998 EHB at 1103-04. Although neither of these cases is directly on point, both cases demonstrate that the analytically important focus in evaluating jurisdiction is on the triggering event as opposed to subsequent events. They both support our conclusion today that, once jurisdiction properly attaches, we have considerable control in determining when it ends.

With no authority to support it, the Department's argument is reduced to a rather metaphysical construct that does not withstand scrutiny. The Department's theory envisions the permit denial as a continuing phenomenon that started its existence with the denial letter and continued in place until our remand order. It was only at the moment of our remand that the denial ceased to exist.

The Department's theory is artificial and overly complicated. The permit denial was a static event. When it occurred and an appeal was filed, our jurisdiction was triggered. Once our jurisdiction is triggered, it no longer matters what happens to the underlying action as far as our jurisdiction is concerned.<sup>1</sup> Our continuing jurisdiction is not at the mercy of the continuing existence (whatever that means) of the action that triggered our jurisdiction in the first place.

We also do not necessarily agree that a partial remand must be characterized as having vacated the permit denial. After all, our order did not change the reality that Dauphin Meadows does not have the approved environmental assessment that it seeks. From a practical point of view, the permit denial is still in effect. And in fact, our order did not reverse that denial. In other words, this Board has not as yet taken a final action that has definitively ruled upon the Department's action. See *PUSH v. DEP*, Cmwlth. Ct. Docket No. 2014 C.D. 1999 (September 21, 1999) (appeal from Board adjudication that included remand order quashed as an appeal from an interlocutory order); *Blose v. DEP*, Cmwlth. Ct. Docket No. 834 C.D. 2000 (February 2, 2001) (no petition for review may be filed from Board order remanding matter to the Department). A full adjudication of this matter must continue to await further review. The Department's statement that there is "no longer anything to adjudicate" (Memorandum, p. 4-5) is incorrect. The central question remains unresolved.

The Department next argues that this Board does not have jurisdiction because Dauphin Meadows can file a mandamus action in Commonwealth Court if it is unhappy with the Department's action (or lack thereof) following the remand. We do not know whether Dauphin Meadows could file a mandamus action at this time. That would be for a court to decide. But we

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<sup>1</sup> A matter might become moot, but mootness is not a purely jurisdictional issue. *Horsehead Resource Development Company, Inc v. DEP*, 1998 EHB 1101, 1103-04.



would point out that mandamus is ordinarily not available if an effective administrative remedy is available. *Empire Sanitary Landfill v. DER*, 684 A.2d 1047, 1053 (Pa. 1996); *Marinari*, 566 A.2d. at 387. We strongly suspect that a court would be reluctant to proceed with a mandamus without a showing that this Board cannot offer relief, and whether this Board can offer relief does not depend on the availability of mandamus. This Board either has jurisdiction or it does not, and that determination does not implicate the availability of mandamus in any way. In short, the Department's argument does not get it anywhere. To say that mandamus is available simply begs the real question.

Another difficulty with the Department's argument is that it mischaracterizes what Dauphin Meadows is seeking. A mandamus action would seek an order that **the Department** must do something. Dauphin Meadows is not asking us to order the Department to do anything. Rather, it is asking **this Board** to recommence proceedings. It is arguing that, since the Department has shown that it is not willing to process the application (a question of fact that has prompted us to schedule a hearing), this Board should do so consistent with its *de novo* review authority. The Department would not be required to take any action. Quite the contrary. It will have forfeited that opportunity.

The Department places great weight upon *Marinari v. DER*, 566 A.2d 385 (Pa. Cmwlth. 1989), in support of the proposition that this Board lacked the authority to retain jurisdiction. *Marinari* is inapposite. In *Marinari*, the Department did not take any action on a landfill permit application for years. The frustrated applicant eventually sought a writ of mandamus compelling the Department to act. The Department argued that a writ of mandamus was improper because the *Marinaris* could appeal to this Board. The Court rejected the Department's argument, holding that the *Marinaris* had no ability to obtain relief from the Board because the Department had yet to take

an appealable action. 566 A.2d at 387.

The essence of the *Marinari* decision was that the Department had yet to take any appealable action, thereby triggering this Board's jurisdiction. That critical fact is not present here. The *Marinari* case would only be helpful if the Department's underlying premise was established. That premise, of course, is that this Board lost jurisdiction when it issued the partial remand. If that premise were true, it might be true that Dauphin Meadows could not then appeal the Department's inaction. The correctness of the Department's underlying premise, however, is the dispositive question that is actually now before us. The Department's analysis again begs that fundamental question. *Marinari* does not help us answer **that** question.

On a related note, the Department argues that there was no "need" for us to have retained jurisdiction because Dauphin Meadows had the ability to seek a mandamus if the Department failed to follow through on our order. First, whether there was a "need" to retain jurisdiction is an issue wholly separate from whether we had the ability to do so, which is the proper subject of the Department's current motion. The Department would have needed to raise the issue of whether jurisdictional retention was appropriate or needed –as opposed to within our power - - by way of a timely motion for reconsideration. The only reason we consider the Department's current motion so long after the issuance of the order is that it questions the existence of subject matter jurisdiction, a question that can be raised at any time. *Blackwell v. State Ethics Commission*, 567 A.2d 630, 636 (Pa. Cmwlth. 1989).

Furthermore, we need not consider the possibility of ordering the Department to comply with our order, which would be the objective of a mandamus action. We would not under these circumstances "determine the Department should be required to take a speedier action regarding

Dauphin Meadows' permit application.” (Department Reply Brief at 3.) The Department was given an opportunity to act and the question now is whether it has forfeited that opportunity entirely.

Our retention of jurisdiction was “needed” if we were to have the clear ability to recommence our proceedings without the possible need for a new appeal. The availability of a mandamus remedy against the Department would not have satisfied that need.

The Department also argues that Dauphin Meadows' motion to rescind must be treated as an attempt to file a new appeal, but that argument is premised on its failed attempt to argue that the original appeal is no longer in place. Our rejection of the premise renders the secondary argument irrelevant. The motion to rescind is not a new appeal. It is a request for additional relief in an appeal that remains vital.

Although Dauphin Meadows cites the Department's inactivity, it is not attempting to appeal from that inactivity. Dauphin Meadows cites not only the Department's inactivity as evidence that this Board must move forward with a *de novo* review, but other affirmative acts (e.g. denial of a permit renewal) as well. Whether that inactivity and/or those affirmative acts are separately appealable is not the issue. The issue **in this appeal** is whether that inaction and/or those actions evidence the Department's bad faith or misunderstanding of this Board's remand order.

Similarly, Dauphin Meadows argues that the Department has taken new appealable actions regarding its landfill since this Board's remand order. (In fact, Dauphin Meadows has filed separate appeals from those allegedly final actions.) That argument, however, is beside the point of the Department's motion, which attacks this Board's right to retain jurisdiction to review the Department's original action - - the denial of the permit modification. Whether this Board can retain jurisdiction in that appeal does not depend in any way on whether the Department has taken

separate, new, appealable actions. If there is any dispute regarding the appealability of those actions, it will need to be addressed in the context of Dauphin Meadows' appeals from those actions.

The Department points out that Dauphin Meadows agreed following the issuance of our remand order that the Board "lacked the power to take further action with respect to the appeal filed by Dauphin Meadows." (Memorandum of Law in Response to DEP's Motion for Clarification, pp. 2-3.) Dauphin Meadows also stated that the Department's permit denial "has been vacated as a matter of law" and "nothing awaits adjudication." *Id.* Of course, now Dauphin Meadows argues precisely the opposite. The Department makes the point "not to advance a theory that Dauphin Meadows is legally bound to its original position, but only to argue that Dauphin Meadows got it right the first time." (Reply Brief, p. 2.) It also asserts that Dauphin Meadows' statements constitute legally binding admissions that Dauphin Meadows lacks standing to pursue further relief from this Board.

We view Dauphin Meadows' concessions to be of no consequence. Dauphin Meadows' earlier position on the law does not preclude this Board from making its own conclusions of law. Indeed, it is absolutely required to do so. *See Martin v. Poole*, 336 A.2d 363, 365 n. 2 (Pa. Super. 1975); *Enoch v. Food Fair Stores, Inc.*, 331 A.2d 912, 914 (Pa. Super. 1974).

To some extent, the parties slip into argument about whether the Department has acted properly in response to this Board's remand order. That argument is properly directed toward resolution of Dauphin Meadows' motion to rescind our earlier order, not the Department's motion to dismiss. Whether the Department has acted properly in response to this Board's remand order does not have any relevance in deciding whether this Board had the authority to issue a partial remand in the first instance.

For the foregoing reasons, we have no hesitation in concluding that the Board continues to have jurisdiction in this appeal. Our retention of jurisdiction was well within our authority.

Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

DAUPHIN MEADOWS, INC.

v.


COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION, and UPPER DAUPHIN AREA  
CITIZENS' ACTION COMMITTEE and  
SENATOR JEFFREY E. PICCOLA,  
Intervenors

EHB Docket No. 99-190-L

ORDER

AND NOW, this 8<sup>th</sup> day of February, 2001, the Department's Motion to Dismiss Appeal and/or Relinquish Jurisdiction is DENIED.

ENVIRONMENTAL HEARING BOARD

  
BERNARD A. LABUSKES, JR.  
Administrative Law Judge  
Member

DATED: February 8, 2001

See next page for a service list.

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WILLIAM T. PHILLIPY II  
 SECRETARY TO THE BOA

**WILLIAM A. SMEDLEY**

v.

**COMMONWEALTH OF PENNSYLVANIA,  
 DEPARTMENT OF ENVIRONMENTAL  
 PROTECTION and INTERNATIONAL  
 PAPER COMPANY, Permittee**

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**EHB Docket No. 97-253-K**

**Issued: February 8, 2001**

**ADJUDICATION**

**By Michael L. Krancer, Administrative Law Judge**

**Synopsis:**

The Board sustains the granting by DEP of a minor operating permit modification to International Paper Company allowing the company to add a component of tire derived fuel for its two boilers. Smedley has standing because the Board finds that he is exposed to and comes into contact with air emissions emanating from the International Paper plant. The Board, as the initial trier of fact, reviews the matter anew to determine whether the Department's action is in conformance with the law and otherwise reasonable and appropriate. The Appellant in this case failed to demonstrate that the Minor Modification would result in the increase in the emissions of any contaminant.

**INTRODUCTION**

This case involves the appeal by William A. Smedley (Smedley or Appellant) of the issuance by the Department of Environmental Protection (DEP or Department) of an air quality minor operating permit modification (Minor Modification) under the Pennsylvania Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. §§ 4001-4106, to



International Paper Company (IP). The Minor Modification modified IP's existing air quality permit to allow it to substitute a prescribed quantity of Tire Derived Fuel (TDF) for coal as fuel in its two boilers at its paper manufacturing plant in Lock Haven, Pennsylvania.

Smedley challenges the Department's granting of the Minor Modification on numerous grounds. He claims that the addition of TDF to the fuel stream cannot qualify as a "minor operating permit modification" under the Department's regulations. He asserts that the addition of TDF will result in an increase of emissions of various contaminants, especially dioxin and furan compounds, which will cause an adverse health impact. Smedley also asserts that the Department erred in not requiring more stack testing before granting the Minor Modification. He also claims that the Department erred in not conducting a compliance history review before granting the Minor Modification. In that regard, he claims that the Department erred in not placing IP on its compliance docket which is a list of violators of the Air Pollution Control Act (APCA or the Air Pollution Control Act). He asserts that the Department was either precluded from or should not have granted the Minor Modification because IP's compliance history is deficient. He further claims that the Minor Modification is precluded because it will cause "air pollution" as that term is defined by statute and regulation and because the action violates Article I, Section 27 of the Pennsylvania Constitution.

#### **FINDINGS OF FACT**

1. The Department of Environmental Protection (DEP or Department) is the executive agency of the Commonwealth charged with the responsibility of administering and enforcing the provisions of the Air Pollution Control Act, 35 P.S. §§ 4001-4106, and the rules and regulations promulgated thereunder codified at 25 Pa. Code, Article 3, Chapters 121-143.

2. Appellant is William A. Smedley (Smedley).

3. On November 21, 1997 Smedley filed a Notice of Appeal with the Board challenging DEP's granting of a minor operating permit modification to IP's existing air quality permits. (NOA)

4. International Paper Company (IP) owns and operates a paper mill located in Lock Haven, Pennsylvania. (Ex. B-1)

5. Lock Haven is situated in a deep valley and emissions from the IP plant on some occasions literally "hug the ground" in the valley in downtown Lock Haven. (N.T. 123-24, 26)

6. Smedley visits Lock Haven frequently. (N.T. 827)

7. Smedley's work as President of the not-for-profit organization called Greenwatch requires him to frequent Lock Haven. (N.T. 827-28)

8. Smedley frequents Lock Haven to attend public meetings. (N.T. 828-29)

9. Smedley is a member of the Lock Haven YMCA and swims at the YMCA pool on average three times per week. (N.T. 827)

10. Smedley frequents the town of Lock Haven to visit restaurants and other types of businesses. (N.T. 827)

11. Smedley lives in Jersey Shore, Pa. which is about 11 miles directly down-valley from Lock Haven. (Smedley Tr. 827, 842)

12. Emissions from the IP plant on occasion travel directly down the valley and actually go by Smedley's house. (Smedley Tr. 833)

13. IP has two identical Riley traveling grate spreader stoker boilers. (N.T. 1569)

14. IP operates both its two Riley stoker boilers under operating permit nos. 18-302-017A (Boiler No. 1) and 18-302-015B (Boiler No. 2), which were issued by DEP on August 11, 1993. (Ex. B-1)

15. On December 27, 1994, DEP issued IP Operating Permit #OP-18-005, which is IP's Reasonable Available Control Technology (RACT) permit. (Ex. B-1, Ex. IP-4)
16. IP uses its boilers to generate steam and produce electricity. (N.T. 1575)
17. Operating permit nos. 18-302-017A and 18-302-015B specifically provide for IP's boilers to burn bituminous coal and such other fuels that DEP approves. (N.T. 1321)
18. On May 15, 1995, IP submitted a letter to DEP requesting written confirmation of its verbal approval to allow IP to conduct a trial burn using Tire Derived Fuel (TDF or tire derived fuel) as part of its fuel for its #2 boiler during the week of June 5, 1995. (Ex. IP-4)
19. Tire derived fuel is composed of tires that have had their steel belts removed and are shredded and chipped into pieces of rubber no greater than two inches in size. (N.T. 1538, 1567; Ex. IP-33)
20. The purpose of the trial burn was, first, to determine whether burning TDF with coal was physically possible in IP's boilers and, second, to characterize air emissions from burning TDF and coal as compared to coal alone. (N.T. 790, 311)
21. Before DEP approved IP's request for a trial burn, it reviewed information collected from a federal government-clearing house regarding stack test information from an industrial boiler burning bituminous coal in the Midwest. (N.T. 801-02, 9-10)
22. The stack test results from the industrial boiler in the Midwest compared bituminous coal and 20% tire derived fuel emissions. (N.T. 810)
23. DEP believed that these stack tests results were very indicative of what they were going to see when IP performed stack test results, but because every facility is different DEP wanted to go ahead and have IP perform its trial burn. (N.T. 810-11)

24. On May 24, 1995, DEP approved IP's request to trial burn tire derived fuel in its boiler #2 during the week of June 5, 1995. (Ex. IP-5, Ex. C-6)

25. The trial burn was used as a screening mechanism to determine if any of the primary component emissions increased when TDF was burned. (N.T. 790)

26. The primary components tested were carbon monoxide (CO), nitrogen oxide (NO<sub>x</sub>), sulfur dioxide (SO<sub>2</sub>), and particulate matter. (N.T. 790-91)

27. On July 18, through July 20, 1995, the environmental consulting firm, Entropy Inc., conducted the trial burn on IP's #2 boiler. (Ex. B-1, Ex. A-10, Ex. C-8, Ex. IP-6)

28. The trial consisted of nine test burns over three days from which emissions data was recorded. (Ex. A-10) The nine test burns were conducted as follows:

- Four test burns used 20% tire derived fuel and 80% coal.
- One test burn used 10% tire derived fuel and 90% coal.
- Two test burns used all coal.
- Two test burns were conducted to determine whether coal feeding and coal handling equipment could also be used to handle tire derived fuel, but emissions data was not recorded.

(Ex. A-10, p. 5, Ex. A-17)

29. Stack testing was performed for heavy metals, particulates, and carbon monoxide, and the facility's continuous emissions monitoring systems recorded data for nitrogen oxide and sulfur dioxide. (Ex. B-1, Ex. A-10, Ex. C-8)

30. On March 8, 1996, IP submitted Entropy Inc.'s Report (the Entropy Report) on the trial burns to DEP. (Ex. A-10, Ex. C-8, Ex. IP-6)

31. The Entropy Report finds that:

With the exception of lead in test 5, and zinc and arsenic in test 7, SO<sub>x</sub>, NO<sub>x</sub>, particulate, zinc, arsenic and chromium emissions were lower in all four tests which utilized 20% TDF on a BTU basis. On average, the results indicated that with 20% TDF:

1. SO<sub>2</sub> emissions were 8.1% lower.
2. NO<sub>x</sub> emissions were 9.3% lower.
3. CO emissions were 15.7% higher.
4. Filterable particulate emissions were 65.6% lower.
5. Lead emissions were 15.2% lower.
6. Zinc emissions were 15.2% lower.
7. Arsenic emissions were 9% lower.
8. Chromium emissions were 35.5% lower.
9. Opacity was basically unchanged at <1%.

Combustion of up to 20% TDF, therefore, offers the potential for reduced environmental impact.

(Ex. A-10, p. 7)

32. DEP reviewed the Entropy Report in order to establish a baseline for tire derived fuel, and to determine if IP was in compliance with the emissions limits in the permit when tire derived fuel was burned. (N.T. 1051, 1065-66)

33. DEP found that the Entropy Report was representative of the actual emissions for the facility while operating under the conditions it was tested for during the trial burn. (N.T. 1059-60; Ex. C-9)

34. Entropy used accepted and standard EPA testing protocols (reference methods 1, 2, 3a, 4, 5, 10, 29) during the 1995 trial burns. (N.T. 1057-58)

35. DEP tested for particulate matter using a different method than method 5 because at that time Pennsylvania defined particulate matter different than EPA and DEP's testing method included an additional component of "back half insoluble" which EPA's method of measurement did not. (N.T. 1059-60)

36. When back half insoluble is included in particulate testing methods, particulate test results probably would increase for all runs whether that was with tire derived fuel or coal only fuel. (N.T. 1060)

37. DEP's review of the Entropy Report was appropriate, consistent with sound scientific practice, and without relevant error.

38. The Entropy Report has shown the following carbon monoxide emissions data:

- a. Baseline coal only test run: 67.8ppm and 22.1pph.
- b. 10% tire derived fuel test run: 71.6ppm and 24.0ppm.
- c. 20% tire derived fuel test runs: 69.0ppm, 94ppm, 75.5ppm, 75.0ppm, and 22.6ppm, 31.0ppm, 25.5ppm and 24.2ppm respectively.

(Ex. A-10, Tables 2-1, 2-2, 2-3)

39. The apparent increase in carbon monoxide emissions reported when tire derived fuel was burned prompted DEP to request a second trial burn. (N.T. 792-93)

40. Through the Entropy Report, IP requested permission to perform a 90-day continuous trial burn to determine the long-term variability of burning tire-derived fuel. (Ex. A-10, p. 1)

41. On April 11, 1996, DEP approved IP's request for a second trial burn. (Ex. A-16, Ex. C-10, Ex. IP-8)

42. From July 22 to July 25, 1996, IP had Roy F. Weston, Incorporated (Weston) perform a second trial burn on boilers #1 and #2. (N.T. 1092; Ex. C-11, Ex. A-11, Ex. IP-9)

43. The second trial burn compared carbon monoxide total hydrocarbon emissions when 100% coal was used to fuel the boiler versus burning a mixture of 30% tire derived fuel and 70% coal. (Ex. A-11, p. 1-1)

44. Total hydrocarbons (THCs) refers to a wide array of different compounds containing carbon and hydrogen atoms. (N.T. 1093-94)

45. A total of six test burns were conducted; three test burns were done on July 22, 1996 and involved burning coal only, and an additional three test burns were done on July 25, 1996 involving burning coal mixed with 30% tire derived fuel. (Ex. A-11, p. 2-1 to 2-5)

46. The results of Weston's testing were reported in written format dated August 28, 1996. (Ex. A-11)

47. On November 22, 1996, IP requested DEP to review the Weston Report to determine if IP could obtain a permit to burn TDF at its Lock Haven Mill. (Ex. B-1, No. 14)

48. Andrew Zemba from DEP reviewed the Weston Report. (N.T. 1091)

49. Mr. Zemba reviewed the Weston Report for carbon monoxide and THC but did not review the continuous emission monitoring data relating to nitrogen oxide and sulfur dioxide. (N.T. 1093)

50. At the time of Mr. Zemba's initial review of the Weston Report, it did not contain sufficient information for him to determine whether the results were acceptable. (N.T. 1095)

51. Accordingly, on January 6, 1997, Mr. Zemba sent IP a letter outlining a list of 10 questions and a request for additional information to aid in his further analysis of the Weston Report. (N.T. 1095; Ex. C-12)

52. On February 7, 1997, IP responded to Mr. Zemba's January 6, 1997 letter. (N.T. 1095-96; Ex. C-13)

53. On February 18, 1997, Mr. Zemba prepared a memorandum for Mr. Richard Maxwell in the DEP regional office based on his review of IP's February 7, 1997 supplemental information. (N.T. 1097-98; Ex. C-14)

54. Mr. Zemba's February 18, 1997 memo (Exhibit C-14) noted five discrepancies with Weston's trial burn test report, but nonetheless determined that test results were acceptable to the Department. (N.T. 1101-02; Ex. C-14)

55. Test method 25a reports THC's on an as carbon basis, which understates the amount of total THC's emitted. (N.T. 1185; Ex. A-30)

56. Since the fall of 1998, DEP has had a policy of reporting THC's on an as propane basis. (N.T. 1185; Ex. A-30)

57. However, the Weston Report data for THC emissions can easily be converted from an as carbon basis to an as propane basis using a simple mathematical conversion formula (N.T. 1187-88)

58. When the as propane basis for reporting THC's is employed the numbers will be 23% higher than when reported under the as carbon basis. (N.T. 1189)

59. The relative ratios for THC's will not change when the as propane basis of reporting THC's is employed because all values will increase by approximately 23% as a result of reporting THC's on an as propane basis as opposed to an as carbon basis. (N.T. 1189)

60. Exhibit C-14 incorrectly states that the stack height discharging emissions from the IP boilers are 700 feet above grade. (N.T. 1100)

61. The stack height on IP's boilers is 750 feet above sea level. (N.T. 1100)

62. The stack height for IP's boilers was not a relevant factor in Mr. Zemba's review of the integrity of the testing procedure and actual emissions reported in the Weston Report. (N.T. 1100-01)

63. Weston used expired carbon monoxide cylinders when performing instrumental calibrations. (N.T. 1096; Ex. C-12, C-13)



64. Carbon monoxide calibration gases usually remain accurate a month after their expiration date. (N.T. 1097; Ex. C-13)

65. In response to Mr. Zemba's question about the expiration of the carbon monoxide calibration cylinders, IP was able to verify the accuracy of the carbon monoxide gases by cross checking each gas in the following manner which Mr. Zemba described:

Using the Calibration Data sheets that were compiled before each part of the trial, I performed a cross check on the CO gases. First, I inspected the correction coefficient on each data sheet. A correction coefficient of 1 indicates that the analyzer is functioning properly. Next, I verified the calibration gases. This is achieved by summing together the ppm for each calibration point and also the mv for each calibration point. Then, a fraction is calculated at each point by dividing the corresponding ppm and mv by their totals. The ppm and mv fractions should be the same at each point if the calibration gases were correct. The results were that the CO gases cross-checked with each other.

(Ex. C-13)

66. On June 11, 1997, after performing trial burns in 1995 and 1996, IP requested that DEP approve a modification to its operating permit nos. 18-302-017A and 18-302-015B to allow it to burn prescribed amounts of TDF along with coal. (N.T. 1323, 1584; Ex. B-1, Ex. C-15, Ex. IP-13)

67. DEP processed IP's permit modification request as a minor operating permit modification pursuant to 25 Pa. Code § 127.462. (N.T. 1323-24)

68. On September 11, 1997 IP's request was published in the *Lock Haven Express*. (NT 1325)

69. On September 22, 1997, Smedley submitted a public comment to DEP regarding the proposed Minor Modification of IP's operating permits to allow the burning of tire derived fuel in its boilers (N.T. 831; Ex. C-17). Smedley's comment letter stated as follows:

I am writing to express my opposition to the "minor" modifications applied by International Paper to their air quality permit. First, I do not consider burning tires a "minor" modification, I consider it a major modification. Granting this modification will begin a major battle with your department, International Paper and the supporters of clean air and a healthy environment in Central Pennsylvania. Burning tires for fuel is lunacy, especially in Central PA!!! As you know we already have too much cancer.

If you pursue this application I will spearhead another grass-roots environmental movement against International Paper and DEP which will more than likely involve legal action. Do you want another major controversy in Lock Haven? AIR has already located and has ready to testify expert witnesses who would be more than happy to testify about the hazards of burning tires. Don't test your new laws allowing pollution from industry on us! Also in your reply, if you chose to do so, do not waste your time trying to tell me how burning tires will not result in any increased pollution in this valley as I know otherwise.

In closing let me reiterate one final point, ALLOWING THIS MODIFICATION TO IP'S PERMIT WILL BEGIN ANOTHER MAJOR ENVIRONMENTAL BATTLE IN CENTRAL PA. PLEASE DO NOT ALLOW THIS PERMIT TO BE MODIFIED.

Very Sincerely

/s/ Bill Smedley  
Bill Smedley  
Chairman-AIR  
legal committee

(Ex. C-17)

70. Mr. Maxwell reviewed the Entropy and Weston stack test reports from IP's two trial burns and the DEP review memoranda prepared by Mr. Starnier and Mr. Zemba regarding the Entropy and Weston stack test reports when considering IP's request for a Minor Modification.

(N.T. 1333-35)

71. Mr. Maxwell reviewed two EPA documents: (1) the Project Summary, Pilot-Scale Evaluation (Ex. C-18); and (2) the Pyrolysis Report (Ex. C-19) (N.T. 1335-46)

72. The Project Summary, Pilot-Scale Evaluation is a pilot scale, or laboratory scale, test of emissions resulting from burning natural gas versus natural gas/TDF fuels. (Ex. C-18 p. 2) It attempts to determine what kind of air pollutants would occur from the combustion of TDF versus the combustion of conventional fossil fuels. (N.T. 1340)

73. The Project Summary, Pilot-Scale Evaluation reports emissions of VOC at or near the detection limits for both natural gas and TDF fuels. ((N.T. 1338-39; Ex. C-18, p. 3)

74. The Entropy Report is consistent with the Project Summary, Pilot-Scale Evaluation because it reports VOC emissions from the IP boilers at or near the detection limits when coal or coal/TDF fuels are burned. (N.T. 395)

75. The Project Summary, Pilot-Scale Evaluation reports that semi-volatile organic compound levels were very low and virtually undetectable for both natural gas and TDF fuels. (N.T. 1339; Ex C-18, pp. 3-4)

76. According to the Project Summary, Pilot-Scale Evaluation except for zinc, potential emissions from TDF combustion are similar to emissions from conventional fossil fuels when burned in well-designed and well-operated combustion devices. (N.T. 1340; Ex. C-18, p. 5)

77. The Pyrolysis Report is an EPA compilation of data from many different sources, including stack testing and information on TDF usage in many facilities. (N.T. 1344)

78. The purpose of the Pyrolysis Report is to provide technical assistance to state, local and private air pollution control agencies. (N.T. 1347; Ex. C-19, p. iii)

79. The Pyrolysis Report reports a general reduction of emissions of particulates and nitrogen oxides when TDF is burned. (N.T. 1346; Ex. C-19)

80. One facility in the Pyrolysis Report reported increased carbon monoxide emissions when TDF was burned. (N.T. 1346; Ex. C-19)

81. Mr. Maxwell reviewed the Pyrolysis Report and the Project Summary, Pilot-Scale Evaluation independently and arrived at his own conclusions regarding the Minor Modification. (N.T. 1353)

82. Specifically Mr. Maxwell concluded as follows:

I concluded that burning tire-derived fuel in the boilers along with coal would not result in the emission of any air contaminant that would be in excess of any regulatory limitation or permit limitation. I concluded that there would be no increase in the emission of any air contaminant from burning tire-derived fuel and coal over the level that existed from burning coal only. And I also felt that I had sufficient information -- in fact, there was no reason to be believe that air pollution would be created from the burning of coal and tire-derived fuel, that there would be any increase in air pollution over whatever level existed for burning coal only.

(Maxwell Tr. 1355-56)

83. On this basis, Mr. Maxwell recommended to Mr. Aldenderfer that IP's minor permit modification be granted. (N.T. 333, 1356)

84. Mr. Maxwell wrote the Minor Modification approval letter for the signature of his superior, Mr. Aldenderfer. (N.T. 1356; Ex. C-26)

85. The Minor Modification added conditions 13, 14 and 15 to IP's OP-18-0005 as follows:

In addition to bituminous coal, Boilers 1 and 2 may burn shredded tires, otherwise known as tire-derived fuel or TDF, provided that the TDF is mixed with bituminous coal prior to being introduced to the boilers and provided that at any given time the TDF does not comprise more than 25% of the total weight, or more than 30% of the total available BTUs, of the TDF/coal mixture being fed to each individual boiler.

The approval to burn TDF which is granted herein is based upon the Department's determination that the use of a TDF/coal mixture in the respective boilers will not cause an increase in the emission of any air contaminant above the levels resulting from the use of coal only and is potentially subject to rescission should the Department ever determine that such is not the case.

The company shall establish and maintain a monitoring and record keeping system which will accurately demonstrate that the TDF does not at any given time comprise more than 25% of the total weight, or more than 30% of the total available BTUs, of the TDF/coal mixture being fed to each individual boiler. The company shall also maintain records of the total amount (weight) of TDF burned per month in each boiler. All records generated pursuant to this condition shall be retained on-site for a period of at least two years and shall be made available to the Department upon request.

The company shall perform any additional stack testing upon Boilers 1 and/or 2 which the Department may determine is needed to confirm compliance with any requirement contained herein or any requirement specified in, or established pursuant to, any rule or regulation contained in Article III of the Rules and Regulations of the Department of Environmental Protection.

(Ex. C-26)

86. IP's Minor Modification does not modify or affect its 50 ton per year VOC limitation (Condition 10) in its existing air permit. (N.T. 755-56; Ex. C-3, Ex. C-26)

87. The use of tire-derived fuel did not require physical changes to the boilers. (N.T. 1356-57, 1575)

88. IP substitutes a prescribed amount of TDF for coal as fuel in Boilers No. 1 and 2. (N.T. 1567, 1664-65)

89. The coal and tire derived fuel are mixed with each other prior to entering the boiler. (N.T. 1576-77)

90. The purpose of IP's minor permit modification is to save IP money on fuel costs and create an environmental benefit. (N.T. 1665)

91. Burning TDF saves IP approximately \$300,000 to \$400,000 per year in fuel costs. (N.T. 1782)

92. Smedley's expert, Dr. Paul Connett, is qualified as an expert in the fields of chemistry, dioxin, health risk assessment and incineration/combustion. (N.T. 496)

93. IP's corporate manager of Industrial Hygiene, Larry Laird, is qualified as an expert in the fields of interpretation of laboratory reports, assessment of air emissions and the impact of air pollution controls systems on air emissions (meaning specifically determining what the impact would be on the level of air emissions being emitted from those sources). (N.T. 1648, 1661-62)

94. IP's expert, Dr. Kathryn E. Kelly, is qualified as an expert in four areas: (1) toxicology; (2) health risk assessment; (3) interpretation of lab and stack test reports including dioxin air emissions; and (4) assessment of potential human health impacts of air emissions including dioxin emissions. (N.T. 2062-63, 2114)

95. Dr. Connett opined that the Minor Modification would result in increased dioxin emissions that will lead to adverse health impacts. (N.T. 535-43, 575-88)

96. The foundation of his opinion that dioxin emissions will increase with the burning of TDF is the notion that the chlorine content of the TDF IP burns is higher than the chlorine content in the coal IP burns. (N.T. 508, 510, 635-36, 643-44; Ex. C-22)

97. Dr. Connett did not know the chlorine content of either the coal or tire derived fuel being used at the IP plant. (N.T. 644)

98. The Board discredits Dr. Connett's opinion that dioxin emissions will increase at IP when TDF is burned because he did not know the chlorine content of either the coal or tire derived fuel being used at the IP plant.

99. IP had the chlorine content of its coal tested in part for reporting to the EPA emissions of hydrogen chloride gas under the Federal SARA Title III. (N.T. 1737-38, 1743)

100. The chlorine content of the TDF used at IP is lower than the chlorine content of the coal used at IP. (Ex. IP-16, IP-17, IP-18)

101. The chlorine content of IP's coal is 0.15%-0.16%. (N.T. 1745; Ex. IP-16, IP-17)

102. The chlorine content of the type of TDF IP uses is 0.09%. (N.T. 1767; Ex. IP-18)

103. The chlorine content of IP's coal/TDF fuel mixture is the same or less than the chlorine content of coal fuel alone and therefore, the amount of chlorine burned under the coal/TDF fuel mixture is the same or less than the chlorine content of coal fuel alone. (N.T. 1696-97, 1767-68; Ex. IP-16, IP-17, IP-18)

104. The BTU value of IP's coal/TDF mixture is approximately 20% higher than that of just coal. (N.T. 1767-68)

105. The same or less amount of chlorine is subject to burning when IP uses a coal/TDF mixture than that of coal because the coal/TDF mixture has a higher BTU value. (N.T. 1767-68; Ex. IP-16, IP-17, IP-18)

106. Putting aside the chlorine content issue, Dr. Connett's testimony did not convince the Board in other respects that dioxin emissions would increase because of the Minor Modification. (N.T. 537, 544-46, 549, 636-38, 656-60, 714-16; Ex. C-19, C-22)

107. The Board credits Dr. Kelly's opinion that there is no credible evidence that dioxin emissions will increase when TDF is added to the fuel stream (N.T. 2138-42)

108. Chlorinated thiophenes are a product of incineration in the presence of chlorine and sulfur. (N.T. 538-39)

109. There is no evidence that establishes that thiophene emissions will increase as a result of IP's Minor Modification.

110. There is no evidence that establishes that styrene 1-3-butadiene and chloroprene emissions will increase because of IP's Minor Modification. (N.T. 553-54, 2148-49; Ex. C-18; Ex. A-31)

111. Smedley failed to present any affirmative evidence that either the Weston or Entropy Reports show that an increase in carbon monoxide emissions is to be expected as a matter of course with the use of a TDF/coal mixture versus a coal-only fuel.

112. The Entropy Report does report an increase in CO emissions when TDF is burned for certain particular test runs. (Ex. A-10, p. 7)

113. The Weston Report data showed that CO emissions from Boiler No. 1 increased with the use of TDF while CO emissions from Boiler No. 2 decreased with the use of TDF. (N.T. 318)

114. Mr. Maxwell concluded that the Weston Report, when considered together with the Entropy Report, confirmed that there is a natural variability in CO emissions regardless of the fuel being burned, which conclusion the Board credits. (N.T. 325-28)

115. DEP's conclusions regarding CO emissions were confirmed by expert testimony at the hearing. (N.T. 1705-06, 2117-18)

116. Ash is produced as a result of combustion. (N.T. 1423)

117. Bottom ash is the ash material that remains in the combustion device. (N.T. 1423)



118. Fly ash is the ash material that is carried in the gas stream and removed by an air pollution control device prior to the gas and fly ash being vented through a stack into the atmosphere. (N.T. 1423)

119. Pollution control devices do not remove 100% of fly ash. (N.T. 1423-24)

120. On September 8, 1995, IP submitted to DEP lab analysis of the fly and bottom ash produced during the 1995 trial burn. (Ex. A-29)

121. Center Analytical Labs Incorporated performed analysis of fly ash from a coal only test run and the 20% TDF test run. (Ex. A-29)

122. The fly ash was tested using both the TCLP test and the "total" test method. (N.T. 1438)

123. The TCLP testing procedure involves a toxic leaching process whereby acid is mixed into the ash and a certain amount of contaminants including metals will leach out from the ash into a liquid solution called leachate. (N.T. 1436-44)

124. Test results reported under the TCLP test do not reflect any concentration of potential contaminants in the fly ash itself but, instead reflect contaminants which have leached out into the leachate after the ash is reacted with acid. (N.T. 1436-44)

125. "Total" testing is testing of the fly ash itself to determine the total concentration of a particular contaminant on the fly ash. (N.T. 1438, 1444-48)

126. Smedley failed to establish that there was any connection between TCLP testing and prospective air emissions. (N.T. 1079-80, 1115-16, 1424-53, 1539-40, 1794-95, 1812, 1992, 2372-75; Ex. A-29, Ex. C-8)

127. Zinc emissions as reflected in the air emissions testing at IP actually decreased or did not increase when tire derived fuel was added. (Ex. C-8, Tables 2-1, 2-2, 2-3; N.T. 1539-40; 1794-95, 2372)

128. The numerical decrease in zinc levels as a result of burning tire-derived fuel might not be statistically significant. (N.T. 2379)

129. Ash testing, whether TCLP method or "total" method, results for metals do not translate into predictors or indicators of emission results. (N.T. 1436-44; Ex. A-29)

130. Mr. Laird determined from his review of the Entropy and Weston Reports that when tire derived fuel was burned emissions would not increase as compared to burning just coal, and in some cases, NO<sub>x</sub> and SO<sub>x</sub> emissions would be reduced. (N.T. 1673)

131. Mr. Laird opined that IP would be able to maintain its permit limits with relative ease when it burns coal and tire derived fuel. (N.T. 1676)

132. Mr. Laird testified to a reasonable degree of scientific certainty that there will be no significant difference in dioxin emissions when burning tire derived fuel and coal in IP's boilers. (N.T. 1701)

133. Dr. Kelly testified that based on her experience and her review of numerous data, she had the following opinions to a reasonable degree of scientific certainty:

- a. There would not be expected to be any increase in emissions of contaminants of concern as a result of the IP plant burning the allowed amount of TDF with coal; and
- b. There would not be expected to be any overall adverse impact on the quality of air emissions as a result of the IP plant burning the allowed amount of TDF with coal.

(N.T. 2123-36)

134. Since DEP granted the Minor Modification, DEP is not aware of any data showing an increase in any emission parameter. (N.T. 1367)

135. The monitoring data from IP's continuous emissions monitoring devices, which it submits to DEP on a quarterly basis, shows a decrease in average emissions of NO<sub>x</sub> and SO<sub>2</sub>. (N.T. 1376-1378)

136. Mr. Maxwell has reviewed continuous emissions data for the second quarter of 1997 through the second quarter of 1999. This represents four quarters of data before IP commenced burning TDF and five quarters after it commenced burning TDF. (N.T. 1367)

137. The continuous emissions data from before and after IP started burning TDF shows that there was actually a decrease in emissions of sulfur oxide and nitrogen oxides. (N.T. 1368)

138. Dr. Connett has never been satisfied with the quantum of testing done anywhere or anytime with respect to dioxin emissions from burning TDF. (N.T. 549)

139. Dr. Connett has never seen any test of emissions from burning TDF that gives him confidence that one can even make a prediction of what dioxin emissions will be when TDF is burned. (N.T. 549)

140. Dr. Connett testified that testing he has seen for dioxin emissions are insufficient for a variety of reasons. He said that "[y]ou need data during startup. You need data during shutdown. You need data which takes into account upset conditions. You need data over a prolonged period of time." (N.T. 547)

141. Dr. Kelly opined that the testing regimen performed by IP was sufficient and that she would not have recommended, nor does she recommend now, that additional testing is necessary. (N.T. 2149-53) The Board credits her testimony on that issue.

142. The compliance docket is an electronically shared file maintained by the DEP that contains a listing of violations that are occurring at various sites and sources throughout the Commonwealth. (N.T. 170, 955)

143. DEP cannot issue a permit or a plan approval to a source or facility on the compliance docket until that source or facility is removed from the docket, or until the violations are being resolved to the satisfaction of the Department. (N.T. 955)

144. DEP does not automatically place violators on the compliance docket, rather DEP usually begins with NOV's and then issues either a consent assessment of a civil penalty or a consent order and agreement for ongoing violations. (N.T. 956)

145. The DEP does not believe that the compliance docket is a tool of first choice for compliance enforcement. (N.T. 956)

146. Only one company has ever been placed on the compliance docket by DEP. (N.T. 397-98, 996)

147. Mr. Aldenderfer would not have recommended that IP be placed on the compliance docket as of February 16, 2000 because IP had worked cooperatively with DEP for a number of months with respect to quantifying its VOC emissions and DEP believed that IP had shown a willingness to comply and was proceeding with as much haste and good intent as DEP believed was reasonably acceptable. (N.T. 205)

148. On September 27, 1994, a RACT operating permit #OP-18-005 was issued to IP with a 50 ton per year VOC limitation in the permit. (N.T. 1382; Ex. C-3, Condition #10)

149. In October 1994, as required by its RACT permit, IP reported that its potential to emit VOCs in 1990 was 38.61 tons per year and 41.48 tons per year in 1994. (N.T. 1375; Ex. C-45)

150. On December 7, 1994, IP submitted a letter to Mr. George Mentzer of the DEP's Bureau of Air Quality Control asking the DEP to remove the 50 ton per year VOC restriction from its RACT permit and review its VOC RACT compliance plan as it was submitted. (N.T. 1379-80; Ex. C-47)

151. Mr. Maxwell believed that the problems with quantifying VOC emissions from IP involved the paper machines and its deinking plant. (N.T. 1385)

152. IP's deinking plant was permanently shut down in October 1997 for financial reasons. (N.T. 1722)

153. In March 1997 DEP and IP met to discuss the quantification of VOC emissions at IP resulting in the following three determinations: (1) IP agreed to devise a test protocol and submit that protocol to DEP; (2) IP agreed to test VOCs according to the test protocol approved by DEP; and (3) IP agreed if necessary to use the results of the VOC emissions testing to submit a revised RACT plan to the Department if the testing proved that VOC emissions were above 50 tons per year. (N.T. 1387, 1719-20)

154. IP and DEP spent a lengthy period of time developing a testing protocol, which turned out to be implemented on the paper machines only because the deinking facility had been shut down. (N.T. 1389-90)

155. IP has cooperated with DEP regarding VOC emissions testing of its paper machines. (N.T. 1208-09)

156. Testing of the IP paper machines for VOC emissions pursuant to an approved testing protocol took place in March 1998. (N.T. 1203-04)

157. On November 2, 1998, IP submitted to DEP a VOC paper machine study draft for DEP's review and comments. (N.T. 1208; Ex. C-61)

158. The Department is satisfied with IP's progress in addressing the question regarding the quantification VOC emissions from its paper machines. (N.T. 238, 1390)

159. The Department does not recommend that IP be placed on the compliance docket in connection with its quantification VOC emissions because DEP considers the situation as a matter under study that is being resolved to the satisfaction of DEP. (N.T. 964)

160. IP has not demonstrated a lack of intention or ability to comply with the APCA or any plan approval, permit or order of DEP in connection with its quantification VOC emissions.

161. Over the past years, DEP has received complaints about dust emissions emanating from the IP facility from citizens in the Lock Haven area. (N.T. 968)

162. The dust originated primarily from a coal stockpile area and the trucking of coal and ash. (N.T. 968)

163. IP and DEP reached a \$2,000 consent assessment of civil penalty regarding dust emissions at IP's Lock Haven Mill facility some time in the 1990's. (N.T. 1011-12)

164. There have periodically been fugitive emissions of coal ash and coal dust at IP's Lock Haven Mill facility. (N.T. 1918)

165. IP has spent more than \$50,000 attempting to control fugitive emissions from its Lock Haven Mill facility by utilizing topsoil, planting grass and putting up walls to keep the wind from blowing any fugitive emissions. (N.T. 1922-23; Ex. A-35)

166. IP has an ash disposal area encompassing several acres at the Lock Haven Mill facility, which from time to time has been subject to fugitive emissions of ash. (N.T. 1935-36)

167. In July 1997, DEP received citizen complaints concerning coal dust from IP's Lock Haven Mill facility. (Ex. A-35)

168. DEP investigated those complaints and determined that IP took the problem seriously, made a reasonable effort to correct it, and has not demonstrated a lack of intention or ability to comply with the APCA or any plan approval, permit or order. (N.T. 1998; Ex. A-35)

169. The entirety of the record reviewed by the Board shows that DEP's review of and granting of IP's request for the Minor Modification was in compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources.

170. The entirety of the record reviewed by the Board demonstrates a reasonable effort to reduce the environmental incursion to a minimum.

171. The entirety of the record reviewed by the Board demonstrates that no marginal or additional adverse environmental impact will result from the burning of TDF as compared with the burning of coal only at the IP facility.

172. Indeed, the impact of burning TDF at the IP facility will result in an amelioration of overall adverse environmental impact and risk in the Commonwealth.

173. Waste tires present the risk of tire fires, which produce toxic gasses that can result in significant acute and chronic health hazards. (Ex. IP-27, p. x.)

174. Tire fires can generate significant amounts of waste liquids and solids that can pollute soil, surface and groundwater. (Ex. IP-27, p. ix).

175. Even aside from the problems associated with tire pile fires, tire piles present congregation places for rodents and vectors. (N.T. 2155)

176. Most of the TDF burned at IP comes from Pennsylvania. (N.T. 1668)

177. The IP TDF project will reduce the number of tires that potentially can end up in tire dumps in Pennsylvania which is an environmental benefit.

178. There is no evidence that burning TDF at IP will cause any counter-veiling environmental detriment.

## DISCUSSION

### I. ANALYSIS.

#### A. Standard of Review.

Smedley has both the burden of proceeding and the burden of proof in this case. 25 Pa. Code § 1021.101(a),(c)(2). Thus, Smedley must establish his case by a preponderance of the evidence. *Id.*

Both DEP and IP argue that the standard of this review, in other words, what it is that Smedley has the burden to demonstrate by a preponderance of the evidence, is that DEP committed an “abuse of discretion.” DEP and IP explain that an “abuse of discretion” means that Smedley has the burden of proving that DEP’s action was not merely in error but that it was *flagrantly* wrong. This elevated threshold is described qualitatively by DEP and/or IP as, among other things: (1) bad faith or fraud; (2) a capricious action or an abuse of power; or (3) a manifest and flagrant abuse of discretion or a purely arbitrary execution of DEP’s duties or functions. Also, DEP and IP both cite the case of *Sussex, Inc. v. DER*, 1984 EHB 355, 366, which they argue explains that an “abuse of discretion”, which Smedley must show, is not a mere difference of opinion, or demonstrable error in judgment but it is more in the nature of DEP having erred to the extent of having shown manifestly unreasonable judgment, partiality, prejudice, bias, ill-will, misapplication or overriding of the law, or similarly egregious transgressions. DEP Post Hearing Brief p. 92; IP Post Hearing Brief p. 6-7 citing *Township of Florence v. DEP*, 1997 EHB 763, 773 citing *Sussex, Inc. v. DER*, 1984 EHB 355, 366.



We think that the standard of review as qualitatively described by DEP and IP in their Post-Hearing Briefs is more appropriately applied where *an appellate court* reviews a complete record that has been generated either from a lower court or a specialized administrative agency. *Leeward Construction, Inc. v. DEP*, Docket No. 98-048-L (Adjudication issued June 13, 2000) slip op. at 23 n. 1. As the Commonwealth Court in *Warren Sand & Gravel Co. v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975) pointed out, the Board conducts its hearings *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 “[d]e novo review involves full consideration of the case anew. The [EHB], as a 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’Reilly v. DEP*, Docket No. 99-166-L, slip op. at 14 (Adjudication issued January 3, 2001). 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.

This is not merely a mechanical recitation of the allocation of power to the Board. The important point is that this description of the Board’s function outlines the nexus between the rights of the appellant challenging a DEP action and defenders thereof. The Board operates at that center-point. The Board does not review a matter before it on the basis of an already developed record. The Pennsylvania Legislature and the Commonwealth Court have unambiguously delineated that the Board is a judicial tribunal of *first* impression. The Board protects the procedural due process rights of persons who allege and can prove that they are

adversely affected by an action of DEP, a governmental agency. Under the Environmental Hearing Board Act the Board is established as a quasi-judicial body to review appeals from DEP actions and no action of the Department adversely affecting a person shall be final until the Board has heard the appeal. 35 P.S. § 7514(c); *Fiore v. DER*, 665 A.2d 1081, 1086 (Pa. Cmwlth. 1995). The Board proceeding is the *first* instance that a party challenging a DEP action has the right to judicial-type discovery and, in turn, to present evidence so developed to an independent quasi-judicial tribunal. 35 P.S. §§ 7513(a), 7514(c), 25 Pa. Code § 1021.111. The Board is the *first* opportunity any party challenging a DEP action has to a full adjudicatory hearing where one can present a full case in open court with the rights to subpoena witnesses, examine and cross-examine witnesses and present oral and documentary evidence. 35 P.S. §§ 7514(a), (f); 25 Pa. Code §§ 1021.85 – 1021.98, 1021.107 – 1021.108.

Given the nature of this role and function, a standard of review which is premised on the assumption that a full record has been developed below as would be the case of an appellate tribunal reviewing the result of a trial court is not a good fit. The standard of review described by DEP and IP in its Post-Hearing Briefs describes an appellate review standard and, thus, we believe it is not appropriate here.

Both DEP and IP point prominently to the *Sussex* case. This case, though, demonstrates the point we are discussing. The *Sussex* case contains the often quoted language that:

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

*Sussex*, *supra* at 366 citing *Garrett's Estate*, 335 Pa. 287 (Pa. 1939). *Sussex* is not authoritative for the point DEP and IP cite it here. The *Garrett* case itself, out of which this part of the *Sussex* case was generated, is speaking about review of *appellate* courts based on a fully developed trial record. The Supreme Court in *Garrett* says:

When the *court* has come to a conclusion by the exercise of its discretion, the party complaining of it *on appeal* has a heavy burden; it is not sufficient to persuade the *appellate court* that it might have reached a different conclusion if, in the first place, charged with the duty imposed on the court below; it is necessary to go further and show an abuse of discretionary power.

