Environmental Hearing Board

Adjudications and Opinions

1999

Volume II

COMMONWEALTH OF PENNSYLVANIA
George J. Miller, Chairman

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OF THE

ENVIRONMENTAL HEARING BOARD

1999

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1999.

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

FISHER MINING COMPANY	:	
	:	
v.	:	**EHB Docket No. 98-051-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 27, 1999**

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

Where the Department has established that water which did not meet the effluent limits at 25 Pa. Code § 87.102 bypassed the mining company's treatment pond, and the treatment system failed to utilize neutralizing agent, as evidenced by the water impounded in the treatment pond which did not meet the effluent limits, the Department has met its burden of proving by a preponderance of the evidence that the compliance order it issued for failing to provide adequate treatment in violation of 25 Pa. Code § 87.107 was not an abuse of discretion.

BACKGROUND

This is an appeal by Fisher Mining Company (Fisher) of Compliance Order No. 984009 which was issued by the Department of Environmental Protection (Department) on February 18, 1998 (February 18 Order). Fisher operates four adjacent surface mining operations in Pine Township, Lycoming County, and a coal processing facility (tipple) to process coal produced on those permits. The February 18 Order was issued for violation of 25 Pa. Code § 87.107 for failure to maintain

treatment facilities adequate to treat all water from areas disturbed by mining activities to ensure that 25 Pa. Code § 87.102 effluent limits are met.

A hearing on this matter was held on January 20, 1999 before Administrative Law Judge George J. Miller. The record consists of a joint pre-hearing stipulation, a transcript totaling 240 pages and 16 exhibits. After a full and complete review of the record and post-hearing briefs, we make the following:

FINDINGS OF FACT

1. 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. §§ 1396.1–1396.31 (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); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended,* 71 P.S. §§ 510-517 (Administrative Code), and the rules and regulations promulgated thereunder. (J.S. ¶ 1)[1]

2. Fisher Mining Company (Fisher) is a Pennsylvania corporation with a business address of Box 374, 439 Broad Street, Mountoursville, PA 17754, whose business includes the mining of bituminous coal in the Commonwealth by the surface mining method. (J.S. ¶ 2)

3. John Blaschak is the president of Fisher. (J.S. ¶ 3)

4. Steven Blaschak is the vice president of Fisher. (N.T. 223-224)

5. Fisher operates adjacent surface mining operations in Pine Township, Lycoming County,

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[1] "J.S. ¶ ___" refers to the joint pre-hearing stipulation submitted to the Board on January 20, 1999, as Board Exhibit 1. "C-Ex. ___" refers to a Commonwealth exhibit admitted at the hearing. The Appellant did not offer any exhibits into evidence. References to the hearing transcript will be denoted as "N.T. ___."

Pennsylvania, pursuant to Surface Mining Permit (SMP) No. 41840101, SMP No. 41870101, SMP No. 41920101 and SMP No. 41940101. (J.S. ¶ 4)

6. Fisher operates a coal processing facility (tipple) to process coal produced at the SMP's referenced in paragraph 4. (J.S. ¶ 5)

7. The tipple treatment system was designed to use the coal stockpiles as a filtering medium. The coal piles rest on asphalt, which is an impervious core liner pitched toward the center of the coal pile area. (N.T. 206) Surface runoff from the area of the facility flows to a concrete sump. The discharge from the sump is supposed to pass through a box type structure designed to neutralize the water through contact with soda ash briquettes or other agents. The water was originally to be routed into a steel pipe to convey it down over the outslope of the preparation plant area to a settling/treatment basin. Collection ditches are also used to collect runoff from the slopes of the tipple area and direct it to the basin. The purpose of the basin is to allow suspended solids and precipitated metals to settle prior to the water being discharged through a wooded area in Buckeye Run. (J.S. ¶ 6)

8. On November 3, 1997, personnel from the Department, the Pennsylvania Fish and Boat Commission (PFBC), the Pennsylvania Game Commission (PGC), Fisher and the Otter Run Club met at SMP No. 41840101 to review erosion and sedimentation (E&S) issues. (J.S. ¶ 7)

9. Present from the Department were Hawk Run District Mining Manager Michael W. Smith, Permits Chief John Varner, Hydrogeologist Bob Weiss, Inspector Supervisor Steven Starner and Inspector Wayne McGinness. (J.S. ¶ 17)[2]

[2] In the joint stipulation, paragraphs 8 through 17 were inadvertently misnumbered as paragraphs 17 through 26. The references in the text to the joint stipulation retain the original numbering.