*Garrett's Estate*, 6 A.2d at 860 (emphasis added). In fact, the Board itself, in a reconsideration of *Sussex*, announced that the *Garrett's Estate* recitation did not accurately reflect the Board's appropriate standard of review because the underpinning of that standard is an appellate review of a full trial record whereas the Board, on the other hand, is a trial court of first impression. The Board had this to say on *Sussex's* Petition for Reconsideration:

*Sussex* is correct in its argument that the language in *Garrett's Estate* defining "abuse of discretion" does not accurately enunciate this Board's scope of review of actions of DER. The Administrative Code, 71 P.S. § 510-21, empowers this Board to conduct hearings de novo in appeals from actions of DER, and to substitute its discretion for that of DER when DER acts with discretionary authority. *Warren Sand and Gravel v. DER*, 20 Pa. Cmwlth. 186; 341 A.2d 556 (1975). In the instant appeal, the Board did conduct a hearing de novo, and after reviewing all the evidence that each party put on the record, the Board upheld DER's decision to disapprove *Sussex's* proposed revision to the official sewage facilities plan of East Hanover Township.

*Sussex v. DER*, 1986 EHB 350, 352.

We think that Judge Coleman's point about the *Sussex* case and the standard of review question inherent therein which she stated as follows in the recent case of *Harriman Coal*

*Corporation v. DEP*, EHB Docket No. 99-218-C (Opinion and Order issued July 21, 2000), is a good one:

Appellant argues that the Department abuses its discretion where there is "manifestly unreasonable judgment, partiality, prejudice, bias, ill-will, misapplication or overriding of the law, or similarly egregious transgressions on the part of [the Department]." (Motion, paragraph 27, p. 7.) In support of that proposition. Appellant cites *Sussex, Inc. v. DER*, 1984 EHB 355 (*Sussex I*). However, the standard for abuse of discretion set forth in *Sussex I* is no longer good law. The Board reconsidered that decision and renounced the standard for abuse of discretion it used there, writing, "The language ... defining 'abuse of discretion' does not accurately enunciate this Board's scope of review of actions of [the Department]." *Sussex, Inc. v. DER*, 1986 EHB 350, 352 (*Sussex II*). The Board explained that when it formulated the abuse of discretion standard in *Sussex I*, the Board looked to cases articulating the standard of review of courts sitting in their appellate jurisdiction. However, when reviewing Department actions, the Board is conducting a de novo review--not an appellate review--and, thus, we accord less deference to determinations made by the Department than an appellate court extends to determinations made by lower tribunals. The Board itself has erroneously cited the abuse of discretion standard in *Sussex I* in several decisions—even after *Sussex II* was decided. Those decisions should not be read as resurrecting the standard set forth in *Sussex I*.

*Harriman Coal Corporation v. DEP*, *supra* at 3 n. 1.

The seminal case of *Warren Sand & Gravel Co., Inc. v. DER*, 341 A.2d 556 (Pa. Cmwlth. 1975) also demonstrates the point we are discussing. In that case the Commonwealth Court stated:

When an appeal is taken from DER to the Board, the Board is required to conduct a hearing de novo in accordance with the provisions of the Administrative Agency Law. In cases such as this, the Board is not an appellate body with a limited scope of review attempting to determine if DER's action can be supported by the evidence received at DER's factfinding hearing. The Board's duty is to determine if DER's action can be sustained or supported by the evidence taken by the Board.

*Id.* at 565. This formulation was recently upheld by the Commonwealth Court as it applies to the Board's review in *Pequea Township v. Herr*, 716 A.2d 678, 685-87 (Pa. Cmwlth 1998). *See also* *Lawson v. Department of Public Welfare*, 744 A.2d 804 (Pa. Cmwlth. 2000)(involving review by Department of Public Welfare Hearing Officer of action of a DPW service provider).

Thus, a *de novo* hearing of a DEP action before the Board, as in this case, does not mean that the Board's standard of review is merely to determine whether an abuse of discretion has taken place in the same sense of an appellate court reviewing a full evidentiary record from a trial court. Such an overly narrow application of the meaning of our standard of review is not consistent with either the concept of a *de novo* review nor with the constitutional due process rights of appellants. Actions being heard before the Board involve a determination not just of whether the action under appeal was so egregiously wrong as to amount to being capricious or abusive, or based in partiality, prejudice, bias, ill-will, but a determination, based on the evidence we hear, whether the findings upon which DEP based its actions are correct and whether DEP's action is reasonable and appropriate and otherwise in conformance with the law. 35 P.S. § 7514(c); *Pequea Township v. Herr*, 716 A.2d 678, 685-87 (Pa. Cmwlth. 1998); *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *Warren Sand & Gravel Co. v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975); *O'Reilly v. DEP*, Docket No. 99-166-L, slip op. at 14 (Adjudication issued January 3, 2001).

**B. Standing.**

The Air Pollution Control Act, 35 P.S. § 4010.2, specifically provides who has standing to appeal an order or other action of the Department, such as the Minor Modification granted to IP in this case. Section 4010.2 states as follows:

Any person aggrieved by an order or other administrative action of the department issued pursuant to this act or any person

who participated in the public comment process for a plan approval or permit shall have the right, within thirty (30) days from actual or constructive notice of the action, to appeal the action to the hearing board in accordance with the act of July 13, 1988 (P.L. 530, No. 94), known as the Environmental Hearing Board Act, and 2 Pa. C.S. Ch. 5 Subch. A (relating to practice and procedure of Commonwealth agencies).

35 P.S. § 4010.2. This section refers to standing for those who are aggrieved by the DEP action or who participated in the public comment process. The statutory reference to “aggrieved” means that for an appellant to have standing, he must satisfy the traditional test for being an “aggrieved party” as set forth in the landmark case of *William Penn Parking Garage v. DER*, 346 A.2d 269, 280 (Pa. Cmwlth. 1975). Under the *William Penn Parking Garage* analysis, a party is “aggrieved” so as to have standing to appeal if the appellant’s interest is impacted in a substantial, direct, and immediate manner. See *William Penn Parking Garage*, 346 A.2d at 280. “[T]he requirement of a ‘substantial’ interest simply means that the individual’s interest must have substance – there must be some discernable adverse effect to some interest other than the abstract interest of all citizens, in having others comply with the law.” *William Penn Parking Garage*, 346 A.2d at 282. Further, a direct interest “simply means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains.” *Id.* Finally, “[a]n immediate interest means one with a sufficiently close causal connection to the challenged action, or one within the zone of interests protected by the statute at issue.” *Belitskus v. DEP*, 1998 EHB 846, 859 (citing *William Penn Parking Garage*, 346 A.2d at 283).

The record demonstrates that Smedley has met the aggrieved party standing test outlined in *William Penn Parking Garage*. Lock Haven is situated in a deep valley and emissions from the IP plant on some occasions literally “hug the ground” in the valley in downtown Lock Haven. (Bottorf Tr. 123-24, 126) Smedley visits downtown Lock Haven frequently for business,

community, and social affairs. He is the President and lead investigator for Greenwatch Watch, a not-for-profit environmental organization. Smedley's duties for Greenwatch take him into Lock Haven often. In addition, Smedley visits Lock Haven to attend public meetings held by the Clinton County Commissioners and the Lock Haven Environmental Advisory Committee. Smedley's social life brings him to Lock Haven also. He is a member of the Lock Haven YMCA, which he attends approximately three times per week to swim. Further, Smedley testified that he frequents the businesses and restaurants in Lock Haven. In addition, Smedley lives in Jersey Shore, Pennsylvania which is about 11 miles from Lock Haven. His residence is directly down-valley from Lock Haven. (Smedley Tr. 827, 842) Smedley has observed emissions from the IP plant coming directly down the valley actually going by his house. (Smedley Tr. 833)

IP seems to argue that Smedley *must* have expensive and complex air dispersion modeling coupled with expert testimony to demonstrate standing in an air case. While that sort of effort may very well demonstrate standing in an air case, we think it would be unfair to require it in all such cases. Such a rule would, as a practical matter, preclude many citizens from being able to exercise their right to appeal because they could not afford the very substantial cost of dispersion modeling and the appurtenant expert testimony. Here, the record shows through lay observations that Smedley is exposed to and comes into contact with emissions from the IP plant. Thus, he is within the zone of interests sought to be protected by the APCA. *See Belitskus v. DEP*, 1998 EHB 846, 859 (citing *William Penn Parking Garage*, 346 A.2d at 283).<sup>1</sup>

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<sup>1</sup> Inasmuch as we find that Smedley has "aggrieved party" standing, we need not discuss whether he may also have standing under the "participated in the public comment" clause of Section 4010.2.

**C. The Physical Attributes of the Minor Modification Do Not Preclude DEP's Handling of the Request as a Minor Modification Under 25 Pa. Code § 127.462.**

Based on our review of the record, there is no physical attribute of the Minor Modification that would preclude its being considered a minor modification under the definition of "minor operating permit modification" outlined at 25 Pa. Code § 121.1 or processed as one under 25 Pa. Code § 127.462. It may be true that a change in fuel is not automatically to be considered as a minor modification, but that is beside the point. (Maxwell Tr. 1506) A change in fuel is not precluded by the regulatory definition from being considered as or processed as a minor modification. 25 Pa. Code § 121.1; 25 Pa. Code § 127.462. No physical changes to the boilers were made in connection with this Minor Modification. (Maxwell Tr. 1356-57, Myers Tr. 1575-76) The Minor Modification incorporated some new conditions associated with the new fuel so as to ensure that DEP could rescind the Minor Modification in the event that any information revealed that emissions were increased. (Maxwell Tr. 1357-58; Ex. C-3, Ex. C-26) There was no term or condition of the existing IP air permit which IP was violating and was seeking to change through this Minor Modification. (Maxwell Tr. 1358-59) Although Smedley contends that IP is in violation of its 50 ton per year limitation of Condition No. 10 of its existing permit, a contention which we do not believe was proved, the Minor Modification does not in any event modify or affect in any way IP's existing permit limitation of 50 tons per year emissions of volatile organic compounds (VOCs or volatile organic compounds). (Ex. C-3, Ex. C-26; Schulte Tr. 755-56) The Minor Modification changed monitoring, reporting or recordkeeping requirements by imposing *additional* such requirements. (Ex. C-26, new condition ¶14) No existing monitoring, reporting or recordkeeping requirements were deleted or changed. (Maxwell Tr. 1359; Ex. C-3, Ex. C-26) The Minor Modification was not a



modification under either Title I or Title IV of the Clean Air Act. (Maxwell Tr. 1359) As we will discuss in more detail later, the Minor Modification is not a change that will or is resulting in the exceedence of any emissions already allowed by IP's existing permit, nor was the Minor Modification a change otherwise precluded by the Clean Air Act. (Maxwell Tr. 1359)

For these reasons, the Minor Modification in this case does not fall outside the mechanical definition of a "minor operating permit modification" set forth in 25 Pa. Code § 121.1. DEP did not err in considering it as such and processing IP's request under 25 Pa. Code § 127.462.

**D. Smedley's Expert, Dr. Connett, and His Opinions.**

**1. Introduction.**

Smedley relied virtually entirely on the expert testimony of Dr. Paul Connett for his affirmative case. The Board qualified Dr. Connett as an expert in the fields or areas of chemistry, dioxin, health risk assessment, and incineration/combustion. A majority of Smedley's proffered evidence was an attempt to prove that emissions of dioxins and furans would increase and pose a health hazard as a result of the Minor Modification. Dr. Connett's testimony was that burning TDF together with coal will result in an increase in emissions of contaminants, especially dioxins and furans and dioxin-like compounds and that this increase in emissions will result in adverse health impacts.

**2. Dioxins.**

The underpinning of Dr. Connett's opinion that there will be an increase in dioxin emissions is the premise that the chlorine content in the coal/TDF mixture is higher than the

chlorine content of coal alone. (Connett Tr. 498-507)<sup>2</sup> Dr. Connett testified that the chlorine content in TDF is approximately double that in coal. (Connett Tr. 508) The basis of that opinion

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<sup>2</sup> Dr. Connett illustrated how dioxins and furans are formed as a product of combustion. (Connett Tr. 497-505) The basic building block of both dioxins and furans is the benzene ring. A benzene ring is a six sided chemical molecule consisting of six carbon atoms in a central ring with six hydrogen atoms attached at the corners. Thus the chemical formula for benzene is C<sub>6</sub>H<sub>6</sub> which means there are six carbon atoms and six hydrogen atoms. When two benzene rings are joined together, they are joined at one side and each benzene ring loses two of its hydrogen atoms. The bond between the two benzene rings occurs on the side where each benzene ring has lost its two hydrogen atoms. This double benzene ring is referred to as a "biphenyl". A biphenyl molecule has eight open positions at which other atoms can bond with it. For example, a chlorine atom can attach to one of those positions and the result will be a *chlorinated* biphenyl. If there are multiple chlorine atoms which become bonded to the bonding position on the biphenyl that resultant compound is called a polychlorinated biphenyl or "PCB".

When PCB compounds or combusted bonds are broken and reformed such that an oxygen atom will become bonded between the two benzene rings and, when chlorine atoms are present, one or more chlorine atoms will become bonded to one or more of the open bonding positions in the double benzene ring. This chemical formulation is called a polychlorinated dibenzofuran or *furan* for short. The polychlorinated dibenzofuran molecular structure consists of two benzene rings with a single oxygen bridge between them and at least one chlorine atom on one of the open bonding positions. Polychlorinated dibenzofurans are referred to in chemical shorthand as PCDFs. There are 135 different chemicals in the furan family. The different members of the PCDF family possess a distinct identity based on the number of chlorine atoms and their respective position on the double benzene rings. In the parlance of chemistry these 135 different members of the furan family are referred to as "congeners". (Connett Tr. 625, Kelly Tr. 2309) If in the combustion reaction, two oxygen atoms become the bridge between the two benzene rings instead of only one oxygen atom, and at least one chlorine atom is bonded to one of the positions on the double benzene ring, this chemical structure is referred to as a polychlorinated dibenzodioxin or *dioxin* for short. The chemical shorthand for dioxin is PCDD. There are 75 different PCDD congeners. The tendency today is to refer to the 135 furans and the 75 dioxins generically as "dioxins" with the count of "dioxins" being 210. When we refer to "dioxins" we mean both dioxins and furans.

The common denominator for all PCDFs and PCDDs is the presence of at least one chlorine atom in one of the bonding positions. Each congener of dioxin and furan is named according to the number of and position of the chlorine atom or atoms present. Each bonding position in a double benzene ring, or biphenyl, is assigned a specific number. The top position on the right side benzene molecule is referred to as "1" position and the positions are numbered "2" through "9" as you progress counterclockwise through the positions until you reach the final position at the top of the second benzene ring. Thus, for example, the congener known as 2,3,7,8 tetrachlorodibenzodioxin has four chlorine molecules which are bonded at the 2, 3, 7, and 8 bonding positions.

is Exhibit C-22 which is a July 22, 1991 report entitled "Data on Test Burning of TDF in Solid Fuel Combustors Prepared for Illinois DENR-Monsanto Company Revision 2" (Monsanto Report) (Ex. C-22) On a laboratory test report data sheet in that report, it is indicated that the TDF in this case study had a chlorine level of .48% (Ex. C-22, Laboratory Test Report p. 1 of 43). The report states as follows in the narrative section: "the tire chips sampled showed a doubling of chlorine content as compared to coal." (Ex. C-22, p. 6) Dr. Connett could not specifically identify any other basis or source for his opinion regarding the supposed higher chlorine content in TDF than in coal. (Connett Tr. 510, 635-36, 643-644)

However, the *full* text of the section of the Monsanto Report just quoted states as follows:

The tire chips sampled showed a doubling of chlorine content as compared to coal. *However, industry sources have indicated that tires normally have nearly undetectable levels of chlorine, and results of the stack emission tests would support this.*

(Ex. C-22, p. 6) (emphasis added).

When he was pressed on cross-examination to specify what, if any, basis he had for his opinion that TDF has a higher chlorine content than coal other than the Monsanto Report he was unable to provide any specific response. Indeed, he flipped the question around by interjecting that, "[i]t is what your Department and your Company doesn't know about the chlorine content in those tires. You don't have the data. That is the problem." (Connett Tr. 644)

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Dr. Connett testified that anytime you burn anything with chlorine present you will produce dioxins and furans. He testified that, "[w]ell, certainly, I think it [is] extremely established today that any time you burn something containing chlorine, whether you burn it in a backyard burn barrel, in a medical waste incinerator, a solid waste incinerator or a hazardous waste incinerator, you will get dioxins produced. (Connett Tr. 507) The presence of chlorine in the combustion process and in what amount is a *sine qua non* with respect to the possible formulation of dioxins and furans.

Dr. Connett admitted that he does not know the chlorine content of either the coal or the TDF that is being used at the IP plant. (Connett Tr. 644) Without knowledge of or having at least considered this question, which is the very underpinning of his opinion that dioxin emissions will increase with the burning of TDF, we do not consider that opinion to be persuasive.

IP, on the other hand, presented affirmative evidence about the chlorine content of the TDF and coal which erodes Dr. Connett's opinion on this question away. IP's evidence shows that the level of chlorine content in the TDF it is using is actually lower than the chlorine content in the coal it uses. (Ex. IP-16, 17, 18) Exhibits IP-16 and IP-17 are analyses of coal used as fuel at the IP plant. (Laird Tr. 1737-44) Mr. Laird testified that these analyses were performed in part to ascertain chlorine content of coal for purposes of reporting to the EPA emissions of hydrogen chloride gas under the Federal SARA Title III. (Laird Tr. 1737-38, 1743) These laboratory analyses show the chlorine content of the coal to be 0.15% and 0.16%. (Ex. IP-16, 17; Laird Tr. 1745) Exhibit IP-18 is an analysis of the type of TDF that is being used at the Lock Haven plant. (Ex. IP-18) That analysis shows a chlorine content for the TDF of 0.09%. (Ex. IP-18; Laird Tr. 1767)

Mr. Laird relied in part on Exhibits IP-16, IP-17 and IP-18 in opining that the chlorine content in the coal/TDF fuel mixture is less than the chlorine content of the coal fuel alone and that the amount of chlorine burned under a coal/TDF fuel regimen would be less than in a coal only regimen. (Laird Tr. 1696-97, 1767-68) Another significant point is that since the BTU value of the coal/TDF mixture is approximately 20% higher than that of coal alone, there will be less throughput of the coal/TDF mixture per unit of time. Thus, the amount of chlorine subject

to incineration will be further diminished with a coal/TDF fuel mixture than with coal alone. (Laird Tr. 1767-68; Ex. IP-16, IP-17, IP-18)

Even putting aside the difficulty of the chlorine content and amount of chlorine that would be subject to incineration, Dr. Connett's testimony failed to convince us in other respects that there would be an increase in dioxin emissions. Significantly, the Monsanto Report which is the very report Dr. Connett cites as supportive of his opinion that TDF has a higher chlorine content than coal, a conclusion that, as noted, we do not credit, does *not* conclude that the *actual emissions* of dioxin from incineration of TDF increases over emissions of dioxin from burning coal only. Dr. Connett admitted on cross-examination that the analyses presented in the Monsanto Report for dioxin and furan emissions for coal and coal/TDF fuel mixtures *both* showed non-detect. (Connett Tr. 636-38; Ex. C-22, p. 10 Table)

Dr. Connett also relied upon in his expert report and testified at trial that a data chart in Exhibit C-19, the EPA Research Triangle Control Technology Center "Burning Tires for Fuel and Tire Pyrolysis: Air Implications, December, 1991 (Pyrolysis Report), showed an increase in dioxin emissions with the use of TDF fuel. (Connett Tr. 537) However, on cross-examination he admitted that his interpretation of the chart in the Pyrolysis Report was incorrect. (Connett Tr. 656-60, 714-16) Dr. Connett, then, admitted that the data he had cited and relied upon as showing an increase in dioxin emissions when TDF was burned with coal actually *did not* in fact show that.

Dr. Connett's approach to this question of whether dioxin emission would increase focused not so much on attempting to provide or point to affirmative evidence that it was likely that dioxin emissions would increase as a result of IP's burning TDF, but instead, on his opinion that the data base was insufficient to show that there would *not* be an increase. Dr. Connett

repeated several times the theme that the proponents of the Minor Modification had not proved the negative several times. When asked on direct examination for his opinion whether the existing data base was adequate for quantifying the expected dioxin emissions from burning tires he responded that the existing data base was poor and insufficient and that,

[t]hey haven't explored the potential for upset conditions, the quantities produced during startup and shutdown. I don't think they have got enough data to do an appropriate statistical analysis on, and I don't think that they have looked at the full range of situations where a lot of dioxin could be formed to conclude that dioxin emissions would not increase from IP's burning of TDF.

(Connett Tr. 544-45) He said that "I think that there is not enough data to be dogmatic about what the levels will be, whether they will be high or low." (Connett Tr. 546) Dr. Connett testified that he does not believe that either IP or the Department have a scientific basis for concluding that the burning of TDF will not lead to an increase in dioxin emissions. (Connett Tr. 550) When he was asked by the Board to specify what evidence supported his conclusion that burning TDF was problematic in terms of increased levels of dioxin emissions, Dr. Connett said, "I haven't seen a single test of tire burning which gives me a confidence as a scientist that you have a number to make a confident prediction of what dioxins are going to come out when you burn tires." (Connett Tr. 549)

In light of the above, we cannot conclude that Smedley, through Dr. Connett, has sustained his burden of proof to show that there would be an increase in dioxin emissions as a result of IP's use of coal/TDF fuel over the emissions of dioxin with the use of coal only fuel.

### 3. Thiophenes.

While the vast majority of Dr. Connett's testimony dealt with the subject of dioxin, he also mentioned that polychlorinated thiophenes would be emitted from burning tires. (Connett Tr. 518-19, 538-539) Polychlorinated thiophenes are a product of incineration in the presence of

chlorine and sulfur. As TDF contains both chlorine and sulfur, generation of polychlorinated thiophenes is expected. (Connett Tr. 518-19, 539-39) However, there was no indication that even if there were emissions of polychlorinated thiophenes from the burning of TDF in general that this means that there would be an increase in the amount of such compounds emitted from the burning of the particular TDF/coal mixture used by IP above the levels emitted from burning coal only. Coal also contains sulfur and chlorine. (Ex. IP-16, IP-17) Dr. Connett did not seem to have any specific knowledge of the particular sulfur content of tires, only that sulfur is a "well known component of tires." (Connett Tr. 676) Dr. Connett admitted that sulfur content in both TDF and coal varies. (Connett Tr. 675-76) He also admitted that he did not know whether the IP plant burned high sulfur or low sulfur coal. (*Id.*) He has no basis, then, to know the relative difference in sulfur content of the TDF/coal fuel versus the coal only fuel. We are not persuaded, therefore, that there will be any increase in emissions of polychlorinated thiophenes.

#### **4. Styrene 1,3-butadiene and Chloroprene.**

We reject the contention in Smedley's Post-Hearing Brief that the evidence shows that there will be an increase or potential increase in the emissions of styrene, 1,3-butadiene and/or chloroprene as a result of the burning of TDF under the Minor Modification. Dr. Connett did discuss potential emissions of chloroprene, styrene and 1,3-butadiene associated with burning TDF. (Connett Tr. 553-557) However, his testimony did not establish the point Smedley reaches for in his Post-Hearing Brief. Dr. Connett testified that he *thought* that these were man-made chemicals that were used in the manufacturing of tires. (Connett Tr. 553-54) He was not at all sure, however, that these chemicals were not naturally occurring or occurring in coal since he qualified his discussion as follows:

The reason I listed those – I mean, these are the materials which are used in the manufacture of the rubbers, the elastomers which go into tires. They are man-made chemicals, essentially. And I will be very surprised – I may be wrong on this because I haven't studied all of the chemicals in coal, but I would be surprised if there would have been these substances which have been crafted by scientists at Goodyear and other places to make synthetic rubber. They have actually crafted these starting materials. They didn't get any starting materials from nature. They crafted them to make rubber. Again, I would be surprised if nature had thrown up these materials, but nature is remarkable. Nature is really remarkable in terms of the thousands of combinations that she has come up with.

(Connett Tr. 553-54) Then Dr. Connett was told by Smedley's counsel to *assume* that these chemicals were not in coal and, based on that assumption, he was asked “[w]ould it necessarily mean then that the burning of tire-derived fuel would lead to greater emissions of those compounds than coal or might they all be destroyed in the combustion process?” (Connett Tr. 554) His response, not unexpectedly, was that one cannot expect total destruction in the incineration process. (Connett Tr. 557)

This testimony hardly constitutes an expert opinion that emissions of styrene, 1,3-butadiene or chloroprene will increase as a result of burning TDF at the IP plant. This “opinion” is nothing more than a syllogism.

As affirmative evidence that styrene emissions may increase, Smedley points to two exhibits, one being the Project Summary of the other. First is Exhibit C-18, the Project Summary, Pilot Scale Evaluation of the Potential for Emissions of Hazardous Air Pollutants From Combustion of Tire-Derived Fuel, United States Environmental Protection Agency, Research and Development, July, 1994 (Project Summary, Pilot Scale Evaluation or Ex. C-18) and, second, is Exhibit A-31, Pilot-Scale Evaluation of the Potential for Emissions of Hazardous Air Pollutants from Combustion of Tire-Derived Fuel, Prepared by: Paul M. Lemieux, United



States Environmental Protection Agency, Air and Energy Engineering Research Laboratory, Research Triangle Park, NC, Office of Research and Development, USEPA dated May, 1994 (Pilot-Scale Evaluation or Ex. A-31). Both of these exhibits are reports generated from the pilot-scale evaluation of the combustion of TDF and natural gas. Exhibit A-31 is the full report with its copious data sheets while C-18 is the published Project Summary.

Certain data points reported from the pilot-scale test do seem to reflect a numerical increase in styrene emissions when TDF is added to the fuel stream. (E.g., Ex. C-18, p. 5, Table 3; Ex. A-31 pp. 26-28) However, no affirmative opinion by Smedley's expert was ever rendered that based on this data or based on any other data that styrene emissions will increase at IP when it burns TDF with coal.

Also, Dr. Kelly, we think, disarms any notion that styrene, 1,3-butadiene or chloroprene emissions would increase when TDF is added to the coal fuel stream under this Minor Modification. Dr. Kelly testified as follows in that regard:

As I recall, he specifically stated that they [styrene, 1,3-butadiene and chloroprene] could not be [ ] present in coal. There was quite a lot of data showing that styrene and 1,3-butadiene both are emitted while burning coal and that the emissions tend to reduce for 1,3-butadiene and not change with styrene, as I recall. I did not find any data on chloroprene. It is not considered by EPA in its current list of 34 compounds to be one of the compounds of concern, when looking at emissions from TDF.

(Kelly Tr. 2149) We credit her testimony about styrene, 1,3-butadiene, and chloroprene and conclude that there is no evidence that emissions of any of these materials will increase as a result of burning TDF at the IP plant pursuant to the Minor Modification.

Having concluded that there will be no demonstrated increase in emissions, we need not address the contention that the increased emissions, especially of dioxin, would have adverse health effects.

**E. DEP and IP's Evidence.**

**1. Introduction.**

On the other side of the ledger, DEP and IP produced evidence, besides the points of their evidence that we have already discussed in connection with Dr. Connett's testimony, which we credit, that no emissions of contaminants, including dioxin, would increase as a result of burning the TDF/coal fuel mixture.

**2. The 1995 Trial Burn.**

Well before IP submitted its application for the Minor Modification to allow it to burn a coal/TDF mixture, a meeting was held in 1993 between representatives of IP and DEP to discuss the idea. Both Mr. Maxwell and Mr. Bish attended the meeting. (Maxwell Tr. 789, Bish Tr. 813) Later, IP decided that it would like to conduct a trial burn of TDF.<sup>3</sup> (Bish Tr. 790) The purpose of the trial burn was to test the physical feasibility of burning TDF with coal and to ascertain emissions from the burn. (Maxwell Tr. 311; Bish Tr. 790)

On May 15, 1995 IP directed a letter to DEP regarding its desire to conduct a trial burn and requested DEP's written approval. (Ex. IP-4) Before that trial burn, Mr. Bish of DEP had reviewed stack test data from a coal fired industrial boiler in the Midwest which had experimented with adding a TDF component to its fuel stream. The Midwest facility test data indicated that the emissions had decreased when a 20% TDF component was added to the fuel stream. (Bish Tr. 811) Since all facilities are different, DEP and IP were in agreement that a trial burn here would proceed. DEP approved IP's request for the trial burn in writing on May

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<sup>3</sup> Mr. Maxwell is the Chief of the Engineering Services Section of the Northcentral Region's Air Quality Program, and Mr. Bish is one of the two Supervisors in the Operations Section of the Air Quality Program in the Region. (Maxwell Tr. 305, Bish Tr. 788, Aldenderfer Tr. 203)

24, 1995. (Ex. IP-5, Ex. C-6) DEP called for testing for emissions of carbon monoxide (CO), nitrogen oxides (NO<sub>x</sub>), sulfur dioxide (SO<sub>2</sub>) and particulate matter. (Bish Tr. 790-91)

The trial burn was conducted on behalf of IP by an environmental consulting firm known as Entropy, Inc. on IP Boiler No. 2 on July 18-20, 1995. (Ex. B-1, Ex. A-10, C-8, IP-6) The trial consisted of 9 test burns over 3 days from which emissions data was recorded. (Ex. A-10) There were 4 test burns using a 20% heat fuel input from TDF, 1 test burn using a 10% heat fuel input from TDF, and 2 test burns using all coal. (Ex. A-17) In addition, there were 2 test burns from which emissions data was not recorded, the purpose of which were to determine whether the coal feeding and coal handling equipment could also handle TDF. (Ex. A-10, p. 5) Stack testing was performed for heavy metals, particulates and carbon monoxide. In addition, nitrogen oxides and sulfur dioxide data was recorded from the facility's continuous emissions monitoring systems. (Ex. B-1, Ex A-10, Ex. C-8)

The results of the test burn were submitted to DEP on March 8, 1996 in the form of a report by Entropy, Inc. (the Entropy Report). (Ex. A-10, Ex. C-8, Ex. IP-6) The Entropy Report finds that:

With the exception of lead in test 5, and zinc and arsenic in test 7, SO<sub>x</sub>, NO<sub>x</sub>, particulate, zinc, arsenic and chromium emissions were lower in all four tests which utilized 20% TDF on a BTU basis. On average, the results indicated that with 20% TDF:

1. SO<sub>2</sub> emissions were 8.1% lower.
2. NO<sub>x</sub> emissions were 9.3% lower.
3. CO emissions were 15.7% higher.
4. Filterable particulate emissions were 65.6% lower
5. Lead emissions were unchanged.
6. Zinc emissions were 15.2% lower.
7. Arsenic emissions were 9% lower.
8. Chromium emissions were 35.5% lower.
9. Opacity was basically unchanged at <1%.

Combustion of up to 20% TDF, therefore, offers the potential for reduced environmental impact.

(Ex. A-10, p. 7)

As can be seen, the Entropy Report notes either a decrease in emissions or no change in emissions for all parameters measured except carbon monoxide. It was Entropy's findings about carbon monoxide which led DEP to insist upon a second trial burn.

The Entropy Report also incorporates IP's request to perform a second, more extended trial burn of TDF. The Report noted that, "[i]n view of these favorable results, IP would like to run a 90 day continuous trial to determine the long term viability of burning TDF." (Ex. A-10, p. 1)

Todd Starner of DEP was responsible for reviewing the Entropy Report to determine whether the emissions data it reported could be considered accurate in the view of the Department and, if so, to determine whether the burning of TDF would or would not result in an increase of emissions over the levels in IP's permit.<sup>4</sup> (Starner Tr. 1051-52, 1066) Mr. Starner's conclusions are outlined in his review memorandum dated September 25, 1996. (Ex. A-17) His conclusion, which he restated at the hearing, was that the emissions testing reporting in the Entropy Report were representative of the actual emissions from the facility when operating under conditions of the test. (Starner Tr. 1059-60) In other words, the Entropy Report data was accurate.

Smedley tries to impeach and undermine Mr. Starner's review and his conclusions and thereby, derivatively, the conclusions of the Entropy Report, by pointing out that Mr. Starner's review memorandum incorrectly states that the air pollution control equipment on Boiler No. 2 is

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<sup>4</sup> Mr. Starner is an Air Pollution Control Engineer for the Bureau of Air Quality, Division of Source Testing and Monitoring in the Source Testing Section. (Starner Tr. 1049-50)

an electrostatic precipitator and not a fabric filter collector. (Starner Tr. 1063-64) Mr. Starner testified that he derived this information, which is incorrect, from the Entropy Report. (Starner Tr. 1053-56, 1064) We do not think that this error is relevant at all as to Mr. Starner's review process nor, for that matter, to Entropy's activities. We credit Mr. Starner's testimony that the specific nature of the air pollution control equipment is not important to the nature of his review. His job is to review the emissions data, which is emissions *after passage through the air pollution control equipment*. Thus, for Mr. Starner's purpose, it does not matter whether the air pollution control equipment is a fabric filter or an electrostatic precipitator. (Starner Tr. 1056-57)

Based on the evidence produced at trial, we find Mr. Starner's review of the Entropy Report to have been appropriate, consistent with good scientific practice and without relevant error. We credit Mr. Starner's conclusions regarding the Entropy Report. Furthermore, based on Mr. Starner's review and our own *de novo* review of the matter, we also credit the Entropy Report's findings and conclusions.

### **3. The 1996 Trial Burn.**

As noted, a question was raised by the Entropy Report whether CO emissions would increase as a result of use of TDF. The Entropy Report data shows the baseline coal-only test run CO emissions at 67.8 ppm whereas CO emissions for the 10% TDF test run are reported at 71.6 ppm and for the four 20% TDF test runs at 69.0 ppm, 94.8 ppm, 75.5 ppm, and 75.0 ppm respectively. (Ex. A-10, Tables 2-1, 2-2 and 2-3) Also, the emission rate in lbs/hr. for CO is reported for the coal only run at 22.1 lbs/hr. while for the 10% TDF test run the CO emission rate is 24.0 lbs/hr. and for the 4 20% TDF test runs the CO emission rate is reported at 22.6 lbs/hr.,

31.0 lbs/hr., 24.5 lbs/hr., and 24.2 lbs/hr. respectively. All of this led Entropy to conclude that, "CO emissions were 15.7% higher" with 20% TDF. (Ex. A-10, p. 7)

Mr. Starner was aware of the data regarding carbon monoxide in his initial review of the Entropy Report. (Ex. A-17) Based on the question raised by the Entropy Report about CO, the Department insisted that CO be a specific focus of a second trial burn. (Ex. A-16; Bish Tr. 792-93) DEP approved IP's request for a second trial burn by letter dated April 11, 1996. (Ex. A-16, Ex. C-10, Ex. IP-8)

The second trial burn was designed to conduct stack testing for carbon monoxide and total hydrocarbons (THC). (Zemba Tr. 1093; Ex. A-11, Ex. C-11, Ex. IP-9) Also, nitrogen oxides and sulfur dioxide data was collected from continuous emission monitors on Boiler No. 1 and No. 2. (*Id.*) The second trial burn was performed by Roy F. Weston, Inc. on behalf of IP from July 22-25, 1996. (Zemba Tr. 1092; Ex. A-11, Ex. C-11, Ex. IP-9) Weston described the purpose of the test burn was "for comparison of CO and THC emissions under normal operating conditions (100 percent coal feed) and while burning approximately 30 percent tire derived fuel (TDF)". (Ex. A-11, p. 1-1) THC refers to a wide array of different compounds which contain carbon and hydrogen atoms and which when they react with the atmosphere cause ozone to be formed. (Zemba Tr. 1093-94) A total of 6 test burns were conducted. Three test burns, done on July 22, 1996, involved burning coal only. Three test burns, done on July 25, 1996, involved burning coal mixed with 30% TDF. (Ex. A-11, p. 2-1 - 2-5)

The results of Weston's testing were reported in a written report format dated August 28, 1996 (Weston Report). (Ex. A-11) Mr. Andrew Zemba of DEP was assigned to review the Weston Report. (Zemba Tr. 1091)<sup>5</sup>

When Mr. Zemba first reviewed the Weston Report he concluded that the Report did not contain sufficient information for him to be able to determine that the results were acceptable. (Zemba Tr. 1095) He, therefore, sent a letter to IP dated January 6, 1997 outlining a list of 10 questions and requests for additional information. (Ex. C-12) IP responded by letter dated February 7, 1997. (Zemba Tr. 1095-96; Ex. C-13) Following his review of IP's responses, Mr. Zemba concluded that the test results were acceptable to the Department meaning that the results are representative of and an accurate quantification of the emissions from the process during the test. (Zemba Tr. 1101-02; Ex. C-14)

Smedley challenges the Weston Report and DEP's review of it on several fronts. Smedley points out that Mr. Zemba's review involved an apparently incorrect method for calculating the reporting of emissions of Total Hydrocarbons (THC). Mr. Zemba's review calculated THC emissions on an "as carbon" basis and that reporting THC on an "as carbon" basis is no longer acceptable today. The result of reporting THC on an "as carbon" basis is to understate the amount of THCs. Today, it is DEP policy to have THC reported on an "as propane" basis because reporting THC on an "as carbon" basis understates the amount of THC. (Szekeres Tr. 1185; Ex. A-30)

Even though Mr. Zemba's calculations of THC emissions based on Weston's data was done on an "as carbon" basis instead of on an "as propane" basis, we do not believe that this is of

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<sup>5</sup> Mr. Zemba is currently Air Quality Program Specialist in the Mobile Sources Section in the Division of Air Resources. (Zemba Tr. 1088-91)

any consequence. At the time Mr. Zemba performed his review and his calculations of THC emissions, reporting such emissions on an "as carbon" basis was not contrary to DEP protocol. DEP did not change its policy to call for THC reporting on an "as propane" basis until the Fall of 1998, which was not only well after Mr. Zemba's review but also after the Minor Modification was issued. (Zemba Tr. 1101-03; Ex. C-14)

Mr. Szekeres described how the Weston Report data for THC emissions could be easily converted from an "as carbon" basis to an "as propane" basis using a simple mathematical conversion. (Szekeres Tr. 1187-88)<sup>6</sup> Basically, the conversion multiplies each THC figure by 1.23 to arrive at a THC figure being reported on an "as propane" basis. (Szekeres Tr. 1188-89) This would be done with all THC emissions numbers in the Weston Report, for coal only runs and for coal/TDF runs so that the overall results would not change relative to each other since all numbers would increase proportionally. (*Id.*) Thus, there is no showing that there is any increase in relative THC emissions when TDF is added to the fuel stream.

Smedley also points out that Mr. Zemba made a mistake in calculating the height of IP's stack. Mr. Zemba acknowledged that he made that mistake. (Zemba Tr. 1100) He reports the stack height to be 750 feet above grade. (Ex. C-14) He acknowledged at trial that this was a mistake and that the actual figure should be 750 feet above sea level. (Zemba Tr. 1100) We find this error to be irrelevant to Mr. Zemba's review. He testified that the height of the stack was not a relevant factor in his review which considered the integrity of the testing procedure and the actual emissions from the stack. (Zemba Tr. 1100-01)

Smedley also attacked Mr. Zemba's review of the Weston Report and the validity of the Weston Report on the ground that Weston had used carbon monoxide in the testing process from



carbon monoxide cylinders whose expiration date had passed. Mr. Zemba considered this in his review and it is one of the items about which he requested additional information from IP. (Zemba Tr. 1096; Ex. C-12, item no. 5) He testified that he received additional information from IP on this question which satisfied him that the carbon monoxide used by Weston was not unusable for testing purposes. (Zemba Tr. 1096-97; Ex. C-13) IP's February 7, 1997 response to DEP's January 6, 1997 request for additional information contains a response to this question. (Ex. C-13) Mr. Zemba described this response at trial as indicating that IP had been informed by a chemist working for Gulf State Air Gas, Inc., the carbon monoxide cylinder supplier, that CO calibration gases *usually* remain accurate months after they expire. (Zemba Tr. 1097; Ex. C-12)

It is true as Smedley pointed out that "*usually*" does not mean "*always*". However, Mr. Zemba was aware of the issue, inquired into the question and received an answer which satisfied him. We credit Mr. Zemba's professional integrity and competence and, thus, we credit his conclusion on that question rendered at the time of his review. We are also satisfied on this issue and find that the Weston Report is not undermined or invalid because Weston used carbon monoxide for calibration purposes from expired cylinders. We do agree that it would be better practice to not use carbon monoxide for testing calibration purposes from cylinders which have expired and there could very well be a situation where use of expired materials renders a test report invalid. However, after hearing Mr. Zemba's testimony about this question and reviewing the documentary evidence noted above, we conclude that the Weston Report is not invalid or undermined on this basis. The cylinders were only "recently" expired. Moreover, we heard no

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<sup>6</sup> Richard Szekeres is an Environmental Chemist 2 for the Bureau of Air Quality, Source Testing Section. (Szekeres Tr. 1181-84)

affirmative evidence that the calibration done by Weston was off in any way or that there were any anomalies in the Report that could be attributed to improper calibration.

We are convinced that Mr. Zemba's review of the Weston Report was appropriate, consistent with good scientific practice and without relevant error. We credit Mr. Zemba's conclusions regarding the Weston Report. Moreover, based on Mr. Zemba's review and our own *de novo* review of the matter, we also credit the Weston Report's findings and conclusions.

Mr. Maxwell reviewed and considered the Entropy Report, the Weston Report, the various DEP review memoranda as well as other sources and concluded that:

burning tire-derived fuel in the boilers along with coal would not result in the emission of any air contaminant that would be in excess of any regulatory limitation or permit limitation. I concluded that there would be no increase in the emission of any air contaminant from burning tire-derived fuel and coal over the level that existed from burning coal only. And I also felt that I had sufficient information -- in fact, there was no reason to believe that air pollution would be created from the burning of coal and tire-derived fuel, that there would be any increase in air pollution over whatever level existed for burning coal only.

(Maxwell Tr. 395, 1333-56) On that basis, Mr. Maxwell recommended and DEP decided to approve IP's request for the Minor Modification. (Maxwell Tr. 1356) The Minor Modification approval letter was written by Mr. Maxwell for the signature of his superior, Mr. Aldenderfer.

Smedley argues that DEP's review process was flawed on the carbon monoxide emissions question. He contends that the Entropy Report and Weston Report do not demonstrate that emissions of carbon monoxide will not increase as a result of burning TDF and, thus, DEP's granting of the Minor Modification was improper and the Board should overturn that action.

Dr. Connett, Smedley's only expert, did not offer an opinion that the Entropy Report and Weston Report showed that CO emissions increase with the use of TDF. Nor did Dr. Connett offer an opinion that, in general, one would expect CO emissions to increase when a coal/TDF

fuel mixture is burned compared to a coal-only fuel stream. Thus, there is no affirmative evidence in Smedley's case either that the Weston and Entropy Reports show an increase in CO emissions with the use of TDF or that an increase of CO emissions when burning coal/TDF fuel versus coal-only fuel is expected.

Furthermore, Mr. Maxwell testified on the subject of what the two trial burns together demonstrate about comparative carbon monoxide emissions for coal-only fuel compared to coal-TDF fuel. Mr. Maxwell testified that the two trial burns together showed that the variations in carbon monoxide results did not indicate an increase in carbon monoxide emissions when TDF was added to the fuel stream. (Maxwell Tr. 317-28) He said that the Weston Report data showed that CO emissions from Boiler No. 1 increased with the use of TDF while CO emissions from Boiler No. 2 decreased with the use of TDF. (Maxwell Tr. 318) From that he concluded that the Weston Report, when considered together with the Entropy Report, confirmed that there is a natural variability in CO emissions regardless of the fuel being burned. (Maxwell Tr. 325-28) He was convinced that the Weston Report demonstrated that what they were seeing was not a systemic increase in CO emissions from the use of TDF but, instead, a natural variability in CO emissions levels. (*Id.*) We find DEP's actions here to have been appropriate and its conclusions proper and supported by the data.

Moreover, according to Mr. Laird,

In both cases, if you look at the entire set of data, I believe these measurements were taken over 60-minute periods. If you look at the data, you will see that the CO varies from around 50 to 100 parts per million back and forth from each data set, which is the way it has always run with coal. Variability of CO is from 50 to 100 parts per million. If you do statistics on that, I am sure that you would find out there is no significant difference.

(Laird Tr. 1705-06) This testimony is especially credible coming from Mr. Laird who has overall responsibility for environmental matters at the plant, including permit compliance, and he personally routinely reviews stack testing data from this plant. (Laird Tr. 1633-34, 1636-37)

Finally, Dr. Kelly was asked specifically about the Entropy Report and the Weston Report with reference to carbon monoxide emissions and whether she agreed with the suggestion that the data shows an increase in carbon monoxide emissions when TDF is burned. Dr. Kelly acknowledged that there was a *numerical* difference but she pointed out that the difference was not statistically significant. This means that the difference is more likely than not due to chance, probability or natural variability in measurement reporting than be an actual factual difference. (Kelly Tr. 2115-18)

Thus, we find not only that DEP's handling of the carbon monoxide issue was reasonable and correct at the time of the granting of the Minor Modification but that, on our *de novo* review of the question, we find that the Entropy and Weston Reports, taken together, do not support a conclusion that carbon monoxide emissions will increase as a result of burning TDF at the IP plant.

#### 4. Potential Dioxin Emissions.

Smedley criticizes DEP for its review, or as he would characterize it, lack of review of whether dioxin emissions would increase at the IP facility as a result of its being permitted to burn TDF with coal. The record, however, reflects that DEP considered the question of what, if any, impact the use of TDF in the fuel stream might have on dioxin emissions prior to issuing the Minor Modification. DEP reviewed dioxin emissions data relating to combustion of TDF in its

consideration of this Minor Modification and concluded that there was no reason to believe that there would be an increase of dioxin emissions. (Maxwell Tr. 1336-46, 1534)<sup>7</sup>

At one point, Mr. Maxwell did admit that, taken in isolation, one piece of information supplied to him at trial that he had not seen during the Minor Modification review process did create a question in his mind about the potential that emissions of dioxins/furans could increase upon the introduction of TDF into the fuel stream. (Maxwell Tr. 1530-33) Mr. Maxwell was shown Exhibit A-1 which is entitled "The Inventory of Sources of Dioxin in the United States", April 1998. He had not reviewed that document when he considered the Minor Modification application and it had only been brought to his attention by Mr. Smedley after his filing of the appeal. (Maxwell Tr. 337-38) He was asked to look at various reported emission factors for emission of dioxin when burning coal only compared to when burning a coal/TDF mixture. On page 3-41 an emission factor of 0.282 ng TEQ/kg of tires incinerated is reported. On page 4-27 an emission factor of 0.087 ng TEQ/kg of coal combusted is reported. Then, he was asked to

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<sup>7</sup> Smedley severely challenged the adequacy of Mr. Maxwell's review because the Project Summary, Pilot Scale Evaluation which was one of the source materials that Mr. Maxwell reviewed was the *Project Summary* for the report, not the entirety of the Pilot Scale Evaluation Report and Mr. Maxwell never reviewed the entire report. (Maxwell Tr. 1457) The entire Pilot Scale Evaluation was accepted into evidence as Exhibit A-31. Mr. Maxwell admitted that he never even sought to inquire whether the full document might be available to him. (*Id.*) He did testify that, in his judgment, the Project Summary provided sufficient information for his purposes. (*Id.*)

While the better practice is that DEP review, study and consider the entirety of a particular report on which it in any part is basing a permit decision, we do not believe that this amounts to an error which should result in overturning the decision on the Minor Modification. Here, Mr. Maxwell testified that he relied on several different sources upon which he concluded that there was no reason to believe that burning the allowed quantities of TDF at the IP plant would result in an increase in dioxin emissions. Also, there was no showing that the entirety of the Project Summary, Pilot Scale Evaluation reached any different conclusion on the issue of dioxin and furan emissions. Finally, as we will discuss, the testimony of Dr. Kelly and Mr. Laird provides confirmation today of Mr. Maxwell's conclusion then that there is no reason to believe that IP's burning of TDF will cause an increase in dioxin emissions.

look at a passage on 3-41 which reads, "it must be noted that these [emission factors for dioxins] may be underestimates of emissions from this source category, because the one facility tested in California is equipped with a dry scrubber combined with a fabric filter for air pollution control." (Ex A-1, p. 3-41). He was then asked whether he knew the nature of the air pollution control device at IP and he answered that it was "a fabric filter only." (Maxwell Tr. 1532) Then the following exchange took place:

- Q Does this document reassure you that there would be no dioxin increase from the burning of tires?
- A No.
- Q Would it raise a question in your mind about that?
- A If I had only this document to look at? Yes, I think it would.