10. Present from Fisher were John Blaschak, Steven Blaschak and Boyer Kantz, among others. (J.S. ¶ 18)

11. Present from PFBC were Waterways Conservation Officer Tom Nunamacher, Paul Swanson and Steven Kepler. (J.S. ¶ 19)

12. Present from PGC were hydrogeologist William A. Capouillez and Denny Duzsa. (J.S. ¶ 20)

13. During a November 3, 1997 inspection, Department Inspector Wayne McGinnes collected sample number 4418989. (J.S.¶ 21)

14. Laboratory analysis of sample number 4418989 indicated that the water sampled exhibited a pH of 2.8, acidity which exceeded alkalinity, an aluminum concentration of 31.0 milligrams per liter (mg/l), an iron concentration of 325.0 mg/l, a manganese concentration of 7.28 mg/l and sulfates of 429 mg/l. (J.S. ¶ 23)

15. During a November 6, 1997 inspection, Department Inspector Wayne McGinness collected sample number 4418993. (J.S. ¶ 22)

16. Laboratory analysis of sample number 4418993 indicated that the water exhibited a pH of 3.0, acidity which exceeded alkalinity, an aluminum concentration of 18.3 mg/l, an iron concentration of 47.2 mg/l, a manganese concentration of 4.85 mg/l and sulfates of 665 mg/l. (J.S. ¶ 24)

17. On February 18, 1998, the Department issued Compliance Order 984009 to Fisher for failure to maintain treatment facilities adequate to treat all water (discharges and runoff) from areas disturbed by mining activities to ensure that the effluent limits are met, in violation of 25 Pa. Code § 87.107. (J.S. ¶ 25)

18. Fisher filed a timely appeal of the February 18, 1998 Order to the Board. (J.S. ¶ 26)

19. Officer Nunamacher took photographs of the area on November 3 and 6, 1997 including the E&S/treatment pond and the road leading from the tipple area to the pond. He also took photographs during an overflight of the area on October 28, 1997. (N.T. 18, 24, 26, 28, 30, 33, 35-40; C-Exs. 1-11)

20. While walking through the area near the pond, personnel from the Department, PFBC and PGC observed water running down the pond access road past the treatment pond continuing across the road and off the affected area in the woods. (N.T. 32-35, 56-60, 72-73, 131-133, 162-163, 173-174)

21. At least one inch of rain fell in the area of Fisher's treatment system during the period of November 1-3, 1997. (N.T. 230-237) The flow of water down the road was of sufficient strength to have eroded an indented groove prior to the November 3, 1997 observations. (N.T. 33-35, 37; C-Exs. 4, 5, 7)

22. Officer Nunamacher took photographs of the flow. (N.T. 30-38; C-Exs. 4, 5)

23. Mr. Capouillez followed the water form its origin near the preparation plant, down the access road past the pond, into the woods, to its entry into Buckeye Run. (N.T. 57-59, 64-65)

24. Mr. Capouillez observed that the water picked up coal sediment from nearby stockpiles as it flowed toward the pond and the woods. (N.T. 59)

25. On November 3, 1997, Inspector McGinness collected a sample of the flow which bypassed the pond. (N.T. 72-73, 76; C-Ex. 12)

26. The sample collected on November 3, 1997 of the water bypassing the treatment pond was demonstrated by laboratory analysis not to meet the effluent limitations at 25 Pa. Code § 87.102. (N.T. 152-153; C-Ex. 12)

27. According to the lab analysis of the sample, it appeared to be acid mine drainage. Fisher was directed by Department personnel to correct the flow bypassing the pond. (N.T. 83-84)

28. Personnel from the Department accompanied by Officer Nunamacher returned to the pond area on November 6, 1997 to assess Fisher's E&S controls. (N.T. 36-43, 86, 137-138)

29. During the November 6, 1997 inspection, observations of the reddish-colored water in the pond raised a concern with the Department that the treatment system was not functioning properly. (N.T. 141-142)

30. Inspector McGinness collected a sample of the water in the pond on November 6, 1997. (N.T. 89-90; C-Ex. 14)

31. The sample collected on November 6, 1997 from the pond was demonstrated by laboratory analysis not to meet the effluent limitations at 25 Pa. Code § 87.102. (N.T. 152-153; C-Ex. 14)

32. Concerns about the operation of the treatment system led Department personnel to discover on November 6, 1997 that there was no soda ash in the box for the purpose of neutralizing the water, and the conveyance pipe had rusted and separated from the dispenser such that the water would run directly down the outslope. (N.T. 94-95, 139-140)

33. There was no alkalinity in the treatment pond water on November 6, 1997, which shows no indication of treatment having occurred. (N.T. 188-190)

34. Inspector McGinness wrote an inspection report for the November 3 and November 6 inspections. In the report, Fisher was issued a notice of violation (NOV) for failure to provide adequate E&S controls. (N.T. 86-89; C-Ex. 13)

35. Inspector McGinness conducted a follow up inspection on November 12, 1997. (N.T. 95-98; C-Ex. 15)

36. The parties stipulated that if the Department had presented the testimony of Paul Swanson and Steven Kepler from the Pennsylvania Fish and Boat Commission, and Robert Weiss and John Varner from the Department, the testimony of those four gentlemen with regard to water bypassing the treatment pond and flowing off the affected area into the woods would be consistent with that of Officer Nunamacher and Inspector McGinness. (N.T. 162-163)

37. The circumstances of the condition of the site at the time of the Department's inspection indicated that the water in the treatment pond did not meet effluent standards as a result of Fisher's failure to properly apply soda ash or other neutralizing agent to either the treatment box or treatment pond. (N.T. 94-95, 115, 117-118, 139, 188)

38. Based upon the sample of the water bypass which did not meet 25 Pa. Code § 87.102 effluent limits, the absence of effective neutralization as evidenced by the quality of the water in the treatment pond, and the absence of neutralizing agent in the treatment system on November 6, 1997, the Department issued an order to Fisher on February 18, 1998 for failure to maintain treatment facilities adequate to treat all water (discharges and runoff) from areas disturbed by mining activities to ensure that the effluent limits are met, in violation of 25 Pa. Code § 87.107. (N.T. 99-103, 145-146, 175-176; C-Ex. 16)

DISCUSSION

Where the Department issues an order, it has the burden of establishing by a preponderance of the evidence that its order was an appropriate exercise of its discretion by adducing evidence sufficient to support the order. 25 Pa. Code § 1021.101(b)(4); *Eagle Environmental L.P. v. DEP*, 1998 EHB 896. In its post-hearing brief, the Department asserts that it established by a

preponderance of the evidence that Fisher violated 25 Pa. Code § 87.107[3] on November 3 and 6, 1997, when the mining company failed to maintain treatment facilities for its coal processing facility (tipple) which were capable of ensuring that all discharges from areas disturbed by mining activities met the effluent limits at 25 Pa. Code § 87.102. The Department maintains that the bypass flow which exceeded 25 Pa. Code § 87.102 effluent limits, the absence of neutralizing agent in the treatment system, and the lack of effective treatment as evidenced by the water in the treatment pond which did not meet the effluent limits all constitute violations of 25 Pa. Code § 87.107. This section requires that facilities for treating discharges from areas disturbed by mining be capable of ensuring that all discharges and runoff from such areas meet the effluent limits at 25 Pa. Code § 87.102. Fisher asserts in its post-hearing brief that the Department has failed to show that water bypassed the pond and left the affected area untreated and that the treatment system did not contain neutralizing agent. Fisher further contends that water in a treatment pond which does not meet 25 Pa. Code § 87.102 does not independently establish a violation of 25 Pa. Code § 87.107.

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[3] Section 87.107 of the Department's rules and regulations concerns the hydrologic balance of treatment facilities and states that:

> (a) At a minimum, facilities and measures for treating discharges from disturbed areas shall be designed, constructed and maintained to treat the runoff from a 10-year, 24-hour precipitation event and any groundwater contribution.
> (b) Facilities and measures for treating any discharges shall be based on good engineering design and shall include automatic neutralization processes. The Department may approve a manual neutralization system if the Department finds that:
> (1) Small and infrequent treatment is needed to meet effluent limitations.
> (2) Timely and consistent treatment is ensured.
> (c) The design, construction and maintenance of a treatment facility shall not relieve an operator of his responsibility for complying with effluent standards as provided for in § 87.102 (relating to hydrologic balance: effluent standards).