(Maxwell Tr. 1533)

This does not in our view establish that DEP committed any error in its review process. Nor do we think that this document even constitutes affirmative evidence that dioxin emissions will increase with the use of TDF. As Mr. Maxwell's own answer notes, he looked at other documents regarding the dioxin issue as part of his review of the IP Minor Modification request. Also, the document at issue, Exhibit A-1, marked as "Draft Review (Do Not Cite Or Quote)" in prominent sized lettering on the cover and marked "Draft-Do Not Cite Or Quote" on every page. As Mr. Maxwell was able to point out, the document itself expresses reservations about the dioxin emissions factors it reports. The various emissions factors about which Mr. Maxwell was being asked are rated as either "low" or "medium" confidence rating. (Ex. A-1, p. 3-42, 4-27; Maxwell Tr. 1530-32) Dr. Connett did not testify that this document is evidence that the burning of TDF will result in an increase in dioxin emissions. Also, Dr. Kelly was shown this document and the same passages regarding emission factors. While she readily agreed that the reported

number for the emission factor for coal/TDF was higher than the number for the emission factor for coal only, she did not conclude therefrom that this was evidence that dioxin emissions would increase when TDF was added to the fuel stream at IP. She said that both of these numbers are “statistically, at background”. (Kelly Tr. 2172) Moreover, she emphasized that the document was a draft only, that about 16 volumes of comments have been submitted and the document has not yet been rendered in final form. (Kelly Tr. 2172-73)

**5. Potential Metals Emissions and the “Fly Ash” Issue.**

Smedley also argues that DEP’s review of the Minor Permit Modification request was flawed because it improperly ignored certain testing results of fly ash from the 1995 test burn. These testing results show higher levels of certain metals in the fly ash from the 20% TDF test run over the levels of the same metals in the fly ash from the 100% coal baseline test run. Smedley contends that these results show that air emissions of these metals would be higher. (Ex. A-29, pp. 4-6 “fly ash baseline” laboratory report and pp. 18-28, “fly ash, 20% TDF laboratory report)

Fly ash, along with bottom ash, is produced upon combustion. The bottom ash is ash material that remains in the combustion device itself while fly ash is the ash that is carried in the gas stream and removed by an air pollution control device prior to the gas being vented through the stack into the atmosphere. (Maxwell Tr. 1423) It is true that not 100% of the fly ash can be removed before the gas stream is vented into the air because the air pollution control device which is designed to remove the fly ash from the gas stream before it vents into the atmosphere is not 100% efficient. (Maxwell Tr. 1423-24)

Smedley’s argument on this point rests totally on Exhibit A-29. Exhibit A-29 is a September 8, 1995 submission by IP (then known as Hamerhill Papers) to DEP’s Waste

Management Division of a package of analytical testing results of the bottom ash and fly ash generated from the 1995 trial burn. These analyses report two different kinds of testing, a test referred to as a TCLP test and a "total" test. (Maxwell Tr. 1436-44) The TCLP testing procedure is done by means of a toxic leaching process whereby acid is mixed into the ash and a certain amount of contaminants, including metals, will leach out from the ash into a liquid solution called leachate. Thus, the test results reported with the TCLP test do not actually show the concentration of any certain contaminant on the fly ash itself. The concentrations reported are those in the leached solution from the fly ash's reaction with the acid. (Maxwell Tr. 1436-47) The "total" testing involves the total concentration of a particular contaminant on the fly ash itself. (Maxwell Tr. 1438, 1444-48)

Smedley's argument is based upon the results of the TCLP testing which he contends shows higher levels of certain metals when TDF is added to the fuel stream. However, Smedley failed to make any connection whatsoever between TCLP testing, which involves metals content in liquid leachate generated from mixing acid with fly ash, and any prospective air emissions. (Maxwell Tr. 1436-37, 1444)

Smedley also argued the relevance of the fly ash results derived from the "total" testing method. Smedley's premise is that this increase in metals levels for a selected list of metals when TDF is added to the fuel stream coupled with the notion that air pollution equipment designed to capture fly ash is not 100% efficient translates into an increase in air emissions of metals when TDF is present in the fuel stream.

We reject that notion. First, there is no affirmative evidence to demonstrate Smedley's premise. Not even Smedley's expert testified that this premise is demonstrable in fact. Thus, his assertion is only a working hypothesis and nothing more. Perhaps recognizing this, he argues



not so much that these analyses affirmatively show that there will be an increase in metals emissions when TDF is burned but that DEP acted improperly when it did not at least take the fly ash "total" results into account when it considered IP's request for the Minor Modification or that DEP should have required more emissions testing based on the fly ash analyses. It is not disputed that DEP's air program did not take the fly ash results into account in reviewing IP's request for this Minor Modification. (Starner Tr. 1079-80; Zemba Tr. 1115-16; Maxwell 1423-56) Smedley contends that DEP's failure to consider ash sample results in its decision making process for this Minor Modification constitutes error requiring the Minor Modification to be overturned. We disagree.

Mr. Maxwell testified that data relating to fly ash would not be the type of data he would use in his practice. (Maxwell Tr. 1424-28) He uses stack emissions data. Fly is captured at a point before the gases exit the stack. Mr. Maxwell has never heard of considering fly ash analyses as relating to consideration of stack emissions. (Maxwell Tr. 1426) We think his views on this are reasonable and we find no error on DEP's part regarding not considering fly ash data in connection with an air emission permit in this case.

The evidence at trial reinforced this. Mr. Laird addressed this question also. He testified that Exhibit A-29, the analyses of fly ash, is not the type of data he would rely upon to predict air emissions. (Laird Tr. 1992) Fly ash is, by definition, captured in air pollution control equipment before the gases are emitted into the air through the stack. Also, there is no evidence that the nature, size and quality of very small amount of fly ash that may escape through the air pollution control equipment and which is emitted into the air is the same nature, size and quality of the fly ash that is captured by the control equipment. (Maxwell Tr. 1427-28)

Dr. Kelly testified that she did review Exhibit A-29 but not in connection with consideration of the impact of air contaminants from burning TDF. Her review of Exhibit A-29 related to her consideration of the overall relative environmental impact of burning TDF in the IP boilers versus disposal of tires in other ways. (Kelly Tr. 2374) For consideration of air emissions impact, Dr. Kelly relies on air emissions data. (Kelly Tr. 2374-75)

The analyses of zinc provides a prime example of why the fly ash testing results are not indicative of emissions results. Zinc is the metal which provides the most dramatic increase in concentration in the fly ash "total" results from the 20% TDF test run as compared to the coal-only baseline test run. For the coal-only baseline test run the fly ash "total" result for zinc is 41.3 mg/kg. (Ex. A-29, fly ash baseline laboratory report, p. 6) The fly ash "total" level of zinc for the 20% TDF test run is 531 mg/kg. (Ex. A-29, fly ash 20% tdf laboratory report, p. 20) This is a whopping 1,2857% increase in fly ash "total" levels of zinc. However, as the witnesses testified, the Entropy Report, which measured zinc *emissions*, indicates that zinc *emissions* actually either decreased or did not increase when TDF was added to the fuel stream. (Ex. C-8, Tables 2-1, 2-2, 2-3) Mr. Maxwell testified to this point as did Mr. Laird and Dr. Kelly. (Maxwell Tr. 1539-40; Laird Tr.1794-95; Kelly Tr. 2372) On cross-examination, Dr. Kelly did admit that the numerical reduction in the zinc levels in the test runs for the 20% coal-TDF fuel mixture as compared to the coal-only fuel in the Entropy Report may not be statistically significant. (Kelly Tr. 2379) However, that is not proof that zinc emissions increased with the burning of TDF. At best for Smedley, this means that the emissions of zinc when burning TDF at the IP plant are not different than when burning coal only and that the difference in the test

results “are more likely to be due to chance or probability than due to actual facts”. (Kelly Tr. 2118)<sup>8</sup>

Based on this record, we do not believe that DEP committed error in not considering Exhibit A-29, the fly ash analyses as part of its consideration of IP’s request for this Minor Modification to its air emission permit. We do not believe that Exhibit A-29 provides evidence that zinc emissions in particular or metals emissions in general would be increased when burning TDF. Not only does Exhibit A-29, the fly ash “total” analyses, not show that zinc emissions would be expected to increase at IP with the introduction of TDF to the fuel steam, the Entropy Report shows the contrary. Moreover, DEP did not commit error in not relying on Exhibit A-29 to require more testing of emissions for zinc or other metals. We credit the testimony which indicates that fly ash testing results for metals do not translate into predictors or indicators of emissions results. Also, as noted, the Entropy Report tested for zinc and showed no increase in zinc emissions.

The evidence presented at trial confirms and expands upon the conclusions reached by DEP during its review process. Larry Laird and Dr. Kathryn Kelly testified as experts for IP.

**6. Larry Laird.**

The Board qualified Mr. Laird as an expert in the fields of: (1) interpretation of laboratory reports; (2) the assessment of air emissions; and (3) the impact of air pollution control systems on air emissions, meaning specifically, determining what the impact would be on the

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<sup>8</sup> It is also true that in the Entropy Report, one of the four runs of 20% TDF, run no. 2, the emission rate for zinc is 0.00610 lb/hr while the emission rate for zinc for the coal only fuel baseline run is lower, namely, 0.00389 lb/hr. (Ex. C-8, Table 2-1 and 2-3, Ex. A-17, Laird Tr. 1797-99) However, the other three 20% TDF trial runs all report a lower emission rate for zinc than that reported for the coal only baseline run, *i.e.*, 0.00361 lb/hr, 0.00200 lb/hr, and 0.00149 lb/hr respectively. As noted, none of the expert witnesses interpreted the Entropy Report as showing an increase in zinc emissions when burning TDF as compared to burning coal only.

levels of air emissions being emitted from those sources. (Laird Tr. 1648, 1661-62) Mr. Laird testified that based on his review of the Entropy and Weston Reports, “[t]hat for the...emissions that were measured in these reports, we would not have any more emissions burning TDF than we did with coal alone, and in some cases may have reduced emissions, especially NOx and SOx.” (Laird Tr. 1673) With specific reference to IP’s existing air permit parameters, Mr. Laird testified that, “[m]y opinion is that we will have no issues with maintaining our permit limits while burning a coal/TDF mixture. We will stay below those limits with ease.” (Laird Tr. 1676) Mr. Laird is qualified to render this opinion based on his background and experience in reviewing and interpreting stack testing results and we credit his opinion in this regard.

Mr. Laird also rendered the opinion that emissions of dioxin/furans would not increase as a result of IP’s burning the TDF/coal mixture. (Laird Tr. 1701) He based his opinion upon two reports: the July, 1994 Project Summary, Pilot Scale Evaluation (Ex. C-18), and the Pyrolysis Report (Ex. C-19)

We find Mr. Laird’s opinion that the burning of TDF at the IP plant would not result in the exceedence of any parameter of IP’s permit credible and supported by the bases he stated. We also find Mr. Laird’s opinion that there will not be an increase in dioxin emissions from the burning of the coal/TDF mixture at IP to be credible and supported by bases he stated.

**7. Dr. Kelly.**

Dr. Kelly performed an evaluation of the air impacts of the IP facility burning TDF along with coal as fuel in its boilers. (Kelly Tr. 2115) The Board qualified Dr. Kelly as an expert in the fields of: (1) toxicology; (2) health risk assessment; (3) interpretation of laboratory and stack test reports including dioxin air emissions; and (4) assessment of the potential human health impact of air emissions including dioxin emissions. (Kelly Tr. 2062-63, 2114) Dr. Kelly

testified that, based on her experience and her review of numerous data, she had the following opinions to a reasonable degree of scientific certainty: (1) there would not be expected to be any increase in emissions of contaminants of concern as a result of the IP plant burning the allowed amount of TDF with coal; and (2) there would not be expected to be any overall adverse impact on the quality of air emissions as a result of the IP plant burning the allowed amount of TDF with coal. (Kelly Tr. 2132-36)

Among the many items that she reviewed, Dr. Kelly reviewed the reports of the two trial burns that were conducted at IP, namely the Entropy Report, regarding the trial burn in 1995 and the Weston Report regarding the trial burn in 1996. She testified that, in her opinion, the Entropy and Weston reports showed that, “the compounds of concern that DEP requested IP to test for in stack emissions did not result in any impacts to ambient air of the Lock Haven area and....These reports just showed no net difference in stack emissions.” (Kelly Tr. 2117)

Dr. Kelly’s analysis also included numerous other sources and points of information. She reviewed reports of compilations of stack testing data generated by other state agencies including, among others, Ohio and California. (Kelly Tr. 2115-16) She also reviewed her own extensive files of stack testing data from facilities burning TDF. (Kelly Tr. 2116)

Dr. Kelly also based her opinion on Exhibit IP-27 which is the October, 1997 EPA report of EPA’s Office of Research and Development entitled “Air Emissions From Scrap Tire Combustion” (Scrap Tire Report). (Kelly Tr. 2119) She pointed out that this was a *final* report, not a draft report, and that this is the type of report that experts in the field would rely upon. (Kelly Tr. 2121) The Scrap Tire Report states that its purpose is to summarize the available information on air emissions and potential health impacts from scrap tire combustion. (Ex. IP-27, p. 1) The Scrap Tire Report was designed to address EPA's concern about emissions from

tire fires and to provide guidance to state environmental regulatory agencies on how to assess tire-fueled boilers and other TDF burning units for permitting purposes. (Kelly Tr. 2122; Ex. IP-27, p. 1) It provides combustion emissions data for 22 different facilities burning TDF. (Ex. IP-27) Dr. Kelly testified that the Scrap Tire Report concludes while in some cases emissions are higher or lower when TDF is added to the fuel stream, there is no significant difference in emissions. (Kelly Tr. 2123; Ex. IP-27, p. 2) Based on her review of the Scrap Tire Report, Dr. Kelly's opinion is that burning tires as fuel can provide a significant environmental benefit. (Kelly Tr. 2123)

It is true that in isolated instances in the Scrap Tire Report certain single sample results for a particular parameter may show an increase in emissions when TDF was introduced into the fuel stream. For example, at the Wisconsin Power & Light, Rock River Generating Station in Beloit, Michigan, it is reported that there was an increase of 99% in Total Hydrocarbon (THC) emissions and a 377% increase in carbon monoxide emissions when a 7% component of TDF was added to the normally 100% coal fuel feedstock. (Ex. IP-27, Table A-3b) Likewise, at the Packaging Corporation of America (formerly Nekoosa Packaging) Plant in Tomahawk, Wisconsin, it is reported that there was an increase of 179% in chromium emissions when a 1%-2% component of TDF was added to the normal coal/bark fuel mixture. (Ex. IP-27, Table A-15b) There are other examples of data points showing increases in emissions when TDF was added to the fuel stream. Dr. Kelly indicated that these increases were isolated, taken out of context, were not shown to be statistically significant and in and of themselves did not prove anything. These data points did not, in Dr. Kelly's opinion, undermine the Scrap Tire Report's conclusion or her own opinion. (Kelly Tr. 2178-79, 2195-2196, 2199) We credit Dr. Kelly's testimony in this regard.

Dr. Kelly also based her opinion on an October, 1997 report entitled "Analysis of Emissions Test Results and Residual By-Products From Facilities Using Tires As A Fuel Supplement" (California IWM Report) (Kelly Tr. 2123; Ex. IP-28) Dr. Kelly testified that this was a final report and is the type of report that an expert in the field would rely upon. (Kelly Tr. 2124) According to Dr. Kelly, this report is of particular significance for several reasons. California has very stringent standards for evaluating the impact of facilities and stringent air pollution control rules in particular. California is also a largely "car dependent" state with an associated waste tire management problem. Moreover, California is recognized as a national pacesetter in terms of environmental protection and its policies are often used as models for other states and even the federal EPA. For all of these reasons, Dr. Kelly believes that a California based study on this subject matter has important national significance. (Kelly Tr. 2127-28) We credit this expert's view that this report is of particular significance.

Dr. Kelly testified that the IWM Report finds that "there is little difference between TDF and baseline conditions on the contribution to the potential for risk...There is no discernable trend either positive or negative in the use of TDF". (Kelly Tr. 2126-27) With specific reference to dioxins and furans, the California IWB Report concludes that there is no statistically significant impact on emissions of dioxins and furans with the use to TDF. (Ex. IP-28, p. 29, 44).

Dr. Kelly further based her opinion on her own professional experience and study regarding burning of TDF as a fuel. She has personally looked at many facilities burning natural gas, coal, petroleum, coke, or medical waste, focusing on the impacts on emissions from burning tire-derived fuel in place of or together with the baseline fuel and specifically what differences would be found with regard to off-site health impacts or impacts to air quality. (Kelly Tr. 2128-

29) Her findings are consistent with the data reported in the Scrap Tire Report and the California IWB Report, *i.e.*, that there is not a statistically significant difference in the emissions of the compounds of concern to health when TDF is added as a supplement to the fuel stream. (Kelly Tr. 2129-30) Dr. Kelly's personal reviews on this subject have specifically included consideration of emissions of dioxins and furans. Indeed, she reported that she has found no difference in dioxin and furan emissions and sometimes a net decrease of emissions of those compounds. (Kelly Tr. 2131)

Smedley pressed Dr. Kelly on whether emissions of polyaromatic hydrocarbons (PAHs) might increase when TDF is introduced into the fuel stream. We note, however, that Smedley did not present affirmative evidence that emissions of PAHs would increase with the use of TDF at IP. In any event, Dr. Kelly's conclusion was that the data she had reviewed consistently showed that while in some individual cases PAH emissions may increase and in others emissions may decrease that PAH emissions levels are not statistically recognizably different with the addition of a TDF component in the fuel stream. (Kelly Tr. 2349-51) We believe that Dr. Kelly successfully negated the suggestion that PAH emissions might increase with the use of TDF.<sup>9</sup>

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<sup>9</sup> We have considered and reject Smedley's omnibus request that we consider none of Dr. Kelly's testimony credible because, according to Smedley, she was evasive in her testimony about having been criticized by the Texas Air Control Board for allegedly exaggerating scientific data and misrepresenting the State Board's position on hazardous waste incineration and, as Smedley puts it, she was a "paid lobbyist" for a hazardous waste incineration interest group.

When first questioned about whether she had received a letter allegedly criticizing her from the Texas Air Control Board, she said she had not received such a letter. Then, even before she was shown a copy of the letter, she remembered that she may indeed remember such a letter. (Kelly Tr. 2076-77) The letter is dated August 14, 1992, Ex. A-39. It was sent to Dr. Kelly about 7 ½ years before she was questioned about it at trial. She was asked about it with no prior warning that the question would be raised. While her first reaction was to deny having received any such letter, she *immediately* corrected herself. Smedley's interpretation of these few moments on the stand is that Dr. Kelly at first knowingly lied about having received the letter but when she saw Smedley's counsel pick up a document in the midst of the question she realized



**F. Subsequent Performance Data Regarding IP's Burning of TDF.**

Actual performance data from IP shows that not only have emissions not increased, they have decreased for certain parameters. Mr. Maxwell testified that since DEP granted the Minor Modification, he is not aware of any data showing an increase in any emission parameter. (Maxwell Tr. 1367) On the contrary, there is evidence that emissions of certain parameters have decreased since IP started to implement the Minor Modification and burn TDF. Mr. Maxwell testified that monitoring data from IP's continuous emissions monitoring devices, which it submits to DEP on a quarterly basis, shows a decrease in average emissions of NO<sub>x</sub> and SO<sub>2</sub>.

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that she was caught in her lie and she rushed to attempt to extricate herself from her mendacity by making it appear that she had just remembered the incident. We do not accept that interpretation. The presiding trial judge witnessed the few moments of Dr. Kelly's testimony regarding this letter as well as the entirety of Dr. Kelly's testimony and does not come to that conclusion. He observed Dr. Kelly's demeanor during this moment and during her entire testimony. We credit Dr. Kelly's credibility in connection with this part of her testimony as well as her testimony generally. We do not find Dr. Kelly to be mendacious, evasive or secretive. We found her to be the contrary on all counts.

We also do not discredit Dr. Kelly's testimony because Smedley characterizes her as a "paid lobbyist". At one time in her professional career, Dr. Kelly was working as a consultant for Holnam Cement Company. The State of Montana was considering legislation which would have wholly prohibited the burning of hazardous waste as fuel, including as fuel in cement plants for cement kilns. Holnam Cement Company retained Dr. Kelly to provide testimony in front of the Montana State Senate in opposition to the adoption of such a bill. As Dr. Kelly described her experience in that forum:

When I walked into the Senate chambers in the State of Montana, I was handed a document that I had to sign in order to be able to give testimony before the Senate in Montana. And that document said something to the effect that I acknowledge that by giving this testimony, I am a lobbyist, or something. It was either sign it and not give testimony that I had been asked to give or make a big fuss about it.

(Kelly Tr. 2096)

(Maxwell Tr. 1376-1378) He reviewed continuous emissions data for the second quarter of 1997 through the second quarter of 1999. (Maxwell Tr. 1367) This represents four quarters of data before IP commenced burning TDF and five quarters after it commenced burning TDF. (*Id.*) He compared the data from “before” and “after” and he found that “on average, when you looked at the four quarters versus the five, and you averaged the emissions that were being reported for sulfur oxide and nitrogen oxides, that for both pollutants, the data suggested that there was a decrease.” (Maxwell Tr. 1368)

**G. Smedley’s Contention That DEP Should Have Required More Testing.**

We have already discussed and rejected Smedley’s specific contention that the fly ash testing results contained in Exhibit A-29 should have required DEP to have ordered more testing for metals emissions before issuing the Minor Modification. Beyond that, Smedley asserts that, generally, DEP should have required more testing before it issued the Minor Modification. He points to 35 P.S. § 4006.1(b)(2) which provides as follows:

A permit may be issued after the effective date of this amendment to any applicant for a stationary air contamination source requiring construction, assembly, installation or modification where the requirements of subsection (a) of this section have been met and there has been performed upon such source a test operation or evaluation which shall satisfy the department that the air contamination source will not discharge into the outdoor atmosphere any air contaminants at a rate in excess of that permitted by applicable regulation of the board, or in violation of any performance standard or emission standard or other requirement established by the Environmental Protection Agency or the department for such source, and which will not cause air pollution.

35 P.S. § 4006.1(b)(2)

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We find nothing untoward or sinister about this experience before the Montana Senate. There is certainly nothing about this experience or the document she signed there that in any way undermines her credibility before the Board in this case.

Dr. Connett did not provide a specific indication of what testing he thought would suffice. Indeed, Dr. Connett has *never* been satisfied with the quantum of testing done anywhere or anytime with respect to dioxin emissions from burning TDF. (Connett Tr. 549) He testified that he has *never* seen any test of emissions from burning TDF that gives him confidence that one can even make a prediction of what dioxin emissions will be when TDF is burned. (*Id.*) Dr. Connett testified that testing he has seen for dioxin emissions is insufficient for a variety of reasons. He said that “[y]ou need data during startup. You need data during shutdown. You need data which takes into account upset conditions. You need data over a prolonged period of time.” (Connett Tr. 547) Thus, it would seem that Dr. Connett’s standard for sufficient testing, as a practical matter, could and would never be satisfied no matter how much testing were to be done.

Against this backdrop, as we have already discussed, is our conclusion, in light of all the evidence presented to and considered by DEP in the first instance and to this Board and considered by it under our *de novo* review that there is no evidence which suggests that dioxin emissions will increase when TDF is burned at this plant. Indeed, the evidence is to the contrary. DEP did review a host of information on emissions in this case before it granted the Minor Modification. As discussed before, DEP reviewed information on emissions from burning TDF even before the two trial burns in this case. Then, it reviewed the two test burn reports, the Entropy Report and the Weston Report. Thus, in this case, there was testing and it was satisfactory to DEP. We have reviewed and discussed at length already the nature of the testing and the basis for DEP’s satisfaction therewith and we find no lack of adherence to 35 P.S. § 4006.1(b)(2) on DEP’s part.

Also, Dr. Kelly testified on the specific question of whether additional testing should have been required by DEP or, as a corollary, should be required now by the Board. She opined that the testing regimen which was done was sufficient and that she would not have recommended, nor does she recommend now, that additional testing was or is necessary. (Kelly Tr. 2149-53) In light of the evidence we have seen, we credit her opinion on this question.

We conclude that DEP did not err in granting the Minor Modification without requiring more testing. Likewise, we do not conclude now that the Minor Modification should be rescinded on that basis or that the Board should order additional testing.

**H. Smedley's Contention That IP's Compliance History Statutorily Precludes The Issuance of the Minor Modification.**

Smedley argues that DEP failed to conduct a compliance review of IP or evaluate its compliance history in connection with this application for a minor modification. He also argues that DEP improperly failed to determine whether or not IP should have been placed on the compliance docket. Furthermore, in light of alleged compliance deficiencies of IP, DEP should have placed IP on the compliance docket and, therefore, the Minor Modification should have been denied as required under 35 P.S. § 4007.1(a). Smedley argues that the Board should overturn DEP's granting of the Minor Modification based on the evidence it presented which it alleges shows IP's compliance history to be deficient. Smedley's approach to this matter is off the mark both legally and factually.

Smedley's claim that DEP acted improperly by not conducting a compliance review is wrong. No compliance review in the nature of that outlined in 25 Pa. Code § 127.12a for plan approval applications or in 25 Pa. Code § 127.412 for operating permit applications is mandated for minor operating permit modifications. Section 7.1(b) of the APCA, 35 P.S. § 4007.1, provides that DEP may, in its discretion, refuse to issue a plan approval or a permit when an

applicant has shown a lack of intention or ability to comply with the APCA, its regulations, or a permit or DEP order as indicated by past or present violations. However, even if an applicant has past or present violations, DEP may still issue the applied for plan approval or permit if the lack of intention or ability to comply is being or has been corrected to DEP's satisfaction.

On its face, Section 7.1(b) of the APCA does not apply to applications for minor operating permit modifications. The regulations confirm this at 25 Pa. Code 127.12a, which sets forth the procedures for compliance review in the case of applications for plan approvals, and 25 Pa. Code § 127.412, which sets forth the procedures for compliance review in the case of applications for operating permits. In both cases, an applicant is to submit detailed information on prescribed forms relating to compliance history with its application for a plan approval or permit. There is no such requirement and no such forms to be submitted with applications for Minor Modifications.

Section 7.1(a), on the other hand, does bring the applicant's compliance status into the field of inquiry with respect to applications for minor modifications. Under Section 7.1(a), DEP shall not modify any permit if it finds that the applicant or permittee or related party is in violation of the APCA, any regulation promulgated thereunder, or any plan approval, permit or order of DEP, *as indicated by the Department's compliance docket, unless the violation is being corrected to the satisfaction of the Department.* 35 P.S. § 4007.1(a)(emphasis added). The applicability of Section 7.1(a) in the first instance, then, depends *solely* on whether the applicant is on the compliance docket. Even if the applicant is on the compliance docket, DEP may still issue the requested permit action if the violation is being corrected to the satisfaction of the Department. Thus, the introductory prohibition of Section 7.1(a) is conditional. The Department

may still grant the permit or modification if the compliance problem, is being corrected to the satisfaction of the Department.

Smedley presented a great deal of evidence he claims reflects poorly on IP's compliance status. He argues that DEP abused its discretion in this case by failing to make any determination whether IP should have been placed on the compliance docket. He claims that based on the evidence he presented IP should have been on the compliance docket at the time it applied for the Minor Modification and, thus, the Minor Modification should have been denied. Alternatively, Smedley seems to be arguing that the Board should independently conclude that IP's compliance history is so poor that the APCA requires that it not be allowed to have its Minor Modification.

Smedley's appeal to Section 7.1(a) of the APCA is not supportable. Even aside from the supposed evidence that Smedley presented regarding IP's compliance history, we have already noted that the lynchpin of the applicability of the Section 7.1(a) introductory prohibition is the answer to the simple yes or no question: is IP on the compliance docket? It is undisputed that IP has never been on DEP's compliance docket. (Cooley Tr. 963) Thus, the Section 7.1(a) introductory conditional prohibition is not applicable.

Moreover, we do not think that the APCA vests the Board with the power to either place a party on the compliance docket or, retrospectively, to adjust DEP's handling of its business in that regard to require it to have placed a party on the compliance docket for purposes of analyzing the propriety of a permitting action under Section 7.1(a). Smedley cites no authority either in the APCA or in decisional law which would support such an action on the Board's part. Indeed, the APCA and its regulations command the contrary conclusion. The regulations provide that a decision to *place* a party on the compliance docket is appealable to the Board. 25

Pa. Code Section § 127.12a(h) 25 Pa. Code Section § 127.412. On the other hand, the regulations do not provide that *not* placing a party on the compliance docket is appealable.

We note, however, that the person or persons within DEP who are responsible for taking action on a request for a permit or minor modification such as this one need to affirmatively check to see if a party is on the compliance docket before granting the requested modification. The record indicates that this was not done in this case until after this appeal was filed. (Aldenderfer Tr. 169-70; Maxwell Tr. 368, 1368-69; Cooley Tr. 951, 995-1000) This error in DEP's review process for this Minor Modification is not material, however, since IP was never on the compliance docket.

Moreover, the Board took copious evidence from Smedley on the alleged compliance deficiencies of IP. We find that IP has not evidenced a lack of ability or intention to comply with the APCA, its regulations or any permit or order of DEP.

The gravamen of Smedley's argument that IP has an adverse compliance record is the allegation that IP falsely and/or deficiently reported its overall plant emissions of volatile organic compounds and/or exceeded its permitted allowance of VOC emissions. Smedley contends that the plant exceeded its 50 tons per year permit limit for VOCs.

DEP and IP have been engaged in a continuing dialogue since 1997 regarding the facility's reporting of overall VOC emissions. (Schulte Tr. 744, 759-760) After hearing the evidence on this question, we find that there are significant and difficult technical issues regarding the quantification of VOCs from IP's paper machines which have not been resolved. As of the date of the hearing, the Department and IP were still working cooperatively to quantify VOC emissions from the IP plant in a satisfactory manner. DEP had not concluded that there is any deficiency in compliance with the plant's overall VOC emissions cap as of the date of

hearing. (Cooley Tr. 964, 1005-06; Yowell Tr. 104, 110, 112, 115-116; Szekeres Tr. 1208-09, 1389- 90) We will not conclude that there is either.

Smedley also makes a broad brushed attack on IP's general compliance history. Here Smedley points to a number of disconnected complaints regarding dust from the facility. (See Exhibits A-28, A-32, A-35, A-36, A-38) The most recent example to which Smedley points in asserting that IP is a bad actor was over two and a half years old when presented at trial. Exhibit A-35 is a July 9, 1997 memorandum to the file by Mr. Schulte regarding a dust complaint. (Ex. A-35) Moreover, in that memorandum, Mr. Schulte makes the point that "[i]t is obvious that International Paper is taking this problem seriously and is making more than a reasonable effort to correct it." (Ex. A-35) Thus, there is no basis to conclude from the evidence presented by Smedley that IP has a deficient compliance record.

**I. Smedley's Contention that the Minor Modification Is Precluded Because the Burning of TDF at IP Causes "Air Pollution" Under 35 P.S. § 4003 and 25 Pa. Code § 121.1.**

Smedley contends that the burning of TDF at IP will cause "air pollution" as defined under the APCA and the regulations and, therefore, the issuance of the Minor Modification is statutorily precluded. Smedley points to 35 P.S. § 4003 and 25 Pa. Code § 121.1 which define "air pollution" as follows:

The presence in the outdoor atmosphere of any form of contaminant, including but not limited to, the discharging from stacks, chimneys, openings, buildings, structures, open fires, vehicles, processes or any other source of any smoke, soot, fly ash, dust, cinders, dirt, noxious or obnoxious acids, fumes, oxides, gasses, vapors, odors, toxic, hazardous or radioactive substances, waste or other matter in a place, manner or concentration inimical or which may be inimical to public health, safety or welfare or which is or may be injurious to human, plant or animal life or to property or which unreasonably interferes with the comfortable enjoyment of life or property.



35 P.S. § 4003, 25 Pa. Code § 121.1. Under 35 P.S. § 4008, it is unlawful to cause “air pollution”.

Based on our discussion already set forth, we are convinced that the burning of TDF at the IP facility as allowed in the Minor Modification will not result in “air pollution” as that term is defined in the statute and regulation just cited. As we have discussed in detail, there has been no showing that emissions will increase.

**J. Smedley’s Contention that DEP’s Granting of the Minor Modification Was Violative of Article I, Section 27 of the Pennsylvania Constitution.**

Smedley argues that DEP’s issuance of the Minor Modification constitutes a violation of Article I, Section 27 of the Pennsylvania Constitution. Based in large part on the discussion already presented that the burning of TDF at IP will not result in any increase in emissions of any air contaminant, we do not believe that Smedley established that the granting of the Minor Modification authorizing that activity constitutes a violation of Article 1, Section 27 of the Pennsylvania Constitution.

Article I, Section 27 provides as follows:

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

Pa. Const. Art. I, § 27. This constitutional provision is subject to a three pronged analysis as set forth in the seminal case of *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973), *exceptions dismissed*, 323 A.2d 407 (Pa. Cmwlth. 1974), *aff’d*, 361 A.2d 263 (Pa. 1976) as follows: (1) was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth’s public natural resources; (2) does the record demonstrate a reasonable effort to

reduce the environmental incursion to a minimum; and (3) does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion? *Payne v. Kassab*, 312 A.2d at 94. In this case, the action being challenged here is in compliance with all three prongs of the *Payne v. Kassab* test.

Based on our discussion already set forth, we are convinced that DEP complied with all applicable statutes and regulations at issue in this case in granting the Minor Modification. Nothing about the physical attributes of the requested change in fuel streams disqualifies IP's request from being handled as a minor modification under the regulations. The request is not otherwise outside the bounds of a "minor operating permit modification" under either the APCA or the regulations. DEP was not precluded from issuing this Minor Modification on account of IP's compliance situation. Finally, the burning of TDF at IP will not cause "air pollution" as defined under the APCA or the regulations. Thus, there is compliance with all applicable statutes and regulations.

On the "minimum environmental incursion" question, not only will emissions not increase, we are convinced that there is a strong likelihood that overall emissions will decrease. Indeed, the evidence shows that overall emissions of dioxin, the potential emission of which Smedley is most concerned, will decrease. Thus, there is no question but that this Minor Modification demonstrates a reasonable effort to reduce environmental incursion to a minimum.

We also note that in connection with the balancing approach set forth in the second and third prongs of *Payne v. Kassab*, that the Commonwealth of Pennsylvania Legislature has specifically recognized the significant public hazard created by large stockpiles of waste tires. The Waste Tire Recycling Act, 35 P.S. § 6029.101-6029.113, was passed in part on the basis of

the General Assembly's findings that unused waste tires present a multitude of problems to the Commonwealth's environment that needed to be addressed. The legislative findings for the Waste Tire Recycling Act state that the Legislature finds and declares as follows:

- (1) An estimated 36,000,000 waste tires are stockpiled in Pennsylvania;
- (2) Waste tires and stockpiled tires continue to be an environmental threat to this Commonwealth.
- (3) Approximately 12,000,000 waste tires are generated in Pennsylvania each year.
- (4) Stockpiled tires create environmental hazards such as tire fires and heavy mosquito infestations.
- (5) Landfilled whole tires and tire piles use valuable and productive land space.
- (6) Financial incentives need to be created to help stimulate waste tire markets.

35 P.S. § 6029.102. Moreover, the declared purpose of the Waste Tire Recycling Act is stated as follows:

- (1) To ensure that whole used and waste tires are collected and put to beneficial use or properly disposed.
- (2) To provide for the abatement of whole used and waste tire dumps and their associated threats to public health and welfare.
- (3) To encourage qualified investments by private companies to rehabilitate, expand or improve manufacturing processes, facilities, buildings and land to promote the use and recycling of waste tires.
- (4) To reuse the current supply of waste tires generated each year in this Commonwealth.

35 P.S. § 6029.103.

In addition to the harms cited by the General Assembly in its findings and declaration of purpose of the Waste Tire Recycling Act, IP presented evidence of the harmful effects of the accumulation of waste tires in tire dumps. Specifically, open tire fires "produces toxic gases that can result in significant acute and chronic health hazards." (Ex. IP-27, p. x.) Also, tire fires can generate significant amounts of waste liquids and solids that can pollute soil, surface and groundwater. (*Id.*, p. ix). Dr. Kelly testified that even aside from the problems associated with

tire pile fires, tire piles present congregation places for rodents and vectors. (Kelly Tr. 2155) We credit each of these points. Probably not coincidentally, each of these evidentiary points confirm the Pennsylvania Legislature's legislative findings in the Waste Tire Recycling Act.

Mr. Laird testified that it is his understanding that most of the TDF burned at IP comes from Pennsylvania. (Laird Tr. 1668) The IP TDF project, then, will contribute, albeit in a small way, to the reduction of the number of tires that end up in the Pennsylvania tire dumps as referred to in 35 P.S. §§ 6029.102(2), (4), and (5) and 6029.103(2) posing the threats the Legislature enumerated and declared that it intended to abate by the Waste Tire Recycling Act as set forth in 35 P.S. §§ 6029.102(4), (5) and 6029.103(2). We perceive this to be an environmental benefit, especially in the absence of evidence that the IP TDF project is causing any counter-veiling environmental detriment in another media.<sup>10</sup>

We find that the *Payne v. Kassab* test is fully satisfied in this case.

Based on our discussion already set forth, we are convinced that DEP complied with all applicable statutes and regulations at issue in this case in granting the Minor Modification. Nothing about the physical attributes of the requested change in fuel streams disqualifies IP's request from being handled as a minor modification under the regulations.

The request is not otherwise outside the bounds of a "minor operating permit modification" under either the APCA or the regulations. DEP was not precluded from issuing this Minor Modification on account of IP's compliance situation. Finally, the burning of TDF at

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<sup>10</sup> Obviously, then, we do not agree with Smedley's contention that the IP TDF project constitutes a violation of the Waste Tire Recycling Act. Smedley Post-Hearing Brief, p. 37-38. Smedley's argument is that the use of tires which produce air pollution to the magnitude alleged by Smedley is not "beneficial use" or "proper disposal" of waste tires as referenced in Section 103 (1) of the Waste Tire Recycling Act. 35 P.S. § 6029.103(1). We do not find that there will be any air pollution as a result of the granting of this Minor Modification to IP authorizing the use of TDF as fuel in its boilers.

IP will not cause “air pollution” as defined under the APCA or the regulations. Thus, there is compliance with all applicable statutes and regulations.

On the “minimum environmental incursion” question, not only will emissions not increase, we are convinced that there is a strong likelihood that overall emissions will decrease. Indeed, the evidence shows that overall emissions of dioxin, the potential emission of which Smedley is most concerned, will decrease. Thus, there is no question but that this Minor Modification demonstrates a reasonable effort to reduce environmental incursion to a minimum.

### CONCLUSIONS OF LAW

1. The Board has subject matter jurisdiction over the parties and this appeal.
2. The Appellant, Smedley, has the burden of proof by a preponderance of the evidence to show that the Department erred in granting the Minor Modification, committed an error of law or otherwise acted unreasonably or inappropriately in granting the Minor Modification. 25 Pa. Code § 1021.101(a),(c)(2)
3. The scope of the Board’s review is *de novo* meaning that the Board is not limited to considering only the evidence that was before the Department when it rendered its decision but the Board will consider all relevant and admissible evidence presented to it at the time of hearing and will weigh all the evidence presented anew. 35 P.S. § 7514(c); *Pequea Township v. Herr*, 716 A.2d 678, 685-87 (Pa. Cmwlth 1998); *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *Warren Sand & Gravel Co. v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975); *O’Reilly v. DEP*, Docket No. 99-166-L, slip op. at 14 (Adjudication issued January 3, 2001).
4. Under Section 4010.2 of the Air Pollution Control Act, 35 P.S. § 4010.2, a party has standing to appeal an action of the Department if either the traditional *William Penn Parking*

*Garage* aggrieved party standard is met or if the appellant participated in the public comment process. 35 P.S. § 4010.2

5. Smedley has standing as an aggrieved party because he is exposed to and comes into contact with air emissions emanating from IP's plant and he is thus an aggrieved party. *William Penn Parking Garage*, 346 A.2d 269, 280 (Pa. Cmwlth. 1975); *Belitskus v. DEP*, 1998 EHB 846, 859 (citing *William Penn Parking Garage*, 346 A.2d at 283).

6. The physical attributes of the Minor Modification do not preclude DEP's treating IP's application as one for a minor operating permit modification under 25 Pa. Code § 121.1 and 25 Pa. Code § 127.462.

7. A change in fuel stream from coal only to a prescribed mixture of coal and tire derived fuel is not precluded from being considered as a minor operating permit modification under 25 Pa. Code § 121.1 and 25 Pa. Code § 127.462.

8. DEP did not err in processing IP's request as one for a minor operating permit modification under 25 Pa. Code § 121.1 and 25 Pa. Code § 127.462.

9. DEP did not err in granting the Minor Modification without having required more testing in advance nor is DEP in error by not requiring more emissions testing under the terms of the Minor Modification now.

10. No compliance review in the nature outlined by 25 Pa. Code § 127.12a for plan approval applications or in 25 Pa. Code § 127.412 for operating permit applications is mandated for processing applications for minor operating permit modifications.

11. DEP did not err in not conducting such a compliance review as part of its review process of this application for a minor operating permit modification.

12. Section 4007.1(a) of the Air Pollution Control Act does bar DEP's granting of even a minor operating permit modification if DEP finds that the applicant or permittee or a general partner, parent or subsidiary corporation of the applicant or permittee is in violation of this act, or the rules and regulations promulgated under this act, any plan approval, permit or order of the department, as indicated by the Department's compliance docket, unless the violation is being corrected to the satisfaction of the Department.

13. DEP permitting authorities have an affirmative duty in processing applications for minor operating permit modifications to check the compliance docket to determine whether the applicant may be precluded from receiving approval for the requested modification due to its presence on the compliance docket.

14. The Board does not have the statutory authority to post-facto determine that any entity should have been on the compliance docket.

15. DEP's committed error in its review of this application for a minor operating permit modification in that the persons responsible for reviewing and passing upon the application for the minor operating permit did not affirmatively check as part of the review process to determine whether IP was on the compliance docket.

16. This error is harmless since the record presented at the hearing shows that IP was never at any time on the compliance docket and remand of this action mandating that DEP determine whether IP was or is on the compliance docket would be senseless.

17. The Board concludes on the basis of the full record that IP is not in violation of the APCA, any plan approval, permit or order of the Department.

18. DEP did not err in granting the Minor Modification on the purported basis that IP is in violation of this act, or the rules and regulations promulgated under this act, any plan

approval, permit or order of the Department or that IP has demonstrated a lack of ability or intent to comply with the law.

19. The Minor Modification is not precluded because burning of tire derived fuel does not cause "air pollution" as that term is defined by 35 P.S. § 4003 and 25 Pa. Code § 121.1.

20. The Minor Modification was not issued in violation of Article I, Section 27 of the Pennsylvania Constitution in that: (1) there was compliance with all applicable statutes and regulations relevant to the protection of the environment; (2) the record demonstrates a reasonable effort to reduce the environmental incursion to a minimum; and (3) the environmental harm that will result from the challenged decision does not outweigh the benefits to be derived therefrom.

21. DEP did not err in granting the IP's application for the minor operating permit modification.



COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

WILLIAM A. SMEDLEY

v.

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION and INTERNATIONAL  
PAPER COMPANY, Permittee

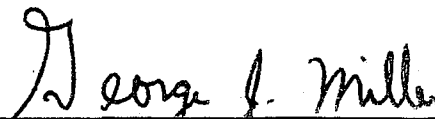
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EHB Docket No. 97-253-K

ORDER

AND NOW, this 8<sup>th</sup> day of February, 2000, the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



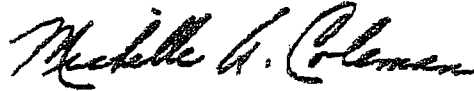
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GEORGE J. MILLER  
Administrative Law Judge  
Chairman



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THOMAS W. RENWAND  
Administrative Law Judge  
Member



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**MICHELLE A. COLEMAN**  
Administrative Law Judge  
Member



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**BERNARD A. LABUSKES, JR.**  
Administrative Law Judge  
Member



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**MICHAEL L. KRANCER**  
Administrative Law Judge  
Member

**DATED:** February 8, 2001

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

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WILLIAM T. PHILLIPY IV  
 SECRETARY TO THE BOARD

<b>QUINN LICKMAN AND</b>	:	
<b>INTERNATIONAL ANTHRACITE CORP.</b>	:	
	:	<b>EHB Docket No. 2001-012-C</b>
<b>v.</b>	:	
	:	<b>EHB Docket No. 2001-013-C</b>
<b>COMMONWEALTH OF PENNSYLVANIA,</b>	:	
<b>DEPARTMENT OF ENVIRONMENTAL</b>	:	<b>Issued: February 13, 2001</b>
<b>PROTECTION</b>	:	

**OPINION AND ORDER ON  
 MOTION TO DISMISS PETITION FOR SUPERSEDEAS**

**By Michelle A. Coleman, Administrative Law Judge**

**Synopsis:**

A motion to dismiss a petition for supersedeas is denied. The motion did not show that the petition fails to state grounds sufficient for a superseas when all doubts are resolved in favor of the appellant.

**OPINION**

This appeal concerns two sets of inspection reports and compliance orders that the Department issued to Quinn Lickman (Appellant) on December 28, 2000. All of the documents relate to activity at the Good Spring South mine site (site) in Porter Township, Schuylkill County.

The first inspection report and compliance order pertain to a December 27, 2000, Department inspection. The compliance order asserts that Appellant violated sections 3.1 and 4(a) of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L.

1198, *as amended*, 52 P.S. §§ 1396.3a and 1396.4(a) (Surface Mining Act), and sections 86.11 and 86.13 of the Department's regulations, 25 Pa. Code §§ 86.11 and 86.13, by engaging in the mining of coal without a valid license or permit. The compliance order directs Appellant to immediately cease operations and begin reclamation. Appellant appealed the inspection report and compliance order on January 9, 2001, and the Board docketed the appeal at EHB Docket No. 2001-012-C.

The second inspection report and compliance order relate to a December 28, 2000, Department inspection. This compliance order asserts that Appellant violated section 18.6 of the Surface Mining Act, 52 P.S. § 1396.18f, and section 611 of the Clean Streams Law, 35 P.S. § 691.611, by failing to comply with the previous compliance order. It directs Appellant to immediately cease all operations and begin reclamation. Appellant appealed the inspection report and compliance order on January 9, 2001, and the Board docketed the appeal at EHB Docket No. 2001-013-C.

On the same day that Appellant filed its notices of appeal concerning the inspection reports and compliance orders—January 9, 2001—Appellant also filed petitions for supersedeas in those appeals.<sup>1</sup> In the petitions, Appellant argues that the Department erred by issuing the compliance orders and inspection reports because:

- 1) Appellant is the president and sole shareholder of International Anthracite Corporation (IAC);
- 2) IAC entered into a contract with Harriman Coal Corporation (Harriman) on December 15, 2000, to lease the site from Harriman, and to mine and sell coal at the site;
- 3) IAC has a license to engage in surface mining operations;

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<sup>1</sup> The petitions Appellant filed are essentially identical to one another.

- 4) Harriman had a mining permit for the site; and,
- 5) so long as IAC had a license to mine the coal and a contract with the permittee, IAC itself was not required to have a permit.

Appellant also asserts that granting the supersedeas would not harm the public health safety or welfare and that, without a supersedeas, the December 28, 2000, compliance orders and inspection reports will result in irreparable injury to IAC and third parties because:

- 1) IAC is not mining under any other permit;
- 2) IAC has had to lay off employees in response to the December 28, 2000, compliance orders;
- 3) the public will be denied access to additional coal when demand for the coal is high; and,
- 4) the company which would process the coal IAC would mine will lose revenue and customers.

On January 23, 2001, the Department filed an answer to the petitions for supersedeas together with a motion to dismiss the petitions for supersedeas without a hearing (motion to dismiss). On February 6, 2001, Appellant filed an answer and memorandum in opposition to the Department's motion.

Section 1021.77(c), 25 Pa. Code § 1021.77(c), provides, "A petition for supersedeas may be denied upon motion made before a hearing ... for ... [a] failure to state grounds sufficient for the granting of a supersedeas." Since, "[a] moving party bears the burden of proving that it is entitled to the relief requested," *Green Thornbury Committee v. DER*, 1995 EHB 294, 302, the Department bears the burden of establishing that Appellant failed to state grounds sufficient for the granting of a supersedeas. In addition, since granting the motion to dismiss the petition would have the effect of putting Appellant out of court on the supersedeas petition, we must give

him the benefit of the doubt with respect to all properly-supported factual averments in the petition.<sup>2</sup>

We will not dismiss Appellant's petition because the Department failed to establish that the petition clearly failed to state grounds sufficient for the granting of a supersedeas. The parties' dispute concerning the petition for supersedeas centers on the lawful *status quo ante*, specifically, whether Appellant and IAC had the authority to mine the Good Spring South prior to the Department's December 28, 2000, compliance orders and inspection reports.

In its petition for supersedeas, Appellant seeks Board authorization for IAC to mine site pending the resolution of Appellant's appeal. According to Appellant, this is a return to the *status quo ante* because IAC possessed all that was required to authorize it to mine the site: Harriman had a permit for the site, IAC had a lease with Harriman to mine the site, and IAC had a license to mine.

The Department argues that, were the Board to authorize IAC to mine the site pending Appellant's appeal, the Board would be doing more than returning the parties to the *status quo ante* because neither Appellant nor IAC were authorized to mine the site on December 28, 2000. In support of its position, the Department argues that Appellant and/or IAC were not authorized to mine at the site then because:

- 1) Harriman lacked a mining license, though a license is required to authorize a contract operator, like IAC, to mine at the site;

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<sup>2</sup> The standard for what is a properly supported factual averment in the context of a motion to dismiss a petition for supersedeas is lower than it is in the context of a motion for summary judgment. Under section 1021.77(a) of the Board's rules of practice and procedure, 25 Pa. Code § 1021.77(a), a petition for supersedeas must be supported by either affidavits supporting the facts alleged in the petition, or by an explanation of why such affidavits were not submitted.

- 2) IAC and Appellant were not certified contract operators, although a contract operator must be certified before it engages in mining activity;
- 3) the Good Spring South mining permit does not authorize IAC or Appellant to mine on the site, although certified contract operators must be listed in the mining permit; and,
- 4) Department compliance orders previously issued to Harriman prohibited mining at the site.

The legal and factual assertions made in the Department's motion to dismiss could conceivably derail Appellant's hopes for a supersedeas in the long run, but the Department failed to adequately support those assertions in its motion. With respect to the first argument, the Department had factual support for its averment that Harriman lacked a mining license, but it failed identify any legal authority for the proposition that a permittee requires a mining license before it can authorize a contract operator to mine the permitted site. With respect to the second argument, the Department supported the factual averment that Appellant and IAC were not certified contract operators, but it failed to cite any legal authority for the proposition that Appellant and IAC had to be certified before they could conduct mining operations at the site. With regard to its third argument, the Department failed to support the factual averment that the Good Spring South mining permit does not authorize IAC or Appellant to mine on the site, and failed to cite any legal authority for the proposition that certified contract operators must be listed in the mining permit.

That leaves only the Department's fourth argument: that Department compliance orders previously issued to Harriman prohibited Appellant and IAC from mining at the site. To support this allegation, the Department pointed to two compliance orders it issued to Harriman in the

summer of 2000.<sup>3</sup> Both compliance orders related to the Good Spring South site. The first, issued July 13, 2000, states, “No further coal mining or removal of coal ... can occur without Department approval,” and “Backfilling and/or reclamation activities are to be conducted on a continuous basis until all affected areas are reclaimed....” The second, issued August 8, 2000, states, “Immediately begin backfilling and/or reclamation of all affected areas, and conduct these activities on a continuous basis until all affected areas are fully backfilled and reclaimed.”

Although the Department argues that these orders precluded Appellant and IAC from mining the site, the Department does not explain why. Rather than speculating—particularly where Appellant has not been put on notice of the Department’s theory so that he can respond—we will deny the Department’s motion and proceed to the supersedeas hearing. There, we can rule on the parties’ arguments where they are more developed.<sup>4</sup>

Accordingly, we issue the following order:

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<sup>3</sup> These compliance orders were incorporated into one of the affidavits that accompanied the Department’s motion. *See* motion to dismiss, para. 7(a); Menghini Exhibit 1.