25 Pa. Code § 87.107.

The tipple features a treatment system designed to use the coal stockpiles as a filtering medium. The coal piles rest on asphalt, which is an impervious core liner pitched toward the center of the coal pile area. (N.T. 206) Surface runoff from the tipple area flows through the piles to a concrete sump. The discharge from the sump is supposed to pass through a box type structure designed to neutralize the water through contact with soda ash briquettes or other agents. The water is then to be routed into a steel pipe to convey it over the outslope of tipple area to a settling/treatment basin. Collection ditches are also used to collect runoff from the slopes of the tipple area and direct it to the basin. The purpose of the basin is to allow suspended solids and precipitated metals to settle prior to the water being discharged through a wooded area in Buckeye Run. (J.S. ¶ 6)

On November 3, 1997, personnel from the Department, the Pennsylvania Fish and Boat Commission (PFBC), the Pennsylvania Game Commission (PGC), Fisher, and Otter Run Club met at the site to review erosion and sedimentation (E&S) issues. (J.S. ¶ 7) The Department personnel present were Hawk Run District Mining Manager Michael W. Smith, Permits Chief John Varner, Hydrogeologist Bob Weiss, Inspector Supervisor Steven Starner and Inspector Wayne McGinness. (J.S. ¶ 17) Personnel present from PFBC included Waterways Conservation Officer Tom Nunamacher and from PGC, Hydrogeologist William A. Capouillez. (J.S. ¶¶ 19, 20) Present from Fisher were Mr. John Blaschak and Mr. Steven Blaschak, among others. (J.S. ¶ 18) The Department presented the testimony of five witnesses who observed surface water bypass Fisher's treatment pond and flow into the woods.[4]

[4] The parties stipulated that four other individuals would offer consistent testimony if called to testify. (N.T. 162-163)

The first of these witnesses to testify was PFBC Waterways Conservation Officer Tom Nunamacher, whose district includes the location of Fisher's mine site. (N.T. 18) His primary duty is to enforce Title 30 of the Pennsylvania Fish and Boat Code, in particular the encroachment and disturbance of waterways. (N.T. 19) Officer Nunamacher described the eleven photographs that he had taken of the tipple area and the treatment pond. (N.T. 19-43; C-Exs. 1-11) The coal storage area adjacent to the access road is evident in two of the photographs. (N.T. 26, 30-31; C-Exs. 3, 4) In other photographs, the access road and the water flowing along the interior berm in an indented groove and over the embankment into the wooded area is depicted. (C-Exs. 4, 5) Officer Nunamacher testified that he was present in the area of the treatment pond on November 3, 1997 and he observed water flow down the right side of the pond access road past the pond, over the embankment and into the woods. (N.T. 30-35) He also described several photographs taken on November 6, 1997 that depict the access road with the flow channel visible, and the discolored water and accumulated sediment in the pond. (N.T. 36-43; C-Exs. 7-11)

Mr. William A. Capouillez, a hydrogeologist with the Pennsylvania Game Commission's Division of Environmental Planning and Habitat Protection, testified next for the Department. (N.T. 55) He was present in the area of the mine site and the treatment pond on November 3, 1997. (N.T. 56) Using three of the photographs taken by Officer Nunamacher, Mr. Capouillez testified that he followed the flow of water from its origin near the tipple, down the access road past the pond and over the bank, through the woods to where it entered into Buckeye Run. (N.T. 56-65; C-Exs. 1, 4, 5) Mr. Capouillez testified that he saw the water pick up coal fines and sediment from the coal stockpile area as it flowed along the access road toward the pond and into the woods. (N.T. 59) Due to the discoloration of the flow, he could see where the flow entered the left bank of Buckeye

Run and he "could see an actual cloud flume as to where it went ahead and went downstream for roughly ten yards or so until there was some dissolution with the additional waters of Buckeye Run." (N.T. 57-58)

Mr. Wayne McGinness, a mine conservation inspector with the Department for 18 years, testified that he was at the mine site on November 3, 1997 in order to observe the E&S controls at the site. (N.T. 67-69) Mr. McGinness testified that while in the area of the treatment pond, he observed water flowing past the pond and off the affected area into the woods. (N.T. 72-73) He collected a sample of the water that bypassed the treatment pond and identified it as sample number 4418989. (N.T. 73-79; C-Ex. 12) He testified that according to the analysis of the sample, the water was indicative of acid mine drainage. (N.T. 81-83) Mr. McGinness explained that acid mine drainage is characterized by a pH of less than 6, acidity exceeding the alkalinity, high metal concentrations of iron and manganese, and sulfates of great than 100. (N.T. 82) The laboratory analysis of sample number 4418989 indicated that the water sampled exhibited a pH of 2.8, acidity which exceeded alkalinity, an aluminum concentration of 31.0 milligrams per liter (mg/l), an iron concentration of 325.0 mg/l, a manganese concentration of 7.28 mg/l and sulfates of 429 mg/l. (J.S. ¶ 23; C-Ex. 12)