<sup>4</sup> In addition to the other arguments raised in their filings, the parties argue whether IAC is a proper party to this appeal. Since actions under appeal were issued to Quinn Lickman and the parties do not disagree that he is a proper party to this appeal, we need not decide whether IAC is a proper party before determining whether the petition has stated adequate grounds for a supersedeas. So long as Lickman is a proper party and the petition states adequate grounds for a supersedeas, we would have to proceed to the supersedeas hearing whether IAC is a party or not.



COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

QUINN LICKMAN AND  
INTERNATIONAL ANTHRACITE CORP.

v.

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

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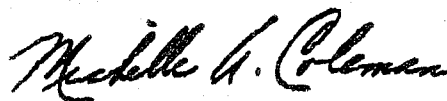
EHB Docket No. 2001-012-C

EHB Docket No. 2001-013-C

ORDER

AND NOW, this 13<sup>th</sup> February, 2001, IT IS ORDERED that the Department's motion to dismiss Appellant's petition for supersedeas is **denied**.

ENVIRONMENTAL HEARING BOARD



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MICHELLE A. COLEMAN  
Administrative Law Judge  
Member

**DATED:** February 13, 2001

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

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WILLIAM T. PHILLIPY IV  
 SECRETARY TO THE BOARD

<b>JOHN M. RIDDLE, JR.</b>	:
	:
<b>v.</b>	:
	:
<b>COMMOWEALTH OF PENNSYLVANIA,</b>	: <b>EHB Docket No. 99-226-MG</b>
<b>DEPARTMENT OF ENVIRONMENTAL</b>	: <b>EHB Docket No. 99-227-MG</b>
<b>PROTECTION and HEPBURNIA COAL</b>	:
<b>COMPANY</b>	: <b>Issued: February 26, 2001</b>
	:

**ADJUDICATION**

**By George J. Miller, Administrative Law Judge**

**Synopsis:**

Appeals from decisions of the Department not to order a mining operator to provide a landowner with an alternate water supply are dismissed even though the Surface Mining Act's rebuttable presumption that the diminishment of the water supply was caused by mining applied. This dismissal is based on the evidence at the hearing on the merits that the diminishment of the appellant's water supply more likely than not was caused instead by a failure to periodically clean the well and by drought conditions that prevailed throughout Pennsylvania.

**BACKGROUND**

These appeals were filed in August and November of 1999 complaining of diminished water in John M. Riddle, Jr.'s (the Appellant) drinking water well. The well in question is located within 1000 linear feet of the area of surface coal mining conducted by Hepburnia Coal Company (Hepburnia) on the Appellant's property. The Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1 - 1396.31,

provides in section 4.2(f)(2), 52 P.S. § 1396.4b(f)(2), a rebuttable presumption of liability of Hepburnia for diminution of water supplies under these circumstances subject to certain defenses. These include the defense that the diminution occurred as a result of some cause other than the surface mining activities.

Rather than order Hepburnia to restore or replace the Appellant's water supply, the Department, following a conference between the Department and Hepburnia, permitted Hepburnia to investigate the Appellant's well. Hepburnia conducted well tests and cleaned out the well in April 1999 based on its investigation. Although the Appellant complained in September 1999 that the well was not producing an adequate supply of water, the Department chose not to require any further action by Hepburnia. These appeals followed.

The Board denied the Department's motions to dismiss for lack of jurisdiction prior to the hearing on the merits. The hearing on the merits was conducted on September 4, 2000 before Administrative Law Judge Michelle A. Coleman. The record consists of notes of testimony consisting of 175 pages and nine exhibits including a factual stipulation of the parties.<sup>1</sup>

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

#### **FINDINGS OF FACT**

1. The Department is the agency of the Commonwealth with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1-1396.3 (Surface Mining Act); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 (Clean Streams Law); the Coal Refuse Disposal Control Act of September 24, 1968, P.L. 1040, *as amended*, 52 P.S. §

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<sup>1</sup> On January 25, 2001 the case was reassigned to Administrative Law Judge George J. Miller because of the deep involvement of Judge Coleman in a large number of hearings.

30.51 *et seq.*; Section 1917-A of the Administrative Code of 1929, P.L. 177, *as amended*, 71 Pa. C.S. § 510-17 (Administrative Code), and the rules and regulations promulgated thereunder.

2. The Appellant John M. Riddle, Jr. (Appellant) is the owner of land on which Hepburnia Company (Hepburnia) is authorized to mine pursuant to a Surface Mining Permit issued by the Department (the "Site"). (N.T. 39)<sup>2</sup>

3. Hepburnia completed blasting activities on the portion of the Site owned by the Appellant on September 2, 1998. (N.T. 41-42)

4. Hepburnia completed blasting activities on the entire Site on December 18, 1998 and completed coal removal on the Site in January 1999. (N.T. 42)

#### **The Appellant's Complaint and the Department's Investigation**

5. In September 1998, the Appellant submitted a complaint to the Department based on his belief that surface mining activity being conducted by Hepburnia was causing the water quantity of his well to diminish. (Board Ex. 1)

6. On September 22, 1998, Dr. Charles E. Miller, Jr., a Department hydrogeologist (N.T. 37-38), was assigned to investigate the complaint lodged by the Appellant regarding diminution of water quantity. (N.T. 42)

7. Dr. Miller's duties as a Hydrogeologist include reviewing mining permits, undertaking hydrological investigations and investigating complaints concerning water supplies. (N.T. 38-39)

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<sup>2</sup> "N.T." designates the notes of testimony. The Exhibits of the Department are designated as "Cmwlth. Ex. \_\_\_." The stipulation of the parties was admitted in evidence as

8. Dr. Miller's field review of the Site led to his determination that the Appellant's well was 550 feet, much less than 1000 feet of the open pit of the surface mining operation. (N.T. 42-43, 51)

9. Dr. Miller notified Hepburnia that the distance from the Appellant's well to the open pit as less than 1000 feet because under Section 4.2(f)(2) of the Surface Mining Act, 52 P.S. § 1396.4(b)(f)(2), a surface mine owner or operator is presumed liable for a water supply that has been diminished if that water supply is within 1000 feet of the permit boundary or area affected by mining, subject to the surface mine owner or operator's opportunity to rebut the presumption. (N.T. 43-44)

10. Hepburnia attempted to rebut the presumption of liability by submitting a hydrological report regarding the Site. (N.T. 44)

11. Dr. Miller reviewed the hydrological report and concluded that: (1) Hepburnia had failed to address certain issues; and (2) the report was not signed or certified by a professional hydrogeologist or geologist as required by the Department. Accordingly, Dr. Miller concluded that Hepburnia had failed to rebut the presumption, and it was still presumed liable for diminution of the Appellant's well pursuant to Section 4.2(f)(2) of the Surface Mining Act. (N.T. 44-45)

12. Dr. Miller notified Hepburnia of his conclusions. (N.T. 45)

### **Hepburnia's Restoration of the Appellant's Well**

13. The Department did not issue an order to Hepburnia to restore or replace the Appellant's well because Hepburnia chose to rehabilitate the Appellant's well by "blowing out" or cleaning the Appellant's well. (N.T. 45-46)

14. On April 5, 1999, Hepburnia did, indeed, clean out the Appellant's well. (N.T. 46; Board Ex. 1, ¶ 12)

15. During the cleaning, Hepburnia removed approximately 27 feet of sediment from the well. (N.T. 46)

16. Prior to cleaning, the pump in the Appellant's well was only a foot and a half from the top of the sediment layer. (N.T. 46)

17. After cleaning, the depth of the Appellant's well was 150 feet and the pump was approximately 28.5 feet from the new bottom of the well. (N.T. 48)

18. The Appellant's well was drilled in 1976. (N.T. 10)

19. To the best of the Appellant's knowledge, prior to April 5, 1999, the Appellant's well had never been cleaned. (N.T. 15, 45)

20. The standard procedure for cleaning wells recommends that wells drilled in the type of geological setting in which the Appellant's well is drilled be cleaned every four to seven years. (N.T. 47)

21. In order to determine whether the Appellant's restored well now supplies an adequate quantity of water for the purposes served by the supply, the Department considered and compared the results of three specific capacity pump tests conducted on the Appellant's well. (N.T. 112-13, 116-17)

22. The first pump test was conducted on March 23, 1991, prior to Hepburnia's mining activities on the Site. (N.T. 112-14; Board Ex. 1, ¶ 14; Cmwlth. Ex. C)

23. The second pump test was conducted on April 5, 1999, after blasting and coal removal activities were completed on the Site, but prior to the cleaning of the Appellant's well.

(N.T. 41-42; 47, 113; Board Ex. 1, ¶ 16; Cmwth. Ex. B)

24. The third pump test was conducted on April 12, 1999, after the Appellant's well was cleaned. (N.T. 47, 113; Board Ex. 1, ¶ 16; Cmwth. Ex. B)

25. Michael W. Smith is employed by the Department as the District Mining Manager for the Hawk Run District Office. (N.T. 107-08)

26. Mr. Smith has a bachelor's degree in biology and environmental science from Susquehanna University and a master's degree in hydrogeology from Pennsylvania State University. He has taken numerous continuing education courses in hydrogeology and has taught surface water and groundwater hydrology and mining hydrology courses for the federal government's Office of Surface Mining. He is a registered professional geologist in the Commonwealth of Pennsylvania and is a member of the National Association of Groundwater Scientists and Engineers. (N.T. 107-08)

27. The Board accepted Mr. Smith as an expert witness in hydrogeology and the science of assessing the quantity of water supplies. (N.T. 111)

28. Mr. Smith compared the specific capacity pump tests taken on March 23, 1991 (pre-mining), April 5, 1999 (post-mining but pre-cleaning) and April 12, 1999 (post-mining and post-cleaning) to determine whether the Appellant's well was sufficiently restored so that it now supplies an adequate quantity of water for the purposes served by the supply. (N.T. 112-13, 116-17)

29. The specific capacity calculations for the April 1999 pump tests reveal that the Appellant's well was very poorly productive prior to being cleaned out, but was very productive after being cleaned out. (N.T. 126-27)

30. The reason that cleaning the Appellant's well restored the productivity of the well is

that the 27 feet of sediment at the bottom of the well freed up productive zones in this bottom portion of the well that had previously been plugged up with sediment. (N.T. 128) The fact that these productive zones are now free has dramatically increased the productivity of the well. (N.T. 128)

31. Based upon his review of the pump tests and his experience and training as a professional hydrogeologist, Mr. Smith opined to a reasonable degree of scientific certainty that, when Hepburnia cleaned the Appellant's well, Hepburnia restored the well to an adequate quantity for the purposes served by the supply, and even restored the well to at least as good a quantity as the pre-mining condition of the well. (N.T. 129)

#### **The Appellant's Subsequent Complaint and the Department's Investigation**

32. In September 1999, the Appellant contacted the Department and, again, complained that his well was not supplying a sufficient quantity of water. (N.T. 50; Board Ex. 1, ¶ 17)

33. After the Department received the complaint, Mr. James Fetterman, a Surface Mine Inspector for the Department (N.T. 95) and Mike Potter from Hepburnia, measured the static water level of the Appellant's well. (N.T. 96-97)

34. Using a static water meter, Mr. Fetterman and Mr. Potter measured the static water level twice on September 21, 1999. (N.T. 98-99)

35. Each measurement revealed that the static water level was 67 feet from the surface elevation of the ground down to the top of the water. (N.T. 99)

36. At the time that Mr. Fetterman conducted his measurements, the entire Commonwealth of Pennsylvania, including Clearfield County, was under a state of drought emergency. It was not raining that day and many of the streams, tributaries, springs and wells within a two-mile vicinity of the Appellant's well were completely dry. (N.T. 50, 80, 97-98)



37. The results of the static water level test showed that the Appellant's well still had sufficient water available. (N.T. 29-31, 155-56)

38. After the results of the static water level test were received by the Department, Mr. Smith had a telephone conversation with the Appellant. (N.T. 129-30)

39. In this telephone conversation, Mr. Smith explained to the Appellant that the results of the specific capacity pump tests conducted on the well before and after cleaning established that the well was restored, and the results of the static water level test conducted on September 21, 1999 established that the well still had sufficient water available. (N.T. 130-31)

40. In the conversation, the Appellant requested that the Department conduct another pump test of his well. (N.T. 131)

41. Even though a pump test was not necessary, Mr. Smith offered to personally come to the Site and conduct a pump test using the Appellant's pump. (N.T. 131)

42. The Appellant refused Mr. Smith's offer because he was concerned that the stress of conducting a pump test might result in his pump burning out. (N.T. 131)

43. The Department declined to order Hepburnia to conduct a pump test using Hepburnia's own pump in the fall of 1999 because there was no evidence indicating that Hepburnia's mining activities affected the Appellant's well during this time: the pre-cleaning and post-cleaning pump tests conducted on the Appellant's well in April 1999 established that the Appellant's well had been completely restored and was now very productive; and Hepburnia had not conducted any blasting or mining activities since the time that the Appellant's well had been completely restored and was now very productive; and Hepburnia had not conducted any blasting.

or mining activities since the time that the Appellant's well had been cleaned. (N.T. 41-42, 126-29, 131-32)

## **DISCUSSION**

We turn first to the merits of the Appellant's claim based on the evidence taken at the hearing. As shown by the foregoing findings of fact, it is plain that the Appellant proved, and the Department did not dispute, that a presumption of Hepburnia's liability for damage to Appellant's water supply applied because his well is located within 1,000 feet of Hepburnia's mining activities on the Appellant's land. However, we are persuaded that the studies done by the Department and Hepburnia are sufficient to prove that the Appellant's water supply was restored by Hepburnia's cleaning of the well and that the Appellant's loss of water supply probably was the result of his failure to clean the well since 1976 when the well was drilled. The Appellant failed to overcome the Department's evidence and prove by expert testimony, or otherwise, that his diminished water supply in 1999 was caused by Hepburnia's mining rather than by his failure to periodically clean the well and existing drought conditions in 1999.

### **The Department's Evidence**

The Department's evidence presented a strong case that the original diminishment of water supply had been caused by the Appellant's failure to clean out the well periodically. The Appellant acknowledged that the well was drilled in 1976 (N.T. 10), but had never been cleaned prior to Hepburnia's cleaning it in April 1999. (N.T. 15) Dr. Miller testified that a well like the Appellant's should be cleaned every 4-7 years. (N.T. 47, 75-76) In any event, the Department's evidence was that the cleaning of 27 feet of sediment at the bottom of the well freed productive zones of ground water to enter the well and that the well was fully productive after it had been cleaned. (N.T. 128) The Department declined to order Hepburnia to do further testing of the

Appellant's well in September 1999 because there was no evidence that Hepburnia's activities had affected the Appellant's well since it had been cleaned. (N.T. 144) The Department's evidence at the hearing also indicated that an alternate likely cause of the Appellant's complaints in 1999 was a state-wide drought which affected the area of the Appellant's well. (N.T. 97-98) Under these circumstances, the Appellant had the burden of coming forward with evidence that the cause of his complaints in 1999 was Hepburnia's mining activities. *See, e.g., Watson v. Philadelphia*, 638 A.2d 489 (Pa. Cmwlth. 1994). He failed to produce any such testimony, expert or otherwise.

Accordingly, we conclude that the evidence sufficiently overcame the presumption of Hepburnia's liability by demonstrating that the Department acted properly in not issuing an order to Hepburnia to take further action to restore the Appellant's water supply, particularly in view of the fact the Hepburnia's mining activity stopped in 1998 before the well was cleaned. In short, while the Appellant was entitled to a rebuttable presumption of Hepburnia's liability, the defense that the diminishment of his water supply in 1999 was not caused by mining was adequately demonstrated.

### **The Appellant's Response**

Instead of presenting testimony that the diminution of his water supply was caused by mining, the Appellant's post-hearing brief relies on the fact that the well never had a diminished water supply before mining began and on the Appellant's criticism of the Department's testimony, much of which was not based in any way on the evidence presented at the hearing. While we have considered the Appellant's response to the extent it is based on the evidence presented at the hearing, we find his response is insufficient to overcome the expert testimony presented by the Department.

In view of the foregoing, we think it unnecessary to discuss the issue of the Board's jurisdiction.

### CONCLUSIONS OF LAW

1. The Board has jurisdiction over the Appellant's appeals.
2. The Appellant established a prima facie case of Hepburnia's liability by reason of the presumption under the Surface Mining Conservation and Reclamation Act, 52 P.S. § 1396.4(b)(f)(2).
3. The Department's evidence was sufficient to overcome this presumption by establishing that the diminishment of the Appellant's water supply more likely than not was the result of the well not having been previously cleaned and by existing drought conditions rather than the result of Hepburnia's mining activity.
4. The Appellant failed to meet his burden to come forward with rebuttal evidence, expert or otherwise, to establish that the diminishment of his water supply was instead caused by Hepburnia's mining activity. *See Watson v. Philadelphia*, 638 A.2d 489 (Pa. Cmwlth. 1994).
5. The Department properly declined to order Hepburnia to take any further action with respect to the Appellant's well.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

JOHN M. RIDDLE, JR.

v.

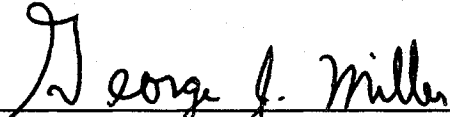
COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION and HEPBURNIA COAL  
COMPANY

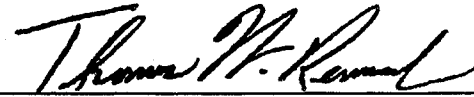
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**ORDER**

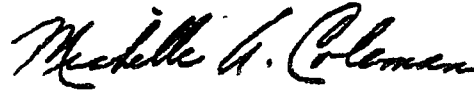
AND NOW, this 26th of February, 2001, the Appellant's appeals are **dismissed** based on the evidence presented at the hearing on the merits.

ENVIRONMENTAL HEARING BOARD

  
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GEORGE J. MILLER  
Administrative Law Judge  
Chairman

  
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THOMAS W. RENWAND  
Administrative Law Judge  
Member

EHB Docket No. 99-226-MG  
EHB Docket No. 99-227-MG



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**MICHELLE A. COLEMAN**  
Administrative Law Judge  
Member


Board Member Bernard A. Labuskes, Jr. concurs in the result.



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**BERNARD A. LABUSKES, JR.**  
Administrative Law Judge  
Member

Board Member Michael L. Krancer concurs in the result.



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**MICHAEL L. KRANCER**  
Administrative Law Judge  
Member

**DATED:** February 26, 2001

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

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WILLIAM T. PHILLIPY IV  
 SECRETARY TO THE BOARD

**HARRIMAN COAL CORPORATION**

v.

**COMMONWEALTH OF PENNSYLVANIA,  
 DEPARTMENT OF ENVIRONMENTAL  
 PROTECTION**

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**EHB Docket No. 2000-148-C**

**Issued: March 7, 2001**

**OPINION AND ORDER ON  
 PETITION FOR SUPERSEDEAS**

**By Michelle A. Coleman, Administrative Law Judge**

**Synopsis:**

A petition for supersedeas is denied. Although Appellant may suffer harm if the Board does not authorize it to mine pending the Board's decision on the merits, the Board will not supersede the Department's denial of Appellant's application for a permit renewal. Appellant failed to make the requisite "strong showing" that it is entitled to the supersedeas where (1) Appellant is unlikely to prevail on the merits of its appeal of the denial of the renewal; (2) it is not clear that Appellant had the authority to mine prior to the denial of the renewal; and (3) Appellant remains in violation of an outstanding consent order and agreement.

The Board will not supersede orders premised on the renewal denial or on the failure to comply with such orders. The fact that the orders were based on the renewal denial—directly or indirectly—is irrelevant since the renewal denial and related orders were not superseded at the time the Department relied on them. The fact that Appellant had appealed the license denial and some of the orders at the time the Department relied on them as the basis for subsequent orders is

immaterial. Since Appellant did not have a supersedeas of the renewal denial or orders until January 12, 2001, Appellant had a duty to abide by those actions until that time. Furthermore, in light of our denial of Appellant's petition for supersedeas concerning the license denial, Appellant failed to show that it would be harmed by the orders pending a decision on the merits.

### OPINION

This appeal concerns a June 13, 2000, Department of Environmental Protection (Department) decision to deny Harriman Coal Corporation's (Appellant) application for a coal mining license renewal (renewal) under the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.1-1396.19a (Surface Mining Act). On July 12, 2000, Appellant filed a notice of appeal alleging that, by denying the permit, the Department violated the Surface Mining Act; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 (Clean Streams Law); the rules and regulations promulgated pursuant to those acts; and the Department's own guidance documents.

Appellant filed a petition for supersedeas together with a memorandum in support on December 7, 2000, followed on December 18, 2000, by a petition for temporary supersedeas. The petitions requested that the Board supersede the license denial and 23 Department compliance orders that Appellant has appealed at EHB Docket No. 2000-173-C, and allow Appellant to resume mining operations. On December 21, 2000, we issued an order denying Appellant's petition for temporary supersedeas and scheduling the supersedeas hearing. On January 3, 2001, the Department filed a motion to dismiss Appellant's petition for supersedeas without a hearing.

The Board held the supersedeas hearing on January 5, 8-10, and 16, 2001. At the start of the hearing, the Board stated that it did not intend to rule on the Department's motion to dismiss



the petition for supersedeas before the supersedeas hearing, but that the Board would take the motion under advisement. Similarly, when the Department moved for non-suit upon the completion of Appellant's case in chief, the Board stated that it would take the motion under advisement and rule upon it later.

However, the Board did rule upon three petitions for temporary supersedeas that Appellant made orally during the course of the supersedeas hearing. In each instance, Appellant requested that the Board supersede the license denial pending the Board's decision on the merits, or at least pending the Board's decision on the petition for supersedeas. The Board denied the first petition, made after Appellant's had presented the first day of their case in chief, and denied the second petition, made after Appellant completed the presentation of its case in chief. But the Board granted the third petition, which Appellant requested during the presentation of the Department's case in chief on January 10, 2001. We agreed to temporarily supersede the license denial and all 23 Department orders pending our decision on the petition for supersedeas.

In its petition for supersedeas, Appellant requests that we supersede the license denial and 23 Department compliance orders that Appellant has appealed at EHB Docket No. 2000-173-C, and that we allow Appellant to resume mining operations. The orders were issued between July 13, 2000, and August 8, 2000—after the Department denied Appellant's license renewal.

## **I. THE FACTUAL BACKDROP**

Although Appellant argues that the Department bore the burden of proof because these proceedings involve a license denial and Department orders, the petitioner bears the burden of proof with respect to a petition for supersedeas. *See, e.g., Fifer v. DEP*, EHB Docket No. 2000-149-MG slip op. at 4 (opinion issued November 3, 2000). Thus, Appellant bore the burden of

proof at the supersedeas hearing. The general facts surrounding the license denial and orders, as developed at that hearing, are as follows:

Appellant is a strip mining operator that mines, prepares, and sells coal. On March 15, 1999, Appellant and the Department entered into a consent order and agreement (consent order) settling a number of preexisting disputes between Appellant and the Department. The consent order provided that, among other things:

- 1) Appellant would pay a civil penalty of \$100,000—either in cash or by the performance of reclamation in lieu of a civil penalty;<sup>1</sup>
- 2) if Appellant decided to pursue the reclamation in lieu of civil penalty option, Appellant had to submit the proposal within 120 days of executing the consent order;<sup>2</sup>
- 3) if Appellant failed to submit a reclamation in lieu proposal within 120 days, or the Department and Appellant failed to agree on the project within 150 days of the execution of the order, Appellant would pay the \$100,000 within the next five days;<sup>3</sup>
- 4) if Appellant could not comply with any of the time limits in the consent order solely because of forces beyond its control, Appellant could request an extension of time, but it had to provide the Department with notice by telephone within five working days of becoming aware of the event impeding performance, and provide written notice to the Department within 10 days of that date. Among other things, the written submission had to include a notarized affidavit specifying the reasons for the delay, the expected duration of the delay, and the efforts Appellant was making to minimize the delay;<sup>4</sup> and,
- 5) amendments to the consent order would be effective only if they were set out in writing and signed by the parties.<sup>5</sup>

Despite the consent order, Appellant failed to submit the reclamation in lieu plan within 120 days, failed to provide a written submission requesting an extension of time as required by

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<sup>1</sup> Exhibit H-4, § 3.p, p. 13.

<sup>2</sup> Exhibit H-4, § 3.p, p. 13.

<sup>3</sup> Exhibit H-4, § 3.p, pp. 13-14.

<sup>4</sup> Exhibit H-4, § 11a.-b., pp. 17-18.

the *force majeure* clause, and failed to pay the \$100,000 civil penalty. Nevertheless, even after the deadline set forth in the consent order expired, Appellant and the Department continued to communicate about the possibility of Appellant performing reclamation in lieu of the civil penalty. On September 15, 1999, Appellant submitted a reclamation-in-lieu of penalty plan. The Department did not agree to that plan, however.

On October 1, 1999, Appellant and the Department signed an amended consent order which, among other things, amended the March 15, 1999, consent order to extend the deadlines for Appellant either paying the civil penalty or securing approval for the reclamation in lieu of penalty project. Under the October 1, 1999, amendment, Appellant had to submit a revised proposal for the reclamation-in-lieu-of-penalty project on or before October 11, 1999; the Department would determine whether it agreed with the proposal on or before November 10, 1999; and, if the parties did not come to an agreement by that time, Harriman would pay the civil penalty by November 15, 1999.<sup>6</sup>

Although the parties continued to discuss the possibility of reclamation in lieu of the civil penalty, Appellant did not submit a revised reclamation-in-lieu-of-penalty project by October 11, 1999, and thus the parties did not agree to such a project by November 10, 1999. Nor did appellant pay the civil penalty by November 15, 1999.

Here again, however, the parties continued to discuss the possibility of Appellant's performing reclamation in lieu of the civil penalty even after the deadline for paying the civil penalty expired. On February 14, 2000, Appellant submitted a revised reclamation plan that it proposed in lieu of the civil penalty. On February 22, 2000, the Department sent Appellant a

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<sup>5</sup> Exhibit H-4, § 15 , pp. 18-19.

<sup>6</sup> Exhibit H-23.

letter saying that the revised plan would be acceptable and that the Department would draft a consent order and agreement consistent with the terms of the revised plan.

The Department sent Appellant the draft consent order and agreement (Department's draft consent order) on March 10, 2000. However, on March 20, 2000, Appellant informed the Department that it would not agree to the proposed consent order and outlined its objections to the draft. The Department responded on March 24, 2000, with a letter demanding payment of \$100,000 civil penalty together with \$138,750 of civil penalties that, according to the Department, Appellant owed under the stipulated civil penalty provision in the consent order and agreement, since Appellant failed to comply with the consent order in a timely manner. Although the parties continued to discuss the possibility of Appellant performing reclamation in lieu of the civil penalty, and Appellant submitted its own draft consent order and agreement addressing the issue, Appellant and the Department never entered into an agreement in writing altering the March 15, 1999, consent order or the October 1, 1999, amendment thereto.

In the spring of 2000, Appellant also sought to renew its coal mining license. Appellant filed an application for renewal on March 16, 2000. The Department issued a renewal on April 24, 2000, and the renewal had an expiration date of May 31, 2000.<sup>7</sup> Among other things, the license provided that it was valid only so long as Appellant complied with the provisions of the March 15, 1999, consent order, and that any violation of the terms of that consent order, or the mining plans referred to in the consent order, would make Appellant's permit null and void.

Appellant sought another renewal so that it could continue as a licensed operator after May 31, 2000. On May 24, 2000, the Department notified Appellant by letter that (1) the

Department intended to deny Appellant's renewal application because Appellant, or a related company, was violating Commonwealth laws or regulations; (2) Section 3.1(b) of the Surface Mining Act, 52 P.S. § 1396.3a(b), barred the Department from granting a license to an applicant with pending violations; and (3) Appellant could request an informal hearing on the matter. Appended to the letter was a list of pending enforcement actions, which included Appellant's alleged violation of the March 15, 1999, consent order. The list also identified two cessation orders issued to Kocher Coal Company.

Appellant met with the Department for the informal conference on June 9, 2000. On June 13, 2000, the Department denied Appellant's license renewal. The denial letter informed Appellant that the Department had denied the renewal pursuant to section 3.1 (b) of the Surface Mining Act because Appellant had pending violations of the Commonwealth's coal mining laws.

On July 12, 2000, Appellant filed an appeal challenging the Department's denial of its license renewal. Appellant did not file a petition for supersedeas or temporary supersedeas at that time, however.

On July 13, 2000, the Department conducted inspections of some of Appellant's sites and issued Appellant at least five compliance orders. Three of the orders<sup>8</sup> asserted that Appellant violated 25 Pa. Code § 88.220 by failing to backfill, close, or otherwise permanently reclaim affected areas on surface mining permits after the mining license was denied. The two remaining

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<sup>7</sup> The cover letter accompanying the renewal explained that the license was issued for less than a year because changes in the Department's regulations required that licenses be issued for no longer than the period covered on the operator's insurance certificate.

<sup>8</sup> The July 13, 2000, compliance order for Surface Mining Permit (SMP) 54803203 (notice of appeal in EHB Docket No. 2000-173-C, Ex. C), the July 13, 2000, compliance order for SMP 54820203 (notice of appeal in EHB Docket No. 2000-173-C, Ex. D), and the July 13, 2000, compliance order for SMP 54850207 (notice of appeal in EHB Docket No. 2000-173-C, Ex. E).

orders<sup>9</sup> alleged that Appellant violated 25 Pa. Code § 88.132 on different permits for the same reason. All five of the July 13, 2000, orders directed Appellant to begin reclamation immediately, to conduct the reclamation continuously, and to have all work completed by October 4, 2000. The orders further directed that no further removal of coal from the site could occur without Department approval. The evidence elicited at the supersedeas hearing supported the Department's contention that Appellant had failed to reclaim affected areas on the permits at the time of the July 13, 2000, inspections.

The Department issued Appellant five additional inspection reports and compliance orders, regarding different permits, on July 14, 2000. Four of the orders<sup>10</sup> asserted that Appellant violated 25 Pa. Code § 88.132 by failing to backfill, close, or otherwise permanently reclaim affected areas on surface mining permits after the mining license was denied. The remaining order<sup>11</sup> asserted that Appellant violated 25 Pa. Code § 88.220 on a different permit for the same reason. Among other things, all five of the July 14, 2000, orders directed Appellant to begin reclamation immediately, to conduct the reclamation continuously, and to have all work completed by October 4, 2000. The evidence elicited at the supersedeas hearing supported the Department's contention that Appellant had failed to reclaim affected areas on the relevant permits at the time of the July 14, 2000, inspections.

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<sup>9</sup> The July 13, 2000, compliance order for SMP 54930102 (notice of appeal in EHB Docket No. 2000-173-C, Ex. A) and the July 13, 2000, compliance order for SMP 54970103 (notice of appeal in EHB Docket No. 2000-173-C, Ex. B).

<sup>10</sup> The July 14, 2000, compliance order for SMP 54840102 (notice of appeal in EHB Docket No. 2000-173-C, Ex. F), the July 14, 2000, compliance order for SMP 54713018 (notice of appeal in EHB Docket No. 2000-173-C, Ex. H), the July 14, 2000, compliance order for SMP 54860109 (notice of appeal in EHB Docket No. 2000-173-C, Ex. I), and the July 14, 2000, compliance order for SMP 54920103 (notice of appeal in EHB Docket No. 2000-173-C, Ex. J).

<sup>11</sup> The July 14, 2000, compliance order for SMP 54880203 (notice of appeal in EHB Docket No. 2000-173-C, Ex. G).

The Department issued Appellant more orders on July 18 and 21, and August 2, 2000. The July 18, 2000, order<sup>12</sup> asserted that Appellant violated 25 Pa. Code § 88.381(12) by failing to reclaim affected areas on another surface mining permit after mining license was denied, and the order directed Appellant to begin reclamation immediately, to perform the reclamation continuously, and to have all work completed by October 4, 2000. The July 21, 2000, order<sup>13</sup> alleged that Appellant violated an order of the Department, section 18.6 of the Surface Mining Act, and section 611 of the Clean Streams Law by continuing to process stone; it directed Appellant to cease processing stone immediately. (Since the July 21, 2000, order was issued in part because Appellant allegedly failed to comply with a previous Department order, the July 21, order is a “failure to comply” order.) The August 2, 2000, order<sup>14</sup> alleged that Appellant violated section 3.1 of the Surface Mining Act, 52 P.S. § 1396.3a, by crushing stone without a valid mining license on a permit that was renewed for reclamation only; this order directed Appellant to cease crushing the stone, to start reclamation immediately, and to perform reclamation continuously until it was completed. The evidence at hearing supported the facts that the Department alleged as the basis for these orders.

On August 8, 2000, the Department issued Appellant 10 additional “failure to comply” orders.<sup>15</sup> Each of these orders alleged that Appellant violated previous Department orders,

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<sup>12</sup> The July, 18, 2000, compliance order for SMP 22815601T (notice of appeal in EHB Docket No. 2000-173-C, Ex. K).

<sup>13</sup> The July 21, 2000, compliance order for SMP 54060109 (notice of appeal in EHB Docket No. 2000-173-C, Ex. L).

<sup>14</sup> The August 2, 2000, compliance order for SMP 54803004 (notice of appeal in EHB Docket No. 2000-173-C, Ex. M).

<sup>15</sup> These orders consist of (1) the August 8, 2000, compliance order for SMP 54820203 (notice of appeal in EHB Docket No. 2000-173-C, Ex. N); (2) the August 8, 2000, compliance order for SMP 54803203 (notice of appeal in EHB Docket No. 2000-173-C, Ex. O); (3) the August 8, 2000, compliance order for SMP 54970103 (notice of appeal in EHB Docket No.

section 18.6 of the Surface Mining Act, and section 611 of the Clean Streams Law by failing to continuously backfill and reclaim affected areas on surface mining permits. Each of the orders also directed Appellant to reclaim the areas continuously until they were completely reclaimed. The evidence at hearing supported the Department's contention that Appellant was not continuously reclaiming the affected areas referenced in these orders at the time the orders were issued.

On August 11, 2000, Appellant filed an appeal challenging the 23 orders that the Department issued to it between July 13 and August 8, 2000. Appellant did not file a petition for supersedeas or temporary supersedeas of the orders at that time. Instead, it waited until December 7, 2000, when it filed a petition for supersedeas at EHB Docket No. 2000-148-C requesting that the Board supersede both the Department's June 13, 2000, denial of Appellant's license denial and the 23 orders issued between July 13 and August 8, 2000. Nor did Appellant file a petition for temporary supersedeas with respect to any of these actions until December 18, 2000. The Board did not supersede any of the actions until January 12, 2001, when we granted the temporary supersedeas on both the license denial and the 23 orders.

Between August 8, 2000, and January 12, 2001, the Department took a number of additional enforcement actions against Appellant. On August 11, 2000, the Department issued

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2000-173-C, Ex. P); (4) the August 8, 2000, compliance order for SMP 54930102 (notice of appeal in EHB Docket No. 2000-173-C, Ex. Q); (5) the August 8, 2000, compliance order for SMP 54850207 (notice of appeal in EHB Docket No. 2000-173-C, Ex. R); (6) the August 8, 2000, compliance order for SMP 22851601T (notice of appeal in EHB Docket No. 2000-173-C, Ex. S); (7) the August 8, 2000, compliance order for SMP 54713018 (notice of appeal in EHB Docket No. 2000-173-C, Ex. T); (8) the August 8, 2000, compliance order for SMP 54880203 (notice of appeal in EHB Docket No. 2000-173-C, Ex. U); (9) the August 8, 2000, compliance order for SMP 54840102 (notice of appeal in EHB Docket No. 2000-173-C, Ex. V); and (10) the August 8, 2000, compliance order for SMP 54860109 (notice of appeal in EHB Docket No. 2000-173-C, Ex. W).



Appellant an inspection report and compliance order<sup>16</sup> alleging that Appellant had been crushing stone at night, in violation of an August 2, 2000, failure to comply order, Section 18.6 of the Surface Mining Act, 52 P.S. § 1396.18f, and Section 611 of the Clean Streams Law, 35 P.S. § 691.611—each of which, according to the Department, precluded Appellant from crushing stone at the site.

On November 15, 2000, the Department issued Appellant a compliance order<sup>17</sup> alleging that Appellant violated 25 Pa. Code § 88.132 by failing to backfill, close, or otherwise permanently reclaim affected areas on surface mining permits after the mining license was denied. The order directed Appellant to begin reclamation immediately and have all work completed by February 15, 2001.

On December 27, 2000, the Department issued Appellant an inspection report and compliance order<sup>18</sup> alleging that Appellant had violated one of the July 13, 2000, orders, section 18.6 of the Surface Mining Act, and section 611 of the Clean Streams Law by conducting, allowing, or authorizing mining on one of its permits. Consequently, the Department directed Appellant to cease operations and begin reclamation immediately. The mining activity at the site was ostensibly conducted by International Anthracite Corporation.

On January 3, 2001, the Department issued Appellant another inspection report and compliance order, alleging that Appellant had violated 25 Pa. Code §§ 88.96 and 88.98 by failing to implement adequate erosion and sedimentation control measures. The order directed Appellant to construct and maintain erosion and sedimentation control measures which would

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<sup>16</sup> The August 11, 2000, inspection report and compliance order concerning SMP 54803004.

<sup>17</sup> The November 15, 2000, compliance order concerning SMP 54803019.

<sup>18</sup> The December 27, 2000, compliance order concerning SMP 54930102.

comply with the approved plan in the surface mine permit and with 25 Pa. Code Chapter 102 by February 2, 2001.

## II. STANDARD FOR PETITIONS FOR SUPERSEDEAS

The standards concerning supersedeas are set forth in Section 4(d)(1) of the Environmental Hearing Board Act, 35 P.S. § 7514(d)(1). Section 4(d)(1) provides:

- 1) No appeal shall act as an automatic supersedeas. The board may, however, grant a supersedeas upon cause shown. The board, in granting or denying a supersedeas, shall be guided by relevant judicial precedent and the board's own precedent. Among the factors to be considered are:
  - a) Irreparable harm to the petitioner.
  - b) The likelihood of the petitioner prevailing on the merits.
  - c) The likelihood of injury to the public or other parties, such as the permittee in third party appeals.
- 2) A supersedeas shall 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.

The Commonwealth Court has noted that the criteria contained in section 4(d)(1)(a)-(c) track the standard for evaluating requests for stays that the Supreme Court adopted in *Pennsylvania Public Utilities Commission v. Process Gas Consumer Group*, 467 A.2d 805 (Pa. 1983). See *Chambers Development Company, Inc. v. Department of Environmental Resources*, 545 A.2d 404, 408 n.5, 7 (1988 Pa. Cmwlth.).<sup>19</sup> *Process Gas* requires a balancing of the criteria at section 4(d)(1)(a)-(c) and that petitioner make a "strong showing" that it is entitled to the relief requested. See *Process Gas*, 467 A.2d at 809. Furthermore, since section 4(d)(1) expressly

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<sup>19</sup> In *Chambers Development Company, Inc. v. Department of Environmental Resources*, 545 A.2d 404 (1988 Pa. Cmwlth.), the Commonwealth Court referred to the standard for supersedeas at what was then 25 Pa. Code § 21.78. While 25 Pa. Code § 21.78 has since been

provides that the criteria at section 4(d)(1)(a)-(c) are “[a]mong the factors to be considered” when the Board rules on a supersedeas, the Board is not limited to considering the criteria at section 4(d)(1)(a)-(c) alone, but may consider other factors as well.

We shall evaluate the merits of Appellant’s request for supersedeas concerning the license denial first, then turn our attention to the 23 orders.

### III. THE LICENSE DENIAL

The parties disagree both as to the effect of a supersedeas of the Department’s decision to deny the renewal and whether Appellant is entitled to the supersedeas. According to Appellant, it had a valid license at the time the Department denied the renewal, and thus, returning the lawful *status quo ante* by a supersedeas would give Appellant a license to mine pending our decision on the merits.

Appellant also insists that it is entitled to a supersedeas under each of the three criteria identified in section 4(d)(1)(a)-(c) of the Environmental Hearing Board Act. According to Appellant:

- a) It will suffer irreparable harm without the supersedeas because, without a license, it is losing the income it would ordinarily obtain from mining coal; it has had to temporarily suspend a large portion of its workforce; it is unable to meet its contractual obligations, jeopardizing its business reputation; and it is missing the winter heating season, when demand for coal is typically highest.
- b) It is likely to prevail on the merits because the Department lacked the authority to deny the renewal based on Appellant’s failure to comply with the March 15, 1999, consent order or Kocher Coal Company’s (Kocher Coal) violations of certain cessation orders.
- c) No threat of pollution or injury to the public or likelihood of injury to other parties will result from allowing Appellant to mine coal. In fact,

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rescinded, the language in Section 4(d)(1)(a)-(c) is identical to that existing in 25 Pa. Code § 21.78 at the time the Court decided *Chambers*. See *Chambers*, at 407.

without its coal mining revenue, Appellant will be unable to continue with its reclamation efforts, which have benefited the Commonwealth and the environment.

The Department contends that, even if we were to supersede the denial of the renewal and return Appellant to the *status quo ante*, Appellant would not have a license to mine coal because its previous license terminated before the Department denied the renewal. Since all Appellant's arguments concerning its right to a supersedeas assume that a supersedeas of the denial is tantamount to a license to mine, Appellant's argument would collapse in on themselves if the Department is correct about the lawful *status quo ante* issue.<sup>20</sup>

In addition, the Department argues that, even if granting a supersedeas would give Appellant a license to mine pending the Board's decision on the merits, a supersedeas is inappropriate here because:

- a) Appellant would not be harmed to the degree Appellant suggests and does not have standing to assert the interests of its employees.
- b) Appellant is unlikely to prevail on the merits of its Appeal because the Department has the authority to deny the license renewal based on Appellant's failure to comply with the March 15, 1999, consent order and the outstanding orders issued against Kocher Coal.

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<sup>20</sup> The purpose of a supersedeas is to preserve the lawful *status quo ante* pending review of the action sought to be superseded. See *Montenay Montgomery Limited Partnership v. DEP*, 1998 EHB 302, 304; 4 C.J.S. Appeal and Error § 408 (1993). Thus, a supersedeas of the license denial could, at most, return Appellant to the status that it had concerning the license at the time the Department denied the renewal.

If Appellant did not have a valid license at the time the Department denied the renewal, our granting Appellant a supersedeas of the license denial—returning Appellant to the *status quo ante*—would not authorize Appellant to mine since Appellant would still be without a license. (Section 3.1(a)(1) of the Surface Mining Act, 52 P.S. § 1396.3a(a)(1), prohibits mining coal without a license.) The Board could not authorize Appellant to mine without a license since doing so would require that we go beyond restoring the parties to the lawful *status quo ante*, and enjoin the Department from enforcing Section 3.1(a)(1) of the Surface Mining Act. It is well settled that the Board lacks equitable powers, such as the ability grant an injunction. See *Marinari v. DER*, 566 A.2d 385, 387 (Pa. Cmwlth. 1989).

- c) Superseding the permit denial would injure the public because Appellant had a legal duty to comply with the March 15, 1999, consent order; the Department properly denied Appellant's license renewal because Appellant failed to comply with that consent order; Appellant remains in violation of the consent order; and failure to comply with the law is injurious to the public *per se*.
- d) Appellant does not have "clean hands" to request a supersedeas of the renewal denial given Appellant's failure to comply with the Surface Mining Act, the coal mining regulations, and the Department's orders in the interim between the denial of the license renewal and the Board's granting of the temporary supersedeas on January 12, 2001, and Appellant is not entitled to a supersedeas where, in essence, it helped itself to a supersedeas previously by ignoring the license denial and subsequent Department orders.

After a careful review of the evidence and the parties' arguments, we conclude that Appellant is not entitled to a supersedeas of the license denial even assuming that the Department could not attribute the Kocher Coal violations to Appellant for purposes of reviewing Appellant's renewal application.

Based on the evidence admitted at the supersedeas hearing, we agree that Appellant is being harmed by its inability to mine coal—that it is losing income, that it is unable to meet contractual obligations, and that it could miss the winter heating season when demand for coal is traditionally greatest. Furthermore, notwithstanding the Department's argument that Appellant lacks standing to assert the interests of its employees, we are sensitive to the fact that harm to the Appellant may have ramifications on its employees and Appellant's ability to retain or attract employees.

But, even if Appellant will suffer serious harm without a mining license, it does not follow that Appellant is entitled to a supersedeas of the denial of its license renewal. This is true for three reasons.

A

First, Appellant failed to make a strong showing that it is likely to prevail on the merits of its appeal of the denial.<sup>21</sup> The October 1, 1999, amendment to the March 15, 1999, consent order required that Appellant submit a revised proposal for its reclamation-in-lieu-of-penalty project by October 11, 1999. The October 1, 1999, amendment also required that, if Appellant and the Department did not agree on the proposal on or before November 10, 1999, Appellant would pay the civil penalty by November 15, 1999. Although Appellant did not submit a revised proposal by October 11, 1999, and Appellant and the Department did not agree on a reclamation project by November 10, 1999, Appellant failed to pay the civil penalty by November 15, 1999. Appellant also failed to secure a second amendment necessary to extend the consent order deadlines and failed to comply with the requirements for invoking the *force majeure* clause under the consent order. Since Appellant has failed to pay the civil penalty, Appellant was in violation of the March 15, 1999, consent order as of November 16, 1999, and remains in violation today.

Section 86.355(a) of the Department's coal mining regulations, 25 Pa. Code § 86.355(a), provides, "The Department will not ... review ... the license of any person who mines coal by the surface mining method if ...:

- 1) The applicant has failed, and continues to fail, to comply with an adjudicated proceeding, cessation order, consent order and agreement or decree ...[; or,]

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<sup>21</sup> By holding that Appellant failed to make a strong showing that it is likely to prevail on the merits of its appeal, we are not holding that Appellant *cannot* prevail on the merits of its appeal. We are simply holding that, based on the evidence and legal issues raised in the supersedeas filings and hearing, Appellant currently seems *unlikely* to prevail on the merits. Naturally, our ultimate decision on the merits will turn on the facts and legal arguments as they are developed subsequently in these proceedings.

- 2) The applicant has shown a lack of ability or intention to comply with an adjudicated proceeding, cessation order, consent order and agreement or decree....<sup>22</sup>

Given Appellant's failure to comply with the March 15, 1999, consent order and the standards for license renewals in 25 Pa. Code § 86.355(1) and (2), Appellant is not likely to prevail on the merits of its challenge to the license denial—even assuming that the Department could not consider the Kocher Coal violations when reviewing Appellant's renewal application.<sup>23</sup>

## B

Second, it is not clear that superseding the license denial would result in Appellant having a license to mine. Appellant's prior license provided that it expired on May 31, 2000. Since the Department did not deny the renewal until June 13, 2000, the *status quo ante* would ordinarily be that Appellant had no license. But Appellant argues that, despite the expiration date in the license itself, Appellant continued to have a license by virtue of 25 Pa. Code § 86.357(b) at the time the Department denied its renewal. Section 86.357(b) provides, "If the applicant requests an informal conference [after receiving notice that the Department intends to deny a license renewal], the license shall remain in effect until the Department has made its decision after the informal conference."

Even assuming Appellant is correct, and 25 Pa. Code § 86.357(b) resurrected Appellant's expired permit after the Department notified Appellant of its intent to deny the renewal, it is

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<sup>22</sup> The Surface Mining Act contains similar provisions. Section 3.1(b) of the Act, 52 P.S. § 1396.3a(b), states, in relevant part, "The department shall not ... renew ... the license of any person who mines coal by the surface mining method if it finds [that the person] has failed and continues to fail to comply or has shown a lack of ability or intention to comply with an adjudicated proceeding, cessation order, [or] consent order and agreement or decree...."

<sup>23</sup> Appellant maintains that 25 Pa. Code § 86.355(1) and (2) did not preclude the Department from issuing the license renewal because the March 15, 1999, consent order was not

unclear that the resurrected permit remained in effect until June 13, 2000, when the Department denied the renewal. The reason has to do with a condition in the April 24, 2000 license—the license allegedly resurrected under Appellant’s reading of § 86.357(b). The condition provides, “This license is being conditionally issued. Pursuant to [the March 15, 1999, compliance order] this license is valid only as long as [Appellant] complies, fully and completely, with the requirements of the March 15, 1999, Consent Order....”<sup>24</sup> Since Appellant continued to violate the March 15, 1999, consent order between the date Appellant requested the informal conference (resurrecting the April 24, 2000, license, according to Appellant) and the date the Department denied the renewal, Appellant’s continued violation of the consent order after the request for an informal conference may have invalidated the resurrected license prior to the Department’s denying the renewal.

### C

Finally, the fact that Appellant has persisted in violating the March 15, 1999, consent order is itself an irreparable injury—an irreparable injury to the Commonwealth. Appellant’s continued failure to abide by the consent order is unlawful activity,<sup>25</sup> and the Supreme Court has

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“adjudicated.” As we read § 86.355(1) and (2), however, the word “adjudicated” refers only to “proceeding,” and not to consent orders or the other items listed after “proceeding.”

<sup>24</sup> The March 15, 1999, consent order contains a similar provision. Section 3.p of the consent order provides, “In addition to other applicable remedies, should Harriman fail to comply with any of the deadlines imposed in this Consent Order ... the denial of Harriman’s Mine Operator’s License ... will be immediately reinstated without prior notice.”

<sup>25</sup> Section 18.6 of the Surface Mining Act, 52 P.S. § 1396.18f, provides, “It shall be unlawful to fail to comply with any rule or regulation of the department or to fail to comply with any order or permit or license of the Department....”

In ruling upon Appellant’s petition for supersedeas with respect to the denial, we did not consider any of Appellant’s alleged violations occurring after the denial, since we concluded that Appellant had failed to establish that it was entitled to a supersedeas of the denial even if we ignored those violations. However, those violations would also qualify as irreparable injury to



held that unlawful activity qualifies as irreparable injury *per se*. See, e.g., *Pennsylvania Public Utility Commission v. Israel*, 52 A.2d 317 (Pa. 1947). Even assuming that such injury would not preclude a supersedeas under section 4(d)(2) of the Environmental Hearing Board Act, it would certainly have to be balanced under section 4(d)(1) against the harm to Appellant.

#### IV. THE 23 ORDERS

Appellant argues that the Board should supersede the 23 orders because the Department improperly denied Appellant's license renewal, the Department assumed that the denial was valid when it issued the orders, and, thus, the orders are "fruit of the poisonous tree." Appellant also argues that it did not have to comply with orders premised upon the license denial or failure to comply orders when Appellant had appealed the license denial and the orders upon which the failure to comply orders were based. The Department responds that it properly denied the license renewal and that Appellant had a duty to comply with the orders, notwithstanding the fact that many of the orders assume that Appellant's license was denied, because the Board had not superseded the license denial when the Department issued the first set of orders, and the Board had not superseded the first set of orders before the Department issued the failure to comply orders.

Appellant is not entitled to a supersedeas of the 23 orders. As we explained in detail above, Appellant is unlikely to prevail in its challenge to the denial of the renewal. Therefore, the orders issued based on the renewal denial are not "fruit of the poisonous tree." Furthermore, Appellant is incorrect when it argues that it did not have duty to comply with the orders because it had filed appeals of the renewal denial and the orders upon which the failure to comply orders

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the Commonwealth under *Israel*, and we conclude later in this opinion that Appellant is unlikely to prevail on the merits of its challenges to the 23 orders appealed at EHB Docket No. 2000-173.

were based. Section 4(d)(1) of the Environmental Hearing Board Act, 35 P.S. § 7514(d)(1) provides, “No appeal shall act as an automatic supersedeas.” *See also Silver Spring Township v. DEP*, 368 A.2d 866 (Pa. Cmwlth. 1977) (holding that a township’s appeal from a Department order granting a temporary variance under the Air Pollution Control Act, did not act as a supersedeas.)

Since Appellant did not obtain a supersedeas of the license denial or the orders until January 12, 2001, Appellant had a duty to treat the license denial and the Department’s orders as valid pending our decision on the merits until then.

Furthermore, Appellant failed to show that it would be harmed by the reclamation orders over and above the denial of the license renewal. Instead, Appellant focused on arguing that it would be harmed if it were unable to mine. Since we have already determined that Appellant is not entitled to a supersedeas of the denial of the renewal, and that Appellant cannot mine without a license, Appellant could not mine pending our decision on the merits even assuming that we were to supersede the orders. Thus, Appellant has failed to show that it would suffer irreparable injury as a result of the orders.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

HARRIMAN COAL CORPORATION

v.

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

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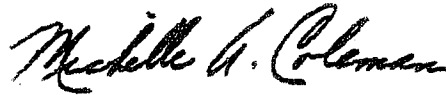
EHB Docket No. 2000-148-C

Issued: March 7, 2001

ORDER

AND NOW, this 7<sup>th</sup> of March, 2001, it is ordered that Appellant's petition for supersedeas is denied, and the temporary supersedeas is rescinded.

ENVIRONMENTAL HEARING BOARD



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MICHELLE A. COLEMAN  
Administrative Law Judge  
Member

DATED: March 7, 2001

See next page for a service list.

c:

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WILLIAM T. PHILLIPY IV  
 SECRETARY TO THE BOARD

**LOWER PAXTON TOWNSHIP**

v.

**COMMONWEALTH OF PENNSYLVANIA,  
 DEPARTMENT OF ENVIRONMENTAL  
 PROTECTION**

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 : **EHB Docket No. 2000-169-K**  
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 : **Issued March 7, 2001**  
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**OPINION ON DEPARTMENT'S  
 MOTION FOR A PROTECTIVE ORDER**

**By Michael L. Krancer, Administrative Law Judge**

**Synopsis:**

The Board denies the Department's Motion For A Protective Order seeking to bar completely the deposition of Larry Tropea, the Deputy Secretary for Water Management. The basis of the Motion is the purported "deliberative process privilege." According to the deposition testimony of the Department employee who signed the letter embodying the action under appeal, Deputy Secretary Tropea was directly, significantly and persistently involved in the decision-making process which culminated in the decision under appeal to the Board. The deliberative process privilege cannot be applied in this instance in light of the Environmental Hearing Board Act under which no action of the Department is final until the Board has reviewed the decision. The role, if any, of the

Deputy Secretary, in the decision under review and the bases therefore must be open to inquiry through his testimony.

### DISCUSSION

Before us is the Department's (Department) Motion For A Protective Order seeking to completely bar the deposition of Deputy Secretary Larry Tropea, Deputy Secretary for Water Management. The deposition was noticed for March 6, 2001. The Motion was filed on March 2, 2001. Appellant filed a response that day as well. The Department's Motion relies primarily on the so-called "deliberative process privilege" as discussed by the Pennsylvania Supreme Court in *Commonwealth of Pennsylvania v. Vartan*, 557 A.2d 1258 (Pa. 1999). The Board held argument on the Motion via conference telephone call on Monday, March 5, 2001, the day before the scheduled deposition. The Board issued an oral ruling denying the Motion and the reasons therefore which was followed later in the day with a written Order.<sup>1</sup> This Opinion is issued to explain in writing why the Department's Motion was denied.

This case is an appeal by Lower Paxton Township of the Department's denial of Lower Paxton's Act 537 Plan for 1999. The controversy surrounds whether a particular treatment technology called "ACTIFLO" is appropriate and permissible. The ACTIFLO technology was the centerpiece of Lower Paxton's proposed Plan which the Department rejected.

The Department's Motion does not set forth specifically the precise facts which supposedly trigger application of the deliberative process privilege which the Department seeks here to invoke. Instead, the Motion cites the *Vartan* case, describes it, and states

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<sup>1</sup> The Board did, however, order that the deposition take place at Deputy Secretary Tropea's place of business.

that *Vartan* applies and that Lower Paxton has not provided adequate justification to depose Deputy Secretary Tropea. Appellant contends that Deputy Secretary Tropea was “significantly and persistently” involved in the specific decision-making process which resulted in the denial of Lower Paxton’s proposed Plan. This allegation is supported by the deposition testimony of Mr. Leon Oberdick, the Department’s Southcentral Office Water Quality Management Program Director, who was the author of the letter denying the Township’s proposed Plan which action is the subject of this appeal. Mr. Oberdick was asked whether he was the Department official who is ultimately responsible for rendering the decision to deny the Townships proposed use of ACTIFLO. He answered that, “[t]here were discussions on that issue with our Central Office up to the level of the Deputy Secretary for Water Management [who is Deputy Secretary Larry Tropea].” (Oberdick Tr. 18) Mr. Oberdick further testified that the meetings at which the topic of whether the ACTIFLO proposal was approvable took place both before and after the denial which is the subject of this appeal. (Oberdick Tr. 19)

After reviewing the Department’s Motion, the *Vartan* case, the cases cited therein, and the relevant passages of Mr. Oberdick’s deposition transcript, we do not think that the deliberative process privilege applies in this circumstance to shield Deputy Secretary Tropea from having to testify about his involvement, if any, in the decision to deny the Township’s proposed Plan and, if he did so participate in that decision, the bases for that denial. Moreover, we do not think that the Department has properly invoked the privilege in any event.

In *Vartan*, the Administrative Office of the Courts of Pennsylvania (AOPC) entered into a contract with Vartan which provided that Vartan was to build a facility to

house the Commonwealth Court. *Vartan*, 733 A.2d at 1260-61. The AOPC had terminated the contract under a provision thereof which allowed for the AOPC to terminate in the event that not all necessary government approvals for construction could be obtained. Vartan then sued. At issue in the part of the case which is relevant here was the AOPC's motion to quash a deposition subpoena directed to former Chief Justice Nix on the basis of the deliberative process privilege. *Id.* at 1263-66. The Court, citing a host of federal court decisions, described the deliberative process privilege as protecting from disclosure documents or information containing confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice. *Id.* at 1263. The Court held that testimony from the Chief Justice regarding the decision of the AOPC to terminate the contract was precluded by the deliberative process privilege. *Id.*

Interestingly, before the *Vartan* case, no deliberative process privilege had been recognized at all in Pennsylvania. See *DER v. Texas Eastern Transmission Corp.*, 569 A.2d 382, 384 (Pa. Cmwlth. 1990). In *Texas Eastern*, the Commonwealth Court noted that although the privilege was recognized under federal law and apparently by statute in some other states, "Pennsylvania Courts have not recognized the deliberative process privilege for executive agencies". *Id.* at 384. The Court specifically declined in *Texas Eastern* to create the privilege judicially as to the Department. *Id.* The Board, on the basis of the *Texas Eastern* case, has rejected the contention that such a privilege existed as to the Department on several occasions. See *F.A.W. Associates v. DER*, 1990 EHB 1802; *City of Harrisburg v. DER*, 1990 EHB 585.

*Vartan's* facts were peculiar to that case. The Supreme Court analogized the application of the privilege to the application of immunity to a Judge with respect to his



or her judicial activities. Deputy Secretary Tropea is not within that ambit. Moreover, the cases cited in *Vartan* wherein the Commonwealth Court has held that deliberations of public officials or official bodies are not subject to discovery are not transferable to this situation. See e.g., *Coder v. Commonwealth, State Board of Chiropractic Examiners*, 471 A.2d 563 (Pa. Cmwlth. 1984); *Brady v. Commonwealth, State Board of Chiropractic Examiners*, 471 A.2d 572 (Pa. Cmwlth. 1984); *Commonwealth v. Pennsylvania Public Utility Commission (PUC)*, 331 A.2d 598 (Pa. Cmwlth. 1975). As we noted, the Commonwealth Court, as recently as 1990, specifically declined to establish a deliberative process privilege as to the Department in EHB proceedings. Thus, the *Coder*, *Brady*, and *PUC* Courts were not applying that privilege as the Department seeks it to be applied here to bar the testimony of Deputy Secretary Tropea.


Also, none of those cases, nor any of the cases cited in *Vartan*, involved the Environmental Hearing Board Act under which no action of the Department adversely affecting a person shall be final until the Board has heard the appeal. 35 P.S. § 7514(c); *Fiore v. DER*, 665 A.2d 1081, 1086 (Pa. Cmwlth. 1995). No blanket deliberative process privilege can be applied to Deputy Secretary Tropea here. Lower Paxton alleges that Deputy Secretary Tropea was personally, directly and persistently involved in the decision to deny Lower Paxton's proposed Plan. It is this very decision which is now under review before the Board. Under the EHB Act, the Appellant has a right to a full *de novo* hearing on that decision before it becomes final. Correspondingly, the EHB is the quasi-judicial body whose statutory role is to determine, based on a full record and via *de novo* review, whether the action of the Department is appropriate and lawful and whether it should or should not become final. *Smedley v DEP*, Docket No. 97-253-K, slip op.

at 25-30 (Adjudication issued February 8, 2001). It is illogical to maintain that the core information about how and on what bases the Department arrived at its decision under review is to be locked away. Indeed, it is hard to imagine a setting which is more antithetical to application of a deliberative process privilege. The review of and scrutiny of the Department's deliberative process with respect to the action under appeal is a part of the very essence of the Appellant's right and the Board's function and duties. Application of the privilege to make that information inaccessible would render nugatory Appellant's rights and the Board's responsibilities.

Also, even the Courts which encountered conditions favorable to the potential application of the privilege, have noted that the burden is on the proponent of the privilege to establish that its elements are present. *Vartan, supra* at 401; *Redlands Soccer Club, Inc. et al. v. Department of the Army*, 55 F.3d 827, 853-856 (3<sup>rd</sup> Cir. 1995). For example, the communication must have been made before the deliberative process was completed and the communication must have been deliberative in character. *Vartan, supra* at 401. Then, if the proponent of the privilege can establish the presence of its base elements, as the second step, since the privilege is not absolute, the Court must balance the interests of the parties to determine whether to apply the privilege so as to block access to the sought after information. *Redlands Soccer Club, supra* at 854. Here, the Department's Motion merely recites the *Vartan* case, explains in a few sentences what it said and asserts that the privilege applies here. We do not think that the Department has made a sufficient showing based on the record that the elements of the privilege apply. Moreover, as Appellant has alleged Deputy Secretary Tropea was directly and personally involved in the decision which is now under review by the Board. This allegation is

supported by deposition testimony of Mr. Oberdick, the signatory of the letter which denied the Township's Plan which is here under appeal. The Appellant has not only an interest in obtaining the information from Deputy Secretary Tropea about his role in the decision under appeal, Appellant has a right to it under the EHB Act.

**ENVIRONMENTAL HEARING BOARD**



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**MICHAEL L. KRANCER**  
**Administrative Law Judge**  
**Member**

**DATED: March 7, 2001**

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

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WILLIAM T. PHILLIPY IV  
 SECRETARY TO THE BOARD

**BRIAN A. and ANTIONETTE CANDELA** :  
 :  
 v. : **EHB Docket No. 2000-073-L**  
 :  
**COMMONWEALTH OF PENNSYLVANIA,** :  
**DEPARTMENT OF ENVIRONMENTAL** :  
**PROTECTION and PAUL T. NELSON,** :  
**PAUL T. NELSON, JR., NANCY N. GORMAN,** :  
**HUSBAND AND WIFE, COLLECTIVELY** : **Issued: March 9, 2001**  
**T/D/B/A, WALDAMEER PARK, INC.** :

**OPINION AND ORDER ON  
 MOTION FOR SUMMARY JUDGMENT**

**By Bernard A. Labuskes, Jr., Administrative Law Judge**

**Synopsis**

The Department has no authority and no legal basis under the Bluff Recession and Setback Act for “exempting” areas that have been designated by regulation as bluff recession hazard areas.

**OPINION**

Paul T. Nelson, Paul T. Nelson Jr., Nancy N. Gorman, Stephen F. Gorman, and Waldameer Park, Inc. (hereinafter collectively referred to as “Waldameer”) are parties who have an interest in Waldameer Park and Water World, an amusement park in Millcreek Township, Erie County. Waldameer would like to build a new roller coaster. The coaster would take advantage of a slope on

the property. Waldameer contacted Millcreek Township about obtaining a building permit. The Township contacted the Department of Environmental Protection (the “Department”) for a determination on whether the coaster could be built on the slope in question.

The Department became involved in a local building permit decision because of the Bluff Recession and Setback Act, 32 P.S. §§ 5201-5215 (the “Bluff Act”), and the regulations promulgated pursuant thereto, 25 Pa. Code Chapter 85 (the “Bluff Regulations”). The Bluff Act provides for the designation of bluff recession hazard areas, which are high banks or bold headlands overlooking Lake Erie that are potentially unstable. 32 P.S. § 5203. The Environmental Quality Board (the “EQB”) has the sole responsibility for designating hazard areas based upon the Department’s recommendations. 32 P.S. § 5204. Once an area is designated in accordance with appropriate regulatory procedures, the Act is primarily administered at the municipal level pursuant to building setback ordinances. 32 P.S. §§ 5205-5206. The Department has some direct enforcement powers, *e.g.* 32 P.S. §§ 5210, 5213, but its primary responsibility is to oversee the municipality’s implementation of the Act via its local ordinance and its issuance of building permits. 32 P.S. § 5207.

Millcreek Township has “been designated as possessing a bluff recession hazard area.” 25 Pa. Code § 85.26(a) and (c). The Township has a bluff setback ordinance. (Ordinance No. 81-9.) (Waldameer Response, Exhibit 12.) Thus, in response to Waldameer’s inquiry regarding a building permit for the proposed roller coaster, the Township sought the advice of the Department, acting pursuant to its oversight responsibility, on whether the location of the coaster was in a bluff recession hazard area.

Following discussions, meetings, site visits, and correspondence, the Department finally and

officially responded to the Township by a letter dated February 29, 2000 from E. James Tabor, Chief of the Coastal Zone Management Section of the Department, to Richard L. Morris, Millcreek Township's Engineer (the "Letter"). The Letter in pertinent part provided as follows:

The Department agrees that the portion of Millcreek Township bluffs that overlook the Presque Isle peninsula ("Exempted Bluff Area") is not presently included in administration of the program established under the Act. The Act only applies to bluffs that "overlook a lake" of a defined size. The Exempted Bluff Area has been considered by the Township, with Departmental concurrence, to overlook the bay and the peninsula, rather than the lake itself.

The Department has made a decision that at present, the proper western boundary for the Exempted Bluff Area is somewhere to the west of Peninsula Drive. It agrees with your assessment that the area where the roller coaster project proposed by Waldamere Park will be located is east of that boundary, and therefore not subject to the Act.

Brian and Antoinette Candela (the "Candelas") filed this appeal from the Letter. The Candelas own property at the bottom of the slope and immediately adjacent to the location of the proposed roller coaster. They argue that the Department exceeded its authority and made an incorrect determination. They have filed a motion arguing that they are entitled to summary judgment on those points. Waldameer filed a response in vigorous opposition to the motion. The Department advised us that it would not be filing a response. For the reasons that follow, we grant the Candelas' motion.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions of record, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d

1222 (Pa. Cmwlth. 1997).

The Candelas characterize the Letter as an attempt on the part of the Department to revise the regulations promulgated by the EQB. The characterization was encouraged by the Department's response to a request for an admission that "DEP made a regulatory decision" that the site was not covered by the Bluff Act and Regulations. Given the wording of the Letter, we can understand the basis of the Candelas' characterization, but we do not agree with it. The Letter is careful not to cite the regulations or state what the regulations mean, and it certainly does not attempt to promulgate a new or amended regulation. Any such attempt would have been invalid and ineffective. The authority to promulgate regulations lies exclusively with the EQB. 32 P.S. § 5206. In particular, only the EQB may designate or change the designation of bluff recession hazard areas. 32 P.S. §§ 5204 (c) and 5207(e). Nor does the Letter attempt to grant a variance or enact a local ordinance or regulation.

The better and more accurate characterization of the Letter is the one advanced by Waldameer; namely, the Letter is an expression of the Department's oversight responsibility under the Bluff Act. 32 P.S. § 5207. The Township was entitled to, and indeed should be commended for, seeking the Department's determination. That determination, while not binding, will undoubtedly guide the municipality's decision whether to issue a building permit, and we would expect that it will be relied upon in any subsequent review of that decision pursuant to the Municipalities Planning Code, 53 P.S. § 10101 *et seq.*

Turning to the substance of the Letter, along the lines previously noted, the Department was careful in the Letter to avoid any language that purported to interpret the regulations themselves. The Letter does not conclude that the roller coaster site is outside of a bluff recession hazard area.

The Department has simply accepted the Township's decision not to enforce the regulation in a certain area, the so-called "Exempted Bluff Area" referenced in the Letter.

To the extent that the Department purports to make a legal conclusion that the coaster site is "exempt" under the operative laws themselves, the Department determination is incorrect. It cannot be relied upon safely by the municipality or accurately by any subsequent reviewing body. One will search the Bluff Act and Regulations in vain for any "exempted" areas, or any authority or basis for the Department or a municipality "exempting" areas covered by a regulatory designation. Waldameer does not cite any such legal support in the Department's defense, and, of course, the Department has chosen not to respond to the Candelas' motion. We conclude that, whatever the regulatory designation does or does not cover, the Department does not have the authority to, or any legal basis for, "exempting" any areas from coverage.

The parties have submitted excellent briefs in support and in opposition of summary judgment, which argued extensively on whether the site is in fact covered by the existing regulations and whether it should be covered. Those issues, however, are not before us due to the limited scope of the Departmental letter under appeal. All that we are properly called upon to decide here is whether the Department's "exemption" is correct, and we have concluded that it is not. Whether the area in question is in fact included in a designated hazard area will be for the Township to decide. Whether the area *should* be included in the designated hazard area is an argument that must be addressed to the EQB. Finally, Waldameer has raised several constitutional arguments, but it correctly acknowledges that, "[g]iven the lack of any action, let alone a final action by any governmental entity *against* the Waldameer Appellees with regard to the land in question, they are unable to fully litigate or brief these issues at this time." (Waldameer Brief at 29 (emphasis



original).) We agree that the issues are not ripe for our review at this time. Accordingly, we issue the following Order.

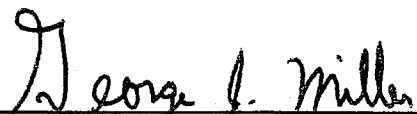
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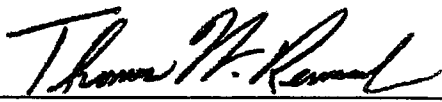
BRIAN A. and ANTIONETTE CANDELA :  
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 v. : EHB Docket No. 2000-073-L  
 :  
 COMMONWEALTH OF PENNSYLVANIA, :  
 DEPARTMENT OF ENVIRONMENTAL :  
 PROTECTION and PAUL T. NELSON, PAUL T. :  
 NELSON, JR., NANCY N. GORMAN AND :  
 STEPHEN F. GORMAN, HUSBAND AND WIFE, :  
 COLLECTIVELY T/D/B/A, WALDAMEER :  
 PARK, INC. :

ORDER

AND NOW, this 9th day of March, 2001, the Appellants' Motion for Summary Judgment is GRANTED. The Department erred in determining that the site of proposed Waldameer Park roller coaster is exempt from the requirements of the Bluff Recession and Setback Act, 32 P.S. §§ 5201-5215. The previously scheduled hearing in this matter is CANCELLED.

ENVIRONMENTAL HEARING BOARD

  
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Administrative Law Judge  
Chairman

  
\_\_\_\_\_  
THOMAS W. RENWAND  
Administrative Law Judge  
Member



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**MICHELLE A. COLEMAN**  
Administrative Law Judge  
Member



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**BERNARD A. LABUSKES, JR.**  
Administrative Law Judge  
Member



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**MICHAEL L. KRANCER**  
Administrative Law Judge  
Member

**DATED:** March 9, 2001

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WILLIAM T. PHILLIPY IV  
 SECRETARY TO THE BOARD

**MICHAEL W. FARMER AND  
 M. W. FARMER COMPANY**

v.

**COMMONWEALTH OF PENNSYLVANIA,  
 DEPARTMENT OF ENVIRONMENTAL  
 PROTECTION**

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**EHB Docket No. 98-226-L**

**Issued: March 26, 2001**

**ADJUDICATION**

**By Bernard A. Labuskes, Jr., Administrative Law Judge**

**Synopsis:**

The Board dismisses an appeal brought by a certified tank inspector and his employer from a \$14,000 civil penalty assessment imposed for seven faulty inspections. Among other things, the inspector inaccurately reported that inspected facilities were employing proper leak detection and corrosion protection when, in fact, they were not. After considering such factors as the willfulness of the violations, deterrence, and potential harm to the environment, the Board upholds the assessment because the underlying violations were either stipulated or established in a previous Board decision, and the assessment itself complies with the law and is otherwise reasonable and appropriate.

**FINDINGS OF FACT**

1. The Department is the administrative agency vested with the authority and

responsibility to administer and enforce the requirements of the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, as amended, 35 P.S. § 6021.101, et seq. ("Storage Tank Act"); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1, et seq. ("Clean Streams Law"); Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17 ("Administrative Code"); and the rules and regulations promulgated under those Acts. (Joint Stipulation of the Parties, as amended [hereinafter "Stip."] 1.)

2. M. W. Farmer Company ("Farmer Co.") is a Pennsylvania corporation with a business address of 13 Fleming Street, South Williamsport, PA 17701. (Stip. 2.)

3. Michael W. Farmer ("Mr. Farmer") is both the president and an employee of Farmer Co. (Stip. 3.) (Mr. Farmer and Farmer Co. shall hereinafter be referred to collectively as "Farmer" unless otherwise indicated.)

4. Pursuant to the Storage Tank Act and regulations promulgated thereunder, the Department has established a certification and licensing program for installers and inspectors of storage tanks and storage tank facilities, including procedures for the suspension and revocation of certifications. (Stip. 4.)

5. At all relevant times, Mr. Farmer was a certified installer and inspector of storage tanks and storage tank facilities, the Department having issued certification I.D. No. 15 to him, personally, pursuant to the Storage Tank Act. (Stip. 5.) Mr. Farmer was certified at least as early as 1994. (T. 232.)

6. Mr. Farmer has had extensive training and experience in working with and inspecting tank systems. (T. 51-58, 227-233.) The Department through telephone calls, meetings, training sessions, an administrative conference, and joint inspections invested substantial time and effort and

progressive enforcement in attempting to improve Farmer's performance as a certified inspector. (T. 55, 109, 148-149, 177-178, 206-207, 220-221, 274.)

7. The Department requires both the inspector and his corporate employer to be certified. (T. 130-132.)

8. At all relevant times, Farmer Co. was identified by the Department company certification I.D. No. 19. (Stip. 6.) It is one of the most active certified companies in the Department's Northcentral Region. (T. 142.) The company employs inspectors other than Mr. Farmer. (T. 144.)

9. The oversight of certified inspectors relating to underground storage tank facility inspections is a significant duty of the staff of the Department's Storage Tank Section. (Stip. 7.)

10. At all relevant times, there were approximately 3,500 storage tanks at approximately 1,400 individual facilities in the Department's Northcentral Region. (Stip. 8.)

11. At all relevant times, the Department had a total of six employees to administer and enforce the Storage Tank Act in the Northcentral Region. (Stip. 9.)

12. December 22, 1998 was a key compliance date dealing with the upgrade or replacement of underground storage tanks which did not at that time have adequate protection against corrosion or appropriate devices to protect against spills and overflows, which are common causes of underground storage tank failures. (Stip. 10.)

13. The Storage Tank Act authorizes the Department to, upon notice, require a storage tank owner to undertake an inspection of its storage tank facility by a certified inspector. (Stip. 11.)

14. The Commonwealth of Pennsylvania, in the Storage Tank Act and the regulations promulgated pursuant to that Act, has opted to rely upon certified installers and certified inspectors

to accomplish the grass-roots activities that are so essential to this program. (Stip. 12.)

15. Inspectors must fill out an inspection report form for each inspection, give one copy to the facility owner, and send copies to the Department. (T. 33-34.) The content of the form has changed over time in an effort to make it more user-friendly. (T. 96, 241.)

16. The information provided by a certified inspector on the inspection report form that is submitted to the Department encompasses the following: construction and operation of underground tanks and piping; whether those devices have corrosion protection or not; key information on leak detection for tanks and piping; information about spill devices, overfill devices and vapor recovery; registration information; whether there exists any sign of a release at the time of the inspection; whether any contamination exists at the time of the inspection; the number of tanks; and whether there are any abandoned tanks at the facility. (Stip. 13.)

17. The Department relies heavily on the accuracy, reliability, and dependability of the information that it receives from certified inspectors. (Stip. 14.) The inspector must conduct an independent investigation that includes a review of records and does not simply rely upon the representations of an owner/operator. (T. 39-41.)

18. The information on the inspection report form should indicate the compliance status of the facility as it exists during the inspection. (Stip. 15.)

19. The inspection report includes space for setting forth narrative comments that explain marks contained in the checklist if necessary. (T. 42; C. Ex. 4.)

20. The Department allows an inspector to wait as much as 60 days before submitting a report in order to give the owner an opportunity to correct deficiencies that are uncovered during the inspection. (T. 42, 43.) Even if the inspector waits to submit the report, the report must still

accurately describe conditions on the day of the inspection. (T. 221.) The corrective measures could be described in the narrative section of the report. (T. 42-43.)

21. The Department makes decisions of compliance and noncompliance for storage tank facilities based upon the information that it receives from certified inspectors. (Stip. 16.)

22. If determined to be in compliance, most storage tank facilities, after an initial inspection, will not be reinspected for a period of five years. (Stip. 17.)

23. The certified inspection program provides an opportunity for owners and operators to understand more about their regulatory obligations. (Stip. 18.)

### **PennDOT Facility**

24. On October 29, 1996, Farmer performed a facility operations inspection at the Pennsylvania Department of Transportation ("PennDOT") County Maintenance Facility, which is identified by the Department Facility I.D. No. 12-26798. (Stip. 43.) The facility is in Emporium, Pennsylvania. (C. Ex. 8.)

25. Although Farmer on his inspection report indicated that tanks 003 and 004 were constructed of bare steel, in fact, those tanks were constructed of fiberglass. (Stip. 44.)

26. A Department review of the inspection report completed by Farmer revealed that Farmer failed to identify and provide operational information for underground storage tank 005. (Stip. 45.)

27. Although underground storage tank 005 was registered with the Department and located on that site on the date of Farmer's inspection, Farmer provided no information to the Department regarding that tank. (Stip. 46.)

28. Farmer did not inspect any of the PennDOT facility's records to verify an oral



representation from someone at the facility that the tanks were constructed of steel because he was advised that the records were stored at a different PennDOT facility. (T. 248, 279.)

29. Farmer made a deliberate choice not to seek out the records in part because his bid price for the inspection did not in his view allow for that extra effort. (T. 222.)

30. The Department's inspection report form allowed the inspector to identify the tanks' construction as "unknown." (C. Ex. 8.)

31. Farmer's explanation for not inspecting the fifth tank was that he did not see the tank's registration posted on the facility's wall. (T. 281.)

### **Stiff Oil Company**

32. On July 2, 1997, Farmer performed a facility operations inspection at the Stiff Oil Company, which is identified by the Department Facility I.D. No. 45-17882. (Stip. 61.) The facility is located in Stroudsburg, Pennsylvania. (C. Ex. 26.)

33. Although Farmer, on pages 1 and 2 of his inspection report, indicated that tanks 001 through 004 were in compliance with release detection requirements through the use of vapor monitoring and annual tightness testing, they were not because there was no site assessment at the facility. (Stip. 62.)

34. In order for a facility to comply with the Department's requirements for leak detection using vapor monitoring, the facility must have a site assessment at the site. (Stip. 40.)

35. The site assessment, also referred to as a site evaluation, verifies that vapor monitors have been placed such that they will detect increases in concentrations of the stored substance. (C. Ex. 26.)

36. The facility operator only performed the site assessment after the fact of Farmer's

inspection and the Department's reinspection. (T. 163.)

### **Danville Sales and Service**

37. On July 7, 1997, Farmer performed a facility operations inspection at Danville Sales and Service, which is identified by the Department Facility I.D. No. 49-28967. (Stip. 47.) The facility is located in Northumberland, Pennsylvania. (C. Ex. 11.)

38. Although Farmer, on page 3 of his inspection report, indicated that at the time of his inspection tanks 005 through 007 were in compliance with release detection requirements through the use of an automatic tank gauge for the monthly leak test, in fact that equipment was not performing that test. (Stip. 48.)

39. No other method of leak detection was being employed at Danville Sales and Service. (Stip. 49.)

40. Although Farmer, on page 4 of his inspection report, indicated that tanks 005 through 007 were in compliance with galvanic cathodic protection requirements, in fact those tanks were not cathodically protected by a structure-to-soil-potential greater than .85 volts. (Stip. 50.)

41. Arthur T. Stametz, President, Danville Sales and Service, Inc., if called as a witness, would have testified that he relied on Farmer to guide him into compliance with the Storage Tank Act and its regulations. (Stip. 19.)

42. The tanks eventually needed to be dug up and outfitted with new sacrificial anodes to bring the tanks into compliance with corrosion protection requirements. (T. 200.)

43. Farmer's explanation for inaccurately reporting the facility's release detection capability was that the system was due to be upgraded within a few weeks. (T. 282.) Farmer did not note this in the comments section of the inspection report. (C. Ex. 11.)

44. It was not until sometime in August or September that equipment at the facility was able to perform leak detection in accordance with regulatory standards. (T. 199.)

### **Brownie's Gulf Service**

45. On July 24, 1997, Farmer performed a facility operations inspection at Brownie's Gulf Service, which is identified by the Department Facility I.D. No. 49-25977. (Stip. 51.) The facility is located in Milton, Pennsylvania. (C. Ex. 4.)

46. Although Farmer, on pages 1 and 3 of his inspection report, indicated that tanks 001 through 004 were in compliance for release detection by inventory control, tightness testing, and vapor monitoring, in fact the facility was not employing any method of leak detection that complied with the Department's leak detection requirements. (Stip. 52.)

47. Although Farmer, on page 3 of his inspection report, indicated that tanks 001 through 004 were fulfilling all of the requirements for inventory control as a method of leak detection, this indication was incorrect because no readings were recorded to one-eighth of an inch accuracy, the owner was using a stick marked in one-quarter of an inch increments, there was no monthly water check recorded, and no monthly reconciliation records existed. (Stip. 20-39, 53.)

48. Although Farmer, on page 2 of his inspection report for the Brownie's Gulf Service, indicated that the piping associated with tanks 001 through 004 was in compliance for release detection, in fact the facility was employing a method of line leak detection different from that identified by Farmer. (Stip. 54.)

49. Brownie's Gulf Service was not complying with piping release detection through vapor monitoring, as Farmer indicated on his inspection report, because no vapor monitoring wells existed along the piping excavation. (Stip. 55.)

50. Farmer's explanation for his reporting inaccuracies regarding tank leak detection at Brownie's was that, although proper records were not being kept, the operator stated that he checked for water, and equipment was available at the facility for measuring to an eighth of an inch and for checking for water. (T. 275-276.)

### **Brennan Truck Plaza**

51. On September 30, 1997, Farmer performed a facility operations inspection at the Brennan Truck Plaza, which is identified by the Department Facility I.D. No. 19-70580. (Stip. 56.) The facility is located in Mifflinville, Pennsylvania. (C. Ex. 14.)

52. Although Farmer, on page 3 of his inspection report, indicated that tanks 001 through 006 were fulfilling all of the requirements for inventory control as a method of leak detection, there were no monthly reconciliation records and Farmer did not review any records verifying that a monthly check for water was being performed. (Stip. 57.)

53. Although Farmer, on pages 1 and 3 of his inspection report, indicated that tanks 001 through 006 were in compliance for release detection, in fact that facility was not employing any method of leak detection that complied with the Department's leak detection requirements. (Stip. 58.)

54. Although Farmer, on pages 1, 2 and 4 of his inspection report, indicated that tanks 005 and 006 were in compliance with line leak detection requirements through the use of an automatic line leak detector, in fact no such equipment existed on those lines on the date of Farmer's inspection. (Stip. 59.)

55. Although Farmer, on page 4 of his inspection report, indicated that tanks 005 and 006 were in compliance for galvanic cathodic protection, Farmer never tested those tanks himself, and he

does not know if they were ever tested. (Stip. 60.)

56. There is a space on the inventory control form where the operator is to mark whether or not a water check was performed. (T. 300, 304.)

57. Farmer's explanation for his reporting inaccuracies was that he relied upon the operator's oral representations, and that the operator was trying to do his best to comply. (T. 283-284.) Farmer explained that he did not check for line leak detection for tanks 005 and 006 because "a truck was parked over there." (T. 286.)

### **Roadway Express**

58. On October 11, 1997, Farmer performed a facility operations inspection at a Roadway Express facility, which is identified by the Department Facility I.D. No. 45-13152. (Stip. 63.) The facility is located in Tannersville, Pennsylvania. (C. Ex. 25.)

59. The Roadway Express facility is a very large operation, with 80,000 gallons of diesel capacity. (T. 158-159.)

60. Although Farmer, on pages 1, 2, and 3 of his inspection report, indicated that tanks 014 through 020 were in compliance for release detection through the use of an automatic tank gauge, in fact that equipment was not being used to place that facility in compliance with those requirements. (Stip. 64.)

61. Although Farmer indicated that the facility was in compliance with leak detection requirements through the use of an unspecified alternate method (Stip. 65), in fact, the facility was using inventory control that was ineffective due to the multiplicity of tanks (T. 155, 158-159, 168, 169, 174).

62. The necessary equipment was installed and in place; it was not being used properly.

(T. 156-157, 159, 170.)

**M.W. Farmer Company**

63. On July 17, 1997, Farmer performed a facility operations inspection at the Farmer Co. facility, which is identified by the Department Facility I.D. No. 41-24347. (Stip. 41.) The facility is located in Williamsport, Pennsylvania. (C. Ex. 21.)

64. The tank registration for the tanks located at that facility is under the name of M.W. Farmer and Company. (Stip. 42.)

65. This Board previously found that “[Mr.] Farmer inspected tanks owned by M.W. Farmer Company while he was employed by M.W. Farmer Company as a certified inspector.” *Michael W. Farmer and M.W. Farmer Co. v. DEP*, 1998 EHB 1292, 1300, *aff’d*, Commonwealth Court Docket No. 3468 C.D. 1998 (December 3, 1999), *appeal denied*, Pa. Supreme Court Docket No.174 MAL 2000 (August 14, 2000). (Stip. 75-78) (describing procedural history).

66. This inspection in violation of the conflict-of-interest rule formed the basis for the revocation of Mr. Farmer’s certification and the suspension of Farmer Co.’s certification, both of which were previously upheld by this Board and on appeal. *Id.*

**DEP Penalty Assessment**

67. On each inspection report noted above, Mr. Farmer signed his name under the following paragraph:

I, the DEP Certified Inspector, have inspected the entire above referenced facility. Based on my observation of the facility and the information provided by the owner, I certify under penalty of law as provided in 18 Pa.C.S.A. Section 4904 (relating to unsworn falsification to authorities), that the information provided by me is true, accurate, and complete to the best of my knowledge and belief.

(Stip. 66.)

68. At depositions, and many times thereafter, Department officials have officially stated that they did not believe that Farmer intentionally falsified the subject inspection reports. (Stip. 91.)

69. On October 22, 1998, the Department assessed a civil penalty in the total amount of \$14,000 against Farmer for violations of the Storage Tank Act. (Stip. 71.) It is this assessment that is the subject of this appeal.

70. This \$14,000 penalty actually represents the assessment of a \$2,000 penalty for the violations found at each of the seven facilities identified above. (Stip. 72.)

71. The Department employs a "civil penalty worksheet" to calculate the amount of a penalty to be assessed under the Storage Tank Act using the following steps: First, the base penalty amount (\$100-10,000) is determined by the seriousness of the violation (low risk, medium risk or high risk); next, the base amount is multiplied by a willfulness factor (1, 2, or 3) determined by the degree of culpability of the violator (basic, negligent/reckless, or deliberate); and finally, environmental damage and administrative and other costs are added to arrive at the total penalty amount. (Stip. 73.)

72. The Department calculated the penalties for the violations described above as follows: (1) the Department rated the seriousness of each violation as low risk (\$1000) and assessed the degree of willfulness as factor "2" (negligent/reckless); (2) because there was no environmental damage and the Department waived administrative costs, the total penalty for each violation was calculated as (\$1000 x 2) or \$2000; and (3) this amount was then multiplied by the number of separate violations (7) to arrive at the \$14,000 total penalty amount. (Stip. 74.)

73. For purposes of calculating civil penalties, the Department treated each defective

inspection report as one violation, regardless of the number of inaccuracies in the report. (C. Ex. 31, 32.)

74. The Department classified each of the violations as “low risk” due to the absence of environmental damage (T. 70, 79-80), and assessed an amount slightly above the midpoint of the penalty range for the seriousness of each violation to reflect the importance of the reporting deficiencies (e.g. leak detection mischaracterized), the number of violations, the length of time that the applicable regulations had been in effect, and the resources brought to task by the Department. (T. 70-71, 78-80, 90-91, 190, 192, 201.)

75. The Department classified each of the violations as negligent/reckless at least in part because of the amount of effort that the Department had devoted to training and imposing progressive enforcement measures against Mr. Farmer, and the experience of Mr. Farmer and Farmer Co. (T. 71, 80-81, 192.) The Department considered the violations “negligent/reckless” because Farmer should have known he was violating the law, and the violations with the exercise of reasonable care could have and should have been prevented. (T. 63-64, 70-72, 182.)

## DISCUSSION

### A. The Civil Penalty Assessments

Our responsibility in this appeal is determine whether the Appellants committed violations of the law, and if so, whether the Department’s civil penalty assessment for those violations is in compliance with the law and is otherwise reasonable and appropriate. *202 Island Car Wash, L.P. v. DEP*, EHB Docket No. 98-023-MG (Adjudication issued May 19, 2000), slip op. at 23-24. Our review is *de novo*, and we will modify a penalty that fails to meet these criteria. *Id.* The Department bears the burden of proof. 25 Pa. Code § 1021.101(b)(1).



The penalties assessed against Farmer are in compliance with the law. With regard to the underlying violations, Farmer is precluded by the doctrine of collateral estoppel from relitigating our finding that he violated the conflict-of-interest rule, 25 Pa. Code § 245.106, by inspecting his own facility. We found in earlier litigation that Farmer not only committed the violation, but that the violation justified a revocation of Mr. Farmer's license and a suspension of Farmer Co.'s license. Our decision was upheld on appeal. (Finding of Fact ("F.F.") 67-68.) The identity of the parties, of the issue that was actually litigated, and of the dispositive nature of the issue combine to preclude relitigation of the same issue here. *Sedat v. DEP*, EHB Docket No. 99-171-L (Opinion and Order issued July 18, 2000) (collateral estoppel criteria).<sup>1</sup> In any event, Farmer has not argued in his brief that his conduct complied with the applicable regulation. Farmer has also not disputed that the other underlying incidents that are the subject of this appeal constituted violations of the law. "Farmer is not trying to excuse his conduct." (Farmer Brief at 11.)

With regard to the lawfulness of the penalty itself, the amount of each penalty is well below the statutory maximum of \$10,000 per day. 35 P.S. § 6021.1307(a). There is no other indication that the Department acted contrary to law. Accordingly, our resolution of this appeal turns on whether the amount of the assessment is reasonable and appropriate.

The Tank Act instructs consideration of the willfulness of the violation, damage to the environment, cost of restoration and abatement, deterrence of future violations, and "other relevant factors" in determining the amount of the penalty. 35 P.S. § 6021.1307(a). In considering damage to the environment, we consider potential, as well as actual, harm. *F. R. & S., Inc. v. DEP*, 1999

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<sup>1</sup> Although we precluded Farmer from relitigating the fact of the violation at the hearing, we allowed evidence concerning the violation that related to the civil penalty criteria (willfulness, etc.). (T. 15.)

EHB 241, 268, *aff'd*, 1512 C.D. 2000 (Pa. Cmwlth. Sept. 13, 2000). We have defined the various levels of culpability in the context of civil penalty assessments as follows:

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

*202 Island Car Wash L.P. v. DEP*, EHB Docket No. 98-023-MG (May 19, 2000) slip op. at 16 (quoting *Phillips v. DER*, 1994 EHB 1266, *aff'd*, 2651 C.D. 1994 (Pa. Cmwlth. June 16, 1995).)

The Department did not present any evidence regarding costs of abatement or restoration, so we will not consider that factor. With regard to deterrence, we believe that a \$2,000 assessment for each of Farmer's violations is an amount appropriately calculated to discourage future violations. Concerning general deterrence, it is important that the community of certified inspectors understands that the amount of penalties that will be imposed is likely to exceed the cost savings enjoyed by taking regulatory impermissible shortcuts. Penalties in a range that is lower than those imposed here for the sort of inexcusable carelessness exhibited by Farmer would not be likely to have that necessary deterrent effect.

The penalties serve the specific deterrent function as well. Although Mr. Farmer's individual certification has been revoked and he cannot perform inspections in any event, the penalty is also imposed against Farmer Co., which continues to perform inspections. In addition, Mr. Farmer is the president of the company (F.F. 3), and he undoubtedly has the supervisory ability to ensure that the company's inspectors perform their duties properly. Indeed, the penalties

demonstrate the importance of complying with the law in all aspects of the tank program, an area in which Mr. Farmer's company remains very active. (F.F. 7.) A \$2,000 penalty for each of the violations is an amount appropriately geared toward deterring future violations by Mr. Farmer, his company, and persons under his direction and control.

Farmer contends that the penalties should be lower because of the financial impact of the revocation of Mr. Farmer's certification and the suspension of Farmer Co.'s certification. We are willing to accept in theory that the financial impact of concurrent enforcement measures can be a "relevant factor" that this Board may consider in setting a penalty amount when it deems it appropriate to do so. *See 202 Island Car Wash L.P. v. DEP*, EHB Docket No. 98-023-MG (Adjudication issued May 19, 2000) slip op. at 22-23 (reserving question of whether impact of other enforcement actions *must* be considered). We do not accept, however, that the penalties that were assessed in this case were unreasonable even when we factor in the certification actions. The penalties are only 20 percent of the statutory maximum. The impact of concurrent enforcement measures is only one of the many factors that must be weighed in arriving at an appropriate amount, and considering the entire mix here, including that factor, we believe that the amount assessed was entirely reasonable. We would also note that Farmer made no attempt to quantify the financial impact of the concurrent enforcement measures, which effort if not essential would have certainly been helpful.

Turning to the potential harm caused by the violations, Farmer's major failing at five of the seven sites at issue was his representation that the facility was capable of detecting leaks (in accordance with applicable regulatory standards) when, in fact, it was not. This is a serious matter. Both the owners of the tank systems and the Department were entitled to rely upon Farmer's

representation that any leaks would likely be detected in time to forestall serious harm to the environment. Although Farmer's failure to perform his duty properly regarding leak detection did not increase the risk of a release, it significantly increased the risk that a release would go undetected if it did occur. It is infinitely better to prevent a leak from occurring or doing substantial damage by detecting it quickly than it is to clean up the consequences after the fact.

Farmer compounded the risk at the Danville and Brennan facilities. Farmer represented that the tank systems at those facilities were adequately protected against corrosion when, in fact, they were not at Danville and it is not known whether they were at Brennan. Those misrepresentations are arguably more serious than the misrepresentations regarding leak detection. The false security created by Farmer's conduct meant that the systems involved could have been at risk without anyone knowing about it.

Farmer did not inspect one of the tanks at the PennDOT facility. Farmer did not evaluate the condition of that tank with respect to leak detection, corrosion protection, or anything else for that matter. In addition, misreporting the manufacture of the other tanks at that facility was so fundamental that it distorted everything else that was reported or understood about the tanks.

Finally, Mr. Farmer's violation of the conflict-of-interest rules by inspecting his own company's tanks has already been adjudicated by this Board as sufficient grounds for revoking his license and suspending the company's license. (F.F. 82, 83.) The independence of the certified inspectors is at the heart of the program. Lack of independence makes *everything* in the report suspect. If an inspector can make such a fundamental error, his credibility across-the-board becomes suspect.

It would be a mistake to think of Farmer's violations as "mere paperwork violations," if such

a characterization is intended to imply that the violations were less than serious. In fact, such a characterization is not accurate. The record shows that Farmer's violations were not so much errors in filling out the forms as they were errors in performing the inspections themselves. The most glaring example of this concept is Farmer's failure to inspect the fifth tank at the PennDOT facility. It is not that he inspected the tank but forgot to complete, or made a mistake in completing, the form. The paperwork in this case is actually the evidence of the more basic and more serious underlying violations - - the failure to perform proper inspections.

Farmer notes that the inspection forms used by the Department have been modified over time to make them more user-friendly. He implies in his brief that the evolving nature of the forms should be considered in determining whether his conduct was negligent. Farmer never testified, however, that his errors resulted from any confusion on his part regarding the forms themselves. Our own review of the evidence does not support the conclusion that the content of the forms contributed to Farmer's errors. Farmer has not pointed to anything in particular on the forms that resulted in an error. Any confusion could have been cleared up by Farmer before he started inspecting tanks. As previously noted, Farmer's errors were fundamentally related to his failure to perform complete inspections. If he had performed competent inspections but merely made mistakes in filling out the paperwork, the layout of the forms might have had greater relevance. To repeat, that is not what occurred here.

It is true that the owner/operator has the primary responsibility to ensure that its system is compliant. But if the owner/operator obtains a passing report from an independent inspector who has been duly certified by the Department, it is entirely reasonable to expect that the owner/operator should be able to rely on that report. The parties' stipulations make it clear that the third-party

inspection program is vitally important to the Department's tank program. (F.F. 9-11, 14, 17, 21-23.) The Department and the regulated community must know that they can safely rely upon inspections performed by qualified, responsible, and unbiased inspectors. Inspectors must be careful not to violate the trust that has been placed in them.

Farmer argues that the liability of the tank owners should be considered in assessing the penalty. We fail to see why. The tank owners may have some liability for not installing or operating their tanks in accordance with the regulations, but they obviously do not have liability for failing to perform proper inspections, and *vice versa*. Compliance with the operating regulations and the inspection regulations are entirely separate matters. It would be just as incongruous to argue that Farmer has some liability for the tank violations themselves. Given the nature of *Farmer's* violations, this is not a case of shared responsibility for the same conduct. The owners' liability, if any, is completely irrelevant in assessing Farmer's liability.

Similarly, Farmer correctly points out that the owners may have been required to maintain accurate records on site. Their failure to do so, however, is analytically no different than their failure to operate the tank system properly. Neither failing on the owners' part excuses or ameliorates Farmer's misconduct in neglecting to perform complete inspections. There is, perhaps, some irony in Farmer's argument that his liability for failing to uncover violations at some of the sites should be reduced because the tank owners are liable for the underlying violations that Farmer failed to uncover. If the owners at those sites had not done something wrong, we would not be here addressing those sites, but that dramatically misses the point. The very purpose of the inspection program is to ensure that such underlying problems are discovered and corrected. Farmer had that independent duty, which he failed to fulfill.

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installation as well as inspection (F.F. 5), he should have been quite capable of performing his duties properly. For example, he should have understood that an inspector cannot simply rely upon the word of facility operators or employees (F.F. 23, 68, 75), but must perform complete, independent inspections. If it were acceptable to rely upon operators' conclusions, the Department would have simply required operators to complete self-evaluations. There would be no need for third-party inspectors.

Farmer, with the exercise of reasonable care, should have avoided inspecting tanks owned by his own company. (F.F. 82.) Even if there was some confusion regarding whether Farmer or his company owned the tanks, either case would dictate against Mr. Farmer's inspection of those tanks in the exercise of reasonable prudence.

At the Brennan Truck Plaza, Farmer reported that the piping associated with all six tanks had automatic line leak detection devices. He noted that the devices had been installed and tested. Such devices are observable in most situations by lifting a cover from a pump manway. Department employees opened those manways during their reinspection only to discover that the piping associated with two of the tanks had no detection devices. Obviously, without devices, they could not have been tested as represented in the report. (T. 88-89.)

We could go through the record and list many other instances where Farmer's culpability is demonstrated, but the fundamental point that applies to all seven inspections is that an experienced and certified inspector exercising reasonable care in performing legitimate inspections would not have made the errors that form the basis of these penalty assessments. Farmer's excuses and explanations only served to accentuate his carelessness and disregard for the inspection program. The evidence, together with the entire tenor of Farmer's testimony (T. 227-305), clearly suggests



that he acted with a conscious disregard for the duty of an inspector to complete a thorough and accurate inspection. Farmer did not take his responsibility seriously and he failed to meet the most basic standards of diligence and reason with regard to conducting himself to the best of his ability. As a result, he repeatedly made serious inspection errors. He did not inspect the entire facility, relied upon the uncorroborated representations of owners and their employees, failed to check records, evaluated compliance based upon planned future upgrades that did not exist at the time of the upgrade, and found compliance based upon the operator's best efforts as opposed to actual compliance. If he was not reckless, he certainly failed to exercise reasonable care. This Board previously found as follows regarding Mr. Farmer: "Indeed, we are troubled by a pattern of behavior which has emerged from the record before us. The evidence reveals an individual who lacks regard for the law which governs his own work and the work of his company." *M. W. Farmer Co. v. DEP*, 1998 EHB 405, 410. The record in this appeal served to bolster that conclusion beyond any doubt.

Farmer contends that he should not be held to "some arbitrary standard that has been imposed on him and not others similarly situated." Farmer presented no evidence that the standards imposed upon him were "arbitrary." He has not disputed his underlying violations of the law. He also has not challenged any of the applicable regulations. To the extent that he is arguing that he is being penalized where others are not, or that the amounts of his civil penalties are too high when compared to other violators, the argument has no merit. We addressed this issue in *F.R. & S. Inc., supra*, as follows:

Finally, the Permittee once again asserts that the Department should have considered civil penalties assessed against other landfills which missed capping deadlines. We have dealt with this question in two earlier opinions and again at the hearing in this appeal. *F.R. & S.*,

*Inc. v. DEP*, 1998 EHB 1288; *F.R. & S., Inc. v. DEP*, 1998 EHB 947. The Board's position has consistently been that civil penalties assessed against other persons are only relevant if the Department took other similar penalty assessments into consideration when assessing the penalty against the Permittee or if the Department's enforcement program resulted in a violation of equal protection or due process. The Department witnesses testified that other specific landfills were *not* considered in assessing the penalty against the Permittee. (See, e.g., Steiner, N.T. 587). This is unlike the testimony presented by the Department in *Gemstar v. DEP*, 1998 EHB 53, *vacated on other grounds*, \_\_A.2d\_\_ (No. 723 C.D. 1998, Pa. Cmwlth. filed March 16, 1999), where Department witnesses testified that other landfills were considered as a relevant factor in assessing the civil penalty.

1999 EHB at 271.

There is no evidence in this appeal that the Department took other penalty assessments into consideration when assessing the penalties against Farmer. Even if it had, there was only a vague allusion to one other penalty assessment in the record (T. 173, 301), and there was no evidence concerning the circumstances leading up to that assessment. We have no way of knowing that the circumstances were similar. There was also no evidence that other inspectors engaged in the pattern of conduct exhibited by Farmer but were not penalized. Finally, there was no evidence that Farmer was deprived of *any* necessary procedural safeguards, let alone deprived of any safeguards that other penalty recipients enjoyed. Indeed, the very purpose of the instant proceeding is to provide Farmer with the process that is his due. In short, we do not accept Farmer's unspecified allusion to civil penalties that may have been imposed against other parties as having any relevance to whether the penalty assessed in this case is appropriate.

In conclusion, we have no hesitation in finding that a \$2,000 penalty is reasonable and appropriate for each of Farmer's violations. The Department has assessed the penalty jointly and

severally against Mr. Farmer and Farmer Co., his employer, and neither Mr. Farmer nor the company has questioned the joint assessment.

### CONCLUSIONS OF LAW

1. The parties have stipulated the following conclusions of law, which this Board has independently determined are correct statements of the law:

a. Section 1307 of the Storage Tank Act permits the Department to assess a civil penalty in an amount not to exceed \$10,000 per day for each violation of a provision of the Act or a regulation promulgated thereunder. 35 P.S. § 6021.1307. (Stip. 68, 86.)

b. Under the Storage Tank Act, each violation of the Act constitutes a separate violation. (Stip. 69, 86.)

c. In determining the amount of the penalty to be assessed under the Storage Tank Act, the Department is to consider the willfulness of the violation and other relevant factors. 35 P.S. § 6021.1307. (Stip. 70, 87.)

d. The Environmental Hearing Board has jurisdiction over the parties and the subject matter of this appeal. (Stip. 81.)

e. The Storage Tank Act authorizes the Department to “establish, by regulation, a certification and licensing program for installers and inspectors of storage tanks and storage tank facilities, including procedures for the suspension and revocation of certifications.” 35 P.S. § 6021.107(d). (Stip. 82.)

f. An inspector may not be an employee of the owner of the tank that he is inspecting. 25 Pa. Code § 245.106. (Stip. 83.)

g. Certified inspectors are required to complete and file with the Department a certification that the inspection activity conducted by the certified inspector meets the requirements of the Storage Tank Act and applicable regulations. 25 Pa. Code § 245.132(a)(2). (Stip. 84.)

h. The Storage Tank Act authorizes the Department to, upon notice, require a storage tank owner to undertake an inspection of its storage tank facility by a certified inspector. 25 Pa. Code § 245.21(d). (Stip. 85.)

2. The Department has the burden of proving by a preponderance of the evidence that the Appellants violated the law and that the amount of the penalty assessed complies with the law and is otherwise reasonable and appropriate. *202 Car Wash, L.P. v. DEP*, EHB Docket No. 98-023-MG (Adjudication issued May 19, 2000).

3. In performing a facility operations inspection at the Farmer Co. facility on July 17, 1997 while employed as a certified inspector by Farmer Co., Farmer violated 25 Pa. Code § 245.106.

4. Farmer's incomplete inspections and inaccurate reports regarding the PennDOT, Danville Sales & Service, Brownie's Gulf, Brennan Truck Plaza, Stiff Oil, and Roadway Express facilities constituted violations of 25 Pa. Code §§ 245.132(a)(2) and (6)(ii) and 35 P.S. §§ 6021.1304 and 6021.1310.

5. The assessment of a \$2000 penalty for each of seven identified violations of the Storage Tank Act complied with the law and was otherwise reasonable and appropriate based upon the criteria for setting civil penalties set forth in the Storage Tank Act.

6. Farmer's conduct was, at a minimum, negligent.

7. M.W. Farmer Company and Michael W. Farmer are jointly and severally liable for the penalty.

8. Farmer is precluded by the doctrine of collateral estoppel from challenging in this civil penalty appeal the fact of the July 17, 1997 violation of the conflict-of-interest provisions of the Storage Tank Act. *Sedat, Inc. v. DEP*, EHB Docket No. 99-171-L (Opinion and Order issued July 18, 2000) (criteria for application of collateral estoppel).

COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

MICHAEL W. FARMER AND  
M. W. FARMER COMPANY

v.

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION

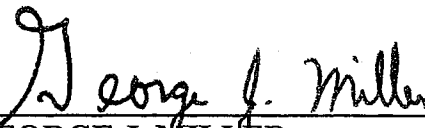
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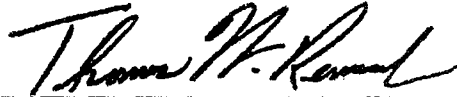
EHB Docket No. 98-226-L


ORDER

AND NOW, this 26<sup>th</sup> day of March, 2001, this appeal is **DISMISSED**.

ENVIRONMENTAL HEARING BOARD

  
\_\_\_\_\_  
GEORGE J. MILLER  
Administrative Law Judge  
Chairman

  
\_\_\_\_\_  
THOMAS W. RENWAND  
Administrative Law Judge  
Member

  
\_\_\_\_\_  
MICHELLE A. COLEMAN  
Administrative Law Judge  
Member



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**BERNARD A. LABUSKES, JR.**  
Administrative Law Judge  
Member



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**MICHAEL L. KRANCER**  
Administrative Law Judge  
Member

**DATED:** March 26, 2001

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

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COMMONWEALTH OF PENNSYLVANIA  
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**JEFFERSON COUNTY  
 COMMISSIONERS, et. al**

v.

**COMMONWEALTH OF PENNSYLVANIA,  
 DEPARTMENT OF ENVIRONMENTAL  
 PROTECTION and EAGLE  
 ENVIRONMENTAL, Permittee**

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 :  
 : **EHB Docket No. 96-061-MG**  
 : **(Consolidated with 96-063-MG,**  
 : **96-065-MG and 96-066-MG)**  
 :  
 : **Issued: March 30, 2001**  
 :  
 :

**OPINION AND ORDER ON  
 MOTION TO SUSTAIN APPEAL**

**By George J. Miller, Administrative Law Judge**

**Synopsis**

The Board denies a motion to sustain an appeal of the issuance of a solid waste permit. Although there has been no waste disposed of at the facility within the last five years, and the permit may be void, that issue is currently on appeal before the Board. Accordingly, it would not be appropriate to sustain this appeal until the question of whether or not the permit is void by operation of law is fully litigated.

**OPINION**

Before the Board is the motion of the Jefferson County Commissioners, the Jefferson County Solid Waste Authority, the Clearfield-Jefferson Counties Regional Airport Authority, and certain individuals (collectively, Appellants), to sustain their appeal of the issuance of a solid waste permit to Eagle Environmental, L.P. (Permittee). Specifically, the Appellants contend that the permit has become void by operation of law



and their appeal should be sustained. For the reasons which follow, we will deny the Appellants' motion.

This matter is one of several matters before the Board concerning the Permittee's proposed solid waste landfill known as the Happy Landings Landfill located in Washington Township, Jefferson County. To summarize, the solid waste permit at issue was one of several permits which were issued to the Permittee on February 9, 1996, for the operation of the landfill.<sup>1</sup> After the Department discovered the existence of wild trout streams in the vicinity of wetlands where the Permittee intended to build disposal cells, the Department suspended those permits in order to give the Permittee the opportunity to redesign the landfill to avoid encroachment upon wetland areas now considered to be exceptional value wetlands. This order was appealed by the Permittee. *Eagle Environmental, L.P. v. DEP*, EHB Docket No. 96-215-MG. With the agreement of the parties, the Appellants' appeal of the issuance of those permits was stayed, pending the Board's decision on the Department's suspension order. On September 3, 1998, the Board issued an adjudication which found that the Department had appropriately suspended the solid waste permit. *Eagle Environmental, L.P. v. DEP*, 1998 EHB 896.<sup>2</sup> That adjudication was appealed by the Permittee to the Commonwealth Court which has

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<sup>1</sup> This action by the Department is the subject matter of the current appeal.

<sup>2</sup> The Board has denied one other motion to sustain this appeal because we found that our factual determination concerning the status of the wetlands was not *res judicata* for the purposes of the appeal of the issuance of the permit. *Jefferson County Commissioners v. DEP*, 1999 EHB 601.

not yet rendered a decision.<sup>3</sup> *Eagle Environmental, L.P. v. Department of Environmental Protection*, Commonwealth Court Docket No. 2704 CD 1998.

However, by letter dated February 12, 2001, the Department informed the Permittee that the solid waste permit was void because no waste had been disposed of within five years of the issuance of the permit. Additionally, the letter revoked related air quality, NPDES and encroachment permits. At about the same time the Appellants filed a motion to dismiss the *Eagle Environmental* appeal at Commonwealth Court Docket No. 2704 C.D. 1998, on the grounds that the appeal from the Board's adjudication on the permit suspension had become moot. That motion was denied by *per curiam* order dated February 28, 2001. On February 26, 2001, the Permittee filed an appeal with the Board from the Department's February 12, 2001 letter. *Khodara v. DEP*, EHB Docket No. 2001-046-MG.

The Appellants now request the Board to "sustain" their appeal because the solid waste permit has expired by operation of law. Specifically, Condition 34 of the Permit, and 25 Pa. Code § 271.211(e), both provide that the permit shall become void if no waste is disposed of at the facility within five years of issuance of the permit. The Department agrees. The Permittee opposes the motion on the ground that it has appealed a letter from the Department which takes the position that the permit is void, therefore it is inappropriate to grant the Appellants' motion. We agree.

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<sup>3</sup> A panel of the Commonwealth Court heard oral argument and in an unpublished opinion, the Board's decision was affirmed. However, the court granted reargument. The court *en banc* again heard oral argument in June, 2000, but has not yet rendered a final decision.

The Permittee admits that it has not disposed of any waste at the Happy Landings Landfill. (Permittee's Response, ¶ 5) However, the very question at issue here – the application of 25 Pa. Code § 271.211(e) – is pending litigation in *Khodara v. DEP*. As the Permittee correctly points out, the Board may find that the regulation does not apply to the Permittee, or that the Department misinterpreted the regulation.<sup>4</sup> Clearly, the outcome of *Khodara v. DEP* has an implication on the present appeal. Moreover, the Commonwealth Court's disposition of *Eagle Environmental* could be important to the resolution of the controversy surrounding the landfill. Finally, as the parties agreed, this appeal was stayed pending the outcome of *Eagle Environmental, L.P. v. DEP*. Until the *Eagle* appeal is finally resolved, we do not believe that it is appropriate to lift the stay on the present appeal and dismiss it. It is also not appropriate to judge the propriety of voiding the permit until we decide the important legal question presented by the Permittee's recent appeal in *Khodara v. DEP*.

Accordingly, we deny the Appellants' motion and enter the following:

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<sup>4</sup> Of course, the Board could also find that the Department was entirely correct in its interpretation and application of the regulation to the Permittee.

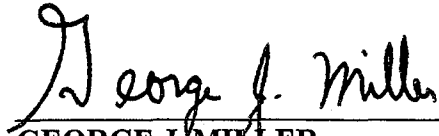
COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

JEFFERSON COUNTY :  
COMMISSIONERS, et. al :  
 :  
 : EHB Docket No. 96-061-MG  
 v. : (Consolidated with 96-063-MG,  
 : 96-065-MG and 96-066-MG)  
 :  
 COMMONWEALTH OF PENNSYLVANIA, :  
 DEPARTMENT OF ENVIRONMENTAL :  
 PROTECTION and EAGLE :  
 ENVIRONMENTAL, Permittee :

ORDER

AND NOW, this 30th day of March, 2001, the Appellants' motion in the above captioned appeal is hereby denied.

ENVIRONMENTAL HEARING BOARD

  
\_\_\_\_\_  
GEORGE J. MILLER  
Administrative Law Judge  
Chairman

DATED: March 30, 2001

c: DEP, BUREAU OF LITIGATION  
Attention: Brenda Houck, Library

FOR THE COMMONWEALTH, DEP:  
Michael Buchwach, Esquire  
Southwest Region

FOR APPELLANTS:  
Jefferson County Commissioners  
Jefferson County Solid Waste Authority  
Clearfield-Jefferson Counties Regional Airport Authority  
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Confluence, PA

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Ridgway, PA

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**UNREPRESENTED INDIVIDUAL APPELLANTS:**

(See attached list of names and addresses)

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WILLIAM T. PHILLIPY IV  
 SECRETARY TO THE BOARD

**LITTLE SWATARA VALLEY ASSOCIATION**

**v.**

**COMMONWEALTH OF PENNSYLVANIA,  
 STATE CONSERVATION COMMISSION, et al.**

:  
 :  
 : **EHB Docket No. 2000-031-L**  
 :  
 : **Issued: April 3, 2001**  
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**OPINION AND ORDER ON  
 MOTION FOR SUMMARY JUDGMENT**

**By Bernard A. Labuskes, Jr., Administrative Law Judge**

**Synopsis**

With the exception of claims that the appellant has decided not to pursue, the Board denies a motion for summary judgment in an appeal from the approval of a nutrient management plan because there are issues of disputed fact.

**OPINION**

The Little Swatara Valley Association (the "Association") filed this appeal from the approval by the State Conservation Commission's (the "Commission's") delegatee, the Berks County Conservation District, of George E. Christianson's ("Christianson's") nutrient management plan for a swine operation in Bethel Township, Berks County (the "Plan"). The Commission has moved for summary judgment on every claim raised in the Association's notice of appeal. With the exception of the claims that the Association has decided not to pursue, the Commission's motion is denied because the claims raised by the Association involve genuine

issues of disputed material fact, thereby rendering the issuance of summary judgment inappropriate. 25 Pa. Code § 1021.73; Pa.R.C.P. 1035.2; *Penn Argyl Borough v. DEP*, 1999 EHB 701.

In its response to the Commission's motion for summary judgment concerning the issues that the Association raised in Paragraphs 3(g), (i), (k), (l), (m), and (n) of its notice of appeal, the Association states as follows:

Pursuant to Pa.R.C.P. No. 229, 42 Pa. C.S.A., LSVA hereby discontinuances, without prejudice, its objection set forth in [Paragraphs 3(g), (i), (k), (l), (m), and (n)] of its Amended Notice of Appeal.

(LSVA Answer, Paragraphs 55-89, 113.) Although Pa.R.C.P. 229 does not apply to Board proceedings, we accept the Association's stated intention not to pursue the claims, which equates to a decision not to defend against the Commission's motion for summary judgment on those points. There is no provision, however, in the Board's rules for dropping a claim "without prejudice" in defending against a motion for summary judgment, and we do not accept that qualification.

All of the other issues raised by the Commission involve disputed questions of material fact. We will not attempt to create an exhaustive list of the many disputed facts, but will simply describe a few by way of example.

The Association alleges that the nutrient management plan is defective because Christianson will not be the "operator" of the concentrated animal operation in question. Section 6 (b) of the Nutrient Management Act, 3 P.S. § 1076(b), provides that "[t]he operator of any concentrated animal operation shall develop and implement a nutrient management plan consistent with the requirements of this section." The Commission argues that it is entitled to summary judgment because Christianson's plan "indicates that" Christianson will be the operator

because it is he “who exerts the power or influence over the project and [he] who is bringing it about, causing it to function, and will be putting and keeping it in operation.” (Commission Memorandum of Law at 12.) These are questions of fact, and the fact that the plan “indicates that” they are true does not rise to the level of establishing an undisputed fact.

Along the same lines, the second claim listed in the notice of appeal asserts that Christianson “will not have any control over” the area of the farm where manure will be applied. The Association complains that manure application will be accomplished by an unregulated third person, and that the plan impermissibly leaves decisions regarding application to the unbridled discretion of that party. (Notice of Appeal, Paragraph 3(b).) This states an interesting issue that raises questions of fact inappropriately addressed in the context of the Commission’s motion for summary judgment.

The Association asserted in its notice of appeal that the nutrient management plan should not have been approved because it allows 90 percent of the manure that the operation will generate to be exported to unknown locations. The Commission responds in its motion that there is nothing illegal about that. “As such, [the plan] fully comports with the purposes of the Nutrient Management Act and the Commission’s motion for summary judgment should be granted.” (Memorandum of Law at 21.) The Commission’s argument does not consider that we also are likely to review its action to assess not only whether it was legal, but whether it was otherwise appropriate as well. Even if we assume that the plan strictly comports with the law, its approval might nevertheless have been unreasonable under the unique circumstances of this case. Making this assessment will require a complete understanding of the facts following a hearing.

Many of the Commission’s arguments in support of its motion may be reduced to its



repeated assertion that the Association has "failed to adduce evidence" in support of its claims. These assertions are based in turn on the Association's occasionally perfunctory responses to the Commission's interrogatories, which had asked the Association to describe the factual bases for the Association's claims. The Association in response points out examples of inadequate responses that it received to its interrogatories. While we do not necessarily applaud some of the responses provided here, neither party moved to compel more complete responses. Our purpose here is not to evaluate compliance with discovery requirements. We are satisfied that the Association's response to the Department's motion has preserved the Association's position in the face of the motion for summary judgment, notwithstanding its prior responses to interrogatories.

The Commission asks that we decide that the Association's expert witness is not qualified to offer opinions in this matter. The Commission goes on to assert that we should not accept the Association's expert's opinion in part because it is contrary to the Commission's expert's opinion. (Memorandum of Law at 30-31.) We cannot accept that these matters are suited for resolution in the context of summary judgment. The evaluation of the respective expert witnesses' qualifications and their conflicting opinions will need to await the hearing on the merits currently scheduled to begin on May 29, 2001.

We will not belabor the point with further examples. Suffice it to say that the standard for granting summary judgment on the issues still in dispute has not been met here. Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

LITTLE SWATARA VALLEY ASSOCIATION

v.

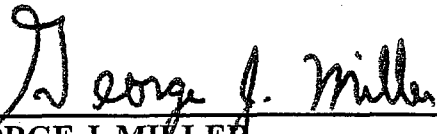
COMMONWEALTH OF PENNSYLVANIA,  
STATE CONSERVATION COMMISSION, et al.

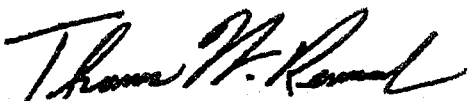
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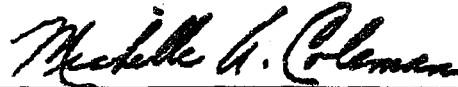
ORDER

AND NOW, this 3rd day of April, 2001, the State Conservation Commission's motion for summary judgment is **GRANTED** with respect to Paragraphs 3(g), (i), (k), (l), (m), and (n) of its notice of appeal based upon the Association's decision not to pursue those claims, but is **DENIED** in all other respects.

ENVIRONMENTAL HEARING BOARD

  
\_\_\_\_\_  
GEORGE J. MILLER  
Administrative Law Judge  
Chairman

  
\_\_\_\_\_  
THOMAS W. RENWAND  
Administrative Law Judge  
Member



---

**MICHELLE A. COLEMAN**  
Administrative Law Judge  
Member



---

**BERNARD A. LABUSKES, JR.**  
Administrative Law Judge  
Member



---

**MICHAEL L. KRANCER**  
Administrative Law Judge  
Member

**DATED:** - April 3, 2001

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

**For the Commission:**  
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Southcentral Regional Counsel

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**For George Christianson:**  
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rb



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WILLIAM T. PHILLIPY IV  
 SECRETARY TO THE BOARD

**JACQUES KHODARA,  
 EAGLE ENVIRONMENTAL LP**

v.

**COMMONWEALTH OF PENNSYLVANIA,  
 DEPARTMENT OF ENVIRONMENTAL  
 PROTECTION**

:  
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 :  
 : **EHB Docket No. 2001-046-MG**  
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 : **Issued: April 5, 2001**  
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**OPINION AND ORDER ON  
 MOTION TO INTERVENE**

**By George J. Miller, Administrative Law Judge**

**Synopsis**

The Board grants a motion to intervene by a municipality on the grounds that it has a sufficient stake in the outcome of the appeal to be an “interested party” pursuant to the Environmental Hearing Board Act.

**OPINION**

Before the Board is the motion of Jefferson County to intervene in an appeal by Jacques Khodara and Eagle Environmental, L.P. (collectively, Permittee) which challenges a determination by the Department that certain permits issued in connection to a landfill have expired or been revoked. For the reasons that follow, we will grant Jefferson County’s motion.

This appeal is the latest of several appeals filed by various parties in connection with the permits issued to the Appellants to operate the Happy Landings Landfill, located in Washington Township, Jefferson County. These appeals are in various stages of litigation in

various forums.<sup>1</sup> The current matter challenges a letter dated February 12, 2001, by the Department which informed the Permittee that the solid waste permit was void because no waste had been disposed of within five years of the issuance of the permit. Additionally, the letter revoked related air quality, NPDES and encroachment permits. Jefferson County, which is already an intervenor in the related appeal, seeks to intervene also in the present appeal.

The Environmental Hearing Board Act provides that “[a]ny interested party may intervene in any matter pending before the Board.” Act of January 13, 1988, P.L. 530, 35 P.S. § 7514(e). The Commonwealth Court recently explained that

in the context of intervention, the phrase “any interested party” actually means any person or entity interested, i.e., concerned in the proceedings before the Board. The interest required, of course, must be more than a general interest in the proceedings; it must be such that the person or entity seeking intervention will either gain or lose by direct operation of the Board’s ultimate determination.

*Jefferson County v. Department of Environmental Protection*, 703 A.2d 1063, 1065 n.2 (Pa. Cmwlth. 1997)(quoting *Wheelabrator Pottstown, Inc. v. Department of Environmental Resources*, 607 A. 2d 874, 876 (Pa. Cmwlth. 1992)). Other cases have likened the test for intervention to that for standing. *Borough of Glendon v. Department of Environmental Resources*, 603 A.2d 226 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 608 A.2d 32 (Pa. 1992). Clearly, Jefferson County has an interest in the outcome of litigation concerning the viability of permits for a landfill within its borders. *See Franklin Township v. Department of Environmental Resources*, 452 A.2d 718 (Pa. 1982); *Borough of Glendon v.*

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<sup>1</sup> For a more detailed summary of some of these cases, see *Jefferson County Commissioners v. DEP*, EHB Docket No. 96-061-MG (Opinion issued March 30, 2001).

*Department of Environmental Resources*, 603 A.2d 226 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 608 A.2d 32 (Pa. 1992).

The Permittee opposes the intervention of Jefferson County because it seeks to raise issues which are already addressed in other appeals. We believe that the question in the current appeal is a fairly narrow legal question that does not overlap with the earlier appeals challenging the issuance of the permit (*Jefferson County Supervisors v. DEP*, EHB Docket 96-061-MG) and the suspension of the permit (*Eagle Environmental, L.P. v. DEP*, EHB Docket No. 96-215-MG). In the event that Jefferson County seeks to introduce matters unrelated to the question of whether or not the solid waste permit is void as a matter of law, the Permittee is free to make an appropriate motion at that time. At this juncture, the possibility of unrelated issues is not a basis to deny the motion to intervene.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

JACQUES KHODARA,  
EAGLE ENVIRONMENTAL LP

v.

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION and JEFFERSON COUNTY,  
Intervenor

:  
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: EHB Docket No. 2001-046-MG  
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ORDER

AND NOW, this 5th day of April, 2001, the petition of Jefferson County to intervene in this appeal is hereby **granted**. The following caption shall be reflected on all future filings with the Board:

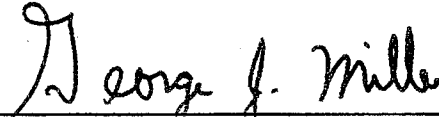
JACQUES KHODARA, EAGLE  
ENVIRONMENTAL, L.P.

v.

COMMONWEALTH OF  
PENNSYLVANIA, DEPARTMENT OF  
ENVIRONMENTAL PROTECTION and:  
JEFFERSON COUNTY, Intervenor

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: EHB Docket No. 2001-046-MG  
:  
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ENVIRONMENTAL HEARING BOARD



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GEORGE J. MILLER  
Administrative Law Judge  
Chairman

DATED: April 5, 2001

See following page for service list.

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

**For the Commonwealth, DEP:**  
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Kenneth Bowman, Esquire  
Southwest Region

**For Appellant:**  
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Christopher R. Nestor, Esquire  
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**For Intervenor:**  
Robert P. Ging, Jr., Esquire  
P.O. Box 220  
Confluence, PA 15424





includes a coal refuse disposal area, which is permitted under Coal Refuse Disposal Permit No. 02733702. The complex is inactive except for ongoing treatment obligations.

Both the deep mine and the refuse disposal area produce acid mine drainage (“AMD”). The Department has authorized Consol to collect AMD seeps from the refuse area and direct them via at least one borehole into the deep mine. The combined AMD is then treated by Consol’s treatment plant at the deep mine. In another appeal involving the same parties, *Maddock v. DEP*, EHB Docket No. 99-124-L, which is currently pending before the Board, it is essentially undisputed that Consol’s drilling of a conduit borehole had at least a temporarily adverse impact on the Maddocks’ nearby well.

Once AMD treatment was integrated into one system, the question presumably arose whether it was necessary to maintain separate bonds covering reclamation at the refuse area and the deep mine. Consol applied to revise the refuse area permit to, among other things, increase the bond for the permit to cover all of the AMD treatment at the complex. It correspondingly asked the Department to irrevocably waive collection of the reclamation bond that was posted for the deep mine. At first, the Department withheld waiving collection of the deep mine bond pending its review of Consol’s application to revise its refuse area permit. (Department Motion to Dismiss, Exhibit M.) Once the additional bonding was provided for the refuse area permit, however, the Department agreed to waive collection of the deep mine bond. (*Id.*) The Maddocks appealed from both the revision of the refuse area permit and the waiver of collection of the deep mine bond. This particular appeal is from the waiver.

The Maddocks contend in their notice of appeal that it was inappropriate for the Department to waive collection of the deep mine bond because the deep mine is essentially being used as the storage unit for all of the AMD that is being generated at the complex. In other

words, they contend that it is inappropriate to release a bond for a deep mine that not only has continuing treatment obligations, but is an integral part of a system that treats other area discharges as well.

The Department has filed a motion to dismiss. Consol has joined in the motion. The Department argues that (1) the Maddocks lack standing, and (2) the issues raised by the Maddocks “are not relevant.” We reject both arguments as presented in the current context and deny the motion to dismiss without prejudice to raise the arguments again after the development of a more complete record.

We described the basic principles of standing in *Giordano v. DEP*, EHB Docket No. 99-204-L (Opinion and Order issued October 4, 2000), as follows:

In order to establish standing, appellants must prove that (1) the action being appealed has had – or there is an objectively reasonable threat that it will have – adverse effects, and (2) the appellants are among those who have been – or are likely to be – adversely affected in a substantial, direct, and immediate way. *Friends of the Earth, Incorporated v. Laidlaw Environmental Services, Inc.*, 120 S. Ct. 693, 704-05 (2000) (“FOE”); *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 280-83 (Pa. 1975); *Wurth v. DEP*, EHB Docket No. 98-179-MG, slip op. at 16-17 (Opinion and Order issued February 29, 2000). The first question expresses the Board’s gatekeeper function; the Board will not allow a waste of resources on cases where there is no actual harm or credible threat of any harm to anybody and, therefore, no legitimate case or controversy. The appellants are not required to prove their case on the merits, but they must show that they have more than subjective apprehensions, and that the likelihood of adverse effects occurring is not merely speculative. *Ziviello v. DEP*, EHB Docket No. 99-185-R, slip op. at 7 (Opinion and Order issued July 31, 2000). The second question focuses on the particular appellants to ensure that they are the appropriate parties to seek relief because they personally have something to gain or lose as a result of the Board’s decision. The second question cannot be answered affirmatively unless the harm suffered by the appellants is greater than the population at large (i.e. “substantial”), and there is a direct and immediate connection between the action under appeal and the appellants’ harm (i.e. causation in fact and proximate cause). *William Penn, supra*. Ultimately, “[t]he

purpose of the standing doctrine is not to evaluate whether a particular claim has merit but rather to determine whether an appellant is the appropriate party to file an appeal from an action of the Department.” *Ziviello*, slip op. at 7 (citing *Valley Creek Coalition v. DEP*, 1999 EHB 935, 944).

\* \* \*

The appropriate evidentiary standard of review in evaluating a standing challenge depends upon when standing is challenged. In that respect, the standing issue is really no different than any other issue in the case. Although it is not necessary to plead standing, *Ziviello*, slip op. at 5, *Tessitor v. DER*, 1995 EHB 603, 606, *aff'd*, 682 A.2d 434 (Pa. Cmwlth. 1996), it is the appellants who are ultimately required to prove that they have standing if the question is put at issue. If the question is raised in a motion to dismiss early in the case, we essentially accept all of the appellant’s allegations as true and decide whether the opposing party is nevertheless entitled to judgment as a matter of law. *Beaver Falls Municipal Authority v. DEP*, EHB Docket No. 2000-098-R (Opinion and Order issued August 25, 2000); *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925. If the question is raised at or near the conclusion of discovery in the context of a summary judgment motion, we will only rule on the issue if there are no genuine issues of material fact and it is clear that the appellant does or does not have standing as a matter of law. Pa. R.C.P. 1035.2; *Ziviello*, slip op. at 4. If the question is still contested after the evidentiary hearing, we determine whether the appellants have carried their burden of proving that they have standing by a preponderance of the evidence. 25 Pa. Code § 1021.101; *see, e.g., Township of Florence*, 1997 EHB 763, 773-74.

*Giordano*, slip op. at 2-4.

In that the Maddocks’ well appears to have some hydrogeological connection to activities at the mine complex, and keeping in mind that we are ruling upon a motion to dismiss, we conclude that there is an objectively reasonable threat that the Maddocks would be among those who might suffer if inadequate bonding is in place to cover future treatment obligations. The deep mine is connected to the borehole, which may be connected hydrogeologically to the Maddocks’ well. Those connections are enough to create more than a merely speculative, subjective apprehension on the part of the Maddocks. The interest certainly appears greater than

that of a member of the general public who is interested in seeing that all laws are enforced. For current purposes, we conclude that the Maddocks have standing to proceed.

We now turn to the Department's contention that the Maddocks' issues are irrelevant. The Department's position boils down to the argument that the discharges at the complex are adequately covered by the increased bonding at the refuse area. The argument, however, begs the question presented in this appeal. We are not willing to assume in the current context that it is acceptable for bonds on a refuse area to cover a related deep mine treatment obligation. Even if it is acceptable in concept, it might be inappropriate to release the entire amount of the deep mine bond if the refuse area bonds prove to be inadequate.

There is a certain logic to the Maddocks' position that a bond should not be released on a mine that is obligated to treat AMD. *Cf. Al Hamilton Contracting Company v. DER*, 1995 EHB 855, 878 (DER may not release a bond for a surface mining permit where bond is less than the cost of long-term treatment of AMD discharges). On the other hand, the Department's position that duplicative bonding is not necessary also has some appeal. We are not able at this time to resolve this tension by way of a motion to dismiss without the development of a thorough factual record.

Accordingly, we issue the following Order:

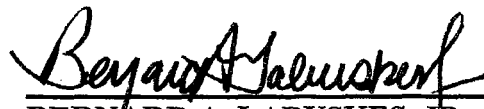
COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

RICHARD and CATHY MADDOCK :  
 :  
 v. : EHB Docket No. 2000-164-L  
 :  
 COMMONWEALTH OF PENNSYLVANIA, :  
 DEPARTMENT OF ENVIRONMENTAL :  
 PROTECTION and CONSOLIDATION COAL :  
 CO., Permittee :

ORDER

AND NOW, this 10th day of April, 2001, the Department's motion to dismiss is  
DENIED.

ENVIRONMENTAL HEARING BOARD

  
BERNARD A. LABUSKES, JR.  
Administrative Law Judge  
Member

DATED: April 10, 2001

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

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RICHARD and CATHY MADDOCK :  
 :  
 v. : EHB Docket No. 99-224-L  
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 COMMONWEALTH OF PENNSYLVANIA, : Issued: April 13, 2001  
 DEPARTMENT OF ENVIRONMENTAL :  
 PROTECTION and CONSOLIDATION COAL :  
 CO., Permittee :

ADJUDICATION

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

The Department revised a mining company's coal refuse disposal area permit to authorize the company to use a borehole that it had already drilled as a conduit to collect surface seeps and direct them to treatment. A *pro se* appeal by nearby well owners is sustained in part because the Department issued the revision without first having required the mining company to obtain updated hydrogeological and water supply information. The permit revision is remanded to the Department for reconsideration in light of updated information. The well owners' request that the revision be conditioned upon the mining company placing a bond on their well is denied because there is no basis for awarding that relief in this appeal.

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency with



the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1-1396.19a (“Surface Mining Act”); the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1996, P.L. 31, *as amended*, 52 P.S. §§ 1406.1-1406.21 (“Mine Subsidence Act”); the Coal Refuse Disposal Control Act, Act of September 24, 1968, P.L. 1040 *as amended*, 52 P.S. §§ 30.51-30.206 (“Coal Refuse Disposal Act”); and the Clean Streams Law, Act of June 22, 1937, P.L. 1987 *as amended*, 35 P.S. §§ 691.1-691.1001 (“Clean Streams Law”) (Commonwealth’s Exhibit (“C. Ex.”) 2.)

2. Richard and Cathy Maddock (the “Maddocks”) are individuals who reside in Plum Borough, Allegheny County. (Notice of Appeal; Maddocks Exhibit (“M. Ex.”) 14.)

3. Consolidation Coal Company (“Consol”) is a Delaware corporation authorized to do business in Pennsylvania. (C. Ex. 2.)

4. Consol is the permittee for the Renton Coal Refuse Disposal Area, Permit No. 02733702, located in Plum Borough, Allegheny County (the “refuse area”). The permit was first issued in 1984, and it has subsequently been renewed and revised. (C. Ex. 3.)

5. The refuse area is adjacent to the Renton deep mine, which is permitted under Permit No. 02841305 (the “deep mine”). (C. Ex.2.) The refuse area and deep mine are inactive except for compliance with ongoing treatment obligations. (Transcript (hereinafter “T.”) 232.)

6. Under the terms of a 1983 Consent Order and Agreement between the Department and Consol, a 1987 Consent Order and Adjudication between the Department and Consol, and plans submitted pursuant to the consent orders and approved by the Department, Consol is required to pump the mine pool in the deep mine, maintain a certain mine pool elevation, collect seeps and discharges present at the refuse area, divert those discharges to the deep mine, and treat the water in

the deep mine. (T. 166-169; M. Ex. 4; C. Ex. 2.)

7. Consol was authorized pursuant to the consent orders to direct the discharges from the refuse area to the deep mine through boreholes. (T. 169-170, 226, 237.)

8. On June 24, 1998, Consol submitted a "Notice of Intent to Explore or Request For Permit Waiver" form (the "NOI") to the Department. (M. Ex. 1.) The NOI notified the Department of Consol's intent to drill exploratory boreholes within the permitted area in order to locate a mine void for the purpose of establishing a permanent borehole for use as a conduit. (M. Ex. 1.)

9. Pursuant to 25 Pa. Code § 86.133, an NOI must be filed at least ten days in advance of drilling to give the Department an opportunity to object or comment if it chooses to do so, but no Departmental approval is necessarily required. (T. 64-65, 71.)

10. Consol drilled Borehole 10, the borehole that is pertinent in this appeal, before the Department acted upon the NOI. (T. 207; M. Ex. 14.)

11. The Maddocks live near Borehole 10. (M. Ex. 9; C. Ex. 1.)

12. Consol did not obtain any background data concerning the output and quality of the Maddocks' water supply well before drilling the borehole. (T. 38, 191.)

13. At about the same time as Consol drilled the borehole, the Maddocks' well went dry. (M. Ex. 9.) A nearby monitoring well a few hundred feet from the new borehole that had previously exhibited artesian flow also went dry. (T. 113-114; M. Ex. 9.)

14. The Maddocks reported the loss of their water supply to Consol. The next day, the Maddocks reported the loss of their water to the Department. (M. Ex. 9.)

15. Consol provided the Maddocks with a temporary water supply and began investigating the Maddocks' reported water loss. (M. Ex. 9.)

16. Consol installed casing and grouted the annular space of Borehole 10 after the Maddocks reported their water loss to the Department. (T. 220.) Thereafter, the Maddocks' well began producing again. (M. Ex. 9.) Artesian flow has returned to the nearby monitoring well. (T. 114.)

17. The Department continues to investigate the Maddocks' water supply complaint and has not reached a final decision as to whether the water supply has been restored. (T. 155, 190-191.)

18. In that there is no background information regarding the Maddocks' well, the Department will evaluate the well's output to assess whether an adequate quantity is produced for its preexisting uses and whether its quantity meets regulatory drinking water criteria. (T. 69-70, 189, 201, 214.)

19. Consol's borehole was successful in intercepting a mine void. (M. Ex. 2.) Whether or not a NOI would have been adequate for drilling temporary holes, the Department's view was that Consol's permit needed to be revised to authorize the ongoing use of the borehole. In other words, an NOI was inadequate to allow for the permanent use of the hole. (T. 43, 52, 149-150, 153, 158, 174-175, 180-181, 207.)

20. The Department directed Consol to apply for a permit revision. (T. 208.)

21. Consol applied for the permit revision in February 1999. (M. Ex. 2.) Consol did not include any updated hydrogeology information or alternative water supply information in its application. It simply referred the Department to information generated in connection with the original permit in 1984. (M. Ex. 2.) The Department did not require updated information. (T. 125, 130-131.)

22. The Department approved the permit revision on October 6, 1999, and this appeal is taken from that revision. (Notice of Appeal.)

## DISCUSSION

Our responsibility in this appeal is to make a *de novo* determination of whether Consol should have been issued a permit revision. *Warren Sand & Gravel, Inc. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975); *Smedley v. DEP*, EHB Docket No. 97-253-K (Adjudication issued February 8, 2001) slip op. at 25-30. We assess whether the issuance of the permit is consistent with the law and is otherwise reasonable and appropriate. *Smedley, supra*; *O'Reily v. DEP*, EHB Docket No. 99-166-L (Adjudication issued January 3, 2001). As the parties challenging the issuance of the permit revision, the Maddocks bear the burden of proving by a preponderance of the evidence that issuing the revision was an error of law or inappropriate. 25 Pa. Code § 1021.101(c)(2).

The Maddocks present what they have characterized as two basic arguments in their initial post-hearing brief. (Maddock Brief at 1.) First, they argue that Consol should have obtained background data relating to their well before Borehole 10 was drilled. Second, they argue that Consol should not have drilled the borehole pursuant to a Notice of Intent to Explore (NOI). As a result, they assert that something more needs to be done about their well. Specifically, they seem to be asking that a “bond” be placed on their well so that they can be ensured that they have a safe, permanent water source. (Maddock Brief at 16.)

In their reply brief, the Maddocks argue that the permit revision should not have been issued without considering updated information on hydrogeology and alternate water supplies. They ask

that we remand the revision to the Department with instructions to reconsider the revision based upon necessary permitting information. It is important to point out that the Maddocks do not question in either of their briefs that the borehole that was authorized by the permit revision should continue to remain in place and in use. In other words, they do not contest its ongoing use as a conduit for acid mine drainage.

With regard to the Maddocks' allegation that Consol erred in drilling the borehole in the first instance pursuant to an NOI rather than a permit revision, we conclude that the initial use of an NOI to explore for mine voids for the placement of a conduit was appropriate. 25 Pa. Code § 86.132 ("coal exploration" includes drilling to gather environmental data to establish the conditions of the area). On the other hand, it was also appropriate for the Department to have required the permit to be revised once it was determined that the hole would be used on a going-forward basis. 25 Pa. Code § 86.52(a) (permit revision required for a change to coal mining activities). That is, in fact, exactly what the Department required. Even if we assume for purposes of argument that proceeding pursuant to an NOI was a mistake, the Maddocks have never alleged that the Department should have refrained from requiring Consol to revise the permit to rectify Consol's mistake. We do not independently view it to have been an error under the circumstances for the Department to have required an after-the-fact revision. To the contrary, we conclude that it was the proper action to take.

The Maddocks' second citation of error was that Consol did not obtain any baseline data from their well before drilling the borehole. There is no such requirement, however, for exploratory activities. 25 Pa. Code § 86.133. It was obviously impossible to obtain pre-borehole data once the need to issue a permit revision was established. It was impossible when the Department acted and it is impossible now.

Turning to the Maddocks' claim that additional hydrogeological and water supply information should have been obtained prior to the issuance of the revision, an application for a permit revision must contain *inter alia* "[a] description of the proposed revisions, including appropriate maps, plans and application to demonstrate the proposed revision complies with the acts and this chapter" 25 Pa. Code § 86.52. The use of the adjective "appropriate" leaves room for the exercise of discretion on the part of the Department and this Board.

The Department contends that it was lawful and reasonable not to require updated information because no new areas for mining or coal refuse disposal were being proposed, the hydrogeology of the area had not changed since the submission of the 1984 permit application, the facility is inactive, the revision was prompted by consent-order treatment obligations, and the Department already had information regarding water quality in the area. (Department Brief at 10-11, 27-28.) Consol makes a similar point: "DEP did not require Consol to submit any additional hydrologic information with the application because in the view of the DEP permit reviewer such information was not necessary given the nature of the proposed revision." (Consol Brief at 6-7.) The Department also argues that such hydrogeological information should only be required if additional mining or coal refuse disposal is anticipated. (Brief at 27.)

We do not believe that the Department violated the law when it decided not to require new hydrogeologic and water supply information, but we do conclude that it acted unreasonably under the circumstances of this case. Taking the Department's points in reverse order, a permit revision is required for "a change to the coal mining activities." 25 Pa. Code § 86.52. The requirement to obtain a revision is not necessarily limited to cases where there will be additional mining or refuse disposal. Indeed, the Department required a revision in this case.

The Department points to the fact that the regulations describing hydrogeological and water source information required in permit applications for coal refuse disposal refer to *proposed* operations. *See, e.g.*, 25 Pa. Code § 90.13. Virtually every permitting regulation, however, refers to “proposed” disposal activities. 25 Pa. Code §§ 90.11-90.22. We do not accept that the use of “proposed” in these regulations was meant to exclude their application to permit revisions.

This case presents a situation where it is essentially undisputed that an operator’s “coal mining activities” (*see* 25 Pa. Code § 86.1) likely had at least a temporary impact on a water source, and perhaps a nearby monitoring well with artesian flow as well (M. Ex. 9). Although it remains to be determined whether the effect was merely temporary, at least some sort of a hydrogeological connection appears to have been established. Under these circumstances, we do not believe that it was reasonable to rely upon information that was generated in 1984 regarding hydrogeology and alternative water supply information. The information mandated by 25 Pa. Code § 90.15 would have been particularly helpful under the circumstances:

The application shall identify the extent to which the proposed coal refuse disposal activities may result in contamination, diminution or interruption of an underground or surface source of water within the proposed permit or adjacent area for domestic, agricultural, industrial or other legitimate use. If contamination, diminution or interruption results, then the description shall identify the alternate sources of water supply that could be developed to replace the existing sources.

25 Pa. Code § 90.15. Here, there is more than a hypothetical risk to at least one water source. We have no way of knowing whether that risk has passed. We do not know whether other sources are at risk, and if so, what alternative sources might be available. Given what happened here, the only reasonable choice was to require this information before issuing the revision.

Having found error, we must decide what needs to be done about it. Initially, we reject the

Maddocks' request that their well be "bonded." The investigation regarding the Maddocks' water loss is currently underway. It has yet to be determined whether the Maddocks' well suffered anything other than a temporary loss of flow. Whether *any* action is appropriate regarding the well remains to be seen. We cannot justify requiring Consol to place a bond on the well where its legal responsibility had not been established. That question remains open and is not the focus of *this* proceeding.

We do, however, feel compelled to remand the permit revision to the Department for reconsideration in light of updated hydrogeological and water-supply information specified in 25 Pa. Code §§ 90.1(a)(4), 90.13, and 90.15. The information should have been obtained before the revision was issued. It is not a useless exercise to demand it now. The borehole remains in place and in use. As previously mentioned, we have no basis for saying that it presents no future risk to the Maddocks or the numerous other residences located in close proximity to the mine complex. (C. Ex. 1.) In the event that the risk is realized, it remains appropriate to plan for alternative supplies. These studies should include information gleaned from the obviously apposite events that have occurred since 1984.

This generalized investigation should be distinguished from the Maddocks' ongoing water loss investigation. While the data to be investigated may overlap, the foci of the two investigations are different. The purpose of the general investigation is to determine whether the borehole in its current condition and location should be permitted on a continuing basis, and to prepare for any water losses that may occur. On the other hand, the purpose of the water loss investigation is to assess whether the Maddocks' supply has been adequately restored.

We see no added value to conditioning the revision on the results of the water loss



investigation. First, we have not been referred to any legal authority to support such a condition. Secondly, such a condition would serve no incremental purpose. Regardless of how the investigation turns out, it will not dictate whether the revision should remain in place. For example, even if the investigation eventually disclosed that the Maddocks' well has been irreparably damaged as a result of the mining activity, it does not follow that the revision should be denied or that measures be taken with regard to the borehole. Consol may in such a case need to take action regarding the Maddocks' water needs, but it will in no event need to take any action regarding the borehole as a result of *that* investigation. The ongoing legitimacy of the permit revision and the water loss investigation are on parallel but completely independent tracks. One does not affect the other.

As we noted at the outset of this discussion, the Maddocks have not asked that Borehole 10 be closed. They have not presented any proof that it is causing any ongoing untoward effects. The hole has been integrated into the treatment system at the complex, and we have no independent reason to believe that its ongoing use presents any immediate danger. Although the additional investigation mandated by this Adjudication may change things, we will not vacate the permit revision, but we will remand it for further investigation in accordance with our Order.

One final note. The Maddocks have alluded to the Department's failure to date to take any enforcement action against Consol (beyond requiring the water loss investigation to be conducted) for proceeding pursuant to an NOI or not obtaining background well data. The Department's choice to date to not take some sort of enforcement action (in addition to directing a water loss investigation) in these circumstances is not appropriately before us.

## CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter.
2. The appellants bear the burden of proving that the Department acted unlawfully or otherwise unreasonably and inappropriately in issuing the subject permit revision.
3. The appellants proved that the Department acted unreasonably in issuing the subject permit revision without having first required Consol to provide updated hydrogeological and water source information as required by 25 Pa. Code §§ 90.11(a)(4), 90.13, and 90.15.
4. The appellants failed to prove that the permit revision should have been conditioned upon a "bond" being placed on their well.

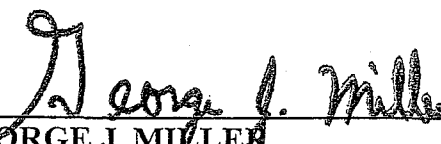
COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

RICHARD and CATHY MADDOCK :  
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 v. : EHB Docket No. 99-224-L  
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 COMMONWEALTH OF PENNSYLVANIA, :  
 DEPARTMENT OF ENVIRONMENTAL :  
 PROTECTION and CONSOLIDATION COAL :  
 CO., Permittee :

ORDER

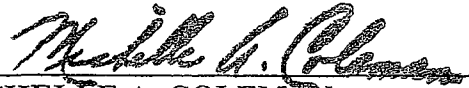
AND NOW, this 13th day of April, 2001, this appeal is **SUSTAINED** as follows. The subject permit revision is remanded to the Department for reconsideration in light of updated hydrogeological and alternative water supply information required pursuant to 25 Pa. Code §§ 90.11(a)(4), 90.13, and 90.15. The Department shall determine within 120 days whether the revision should remain in effect. Absent such a determination, the revision is **VACATED** effective the 121<sup>st</sup> day following the issuance of this Order.

ENVIRONMENTAL HEARING BOARD

  
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GEORGE J. MILLER  
Administrative Law Judge  
Chairman



THOMAS W. RENWAND  
Administrative Law Judge  
Member



MICHELLE A. COLEMAN  
Administrative Law Judge  
Member



BERNARD A. LABUSKES, JR.  
Administrative Law Judge  
Member



MICHAEL L. KRANCER  
Administrative Law Judge  
Member

**DATED:** April 13th, 2001

**c:** **For the Commonwealth, DEP:**  
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**DEFENSE LOGISTICS AGENCY,  
 DEPARTMENT OF THE ARMY, and  
 DEFENSE SUPPLY CENTER  
 PHILADELPHIA**

**EHB Docket No. 2000-004-MG**

v.

**Issued: April 16, 2001**

**COMMONWEALTH OF PENNSYLVANIA,  
 DEPARTMENT OF ENVIRONMENTAL  
 PROTECTION and THE PHILADELPHIA  
 HOUSING AUTHORITY, Intervenor**

**OPINION AND ORDER ON CROSS-MOTIONS  
FOR SUMMARY JUDGMENT**

**By George J. Miller, Administrative Law Judge**

**Synopsis:**

Cross-motions for summary judgment are granted in part and denied in part. The Department's motion is granted with respect to (1) the Appellant's liability under the Clean Streams Law and the Storage Tank Act, (2) the Appellant's waiver of its sovereign immunity, and (3) that the Department's enforcement order is not in violation of the terms of the Consent Order and Agreement and (4) the Department's failure to take action against another responsible party. The Board denies the Appellant's Motion for Summary Judgment on its claim that the issuance of the enforcement order against the Appellant alone was improper because the conflicting claims of the parties involve disputed issues of material fact to be resolved at the hearing on the merits.

## BACKGROUND

This appeal by the Defense Logistics Agency (the Appellant)<sup>1</sup>, a unit of the United States Army, challenges an Order issued by the Department requiring it to take remedial action with respect to a large plume of non aqueous phase liquid (NAPL) hydrocarbon underlying a major portion of South Philadelphia. The area of this plume includes the Appellant's facility, refining facilities owned by Sunoco and the Passyunk Homes property owned by the Philadelphia Housing Authority. The Order was issued under the authority of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001 (Clean Streams Law), and the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101 - 6021.2104 (Storage Tank Act), among other legislation.

The Order requires the Appellant to, among other things, operate and maintain the NAPL removal system designed and constructed by Sunoco at the Passyunk Homes property, to create and operate any additional remedial systems necessary to remove as much of the petroleum NAPL contamination from the affected area as is practicable, to prepare needed risk assessment studies and to meet costs related to the remediation, including the Department's expenses of supervision of the Appellant's compliance with the Order.

The notice of appeal claims that the Order is not supported by the evidence, is not a proper exercise of authority and is an abuse of discretion because:

- (a) Appellant has not waived its sovereign immunity to subject it to claims under the Clean Streams Law;
- (b) the Department inappropriately charged the Appellant with responsibility for the

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<sup>1</sup> The appeal was filed in the name of the Defense Logistics Agency, the Department of the Army and the Defense Supply Center Philadelphia. The Appellant's counsel refers to these

subject pollution and its remediation pursuant to the Clean Streams Law, the Storage Tank Act and the Administrative Code;

- (c) the remediation measures required by the Department's Order are not within the scope of the enforcement powers provided the Department by these statutes;
- (d) the Order violated the terms and spirit of the Agreement including its dispute resolution provisions;
- (e) the Department failed to properly take action against Sunoco;
- (f) the Department inappropriately ordered Appellant to assume responsibility for an operation of a portion of Sunoco's sewer air collection and filtration system; and
- (g) the Department inappropriately ordered reimbursement of expenses which interferes with an established agreement among the Appellant, Sunoco and the Department.

The Department has been attempting to direct a remediation of this contamination for some time. Sunoco began an investigation of the extent of this NAPL plume under a consent order and agreement with the Department in 1993. The Appellant was induced to join the effort to achieve a remediation of this plume under various joint agreements beginning with the three-way 1996 consent order and agreement (Agreement) by and among the Appellant, Sunoco and the Department.

Under the Agreement the NAPL plume was delineated, a NAPL remediation system was designed, risk assessment studies were commenced and initial recovery operations were commenced. The Department's effort to assign the Appellant financial responsibility with Sunoco for the development of an odor abatement study and remediation system in the Passyunk

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three entities as a singular appellant.



Homes area by a regulatory decision under the Agreement was defeated by the Appellant's appeal to this Board as a part of the agreed upon dispute resolution process. The Board set aside that decision as being improper under the Agreement and the stipulated record entered by the parties for the Board's decision. That stipulated record included a risk assessment study, then in draft form, that did not demonstrate an unacceptable health or environmental risk. The Board concluded that such a finding was required to enable the Department to issue its regulatory decision under the Agreement. *Defense Personnel Defense Center v. DEP*, 1998 EHB 512.<sup>2</sup>

The Department's Motion for Partial Summary Judgment and Motion *In Limine* seek a judgment that the Appellant is strictly liable for remediation of the NAPL plume under both the Clean Streams Law and the Storage Tank Act, that the Appellant has no defense of sovereign immunity as claimed in its notice of appeal, that the issuance of the Order is not in violation of the terms of the Agreement, and that the Department's decision not to name Sunoco in the Order is a valid exercise of its enforcement discretion.

The Appellant's Cross-Motion for Summary Judgment and Response to the Department's Motion for Summary Judgment does not contest its liability as a general matter and makes no claim that it has a defense of sovereign immunity. It does claim, however, that the issuance of the Order was an abuse of discretion because, among other things, it failed to comply with the Department's enforcement policy, was based on a misunderstanding of important facts relating to the Agreement, was based on improper use of a confidential memorandum, deviated from the Department's normal processes and negated the dispute resolution process agreed to in the Agreement. The cross-motion also claims that the Order's direction that the Appellant continue

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<sup>2</sup> The present Appellant, Defense Logistics Agency, is a successor to the Defense Personnel Support Center. It was so named after the appeal in the prior proceeding was filed.

to fund a Technical Advisory Group (TAG) and that its direction to reimburse the Department for its oversight expenses is an inappropriate exercise of its enforcement powers and redundant to reimbursement already required of the Appellant under a separate agreement. The Appellant argues that these claims demonstrate that the Order was issued as a result of manifestly unreasonable partiality, prejudice, bias, ill-will or misapplication of the law.

The Department's motion was filed before the completion of discovery. The Appellant was given an extension of time to respond to the motion until after discovery was completed on the understanding that the Board would consider the Department's motion to have been filed after the completion of discovery for purposes of deciding the Department's motion. All discovery proceedings were completed near the end of November, 2000. The Philadelphia Housing Authority was permitted to intervene on December 8, 2000. That agency joined in the Department's Motion for Summary Judgment. The Appellant's cross-motion and response was filed with the Board on January 22, 2001, and the Department's response to the cross-motions and reply was filed on February 16, 2001. The Appellant's replies were filed on March 7, 2001. The Board issued one previous opinion and order on discovery matters on October 23, 2000.

### **DISCUSSION**

The grant of summary judgment is proper under Rule 1035.2 of the Pennsylvania Rules of Civil Procedure whenever (1) there is no genuine issue of material fact that could be established by additional discovery or expert report, or, (2) after completion of discovery relevant to the motion, the party opposing the motion who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. *Schreck v. Department of Transportation*, 749 A.2d 1041 (Pa. Cmwlth. 2000); *Kee v. Pennsylvania Turnpike Commission*, 743 A.2d 546 (Pa.

Cmwlth. 2000). The grant of summary judgment is warranted only in a clear case and the record must be viewed in a light most favorable to the non-moving party resolving all doubts regarding the existence of a genuine issue of material fact against the grant of summary judgment. *See Young v. Department of Transportation*, 744 A.2d 1276 (Pa. 2000); *County of Adams v. DEP*, 687 A.2d 1222 (Pa. Cmwlth. 1997).

Applying these principles to the Department's motion, we will grant the motion with respect to (1) the Appellant's liability under the Clean Streams Law and the Storage Tank Act, (2) the waiver of the defense of sovereign immunity by section 313 of the federal Clean Water Act, 33 U.S.C. § 1323, and by sections 6001 and 9007 of the federal Solid Waste Disposal Act, 42 U.S.C. §§ 6961 and 6991f, and (3) the Appellant's claim that the issuance of the Order requiring the Appellant to undertake remedial action was in violation of the Agreement. We grant in part the Department's Motion for Summary Judgment with respect to the Department's failure to direct remedial action by Sunoco in the Order.

Applying these principles to the Appellant's cross-motion, we will deny the Appellant's motion based on the claims that the issuance of the Order was an abuse of discretion or was erroneous for other reasons because the totalities of the Appellant's evidence of irregularities in the Department's decision to issue the Order against the Appellant might possibly support a conclusion that the Department's action was improper. However, resolution of these questions necessarily requires the Board to consider facts currently in dispute and to make judgments concerning the credibility of witnesses; therefore summary judgment is inappropriate. We will also deny the Appellant's motion concerning those aspects of the Order relating to the reimbursement of expenses for similar reasons set forth below.

### **Liability under the Clean Streams Law and the Storage Tank Act**

The Appellant's response to the Department's motion does not challenge the Department's claim that the Appellant is liable for remediation of the NAPL plume under the Clean Streams Law and the Storage Tank Act.<sup>3</sup> The Department's motion is supported by admissions of the Appellant, an affidavit of David Burke, a Department employee, and an internal memorandum issued or approved by appropriate representatives of the Appellant which establish that the Appellant operated two petroleum storage facilities within the area underlain by the NAPL plume, that a large release occurred from the Appellant's 28<sup>th</sup> Street gasoline station and that there is evidence of serious gasoline contamination at this facility. (Department's Motion pars. 5-8 and supporting admissions and affidavit attached as Exhibits B-D) This evidence is sufficient to establish the Appellant's liability under both of these Acts. Responsibility under the Storage Tank Act is clearly provided by that Act at 35 P.S. § 6021.1302. It provides whenever a release or danger of a release is or may be resulting from a storage tank in this Commonwealth, the Department may order the owner, operator, land owner or occupier take corrective action in a manner satisfactory to the Department. Essentially the same authority is provided by that Act at 35 P.S. § 6021.1309. The Storage Tank Act also creates a rebuttable presumption at 35 P.S. § 6021.1311 that a person who operates a storage tank shall be liable without proof of fault, negligence or causation, for all damages, contamination or pollution within 2,500 feet of the perimeter of the site of a storage tank containing or which contained a regulated substance of the type which caused the damage, contamination or pollution.

The Clean Streams Law at 35 P.S. § 691.307 prohibits the discharge of industrial wastes,

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<sup>3</sup> Instead, the Appellant contends that its status as a landowner was not the basis for the Department's order. *See* discussion below.

defined to include petroleum products, and declares that such a discharge without a permit is a nuisance. That Law at 35 P.S. § 691.610 also authorizes the Department to require by order compliance with such conditions as are necessary to prevent or abate pollution. Accordingly, we will grant summary judgment as to this liability issue.

### **Claim of Sovereign Immunity**

The Appellant's response to the Department's motion makes no response to the claim that the Appellant has waived the defense of sovereign immunity. In their reply brief, the Appellant agrees that it has withdrawn this claim. (Reply to PADEP's Response to Appellant's Cross-Motion for Summary Judgment at 2.) That withdrawal is fully justified. Section 313 of the federal Clean Water Act, 33 U.S.C. § 1323 provides that federal facilities shall comply with state water pollution requirements notwithstanding any immunity granted federal agencies including rule of law. Section 9007 of the federal Solid Waste Disposal Act, 42 U.S.C. § 6991f requires that each federal agency having jurisdiction over any underground tank be subject to and comply with state requirements with respect to such a tank to the same extent as any other persons. Accordingly, this defense has been clearly waived by the Congress for agencies of the federal government. Accordingly, we grant the Department's motion as to the Appellant's sovereign immunity claims set forth in the notice of appeal.

### **The Terms of the Agreement-Remedial Action**

The notice of appeal claims that the issuance of the Order solely against the Appellant violated the terms and spirit of the Agreement as well as the terms of the dispute resolution process set forth in the Agreement. The Department's motion seeks summary judgment on these issues primarily on the ground that the Department reserved in the Agreement "all other rights to institute equitable, administrative, civil and criminal actions with respect to any matter addressed

by this Consent Order and Agreement, including the right to require additional measures to achieve compliance with applicable law....” (Agreement, par. 17, Exhibit A to the Department’s Motion)

In the Board’s previous Adjudication involving the Appellant and the Department we specifically referred to this reservation of rights and entered a Conclusion of Law that the Department remains free to pursue whatever enforcement action it may choose to bring against either Sunoco or the Appellant under the authorities granted it by law to require that the odor abatement project then under consideration be completed or such other remedial action as it may deem proper. *Defense Personnel Support Center v. DEP*, 1998 EHB 512, 534-35.

The Appellant’s Motion and Response do not address this provision. Instead, the Appellant complains that the Regional Director who issued the Order misunderstood some facts, issued the Order in the mistaken belief that the Agreement had expired, did not know the details of a settlement offer the Appellant had made to Sunoco and issued the Order in violation of the Department’s enforcement policy. We see nothing in these claims that are material to the Department’s authority to require the Appellant to undertake action to remediate the NAPL plume because the Agreement reserved this right to the Department. Accordingly, we will grant the Department’s motion to the extent that the Appellant claims that this aspect of the Order was in violation of the terms of the Agreement. The Appellant’s claims that those aspects of the Department’s Order relating to cost reimbursement violate the terms of the Agreement are discussed below.

#### **Issuance of the Order Against the Appellant Alone**

The Department contends that issuing the Order to the Appellant alone was not improper because this Board’s decisions do not require it to name all possible parties in an order. In

addition, the Department says that it has chosen, as it had the discretion to do, to base its order solely on the strict owner and occupier provisions of the Clean Streams Act and the Storage Tank Act, and under these provisions the source of the contamination is irrelevant. (Department Motion, ¶¶ 46-49)

The Appellant, by contrast, claims in its cross-motion that the issuance of the Order was the product of a demonstrable error in judgment, manifestly unreasonable judgment, partiality, prejudice, bias, ill-will, and misapplication of law. (Appellant's Cross-Motion, p. 3) This claim is based primarily on the assertions that the Department in issuing the Order failed to comply with its enforcement action policy, was based on a misunderstanding of important facts, deviated from its normal practice in issuing the Order, negated the dispute resolution process agreed upon in the Agreement and improperly considered a study developed under the dispute resolution provisions of the Agreement. (Appellant's Motion, pp. 3-6). With respect to the remediation tasks required by the Order, the Appellant complains that the Department has no power to require it to operate and maintain the remediation facility designed and constructed by Sunoco. (Appellant's Motion, pp. 38-39)

The Department responds that efforts to draft a settlement agreement which would succeed the Agreement had collapsed. As a result, the Department was without a legally and binding enforcement document in place so that the future performance of the necessary remediation could not be assured. The Department says that the important facts are that the NAPL plume was exceeding 1,000,000 gallons beneath the Appellant's facility, that the risk assessment promised under the Agreement was already 18 months late, and that the Agreement requiring continued operation of the remedial system and continued performance of the risk assessment had expired and were not being renewed. The Department also says that it issued the

Order solely based on the liability provisions of the Clean Streams Law and the Storage Tank Act. The Department also claims that it was proper to use the neutral technical experts' (NTE) reports developed in the dispute resolution proceedings in making internal enforcement decisions.

We will grant in part the Department's motion for summary judgment with respect to appellant's claim that the Department improperly in failed to issue an order against Sunoco as well as against the Appellant. Paragraph 3.f of the notice of appeal states that the Department should have applied the Storage Tank Act's presumption of liability to Sunoco. Paragraph 3.g. complains that "the Department failed to properly take action against Sunoco and further failed to enforce the terms of its 1993 Consent Order and Agreement with Sunoco." We cannot grant relief to the Appellant based on these claims. Both the Clean Streams Law and the Storage Tank Act provide that nothing in the laws of this Commonwealth shall stop the Department from proceeding against any person releasing pollutants into the waters of this Commonwealth even though these waters are at the time polluted from other sources. 35 P.S. § 691.606 and 35 P.S. § 6021.1308.

We will deny the Department's motion with respect to other paragraphs of the notice of appeal because this contention directly conflicts with the Appellant's primary claim that the issuance of the Order to Appellant alone represents manifestly unreasonable judgment, partiality, prejudice, bias, ill-will, or misapplication of the law. This claim fits within our task to determine whether the Department's findings are correct and whether its action is reasonable and appropriate and otherwise in conformance with law. *Smedley v. DEP*, EHB Docket No. 97-253-K slip op. at 30 (Adjudication issued February 8, 2001). *See also Harriman Coal Corp. v. DEP*, EHB Docket No. 99-218-C, slip op. at 3, n.1 (Opinion issued July 21, 2000). Even a criminal



prosecutor must base his decisions on the purpose of the law and the protection of society and may not be based on prohibited considerations such as race, religion or motivated by bad faith or fraud. *Commonwealth v. Parker White Metal Co.*, 515 A.2d 1358 (Pa. 1986); *Commonwealth v. Lutz*, 495 A.2d 928, 935 (Pa. 1985); *In re Adams*, 764 A.2d 577, 582 (Pa. Super. 2000) Similarly, a decision by a trial court that is motivated by partiality, bias, prejudice or ill-will is an abuse of the court's discretion. *Harman v. Borah*, 756 A.2d 1116, 1123 (Pa. 2000)

Accordingly, we deny the Department's motion to the extent it relates to Paragraphs 3.d and 3.h of the notice of appeal. Paragraph 3.d of the notice of appeal states that the Department violated the Agreement by issuing the enforcement order "solely" against the Appellant. Paragraph 3.h of the notice of appeal asserts that the Department erred by ordering the Appellant to assume responsibility for the operation of a portion of Sunoco's treatment system. Under the circumstances of this case, it may very well be necessary for us to consider Sunoco's role in the cleanup in evaluating whether the terms of the enforcement order that was issued to the Appellant are not only lawful, but reasonable and appropriate. To say that the Department had the legal authority to issue the enforcement order is not to say that it was necessarily appropriate to do so. We must examine both questions. Whether it was appropriate, given the three-party consent order between the Department, the Appellant and Sunoco, and other myriad factors, implicates questions of fact and mixed questions of fact and law that will require further development at a hearing. In addition, whether the Department was motivated improperly by bias for or against Sunoco or the Appellant may be determinative or may only have slight bearing on our consideration of whether the enforcement order is reasonable and appropriate depending on the character of the evidence presented at the hearing. If we give the Appellant every benefit of the evidence it relies upon, we conclude that the claims which the Appellant makes with respect

to the Department's actions might conceivably be enough, taken together, to amount to a claim that the Department improperly issued the Order in whole or in part against the Appellant alone. For a good number of years, the Department pursued remediation of the NAPL plume through the efforts and the expense of both Sunoco and the Appellant. The sudden change of issuing the Order against the Appellant alone taken with the Appellant's claims that the Department's Order was procedurally irregular requires further factual development by both parties. Accordingly, we think the case is unusual enough so that a hearing on the merits is required.<sup>4</sup> Accordingly, both the Department's Motion for Summary Judgment and the Appellant's Motion for Summary Judgment on the claim that the Department acted improperly in issuing the Order to Appellant alone will be denied.

We have no hesitation however in rejecting the Appellant's Motion for Summary Judgment on the ground that the Department is without authority to require it to perform the remediation set forth in the Department's Order because it requires the Appellant to take over the operation of a facility designed and constructed by Sunoco. The Appellant cites no authority for its contention. In *Al Hamilton Contracting v. Department of Environmental Resources*, 659 A.2d 31 (Pa. Cmwlth. 1995), the Commonwealth Court made it quite clear that the Department has authority to order groundwater studies beyond the premises of an appellant whenever that is necessary to remediate the contamination involved. We see nothing in the requirement of the Order to indicate that the Appellant operate and maintain a facility constructed by another responsible party is beyond the Department's authority.

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<sup>4</sup> We most certainly could not grant summary judgment on the ground that the Order may be in violation of the enforcement policy memorandum because that statement of policy is not a legally binding regulation that has the force of law. See *Dauphin Meadows v. DEP*, EHB Docket No. 99-190-L (Opinion issued April 27, 2000); *Central Dauphin School District v. Department*

We also deny the Appellant's Motion for Summary Judgment on the ground that the Department utilized the NTE reports in making its internal enforcement decision. The Department responds that there is no legal confidentiality given to this report and that in any event its consideration of it was proper. Accordingly, the Motion for Summary Judgment on this ground alone must be denied because of disputed issues of material facts.

### **Cost Reimbursement Claims**

The Appellant contends first that the Department has no power to require the payment of Department oversight costs in supervising the remedy directed by the Order. We reject this contention for two reasons. To begin with, the Storage Tank Act specifically gives the Department authority to require oversight costs. That statute at 35 P.S. § 6021.1302(b) provides as follows:

**Assessment of expenses.**- For purposes of collecting or recovering the expense involved in taking corrective and cost recovery action pursuant to an order for recovering the cost of corrective action, litigation, oversight, monitoring, sampling, testing and investigation related to a corrective action, the Department may collect the amount in the same manner as civil penalties are collected under the provisions of section 1307(b).

The Appellant's second contention is that the Department does not have the authority to require the Appellant to continue to fund and otherwise support the Technical Advisory Group (TAG), initially established by the Agreement, which will advise and inform the residents and workers in the affected area and provide input to DEP. The Order further provides that the Appellant shall submit all risk assessment plans and work product to both the Department and to the TAG for review.

Finally, the Appellant contends that the Order improperly calls for reimbursement of

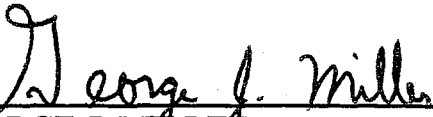
costs which are covered by the Department of Defense and Commonwealth Memorandum of Agreement (DCMOA) under which the Department and the Appellant agreed upon the reimbursement of certain remedial expenses. The Department responds to this objection on the ground that it is not at all clear that the Department's expenses incurred in the oversight or the work performed under the Order are included in the list of reimbursable activities covered by the DCOMA.

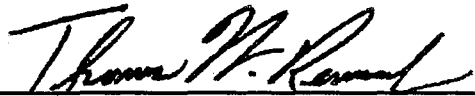
We will deny the Appellant's Motion for Summary Judgment with respect to these contentions. Both the Clean Streams Law and the Storage Tank Act provide the Department with authority to enter such orders as are necessary to aid in the enforcement of the provisions of those acts. *See* 35 P.S. § 691.610 and 35 P.S. § 6021.1309. Whether these provisions of the Order are "necessary to aid in the enforcement" of these acts is necessarily a factual issue. *Wagner v. DEP*, 1999 EHB 690. We therefore conclude that whether the inclusion of cost recovery provisions in the Order requiring the support of the TAG and provisions similar to those contained in the DCOMA is improper involves disputed issues of material fact relating to the necessity of the provisions in the Order to the enforcement of the Clean Streams Law and the Storage Tank Act. With respect to the DCOMA Agreement it may be, as the Department suggested in its brief, that the parties could reach an agreement on whether all the costs described in the Order may be recovered under the DCOMA.

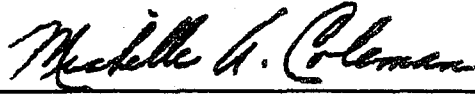
Accordingly, we enter the following Order:





ENVIRONMENTAL HEARING BOARD

  
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Administrative Law Judge  
Chairman

  
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THOMAS W. RENWAND  
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Member

  
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MICHELLE A. COLEMAN  
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BERNARD A. LABUSKES, JR.  
Administrative Law Judge  
Member

  
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MICHAEL L. KRANCER  
Administrative Law Judge  
Member

DATED: April 16, 2001

c:

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

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And

Norman G. Matlock, Esquire  
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WILLIAM T. PHILLIPY IV  
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**JOHN M. RIDDLE, JR.**

v.

**COMMOWEALTH OF PENNSYLVANIA,  
 DEPARTMENT OF ENVIRONMENTAL  
 PROTECTION and HEPBURNIA COAL  
 COMPANY**

:  
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:  
:  
: **EHB Docket No. 98-142-MG**  
: **(consolidated with 2000-001-MG)**  
:  
: **Issued: April 16, 2001**  
:

**OPINION AND ORDER ON  
 CROSS-MOTIONS FOR SUMMARY JUDGMENT**

**By George J. Miller, Administrative Law Judge**

**Synopsis:**

The Board denies a motion for summary judgment filed by the Department in a third-party appeal from the Department's approval of a Stage I bond release. The Board denies the motion as it relates to the issue of whether the permit area was appropriately restored to its approximate original contour and whether drainage controls are adequate. The appellant's motion for summary judgment on each of these issues is also denied as there are issues of material fact which must be resolved at the hearing on the merits. The Board also denies the Department's motion concerning the appellant's standing to object to the bond release on the ground that other landowners were not properly notified.

**OPINION**

This is an appeal from the Department of Environmental Protection's approval of a Stage I bond release for eight acres of land in New Washington Borough, Clearfield County on which Hepburnia Coal Company (Permittee) is permitted to conduct surface



mining activities. John M. Riddle, Jr. (Appellant), as a landowner, filed a timely appeal of this release on August 8, 1998. The Appellant objects to this release on the grounds that 1) the area is not reclaimed to its approximate original contour; 2) appropriate drainage controls have not been installed; and 3) all property owners were not notified of the Permittee's intent to seek Stage I bond release. Both the Department and the Appellant have moved for summary judgment on each of these issues. For the reasons that follow, we deny both motions.

The grant of summary judgment is proper under Rule 1035.2 of the Pennsylvania Rules of Civil Procedure whenever (1) there is no genuine issue of material fact that could be established by additional discovery or expert report, or, (2) after the completion of discovery relevant to the motion, the party opposing the motion who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. *Schreck v. Department of Transportation*, 749 A.2d 1041 (Pa. Cmwlth. 2000); *Kee v. Pennsylvania Turnpike Commission*, 743 A.2d 546 (Pa. Cmwlth. 2000). The grant of summary judgment is warranted only in a clear case and the record must be viewed in a light most favorable to the non-moving party, resolving all doubts regarding the existence of a genuine issue of material fact against the grant of summary judgment. *See Young v. Department of Transportation*, 744 A.2d 1276 (Pa. 2000); *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997).

#### **Approximate Original Contour**

Both the Department and the Appellant argue that they are entitled to judgment in their favor on the question of whether the land was reclaimed to its approximate original

contour as required by the regulations. Both parties admit that there had been mining on the site prior to the Permittee's activities. The Appellant argues that there is a slope that is much steeper than that which was left from the earlier mining activity. The Department's position is that the area has been properly regraded.

Section 86.174 of the Department's mining regulations describes the criteria which must be met before bond funds may be released. 25 Pa. Code § 86.174. Subsection (a) provides that Stage I bonds may be released when the permit area or a portion of the permit area "has been backfilled or regraded to the approximate original contour or approved alternative . . . ." 25 Pa. Code § 86.174. "Approximate original contour" is not explicitly defined in the regulations. However, guidance can be drawn from the definition of "contouring" in the definition section of the mining regulations:

Reclamation of the land affected to approximate original contour 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 with adequate provision for drainage.

25 Pa. Code § 87.1. Further guidance for defining "approximate original contour" can be found in the Department's backfilling regulations. For instance, final graded slopes need not be uniform, but must "approximate the general nature of the premining topography." 25 Pa. Code § 87.144(b). The emphasis of the regulations is blending the land surface with surrounding properties and removing impediments to its post-mining land use. *See Lucchino v. DEP*, 1998 EHB 473. With these principles in mind, we turn to the motions before us.

The Department contends that it is entitled to judgment in its favor on this question because the affected area has been returned to its approximate original contour.

In support of this contention, it relies upon the affidavits and inspection reports of Inspector Supervisor Nancy Rieg, and Mining District Monitoring and Compliance Manager Terry Confer. In these documents the Department contends that the area was inspected on June 29, 1998, and on July 2, 1998, and that both Department inspectors concluded that the area had been backfilled and properly regraded as required by the regulations.

This evidence is insufficient to prove that the area has been properly reclaimed for the purpose of summary judgment. The question of whether or not the property has been regraded to its approximate original contour is generally a question of fact and credibility upon which the Board must hear testimony. Although the inspection reports note that mining had occurred on the property before the Permittee began its activities, there is no evidence which describes the land prior to the Permittee's mining. Additionally, there is no factual basis upon which the Department inspectors based their conclusion that the area had been returned to its approximate original contour.<sup>1</sup> *See Martin v. DER*, 1988 EHB 1256 (the Department's evidence in support of bond forfeiture failed to demonstrate that the site was not backfilled to approximate original contour because it produced no evidence to show what the original contours of the land were). We have held in the past that for the purposes of summary judgment, the affidavit of a mining specialist alone stating that the property meets the standards for bond release, even if uncontroverted by the non-moving party, is insufficient for the Board to conclude that there are no questions

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<sup>1</sup> In lands that have been previously mined, an operator may be exempted from backfilling to approximate original contour with the Department's approval, provided certain other requirements are met. 25 Pa. Code § 87.142. There is no allegation that the Department approved such an application from the Permittee.

of fact in dispute, especially on an issue such as this. *Lucchino v. DEP*, 1999 EHB 214, 222; *Wayne v. DEP*, 1999 EHB 395; *cf. Township of Florence v. DEP*, 1996 EHB 1399, 1405 (the Board will not grant summary judgment concerning emissions decreases where the permittee's evidence is only a conclusion that emissions have decreased, but provides no values for the old level of emissions versus the new level of emissions). Therefore, the Department is not clearly entitled to judgment in its favor on this issue.

However, we will also deny the Appellant's motion for summary judgment on this question. In support of his contention that the property has not been returned to its approximate original contour, he has included photographs taken before the property was mined by the Permittee and photographs which were taken after reclamation work was completed. At best, these photos in combination with the Department's evidence raise an issue of material fact. *See Wayne v. DEP*, 1999 EHB 395. Accordingly, we will deny the Appellant's motion for summary judgment on this issue as well.

#### **Erosions and Sedimentation Controls**

In addition to regrading to an approximate original contour, the Department's regulations also require the installation of drainage controls in accordance with an approved reclamation plan. 25 Pa. Code § 86.174(a). The Department contends that this criterion has been met. In support of this contention it includes the Rieg and Confer affidavits which provide their conclusion that based on their July 2, 1998, inspection of the mining site, adequate drainage controls were in place in accordance with the Permittee's reclamation plan.

We do not believe the Department is clearly entitled to judgment in its favor on this issue either. First, the Department's motion relied heavily upon the affidavits of

Department employees, which were conclusory in nature and without a factual basis for comparison between the pre-mining and post-mining topography. In addition, there are questions in the July 2 inspection report which need to be explained. For example, the report notes a violation of 25 Pa. Code § 87.106, which relates to sediment control measures. Also, although it indicates that “additional ditches for CR area appear to be adequate” the report also notes that further work is necessary in an area below the ditches. Until these notations are explained the Board can not conclude, as a matter of law, that the requirements of 25 Pa. Code § 86.174(a) have been met. *Wayne; Lucchino*.

Similarly, we can not grant judgment in the Appellant’s favor. Although his motion papers include his own statements that there appears to be a great deal of runoff on the property, he has not proffered any evidence which would support judgment in his favor.

#### **Landowner Notification**

The Appellant argues that there are other landowners who should have been notified when the Permittee sought Department approval for Stage I bond release on the property. The Department contends that he does not have standing to pursue this objection.

Standing is a principle of jurisprudence which requires a party to a law suit to be one who is harmed in order to seek redress of an injury. *See generally William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975); *Parents United for Better Schools, Inc. v. School District of Philadelphia*, 646 A.2d 689, 691 (Pa. Cmwlth. 1994)(the purpose of the standing doctrine is to assure that the litigants have

“alleged such a personal stake in the outcome of the controversy as to . . . sharpen the presentation of the issues . . . .”(quoting *Baker v. Carr*, 369 U.S. 186 (1962)).

Although the Board has historically ruled that an appellant must have standing on each individual objection to a Department action which is raised in a notice of appeal,<sup>2</sup> a number of the Board’s administrative law judges believe that those holdings may be out of date. Instead, they would hold that where an appellant has standing to challenge a Department action, he may raise any legal argument in support of that claim. This raises an important question and would signal a significant departure from Board case law. Accordingly, we do not believe it is appropriate to rule on the standing question in the context of a motion for summary judgment. We will deny the Department’s motion at this time, without prejudice. At the hearing on the merits the parties may present evidence concerning the notice issue and fully brief the standing question in post-hearing memoranda.

We therefore enter the following:

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<sup>2</sup> E.g., *Florence Township v. DEP*, 1996 EHB 282, 289-90; *Concerned Citizens of Earl Township v. DER*, 1992 EHB 645, 651; *Estate of Charles Peters v. DER*, 1992 EHB 358, 365-67; *Borough of Glendon v. DER*, 1990 EHB 1501, 1504-05, reversed on other grounds, 603 A.2d 226 (Pa. Cmwlth. 1992).

COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

JOHN M. RIDDLE, JR.

v.

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION and HEPBURNIA COAL  
COMPANY

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: EHB Docket No. 98-142-MG  
: (consolidated with 2000-001-MG)  
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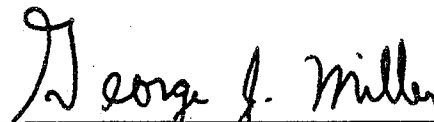
**ORDER**

AND NOW, this 16th day of April, 2001, IT IS HEREBY ORDERED that:

1. The motion for summary judgment of the Department of Environmental Protection in the above-captioned matter is **DENIED** on the issue of whether other landowners were properly notified that Hepburnia Coal Company intended to seek a Stage I bond release.

2. The motion for summary judgment of John M. Riddle, Jr. in the above-captioned matter is hereby **DENIED**.

ENVIRONMENTAL HEARING BOARD



---

GEORGE J. MILLER  
Administrative Law Judge  
Chairman

**Dated:** April 16, 2001

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

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Southcentral Region

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**SOUTHEASTERN CHESTER COUNTY** :  
**REFUSE AUTHORITY** :  
 : **EHB Docket No. 2001-032-K**  
 v. :  
 :  
**COMMONWEALTH OF PENNSYLVANIA,** : **Issued: April 18, 2001**  
**DEPARTMENT OF ENVIRONMENTAL** :  
**PROTECTION** :

**OPINION AND ORDER ON PETITION TO INTERVENE**

By Michael L. Krancer, Administrative Law Judge

**Synopsis:**

The Board grants a motion to intervene by the host municipality in a landfill permit expansion application denial case without restricting the scope of the intervention at this time as had been requested by the Permittee.

**OPINION**

Before the Board is the Petition of London Grove Township, filed on April 2, 2001, to intervene in an appeal by the Southeastern Chester County Refuse Authority (SECCRA) from the Department's termination of administrative review of SECCRA's landfill expansion permit application. The landfill is located in London Grove Township. Neither the Department nor SECCRA oppose the intervention as such, but SECCRA has requested that we allow the intervention only "on the condition that the scope of such intervention be limited to the eight (8) issues raised in SECCRA's Amended Notice of

Appeal.” Appellant’s Answer To Petition To Intervene of London Grove Township, filed on April 9, 2001. SECCRA’s Answer did not cite any case law which would support its request nor did it submit a memorandum of law on the subject.

The Board held a status conference call in this matter on Tuesday, April 17, 2001 in which counsel for SECCRA, the Department and the prospective intervenor, London Grove Township, participated and during which oral argument was heard on the request of SECCRA to prospectively limit the scope of London Grove’s intervention. During the argument, SECCRA still did not cite any case law supporting its request. London Grove directed our attention to Judge Miller’s very recent case of *Khodara v. DEP*, Docket No. 2001-046-MG (Opinion issued, April 5, 2001) as being instructive on the question presented by SECCRA and as support for the Board not placing an *ad initio* limitation on the scope of the intervention.

The Board will deny SECCRA’s request to place a prospective limitation on the scope of London Grove’s intervention. As we noted, SECCRA has cited no case law which supports the placement of an *ad initio* restriction on the scope of the host municipality’s intervention. We agree with London Grove that Judge Miller’s approach to an analogous situation in *Khodara* is applicable here. In *Khodara*, the permittee opposed intervention of the host County in a landfill case because, supposedly, it would seek to raise issues that were the subject of a different appeal that were unrelated to the appeal in which the County sought to intervene. Judge Miller stated that, “[a]t this juncture, the possibility of unrelated issues is not a basis to deny the motion to intervene.” *Khodara*, slip op. at 3. He further wrote that, “[i]n the event that Jefferson County seeks to introduce matters unrelated to the question of whether or not the solid waste permit is

void as a matter of law, the Permittee is free to make an appropriate motion at that time.”

*Id.*

Although we are not here dealing with whether intervention should be *barred* as in *Khodara*, we think that the philosophy underpinning the *Khodara* ruling is applicable to this situation where the permittee, based on the concern that the prospective intervenor may try to introduce matters allegedly outside the scope of the appeal, requests that the Board place a prior restraint on the *scope* of the intervention. We therefore decline to do so. As in the *Khodara* situation, in the event the permittee thinks that the intervenor crosses the line and attempts to introduce an extraneous matter into this appeal, the permittee is free to make an appropriate motion at that time.

SECCRA argues that this approach should be shunned here because it would supposedly place SECCRA at a practical, tactical and/or procedural disadvantage in that SECCRA would then have the burden to come forward to try to quash any attempt which may come by London Grove to introduce extraneous issues. We do not think that this concern is either sufficiently concrete or material to support the imposition of the requested prior restriction. London Grove informed the Board at oral argument that it did not see that it would be attempting to introduce matters that were extraneous to those already at issue in this appeal. We see a prior restriction as a rather remarkable measure that we will not impose it in a vacuum without having been provided any factual or legal support that such a step is warranted and necessary. In this case, SECCRA provided neither.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD


SOUTHEASTERN CHESTER COUNTY :  
REFUSE AUTHORITY :  
 : EHB Docket No. 2001-032-K  
 v. :  
 :  
 COMMONWEALTH OF PENNSYLVANIA, :  
 DEPARTMENT OF ENVIRONMENTAL :  
 PROTECTION :

ORDER

AND NOW, this 18<sup>th</sup> day of April, 2001, the petition of London Grove Township to intervene in this appeal is hereby **granted**. The following caption shall be reflected on all future filings with the Board:

SOUTHEASTERN CHESTER :  
COUNTY REFUSE AUTHORITY :  
 v. : EHB Docket No. 2001-032-K  
 COMMONWEALTH OF :  
 PENNSYLVANIA, DEPARTMENT :  
 OF ENVIRONMENTAL PROTECTION :  
 And LONDON GROVE TOWNSHIP, :  
 Intervenor :

ENVIRONMENTAL HEARING BOARD

  
\_\_\_\_\_  
MICHAEL L. KRANCER  
Administrative Law Judge  
Member

DATED: April 18, 2001

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

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

**PENNSBURG HOUSING PARTNERSHIP, L.P. :**

**v.**

**COMMONWEALTH OF PENNSYLVANIA,  
 DEPARTMENT OF ENVIRONMENTAL  
 PROTECTION and UPPER HANOVER  
 TOWNSHIP, Intervenor**

:  
 :  
 : **EHB Docket No. 99-216-K**  
 :  
 : **Issued: April 23, 2001**  
 :  
 :

**OPINION AND ORDER**

**By Michael L. Krancer, Administrative Law Judge**

**Synopsis:**

The Board denies Appellant's Motion For An Order Compelling Department of Environmental Protection To Approve Amendment Of [Act] 537 Plans To Facilitate Settlement Agreement. There are factual matters unresolved. Also, the relief requested is not connected to and goes well outside the scope of the matter under appeal.

**OPINION**

**Background**

Before the Board is the Motion of Appellant, Pennsburg Housing Partnership, L.P.'s (Partnership) "For Order Compelling Department of Environmental Protection To Approve Amendment Of [Act] 537 Plans To Facilitate Settlement Agreement." The background of this matter was described in the Board's December 30, 1999 Opinion and Order granting the Petition to Intervene of Upper Hanover Township (Upper Hanover or Upper Hanover Township).

*Pennsburg Housing Partnership, L.P. v. DEP*, 1999 EHB 1031. Briefly, this is an appeal by the Partnership of the Department's September 15, 1999 denial of its private request to revise the official Sewage Facilities Plan (Private Request) of Upper Hanover. The Partnership had filed the Private Request pursuant to section 5 of the Sewage Facilities Act which provides that "any person who is a resident or property owner in a municipality may request the department to order the municipality to revise its official plan where said person can show that the official plan is inadequate to meet the resident's or the property owner's sewage disposal needs". 35 P.S. § 750.5(b). The Partnership's Private Request was related to its development of a 70 unit residential facility consisting of 51 multi-family dwellings and 19 single-family dwellings. The development straddles the line between Pennsburg Borough and Upper Hanover. All of the multi-family units and 10 of the 19 single-family units are situated in Pennsburg Borough. The other nine single-family units are situated in Upper Hanover. The Private Request sought a Department order requiring Upper Hanover to revise its official sewage facilities plan to allow the nine single-family units physically located in Upper Hanover Township to make sewer connections to the Upper Montgomery Joint Authority's (UMJA) Red Hill Interceptor. Upper Hanover Township had refused to make that change to its Act 537 Plan and the Department, in turn, denied the Private Request and Pennsburg filed this Appeal on October 20, 1999.

Pursuant to the Board's November 9, 2001 Pre-Trial and Trial Scheduling Order (Scheduling Order), trial in this matter is scheduled to commence on July 17, 2001. The Scheduling Order provides that dispositive motions are to be filed by March 19, 2001, which is the day on which the Partnership filed the instant Motion.

The Motion alleges that in October, 2000, Appellant, Upper Hanover Township and the Upper Hanover Authority have resolved the crux of the underlying dispute in this case by

agreeing that the Partnership shall be permitted to connect the nine single-family lots to the UMJA system. The settlement is supposedly memorialized in a Settlement Agreement dated October 10, 2000 which is attached as Exhibit "A" to the Motion. Moreover, in April, 2000 Upper Hanover Township revised its Act 537 Plan to accommodate the settlement and, in May, 2000, Pennsburg Borough likewise amended its Act 537 Plan to allow the nine units to be serviced by the UMJA.<sup>1</sup> The Partnership states that despite the purported settlement, the Department has refused to approve the respective municipalities' Act 537 Plan revisions to permit the nine units in question to be connected to the UMJA system. Rather, says the Partnership, the Department is attempting to improperly leverage its power under Act 537 to force the municipalities to address totally unrelated concerns and problems the Department supposedly has with the respective municipalities' Act 537 Plans.

The Motion concludes by stating that "once the parties have agreed to resolve the underlying dispute, the Department is obligated to approve the respective 537 Plans to enable the resolution to be carried out."<sup>2</sup> The relief requested is that the Board enter an Order compelling the Department to approve the 537 Plan Amendments of Upper Hanover Township and Pennsburg Borough to facilitate the Settlement Agreement between the Partnership, Upper Hanover Township and Upper Hanover Authority.

On April 10, 2001, Upper Hanover Township filed a "Memorandum In Support" of the

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<sup>1</sup> Exhibit "B" to the Motion is Resolution No. 2000-4 of the Upper Hanover Township Board of Supervisors which allegedly amends its Act 537 Plan. Exhibit "D" is a letter from the Secretary-Treasurer of the Borough of Pennsburg to a company called Pennrose Properties, Inc. stating that the regular meeting on May 1, 2000 of the Borough Council voted unanimously to amend its Act 537 Plan to allow the nine units in question to attach to the UMJA.

<sup>2</sup> The reference to the "respective 537 Plans" presumably means the purported amendments to the respective municipalities' Act 537 Plans which allegedly occurred in April and May of 2000.



Partnership's Motion.

DEP filed its response on April 16, 2001. DEP denies many of the critical factual allegations in the Partnership's Motion. The Department alleges that although Upper Hanover Township did recently amend its Act 537 Plan, the revision did not include a provision for the connection of the nine lots in question to UMJA facilities. Indeed, as the Department was reviewing the proposed revision to Upper Hanover's Plan, the Department was so confused about what the proposed revision included that it questioned the Township's consultant whether the Township was trying to revise its Plan to provide for the nine units to connect to the UMJA. Upper Hanover supposedly responded by telling the Department that it was not addressing the nine units as part of the revision submission then pending but, instead, was intending to address those units as part of a regional planning effort together with other constituent members of UMJA. As of this time, according to DEP, Upper Hanover has not even submitted to the Department for its disposition any supposed revision of its Plan which proposes the connection of the nine lots to the UMJA. Indeed, the Department alleges that Upper Hanover is not a member of the UMJA. Also, the Department professes that it has no knowledge at all of any revision to the Act 537 Plan of Pennsburg Borough.

#### Discussion

The Motion must be denied for numerous reasons. From a factual standpoint, the Motion, Upper Hanover's "Memorandum In Support" and the Department's response leave us so remarkably confused and perplexed that we are reminded of the famous Abbott and Costello routine, "Who's on First"? The Motion states that the Appellant Partnership, Upper Hanover Township, and the Upper Hanover Authority have settled the case. But the Upper Hanover Authority is not a party to the case and the Department, which is, is not a settlor. The Motion

states that both Upper Hanover and Pennsburg Borough have amended their respective Act 537 Plans to accommodate the nine housing units in question in this case so they can be connected to the UMJA. But, Pennsburg Borough is not a party to this case and DEP states that: (1) Upper Hanover is not even a member of the UMJA; (2) while Upper Hanover did recently revise its Act 537 Plan the revision it knows about did not involve the nine units in question; and (3) it is not even aware of any revision to the Act 537 Plan of Pennsburg Borough—who is not a party in this case anyway. Further, DEP states that no Plan revisions of any municipality regarding the nine units have been submitted to it for its disposition. Thus, it would be an understatement to say that there is a tremendous volume of significant factual issues in dispute.

Also, the particular relief requested leaves us just as confused. The relief requested is a *non sequitur* as to the action being prosecuted. As we mentioned, Pennsburg Borough is not even a party to this case. More fundamentally, this case is an appeal from the Department's denial on September 15, 1999 of the Partnership's Private Request for a revision to Upper Hanover's Act 537 Plan. The Motion in front of us, however, asks that the Board compel DEP to approve supposed revisions to Upper Hanover's and Pennsburg's Act 537 Plans which occurred, if they occurred at all, in April and May of 2000. As of yet, according to DEP, no such Plan revisions, whatever their content, have even been submitted to the Department for its review. Thus, the Department has not taken any action on either of the supposed Act 537 Plan revisions—whatever their contents.

This is a matter of apples and oranges in the extreme. These two actions by these two municipalities, even if they did occur, and whatever the specifics of these actions may have been if they did occur, are not before us nor, obviously, is any action of the Department regarding them. The only matter that we *think* is before us at this point is the Department's denial of the

Private Request.<sup>3</sup> There is no confusion on our part that no disposition of *that* matter can be made via this Motion.

For all these reasons, and more that we have not discussed in detail, the Partnership's Motion is denied. Accordingly, we enter the following Order:

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<sup>3</sup> We say that we "think" because we are left wondering whether what the Partnership now tells us in its Motion and Upper Hanover in its Memorandum In Support thereof renders this appeal moot. The premise of the appeal of the Department's denial of the Private Request (or the appeal of any Department denial of a private request under Act 537) is that the local municipality has, in the first instance, denied the petitioner's request to the municipality that it amend its Act 537 Plan. The Partnership alleges that, subsequent to the filing of this appeal, Upper Hanover Township has approved the Partnership's request to have its Act 537 Plan amended and that the Township has supposedly now amended its Plan in conformance with the proposal that it had originally denied. The question whether this appeal is moot is eluded to in DEP's brief but is not before us now since there is no pending motion on that subject. We will have to leave that question for later disposition in the event any party seeks to present it or the Board orders the parties to address it.

**COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD**

**PENNSBURG HOUSING PARTNERSHIP, L.P. :**

**v.**

**COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION and UPPER HANOVER  
TOWNSHIP, Intervenor**

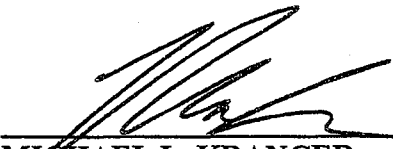
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**: EHB Docket No. 99-216-K**

**ORDER**

AND NOW this 23<sup>rd</sup> day of April, 2001, it is HEREBY ORDERED that the Motion of Appellant, Pennsburg Housing Partnership, L.P., for an Order Compelling Department of Environmental Protection To Approve Amendment of [Act] 537 Plans To Facilitate Settlement Agreement is DENIED.

**ENVIRONMENTAL HEARING BOARD**

  
\_\_\_\_\_  
**MICHAEL L. KRANCER**  
Administrative Law Judge  
Member

**DATED: April 23, 2001**

c:

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

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Southeast Region

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shadow of a doubt that there is no conceivable possibility that mining could cause adverse impacts in order to qualify for a permit. The Department adequately considered in both the permit review process and the permit itself that a portion of Hay Creek was redesignated during the pendency of the permit application as an Exceptional Value stream. The law does not prohibit absolutely mining in the vicinity of an Exceptional Value Watershed and the protections implemented by this permit adequately protect the Watershed. The Department required that the mining plan change significantly and it placed 35 Special Conditions in the permit it issued particular to this site in light of the redesignation of a portion of Hay Creek as an Exceptional Value stream. The Department's use of Special Conditions in this regard in this mining permit are not an illegal evasion of its responsibility to determine that the permit applied for and the plan of mining will adequately protect the environment.

### **FINDINGS OF FACT**

#### **The Parties**

1. The Department of Environmental Protection (DEP or Department) is the executive agency of the Commonwealth charged with the responsibility of administering and enforcing the provisions of the Noncoal Surface Mining Conservation and Reclamation Act 3301, *et seq.*, the Clean Streams Law, 691.1, *et seq.*, and the rules and regulations promulgated thereunder.

2. The Permittee is Haines & Kibblehouse, Inc. (H&K).

3. The Appellants are the Borough of Birdsboro (Birdsboro) and Birdsboro Municipal Authority (BMUA).

### **Subject of Appeal**

4. Birdsboro and the BMUA appeal in this action DEP's issuance to H&K of Noncoal Surface Mining Permit No. 06970302 (the Permit), NPDES Permit No. PA0223794 (the NPDES Permit), and Authorization to Mine No. 301900-06970302-01.

5. Currently, the Permit and authorization to mine only allow H&K to mine on Phase 1 of two Phases. (Ex. H&K-1)

6. H&K is prohibited from mining on Phase 2 until, at the earliest, March 2004, and only upon DEP's written approval. (N.T. 253-54; Ex. H&K-1)

### **Standing**

7. Birdsboro owns and operates two municipal parks located on Hay Creek. (NT- 180-83; Ex. B-27)

8. Rustic Park is located a few hundred feet from the mining site boundary. (N.T. 181-82; Ex. B-27)

9. Birdsboro collects approximately \$7,000 a year in revenue by renting pavilions at Rustic Park. (N.T. 186-87)

10. Birdsboro directs the revenue collected from renting pavilions at Rustic Park to its budget for maintaining its parks. (N.T. 186-87)

11. Should Hay Creek be adversely impacted by mining, the Borough will lose rental income with respect to its parks. (N.T. 187)

12. The Birdsboro Municipal Authority owns 1,700 acres south of and bordering the permitted site, and it owns land on the western side of Rout 82. The land is used for hiking and biking. (N.T. 186)



## Geography of Permitted Site

13. The permitted site is divided into two separated geographical areas designated Phases 1 and 2. (Ex. H&K-1)

14. Phase 1 is located in Robeson Township and Phase 2 is situated in Union Township. (N.T. 31-33; Ex. B-6)

15. Birdsboro is located approximately 2,000 feet from the northern boundary of Phase 1 and 200 feet from the northern edge of Phase 2. (Ex. B-6)

16. The site consists of 289.6 acres and H&K plans to mine 239.6 acres. (N.T. 30, 309-10; H&K-1)

17. The entire Hay Creek Watershed comprises a little over eight square miles. (N.T. 118-119, 309)

18. Hay Creek extends southwesterly from a point north of Phases 1 and 2 and generally follows the western boarder of Phase 1. (Ex. B-7)

19. Hay Creek and Birsdboro bound the western and northern edges of the site. (N.T. 31; Ex. B-6)

20. The Birdsboro Tributary extends southeasterly after joining Hay Creek north of Phases 1 and 2 and generally follows the northeast boundary of Phase 2. (Ex. B-7)

21. The Phase 2 Tributary originates at the southeastern boarder of Phase 2 and joins the Birdsboro Tributary approximately a third of the way down from and on the eastern edge of Phase 2. (Ex. B-7)

22. The Central, Birdsboro, and Phase 2 tributaries are intermittent streams. (N.T. 39)

23. Wetlands A, B, C, E and Nos. 2, 3, 4 are in and around Phase 1. (Ex. B-9)

24. Wetlands No. 5 lies to the east between Phase 2 and Tributary 2. (Ex. B-9)

#### **Application Process and Permits**

25. On July 31, 1997 H&K submitted to DEP its application for a noncoal surface mining permit. (N.T. 217, 219; Ex. H&K-2)

26. On August 16, 1997 the Environmental Quality Board (EQB) had published in the *Pennsylvania Bulletin* a notice of proposed rulemaking to redesignate a portion of Hay Creek as Exceptional Value (EV). (27 Pa. Bull. 4904)

27. EV waters have surface waters of high quality that satisfy the antidegradation requirements of 25 Pa. Code § 93.9b(b). (25 Pa. Code § 93.1)

28. The EV designation of Hay Creek ends at Birdsboro's boundary line with Robeson Township at which point Hay Creek is designated as Cold-Water Migratory Fishing (N.T. 39-40, 233; Ex. B-6)

29. No part of the EV stream designation of Hay Creek is on H&K's land. (N.T. 525-26)

30. Hay Creek's proposed EV designation caused DEP to request H&K to revise its application and mining plan. (N.T. 233, 303-04)

31. H&K's original mining plan proposed to mine the central corridor portion of the site, which is where Wetlands 1 is located. (N.T. 234; Ex. B-7)

32. H&K revised its mining plan by dividing its proposed mining into two separate and distinct phases—Phases 1 and 2--which are separated by Wetlands 1. (N.T. 234; Ex. H&K-2, Ex. B-7)

33. The corridor between Phase 1 and Phase 2 is approximately 700 feet wide at the northern-most section, approximately 900 feet wide at its mid-section, and approximately 1,600 feet at its southern-most point. (Ex. B-7)

34. DEP performed a completeness and technical review of H&K's permit application. (N.T. 494-501; Exs. C-1, C-2)

35. DEP gave special consideration to H&K's permit application because of the proposed EV designation portion of Hay Creek. (N.T. 502)

36. On March 4, 1999 DEP issued to H&K the noncoal surface mining permit, the NPDES permit, and the noncoal authorization to mine Phase 1. (N.T. 219; Ex. H&K-1)

37. The Permit has 35 Special Conditions which address matters particular to the site. (Ex. H&K-1)

38. On September 21, 1999 the Pennsylvania Environmental Quality Board redesignated the portion of Hay Creek south of the Birdsboro border as EV. (N.T. 220; 29 Pa. Bull. 5999)

39. H&K's Permit allows it to mine two distinct areas of its property designated as Phase 1 and Phase 2 respectively. (Ex. B-6; Ex. H&K-1)

40. Phases 1 and 2 are separated by Wetlands 1 and the Central Tributary of Hay Creek. (Ex. B-6)

41. H&K's Noncoal Surface Mining Permit No. 06970302 provides:

The permit is for 289.6 (117.2 ha) acres of which 239.6 (97.0 ha) acres are planned to be affected. Permittee may conduct surface noncoal mining activities only on that area of the permit outlined on the Authorization to Mine and accompanying maps contained in Part C of this permit. Initial authority to conduct mining activities is granted for

an area of 121.2(49.0 ha) acres described in Part C of this permit. Additional authority to conduct mining activities may be granted by written approval of the Department and attached to Part C of this permit. Permittee is prohibited from conducting noncoal-mining activities on that portion of the permit area, which has not been authorized for mining by the Department, in writing, and shown on the bond approval and mining authorization map[s] contained in Part C of this [Permit].

(Ex. H&K-1)

42. H&K's NPDES Permit governs the control of stormwater discharge from the mining operation. (Ex. H&K-1)

43. The NPDES Permit No. PA0223794 provides:

- a. The permit covers stormwater runoff from the area of disturbance, collection, and discharge from a sedimentary basin. The permit requires H&K to retain all stormwater runoff with a sedimentary basin. (N.T. 278; Ex. H&K-1)
- b. The Discharge Limits are as follows: **Type of Discharge Facility E&S; Discharge Parameter Total Suspended Solids; Average Monthly 35.0mg/l; Maximum Daily 70.0 mg/l; Instantaneous Maximum 90.0; Measurement Frequency Monthly; Sample Type Grab.** (N.T 266-67; Ex. H&K-1)
- c. Further, the permit requires the pH to be no less than 6.0, but no greater than 9.0 standard units at all times, and it prohibits the discharge of floating solids or visible foam. (N.T 267; Ex. H&K-1)

d. H&K is not held to its NPDES permit condition during a ten-year 24-hour storm event. (N.T. 267; Ex. H&K-1)

44. Authorization to Mine No. 301900-06970302-01 authorizes H&K to mine “the area designated as bonding increment 01 in the map submitted in support of this Mining Authorization, which covers 121.2 (49.0 ha) acres,” otherwise known as Phase 1. (N.T. 253-55; Ex. H&K-1)

### **Mining Plan**

45. Previous mining on the site during the early 1950s left eight acres of land disturbed by mining. (N.T. 252)

46. The earlier mining took place in the Phase 1 portion of the site, and it had a floor elevation of approximately 250 feet and a 135 foot high wall. (N.T. 252)

47. H&K’s mining operation in Phase 1 will proceed very slowly in a southeasterly direction. (N.T. 252, 291)

48. The advancement of the quarry may be only 100 feet maximum per year, and H&K anticipates that based on the projected tonnage it may take 25 to 30 years to mine out Phase 1. (N.T. 253, 291)

49. H&K’s mining operation will not strip the vegetation on Phase 1 all at once; rather, it will remove ground cover in a five to six acre area as needed to ensure production over a four to six year period. (N.T. 292)

50. H&K will reclaim mined land concurrent with its mining operation so that soil will be replaced and vegetation reestablished, including trees. (N.T. 293)

51. The watershed area between Phases 1 and 2 will be unaffected by mining operations because H&K will not mine in the sub watershed area associated with drainage. (N.T 304)

52. There is a greater than 100 foot setback for the area between Phases 1 and 2, which is the central portion of the site and it includes the entire sub-watershed area for the central tributary. (N.T. 304)

53. The mining in Phase 2 will not approach closer than 100 feet to the Phase 2 tributary. (N.T 35; Ex. B-7)

54. Special Condition 30 of the Permit prohibits H&K from mining on Phase 2 for at least five years after the issuance of Noncoal Surface Mining Permit No. 06970302 and until H&K receives written approval from DEP. Further, DEP's approval is contingent upon Phase 1 mining activities having had no negative or detrimental effect on the Hay Creek watershed. (N.T 253-54; Ex. H&K-1)

55. Special Condition 33 of the Permit requires H&K to notify Birdsboro via certified mail when it submits a request to DEP to mine Phase 2. (Ex. H&K-1)

#### **Water Loss and Surface Water and Groundwater Monitoring**

56. Module 7 of H&K's permit application addressed the issue of water depletion as a result of mining and its effects on the Hay Creek watershed. (Ex. H&K-2)

57. H&K's mining will not lower the water level. (N.T. 304, 406-29)

58. H&K's mining will increase the base flow of water. (N.T. 428-29)

59. Base flow is water that soaks into the ground and then becomes the "base" or level of continuous presence of groundwater, which mounds under the surface of the ground. (N.T. 39, 45-46)

60. Base flow is a source of continual water input of Hay Creek as water from the base flow feeds to seeps which, in turn, drain out into Hay Creek. (N.T. 39, 45-46)

61. In consideration of Hay Creek's EV designation, the level of the pit floor in the proposed Phase 2 mining was raised from its original 260' to 330', thus insuring that no mining would take place at any level that would be below the level of the unnamed tributary of Hay Creek which parallels the northern edge of the Phase 2 area. (N.T. 304-305)

62. Mr. Jeffery Peffer served as a consultant to H&K on its permit application permit. (N.T. 399)

63. Mr. Peffer is President of Peffer Geotechnical Corporation. (N.T. 394)

64. Mr. Peffer has worked on over 40 noncoal mining sites and of those probably two-thirds have involved hydrology studies. (N.T. 394-95)

65. In connection with this mining permit application, Mr. Peffer developed a conceptual model for the geology and hydrology of the H&K mining site, which he later confirmed with actual testing. (N.T. 396-99; Exs. H&K-4, H&K-5)

66. The monitoring design calls for 24 piezometers in the central portion of the property, 21 surface watering monitoring points associated with Hay Creek, and 33 direct groundwater monitoring points and another 8 are contracted to be installed. (N.T. 246-47; Exs. H&K-8, H&K-9)

67. Mr. Peffer has never seen a more extensive surface water and groundwater monitoring program in a permit for noncoal mining in his entire career, and he believes that there is more monitoring required under the Permit than he would have recommended. (N.T. 402-03)

68. The surface water and groundwater monitoring program and the data collected as part thereof would give advance notice of any impact to Wetlands 1 that the mining may create. (N.T. 403-05; 406-11)

69. The surface water and groundwater monitoring program for Phase 1 will be useful information to predict the impacts of mining in Phase 2. (N.T. 405-06)

70. Special Conditions 21-23 of the Permit focus on the protection of surface water and groundwater. (Ex. H&K-1)

71. Special Condition 21 of the Permit is unusually stringent because it prescribes monthly monitoring of static groundwater levels, and it requires H&K to submit the monitoring results within 28 days to DEP. (N.T. 237-38; Ex. H&K-1)

72. Special Condition 22 of the Permit is unusually stringent because it requires H&K to conduct continued surface water monitoring at more points than usually required, for a typical noncoal mining permit, in the receiving streams and springs in and around H&K's property. It also requires H&K to submit the monitoring results within 28 days to DEP. (N.T. 244-46; Ex. H&K-1)

73. If the surface water or groundwater monitoring data indicates a negative impact on Hay Creek, any of its tributaries, or any wetlands associated with the permitted site, Special Condition 23 of the Permit requires H&K to develop and submit a plan to DEP addressing how it intends to eliminate and remediate any negative impact. (Ex. H&K-1)

74. H&K and DEP are responsible for determining if a negative impact occurs. (N.T. 249-50)



## **Wetlands Protection**

75. H&K received permission from DEP to mitigate 1/10 of an acre of Wetlands 5, as outlined in the Wetlands Encroachment Plan. (N.T. 290; Ex. H&K-10)

76. H&K's Wetlands Encroachment Plan was submitted to DEP as part of the July, 1998 resubmission package and it forms part of the permit issued by DEP. (N.T. 296-97; Exs. H&K-7, H&K-10)

77. Special Condition 16 of the Permit requires H&K to implement the approved wetlands mitigation plan described in the permit application, Ex. H&K-10. (Ex. H&K-1)

78. Special Condition No. 19 requires the Permittee to submit additional and/or revised mitigation plans to address any goals or standards which may not be achieved. (Ex. H&K-1)

79. Appellant's expert, Dr. James Schmid, agreed that if any wetlands were threatened by a potential future loss of water supply, that this threat could be ameliorated by simply providing additional water from other sources. (N.T. 171)

80. H&K's expert, Mr. Rightnour, testified that there are a variety of water sources available to augment the water supply to wetlands in the event such a need arose. (N.T. 360)

81. H&K also submitted as part of its permit application, a Functional Value Assessment of Wetlands (Wetlands Assessment). (Ex. H&K-14)

82. This report notes that development of the mining site will permanently impact approximately 8.24 acres of wetlands out of the 11.37 acres of wetlands within the permit boundary. (Ex. H&K-14)

83. The Assessment itself analyzes the functions and values of wetlands delineated (Wetlands 1 through 5 and Wetlands A) (Ex. H&K-14)

84. The Wetlands Assessment provides that its results can be used to select appropriate wetlands mitigation as well as to design replacement wetlands such that the functions and values lost from the wetlands affected can be replaced. (Ex. H&K-14)

85. In July 1997, a meeting was held between DEP, H&K's expert John Ross, and the Pennsylvania Game Commission (PA Game Commission) to discuss H&K's permit application and wetlands specifically. (N.T. 294-96)

86. At the July 1997 meeting, the PA Game Commission indicated that it wanted stringent requirements placed on any proposed mining near the central corridor wetland area, and they offered Ex. H&K-7, an October 27, 1997 letter from William A. Capouillez of the PA Game Commission to Mark A. Snyder of Glacial Sand & Gravel Company, as an example of wetland monitoring requirements they had recommended in the past. (N.T. 294-95)

87. H&K relied on the October 27, 1997 letter to develop a wetlands plan for the site, and H&K tried to exceed the requirements of the letter when planning. (N.T. 296)

88. H&K prepared a Functional Value Comparison of Existing And Mitigation Wetlands plan, which concluded, "the mitigation wetlands will surpass the existing wetlands in value." (N.T. 297-98; Ex. H&K-11 p. 10)

89. H&K's Functional Value Comparison of Existing And Mitigation Wetlands plan was submitted to DEP as part of the July, 1998 resubmission package and it forms part of the permit issued by DEP. (N.T. 297-98; Ex. H&K-11 p. 10)

90. Special Condition 19 of the Permit requires H&K to submit an additional and/or revised mitigation plan in the event that the approved wetlands mitigation plan does not meet all of its intended replacement and mitigation goals. (Ex. H&K-1)

91. Special Conditions 17 and 18 of the Permit address wetlands monitoring. (Ex. H&K-1)

92. Special Condition 17 of the Permit requires H&K to monitor the vegetation of Wetlands 1, during June, every three years when mining is not within 300' (91.5 m), and yearly when mining is within 300' (91.5 m). Further, H&K must submit to DEP a copy of the monitoring results within 60 days. (Ex. H&K-1)

93. Special Condition 18 of the Permit requires H&K to monitor annually in June the vegetation of Wetlands 5 and Wetlands A, B, C, & E, and report the monitoring results to DEP within 60 days. (N.T. 288; Ex. H&K-1)

94. Exhibit H&K-12, "Special Conditions Wetland Evaluation" is a baseline documentation of vegetation in Wetlands 1 and other Wetlands areas around the permitted area and was produced pursuant to the requirements of conditions 17 and 18. (N.T. 361-62; Ex. H&K-12)

95. The Special Conditions Wetland Evaluation is designed to identify a wetlands baseline from which the comparison can be made as time progresses over the next 30 years. (N.T. 361-62; Ex. H&K-12)

96. The Special Conditions Wetland Evaluation develops methodology that can be repeated over a 30 year time period. (N.T. 361- 372; Ex. H&K-12)

97. The Wetland Evaluation is based on acceptable techniques in the field of wetland evaluation. (N.T. 360-61)

98. The procedures outlined in Special Conditions Wetland Evaluation will over time disclose any impact to a wetlands. (N.T. 368)

99. Mr. William A. Capouillez is the Section Chief of Oil, Gas, and Mineral Development for the Pennsylvania Game Commission. (N.T. 457-58)

100. Mr. Capouillez worked for DER as a hydrologist prior to his employment with the Game Commission. (N.T. 459)

101. In his working experience, Mr. Capouillez has reviewed over 100 noncoal mining permits, 30% of which involved wetlands. (N.T. 459-60)

102. In the past Mr. Capouillez has himself initiated litigation against DEP challenging mining permits that he thought were not sufficiently protective of wetlands. (N.T. 460)

103. Mr. Capouillez reviewed and commented on H&K's initial permit application. (N.T. 463, 460-62)

104. Mr. Capouillez made direct recommendations to H&K on how to protect wetlands on the permitted area. (N.T. 467)

105. Mr. Capouillez recommended that transect lines, series of plots, and piezometers be utilized to monitor the wetlands because they would provide data on both deeper and shallower waters as mining progressed towards the wetlands. (N.T. 68-69)

106. Also, Mr. Capouillez recommended that H&K install weirs, which are dam like structures that provide instantaneous data on what kind of flow is occurring in a stream. (N.T. 269-72)

107. Generally, H&K followed Mr. Capouillez's recommendations. (N.T. 467-68)

108. Mr. Capouillez testified that H&K's wetlands monitoring program is at the top echelon as far as wetlands monitoring that the Game Commission has experienced, and that the program exceeds what he is accustomed to seeing with respect to mining. (N.T. 476-77)

#### **Stormwater Control**

109. H&K's NPDES permit imposes highly stringent erosion and sedimentation control plan requirements. (N.T. 259)

110. H&K has four sediment traps and one primary erosion sedimentation control basin on its property. (N.T. 259)

111. As a result of the proposed EV designation of Hay Creek, the storage capacity of the sedimentation traps was increased from 2,000 cubic feet to 5,000 cubic feet of storage capacity per disturbed acre. (N.T. 259-60)

112. As a result of the proposed EV designation of Hay Creek, the storage capacity of the sedimentation basins was increased from 7,000 cubic feet to 8,500 cubic feet of storage capacity per disturbed acre. (N.T. 260)

113. The sedimentary basin has an approximate capacity of 773,000 cubic feet or 5,782,040 gallons. (N.T. 262)

114. The sedimentary basin is designed as a wet pond, meaning that water remains in the basin even after the lowest discharge valve is opened. (N.T. 264)

115. The purpose of the basin is to trap sediment and allow for the discharge of optimal water quality, considering Hay Creek's EV designation. (N.T. 264)

116. The basin allows the stormwater to settle before it is discharged, the sedimentation separates from the water and sinks to the bottom of the basin. (N.T. 262)

117. H&K treats the water with flocculants, which allows for any fine suspended colloidal particles to coagulate and sink to the bottom of the basin. (N.T. 265)

118. The sediment traps and erosion sedimentation control basins constructed and planed are much more stringent than what the present criteria require. (N.T. 259-60)

119. During Phase 1 mining, all stormwater is collected in on-site collection ditches that carry stormwater from the area of disturbance to sedimentary basin 1. (N.T. 261)

120. Also during Phase 1 mining, all stormwater is retained and cannot be released without DEP approval. (N.T. 261)

121. To obtain DEP approval for release of stormwater from the basin, H&K must collect samples of the stormwater and have it analyzed to assure that it is within allowable parameters for all relevant contaminants. (N.T. 262)

122. The analyses showing compliance with all relevant parameters is forwarded to DEP for its review. (N.T. 262)

123. Based on the sample results showing that the stormwater is within all regulated parameters, H&K makes a verbal request to DEP to release the stormwater from the basin. (N.T. 262)

124. H&K releases water from the basin via four valves located at different levels or heights, each valve one above the other on the basin, starting at the highest valve and working down to the lowest valve in the basin. (N.T. 261-63)

125. The water leaving the basin flows through a series of 24 inch ductile iron pipes and eventually discharges into wetlands B. (N.T. 276)

126. The discharge point existed prior to H&K's mining operations. (N.T. 277-78)

127. The manual release system allows H&K to regulate the discharge to a maximum of what was discharging prior to H&K's operations. (N.T. 278-79)

128. A stilling basin at the bottom of the discharge point allows H&K to control the velocity of the discharge and create a more gradual flow. (N.T. 279)

129. H&K has a spill prevention control and countermeasure plan (SPCCP). (N.T. 282; Ex. H&K-3)

130. H&K's SPCCP addresses: (1) spill, containment, diversionary structures and controls in place or available to H&K; (2) the facility fuel delivery and material transfer operations; (3) H&K's spill control countermeasures; (4) the company's commitment to a practical plan; (5) the site's storage tanks; (6) H&K's inspection plan and record keeping thereof; (7) the security of the site, (8) H&K's personnel training; and (9) a list of emergency phone numbers in case an accident occurs. (Ex. H&K-3)

131. The stormwater management plan outlined in the permit will result in less sediments leaving the site than before the site was constructed. (N.T. 344)

132. Utilization of a groundwater recharging system would not be suitable at this site because such a system would require an enormous amount of land and if one tried to recharge the stormwater, about five and one-half million gallons of water per week, it would result in a significant mounding of the groundwater table. (N.T. 425-26)

## DISCUSSION

### **Standing**

The record in this case demonstrates that both Birdsboro and the BMUA have standing to pursue this appeal. Birdsboro is a municipality directly contiguous to the Borough mining operation. Furthermore, Birdsboro owns and operates two municipal parks located on the creek. The Borough generates significant revenue from renting its facilities at the parks. Should the adverse consequences alleged by the Borough occur, *i.e.*, damage to Hay Creek and the Hay Creek watershed, the Borough would be directly and substantially adversely impacted. Should Hay Creek be damaged, we credit the testimony of the Borough Manager, Mr. Ewing, that the Borough would lose rental income with respect to its parks. Also, portions of the Hay Creek Watershed system and its tributaries are directly within the boundaries of Birdsboro and down stream from the quarry. In addition, BMUA owns land which borders on the quarry. These factors are enough to establish standing. *Smedley v. DEP*, EHB Docket No. 97-253-K (Adjudication issued February 8, 2001), *Belitskus v. DEP*, 1998 EHB 846, 859 (*citing William Penn Parking Garage*, 346 A.2d at 283).

### **Standard of Review and Burden of Proof**

The Appellants, Birdsboro and the BMUA, have both the burden of proceeding and the burden of proof in this case. 25 Pa. Code § 1021.101(a),(c)(2). The Board, in its recent adjudication of *Smedley v. DEP*, *supra*, discussed in some detail the nature of the Board's standard of review to be applied in cases before it. In short, actions before the Board involve the determination of whether the findings upon which DEP based its action are correct and whether DEP's action is reasonable and appropriate and otherwise



in conformance with the law. *Smedley* at 30. It is this standard of review that we apply to this case.

With respect to burden of proof and burden of proceeding, Appellants argue that because Birdsboro supposedly demonstrated the likelihood of environmental harm, that the burden of proceeding with affirmative evidence to the contrary and presumably, the burden of proof with respect to the contrary evidence, then shifts to the Department and to H&K to show the lack of harm. Appellants rely on *Marcon, Inc. v. DER*, 462 A.2d 969 (Pa. Cmwlth. 1983) and *Lehigh Township, Lackawanna County v. DEP*, 1995 EHB 1098. Appellants argue that under these precedents, “burden shifting” is called for in this case because of the special concerns in this area of permitting in the area of an exceptional value watershed.

*Marcon* does not compel the conclusion that burden shifting is applicable here. In *Marcon*, the Commonwealth Court approved the Board’s decision to shift the burden of proceeding to the Department after the Appellants presented expert scientific testimony which showed the likelihood of environmental harm in that case. *Marcon, supra*, 462 A.2d at 971. The Commonwealth Court stated as follows regarding “burden shifting”:

Here the Clubs presented expert scientific evidence which tended to show that the permit would have a serious and deleterious effect upon both Sand Spring Run and neighboring Lake Maskenozha. The Board viewed this evidence as credible and so, in essence, shifted the burden of going forward with the evidence to the DER and the petitioners.

*Marcon, Inc.*, 462 A.2d at 971. Thus, *Marcon* supports burden shifting only after Appellants have presented credible evidence that the prospective project being challenged will cause environmental harm.

A close reading of *Lehigh* shows that it likewise does not support the notion that burden shifting is applicable in this case. The *Lehigh* case did not deal directly with burden shifting in the context of an Adjudication. *Lehigh* was the disposition of a Motion to Dismiss by an NPDES Permittee from an appeal against both its NPDES Permit, which allowed for a discharge into the Lehigh River, and DEP's approval of appurtenant Act 537 Plans relating to the discharge. Appellant claimed, in part, that the Department erred in its review of the 537 Plan approval in that, under the Department's sewage facilities regulations, the Department is to consider whether the proposed Act 537 Plan is consistent with the anti-degradation rules and it did not do so in that case. 1995 EHB at 1103, 1111. In declining to dismiss the claim in the face of the Permittee's argument that it would challenge the propriety of those regulations, the Board noted that the Permittee was certainly free to raise that challenge in the appeal but that it was not clear at that point that the provision of the Department's regulations Appellants cited was invalid so as to call for dismissal of Appellant's claim as a matter of law. As an immediate follow-up point, the Board commented that *if* Appellants *presented proof* of their contention that the discharge at issue in that case *would have serious and deleterious effects* on the water quality of Lehigh River, the burden of proof *may* shift to the proponents of the Department's action because of the special concerns in this area of the law of permitting affecting special protection waters. *Lehigh Township*, 1995 EHB at 1112 (citing *Marcon, Inc. v DER*, 462 A.2d 969 (Pa. Cmwlth. 1983)).

Appellants' theory of "burden shifting" in this case is just another way of saying that Appellants must prove their case with affirmative evidence. If Appellants are successful in presenting affirmative evidence which establishes a *prima facie* case on the point or points they have to prove, then it becomes incumbent upon the other party to produce countervailing evidence. The suggestion that burden shifting should apply in this case begs the question of whether Appellants did in fact produce credible affirmative evidence which tended to show that the mining activities authorized by the permit in this case would have a serious and deleterious effect upon Hay Creek and the Hay Creek watershed. Burden shifting applied in *Marcon* because the plaintiff produced such affirmative evidence which was found to be credible. Thus, it then became incumbent upon the Department and the Permittee to produce evidence to the contrary. Appellants' contention that burden shifting should apply here as well assumes that it has produced affirmative credible evidence of likely adverse impact. That question will have to be analyzed as we proceed in the context of reviewing all of the evidence in this case.

#### **Anti-Degradation Requirements**

A recurrent theme to Appellants' arguments in this case is the notion that the mining activity contemplated by this permit is contiguous to an exceptional value stream and that the Hay Creek watershed is thus an exceptional value watershed. The Borough seems to be arguing that either no mining is allowed in an exceptional value watershed or that particularly stringent protections are called for. We believe that mining is not specifically prohibited contiguous to an exceptional value stream or in an exceptional value watershed. Moreover, as we will discuss in more detail, we believe that the

Department did impose particularly stringent conditions on this permit in light of its proximity to an exceptional value watershed.

The relevant regulation is 25 Pa. Code § 93.4(a), entitled “Antidegradation” which states with respect to the protection of exceptional value waters that “the water quality of exceptional value waters shall be maintained and protected.” There is nothing in the law or the regulations which prohibits absolutely mining activities in exceptional value watershed areas. The Appellants point to the Department’s Coal Mining Permit Manual at page 53 which states that “Water Quality Standards require that the existing in stream water quality criteria be maintained when mining in exceptional value watersheds.” It is questionable what import, if any, this document may have to this case. In any event, the Manual acknowledges what 25 Pa. Code § 93.4(a)(d) so provides. Thus, if a requisite showing is made that the mining will not likely have an adverse impact on the Commonwealth’s water resources, including exceptional value waters, the application for the mining permit may be granted. Here, the Department so determined and thus granted the permit.

This case is quite distinguishable from *Oley v. DER*, 1996 EHB 1098, to which Appellants point. It is true, as Appellants note, that the *Oley* case counsels that the Clean Streams Law prohibits degradation which would adversely affect existing uses of exceptional value water resources. 1996 EHB at 1117. Specifically, any physical or biological alteration of wetlands or other water resources as a result of a proposed project could constitute pollution under section 611 of the Clean Streams Law. In *Oley*, however, unlike what the Board finds in this case, the Board found that the Department

did not consider at all in its review of the proposed project potential adverse impacts of the project on nearby wetlands.

In contrast, in this case, the record clearly shows that the Department carefully considered the potential impact of this project on not only adjoining wetlands but with respect to the Hay Creek watershed in its entirety. In addition, the Department took into consideration, and reacted vigorously, to the redesignation of the portion of Hay Creek as an Exceptional Value stream which happened during the pendency of this permit application review. The permit application was filed on July 3, 1997. On August 16, 1997, during the pendency of DEP's review of H&K's application, the Environmental Quality Board published notice of its proposed rulemaking to designate a portion of Hay Creek as an Exceptional Value stream which Rule was made final on September 21, 1999. The redesignation prompted DEP to insist upon very substantial changes to the plan for mining the area. The plan was changed from subjecting the entire area to mining to creating an untouched corridor between two distinct geographic permitted areas: the Phase 1 area and the Phase 2 area. The corridor taken out of the mining plan is a substantially large area being approximately 700 feet wide at its northern-most point, approximately 900 feet wide at its mid-section, and approximately 1,600 feet wide at its southern-most point. The wetlands designated as Wetlands 1 is located within the corridor so it will be left untouched. Other changes in the mining plan were also required including raising the level of the Phase 2 mining floor and increasing the storage capacity of the sedimentation traps and sedimentation basins. The Permit which was eventually issued contained 35 separate special conditions unique to mining at this site, many of which we will be discussing specifically. Numerous witnesses with experience in the

non-coal mining permit process, both from the Permittee's side and the Department's side, testified that this permit was unusually stringent. Also, DEP drafted the Permit with the additional structural protection that Phase 2 mining could not commence until at least 5 years hence and only then if mining activities in Phase 1 had not shown any negative or detrimental effect on Hay Creek, any of its tributaries, any wetlands, or any other surface or ground water quality or water quantity associated with this permit. Ex. B-1, Special Condition No. 30.

**25 Pa. Code § 77.126(a)(3)**

In this case, Appellants' primary claim was that the Department erred in issuing this permit in light of 25 Pa. Code § 77.126(a)(3). This section provides that:

- (a) A permit, permit renewal or revised permit application will not be approved, unless the application can affirmatively demonstrate and the Department finds in writing, on the basis of the information in the application or from information otherwise available, that the following apply:
  - (3) The applicant has demonstrated that there is no presumptive evidence of potential pollution of the waters of this Commonwealth.

25 Pa. Code § 77.126(a)(3).

Under Appellants' view of this provision, the Department is prohibited from issuing a permit unless the applicant proves positively and without doubt that there was no potential for pollution whatsoever. Under Appellants' view, the Department would be prohibited from issuing any noncoal mining permits if there were any conceivable possibility that any adverse impact could result from the mining activity.

Appellants cite no case law which supports this interpretation and the Board has found none either. We think that Appellants' reading of 25 Pa. Code § 77.126(a)(3) is not

correct. Indeed, if the regulation provided what they suggest, it would be doubtful whether any permits for noncoal mining activities would ever be issued.

The case law which has discussed this regulation in the context of coal mining, which has an exactly similar regulatory provision, does not support Appellants' overly aggressive interpretation of Section 77.126(a)(3).<sup>1</sup> In *Al Hamilton Contracting Co. v. DER*, 1992 EHB 1458, a mining company appealed DER's denial of an application to mine the Lansberry site in part because the applicant had failed to demonstrate that there was no presumptive evidence of potential pollution of Commonwealth waters as required by 25 Pa. Code § 86.37(a)(3). In applying 25 Pa. Code § 86.37(a)(3), the Board stated that it construed the language requiring applicants to demonstrate "that there is no presumptive evidence of potential pollution to the waters of the Commonwealth" to mean that "the applicant must demonstrate that pollution of the surface and ground water from its mining activities will not occur." 1992 EHB at 1488. In *Hamilton*, the Board found that there was affirmative evidence supported by credible expert testimony that acid mine drainage would in fact adversely impact surrounding water supplies. Also, even *Hamilton* had conceded that mining the Lansberry site had the potential to create acid mine drainage. *Id.* In order to be entitled to the permit, *Hamilton* had to have been able to show either that it can treat any acid mine drainage produced or that the acid mine drainage will not escape into the waters of the Commonwealth. *Id.* at 1488, 1502. The

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<sup>1</sup> 25 Pa. Code § 86.37(a)(3) provides that a permit application will not be approved unless the application affirmatively demonstrates and the Department finds, in writing, that the "applicant has demonstrated that there is no presumptive evidence of potential pollution of the waters of this Commonwealth. 25 Pa. Code § 86.37(a)(3).

Board held that, based on the affirmative credible evidence to the contrary that Hamilton had not succeeded in doing either. *Id.* at 1502. Thus, DER's permit denial was upheld.

*Hamilton* stands for the proposition that in the face of affirmative credible evidence that pollution to the waters of the Commonwealth will occur from mining activities that the Department is acting appropriately to deny such a permit application. It does not support the conclusion that an applicant must prove with no quantum of doubt that adverse impacts could not possibly occur.

We find that, based on the evidence we heard, that the Department acted properly in granting the permit as issued in this case. We do not believe that Appellants in this case sustained their burden of demonstrating via credible evidence that the activities contemplated by the permit will result in pollution to the waters of the Commonwealth. This is especially so in light of the copious special conditions placed by the Department in the Permit.

### **Ripeness of the Appeal Relating to Phase 2 Mining**

The Department argues that Appellants cannot now challenge the appropriateness of mining in Phase 2. It argues that challenges with respect to Phase 2 mining are not yet ripe for review. The Department points to Special Conditions No. 30 of the Permit which provides that mining activities in Phase 2 are prohibited for a minimum of 5 years after issuance of the Permit and until H&K receives written approval from the Department. It also relies on Special Condition No. 33 which provides that H&K shall notify the Borough by certified letter when, and if, it submits a request to commence



Phase 2 operations.<sup>2</sup> Birdsboro points out that the Permit under appeal covers both Phase 1 and Phase 2. Also, Birdsboro argues that it may challenge the approach taken in the Permit of deferring a decision on whether Phase 2 mining may commence pending review of environmental data from Phase 1 mining.

We will not restrict the scope of Birdsboro's appeal in the manner requested by DEP. The Permit at issue applies to both Phase 1 and Phase 2. The Appellants have the right now to appeal with respect to whatever the scope of Phase 2 mining may be as provided in the Permit. Moreover, we agree with Birdsboro that it may now challenge the appropriateness and legality of the approach taken in the Permit which provides that the Department is deferring a decision whether to allow Phase 2 mining pending development of environmental data garnered during the Phase 1 mining operations.

#### **Loss of Water/Baseflow**

One of Appellants' main contentions is that the mining activities will result in a depletion of water in the watershed thereby causing damage to the watershed itself and, especially, the wetlands in the area. It is apparent from the record that the Permittee addressed this matter in its permit application materials. Module 7 of the application materials addresses this question. (Ex. H & K 2).

We are not convinced that Appellants' expert demonstrated at trial that this loss of water phenomenon will occur at this site in connection with this designed permitted activity. We find credible the testimony of Permittee's expert in hydrogeology, Mr.

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<sup>2</sup> We note that while the Department's brief points out that Appellants, pursuant to Special Conditions Nos. 30 and 33, are guaranteed specific notice and comment protections" it stops short of stating that Appellants would be entitled to file an appeal of any DEP decision to allow Phase 2 mining.

Peffer, who testified that the mining operation, as carefully designed by the Permittee, *will not* cause a loss of water from the central tributary of this watershed. (Peffer Tr. 407-29)

In addition, the design of the Phase 2 mining was altered to address this concern even further as to the Phase 2 operation. The level of the pit floor was raised from 260' to 330'. This results in no mining taking place at any level which would be below the level of the unnamed tributary of Hay Creek which parallels the northern edge of the Phase 2 area. This step was taken specifically in consideration of the redesignation of Hay Creek as an EV stream. (Ross Tr. 302, 308).

For these reasons, we do not find that Appellants have made a showing that water loss will result from the operations contemplated by this Permit.

Also, we find quite compelling the Permittee's evidence that the sophisticated and detailed monitoring program outlined in the Special Conditions to the Permit and operations during Phase 1 of mining at this site will provide very ample warning in the event that there is any unexpected effect of mining in the nature of depletion of groundwater. Indeed, Mr. Peffer testified that he had never seen a more extensive monitoring program in any non-coal permit and this monitoring program went far beyond what he would have recommended for this site. (Peffer 402-09) Special Condition Nos. 21 through 23 provide that H&K is to implement a comprehensive monitoring program regarding groundwater quality and static water levels. This monitoring is to be done on a quarterly basis. In the event that any groundwater monitoring results or any other data indicate any negative impact on Hay Creek or any of its tributaries or any wetland associated with the Permit from mining activities, mining activities "shall cease".

Appellants further allege that H&K failed to analyze properly the potential effects of mining on the watershed. Specifically, Appellants fault H&K for not having done, and vicariously the Department for not having required, pumping tests or computer modeling or aquatic studies as predictive tools in the permit application and review process. However, the regulations do not require those techniques. Specifically, 25 Pa. Code § 77.403(b) states that the Department *may* require modeling or other predictive techniques. In light of the record we have seen, we cannot conclude that it was error for the Department to have not required computer modeling and aquatic studies in this case. Indeed, the Department, in this case, drafted the Permit to include a formidable monitoring program which in itself is a predictive technique.

#### **Wetlands Monitoring and Protection**

Appellants' argument that mining operations will adversely impact wetlands is related to their contention that water loss will occur. It is the supposed water loss that will result in the harm to wetlands. As noted before, we do not find that the alleged water loss effect will occur. In any event, the record in this case demonstrates virtually incomparable measures undertaken in the context of this permit review and this Permit aimed at insuring that prospective operations would not be anticipated to adversely affect wetlands and to provide specific indicators of advanced warning in the event that subsequent events indicated that wetlands might be adversely impacted by operations.

H&K's wetlands mitigation plan, entitled Wetlands Encroachment Plan (Plan), was submitted to the Department as part of its permit application. The Plan outlines the analysis of the alternatives available for development of mining activities at the site with regard to avoidance of impacts to wetlands. (H&K Ex. 10) In addition, the Plan set forth

the selected plan to accomplish that goal. Special Condition No. 16 of the Permit requires the Plan to be implemented. Special Condition No. 19 provides that the Permittee must submit additional and/or revised mitigation plans to address any goals or qualify standards which are not achieved.

Appellants argue that the Plan is inadequate because the water supply may be inadequate to maintain the wetlands and, supposedly, there was no comparison between the functional values of wetlands to be constructed and those being replaced. The first concern is unfounded and the second is untrue.

Even Appellants' expert agreed that if there were a water supply problem that may develop all that one would do to ameliorate it would be to provide additional water from other sources. (Schmid Tr. 171) Mr. Schmid admitted that he did not know whether other sources of water may be readily available at this site. (*Id.*) Mr. Rightnour, the author of the Plan, testified that even in the event that there were to be a shortage of water for the wetlands, there were a myriad of sources which could be relied upon to augment the water supply. (Rightnour Tr. 360)

H&K also submitted as part of its permit application, a Functional Value Assessment of Wetlands (Wetlands Assessment). (H&K Ex. 14) This report notes that development of the mining site will permanently impact approximately 8.24 acres of wetlands out of the 11.37 acres of wetlands within the permit boundary. The Assessment itself analyzes the functions and values of wetlands delineated (Wetlands 1 through 5 and Wetland A). The Wetlands Assessment provides that its results can be used to select appropriate wetlands mitigation as well as to design replacement wetlands such that the functions and values lost from the wetlands affected can be replaced.

In addition to Special Condition No.19, about which we have already discussed, there are a host of special conditions in this Permit aimed at protection of, monitoring of and the monitoring of the protection of wetlands. Special Conditions Nos. 17 and 18 require that H&K produce a monitoring report with respect to impacts on wetlands within the first year of the permit's issuance and, then, every three years thereafter. The report was produced and entered into evidence at the trial. (Ex. H&K 12) This report is entitled Special Conditions Wetland Evaluation (Evaluation). The Evaluation is designed to delineate a baseline of wetlands conditions that can be used for comparison over the years. (Rightnour Tr. 361) This Evaluation, and the ones to be done in the future pursuant to the Special Conditions, will be an effective tool in identifying, evaluating and predicting potential impacts, if any, on wetlands as the mining operation progresses. We are convinced by the testimony of Mr. Rightnour, the architect of this Evaluation, that the Evaluation is based on acceptable techniques in the field of wetlands evaluation. Thus, the Evaluation and its successors will serve as an effective diagnostic tool to provide ample warning in the event conditions turn such that wetlands are being impacted in manners that are unexpected now.

William Capouillez of the Pennsylvania Game Commission, participated in the review of this permit application with regard to the subject of wetlands and wetlands protection. Mr. Capouillez has in the past actually filed appeals of Department mining permits that he believes failed to properly protect wetlands. In contrast, in this case, Mr. Capouillez testified that the monitoring program in this Permit is "at the top of the echelon as far as wetlands monitoring that the [Game] Commission has been privy to see." (Capouillez Tr. 476-77) He testified that "the program far exceeds what I am

accustomed to seeing with respect to mining.” (*Id.*) The Board finds Mr. Capoullez’s testimony on this subject particularly compelling and we credit it.

For those reasons, we find no error in granting this Permit, nor any reason now to overturn that action, insofar as wetlands issues are concerned.

### **Stormwater**

Appellants also complain, in the context of the appeal of the NPDES Permit, about the alleged inadequacy of both the substance of and the consideration of storm water issues with respect to this Permit. However, the record demonstrates that both the Department considered and addressed these issues before it issued the Permit. Moreover, the evidence at the hearing demonstrated that storm water management issues were adequately provided for in this NPDES Permit.

The evidence shows that the management of storm water from this permitted operation will take place in such a manner as to not cause any adverse environmental impact. Specifically, all of the storm water runoff from the quarry site is directed through sediment traps and ditches into sedimentation basins. In those sedimentation basins, the water is treated and held until it complies with all discharge effluent criteria established in the site’s NPDES Permit. The only exception is in the case of an extraordinary storm event in which case the discharge from the sedimentation basins is, by permit, exempt from discharge parameters. The storm water which has been accumulated in the sedimentation basin is sampled to assure that it meets all applicable criteria prior to its being discharged. In addition, H&K must monitor and evaluate wetland B every June in order to confirm that there has been no adverse impact from the discharge of storm water. We find credible Mr. Ross’s overarching point that because of the storm water

management measures outlined in the NPDES Permit, less sediment will be leaving the site during its operation than before the site was constructed. (Ross Tr. 344)

Appellants claim that DEP erred in not requiring H&K to construct a groundwater recharge system for Phase 1 instead of having a basin discharge system. The record is not entirely clear whether and to what extent DEP considered this option during the permit review process. In any event, we credit Mr. Peffer's testimony at trial that such a system would not be appropriate for this site. He testified that such a system would require an enormous commitment of land. Moreover, if one tried to recharge the amount of water that would be involved at this site, about five and one-half million gallons of water in one week, it would result in a significant mounding of the groundwater table.

#### **Permit Conditions As Substitute For Current Determinations**

Appellants argue that the Department acted improperly in this case in that it supposedly employed the copious Special Conditions in this Permit as a substitute for making the regulatorally required determination at the time of the Permit's review that the application demonstrated that there would be no likely adverse impacts to the waters of the Commonwealth. Appellants claim that special permit conditions cannot substitute for the legal requirement of an affirmative demonstration that there will be no likely adverse environmental impact in the operations.

It seems that this argument has two points. First, generally, we take Appellants to be arguing that the many special conditions in the permit relating to ongoing monitoring during mining aimed at either confirming that there is no adverse environmental impact therefrom or at providing adequate advanced warning of the onset of any previously unexpected adverse environmental impacts are improper substitutes for making the

determination at the permit review stage that there will be no adverse impacts. Second, as we eluded to before, the Permit structure which provides for a deferral of a DEP decision whether to allow Phase 2 mining based upon there having been no adverse environmental impacts from Phase 1 mining is an improper substitute for a current demonstration by the Permittee that there will be no adverse environmental impacts from Phase 2 mining.

In support of their argument on this point, Appellants cite *New Hanover Township v. DER*, 1996 EHB 668. That case, though, is not applicable to the situation here. In *New Hanover*, the Department issued a permit for a landfill under the Solid Waste Management Act when the design for the facility was not fully developed and merely theoretical. The Department attempted to justify the permit issuance in that case by pointing to conditions in the permit requiring that the facility undergo a major redesign before it could be placed in operation. The Board, in that case, held that the granting of the permit, even with such conditions, constituted an abuse of discretion. 1996 EHB at 685-86. The essence of the Board's holding in *New Hanover* was that the law required that a permit be issued upon a final design and that the Department could not use conditions of a permit to legitimize what would otherwise be an illegal action.

This case is a far cry from the situation in *New Hanover*. In this case, the Permit, with its copious Special Conditions, was issued upon a workable and detailed final design. This is *not* a situation in which the Department has attempted to rely on conditions of a permit to sustain an otherwise unlawful action on its part. As to Special Conditions Nos. 30 and 33, we see no error in providing for the lock step process which those two conditions establish with respect to mining Phase 2. Indeed, DEP's approach



seems to be harmonious with Appellants' own view of the particular caution needed with respect to mining an EV watershed.

### **Conclusion**

For all these reasons we uphold the Department's issuance of the Permit, the appurtenant authorization to mine and the NPDES Permit.

### **CONCLUSIONS OF LAW**

1. The Board has subject matter jurisdiction over the parties and this appeal.
2. Birdsboro and the BMUA have standing to pursue this appeal. *William Penn Parking Garage*, 346 A.2d 269, 280-83 (Pa. Cmwlth. 1975); *Smedley v. DEP*, Docket No. 97-253-K, slip op. at 30-32; *Belitskus v. DEP*, 1998 EHB 846, 859 (citing *William Penn Parking Garage*, 346 A.2d at 283).
3. The scope of the Board's review is *de novo* meaning that the Board is not limited to considering only the evidence that was before the Department when it rendered its decision but the Board will consider all relevant and admissible evidence presented to it at the time of hearing and will weigh all the evidence presented anew. 35 P.S. § 7514(c); *Pequea Township v. Herr*, 716 A.2d 678, 685-87 (Pa. Cmwlth 1998); *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *Warren Sand & Gravel Co. v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975); *Smedley v. DEP*, Docket No. 97-253-K, slip op. at 26-27; *O'Reilly v. DEP*, Docket No. 99-166-L, slip op. at 14 (Adjudication issued January 3, 2001).
4. Actions before the Board involve the Board's *de novo* determination of whether the findings upon which DEP based its action are correct and whether DEP's

action is reasonable and appropriate and otherwise in conformance with the law. *Smedley v. DEP*, Docket No 97-253-K, slip op. at 30.

5. Birdsboro and the BMUA may challenge in this appeal the aspects of the Permit, the authorization to mine and the NPDES Permit regarding Phase 2 mining as well as the appropriateness and legality of the approach taken in the Permit, which provides that DEP is deferring a decision whether to allow Phase 2 mining pending development of environmental data garnered during the Phase 1 operations.

6. Birdsboro and the BMUA have the burden of proceeding and the burden of proof to show by a preponderance of the evidence that the Department's issuance of the Permit, the appurtenant authorization to mine and the NPDES Permit was error. 25 Pa. Code § 1021.101(a),(c)(2). 25 Pa. Code § 77.126(a)(3) does not require, as Appellants assert, that an applicant prove beyond any doubt that there is no conceivable possibility that any adverse impact could result from the mining activity in order to qualify for a mining permit.

7. Birdsboro and the BMUA failed to sustain their burden with credible evidence that the activities contemplated by the Permit, the authorization to mine and the NPDES Permit will result in pollution to the waters of the Commonwealth.

8. No burden shifting is appropriate in this case because Birdsboro and the BMUA did not present any credible evidence that the activities contemplated by the Permit, the authorization to mine and the NPDES Permit would cause harm to the waters of the Commonwealth. *Marcon, Inc. v. DER*, 462 A.2d 969 (Pa. Cmwlth. 1983); *Lehigh Township, Lackawanna County v. DEP*, 1995 EHB 1098.

9. 25 Pa. Code § 93.4 does not prohibit, absolutely, mining activities in an exceptional value watershed.

10. The Department gave due consideration in the review of the permit applications to the fact that the mining activities would be occurring in proximity to an EV stream and the Permit, authorization to mine, and NPDES Permit terms reflect adequate provisions for the protection of the EV watershed from adverse impact from mining operations. 25 Pa. Code § 93.4.

11. DEP did not err by not requiring computer modeling and aquatic studies in this case. 25 Pa. Code § 77.403(b).

12. There is no legal infirmity with the Permit regarding its application of Special Conditions.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

BIRDSBORO & BIRDSBORO MUNICIPAL  
AUTHORITY

v.

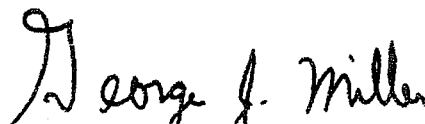
COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION and HAINES &  
KIBBLEHOUSE, INC.


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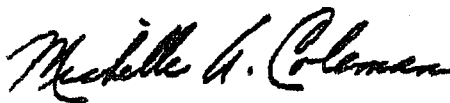
ORDER

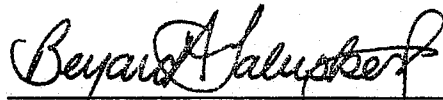
AND NOW, this 30<sup>th</sup> day of April, 2001, this appeal is hereby **dismissed**.

ENVIRONMENTAL HEARING BOARD

  
\_\_\_\_\_  
GEORGE J. MILLER  
Administrative Law Judge  
Chairman


  
\_\_\_\_\_  
THOMAS W. RENWAND  
Administrative Law Judge  
Member

  
\_\_\_\_\_  
MICHELLE A. COLEMAN  
Administrative Law Judge  
Member



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**BERNARD A. LABUSKES, JR.**  
Administrative Law Judge  
Member



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**MICHAEL L. KRANCER**  
Administrative Law Judge  
Member

**DATED:** April 30, 2001

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

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