Mr. McGinness conducted a subsequent inspection of Fisher's treatment system on November 6, 1997. (N.T. 85-86) At that time he issued a notice of violation to the operator indicating that the runoff bypassing the treatment pond had to be corrected on or before November 17, 1997. (N.T. 88-89; C-Ex. 13) The operator was also instructed to submit a comprehensive E&S plan to the Department for approval on or before December 6, 1997. (N.T. 89; C-Ex. 13)

Mr. McGinness testified that on November 6, 1997, there was some water in the impoundments but there was no discharge and the treatment box itself was rusted and in need of

repair. In addition, the pipe which was supposed to transport the treated water to the treatment basin was broken off and "it appeared that the water cascaded when it did discharge down over the embankment to the pond." (N.T. 93-94) Although there was evidence of old soda ash briquette bags and evidence of a small portion of soda ash down over the bank, Mr. McGinness did not see any soda ash in the hopper. (N.T. 94-95, 115, 117-118) The purpose of having soda ash in the hopper is to neutralize the discharge from the traps or the concrete sumps that the collected the water prior to treatment. (N.T. 95)

Mr. Steven C. Starner, an inspector supervisor with the Department, was also at the site on November 3, 1997 and observed water flowing down the access road. (N.T. 128, 131) He testified that a portion of the flow bypassed the pond and went off the affected area into the woods. (N.T. 131-133; C-Ex. 4) He discussed the pond bypass with Hawk Run District Mining Manager Michael W. Smith, who was also present during the site visit. (N.T. 135) It was decided that Inspector McGinness should collect a sample of the water that bypassed the pond. (N.T. 136-137) Mr. Starner was asked by Mr. Smith to return to the site with Mr. McGinness to conduct a more comprehensive review of the E&S controls and the treatment facility. (N.T. 137-138) Mr. Starner stated that on his visit to the site on November 6, 1997, it appeared that some water had bypassed the collection sump and there was no neutralizing agent in the dispenser. (N.T. 139) He also testified that the pipe which was originally designed to transport the water down over the bank was in a state of disrepair causing any water to cascade down over the bank. (N.T. 139)

Based on the reddish coloration of the water, Mr. Starner directed Mr. McGinness to collect a sample of the treatment pond water in order to confirm his observation that the water indicated the presence of acid mine drainage. (N.T. 141, 142) Mr. McGinness collected a second water sample

from the impounded water in the tipple treatment pond and identified it as sample number 4418993. (N.T. 89-90; C-Ex. 14) The laboratory analysis of sample number 4418989 indicated that the water sampled exhibited a pH of 2.8, acidity which exceeded alkalinity, an aluminum concentration of 31.0 mg/l, an iron concentration of 325.0 mg/l, a manganese concentration of 7.28 mg/l and sulfates of 429 mg/l. (J.S. ¶ 23)

After Mr. McGinness received the analyses reports from both water samples (C-Exs. 12, 14), he and Mr. Starner discussed the findings with Mr. Smith. (N.T. 98-99, 143-145) It was decided to issue the February 18 Order for violation of 25 Pa. Code § 87.107 for failure to maintain adequate treatment facilities. (N.T. 145) Both Mr. McGinness and Mr. Starner testified that the February 18 Order was issued based upon the November 3, 1997 pond bypass, the absence of the neutralizing agent in the dispenser on November 6, 1997, and the fact that the November 6, 1997 sample of the water from the treatment pond indicated that the water had not been treated and did not meet the effluent limits at 25 Pa. Code § 87.102. (N.T. 102-103, 145-146)

Mr. Smith was the final Department witness who testified to being present at the mine site on November 3, 1997. (N.T. 172) He observed water running off the coal preparation area down the access road, a portion of which bypassed the pond and flowed into the woods. (N.T. 173-174) He also testified that the water in the treatment pond showed "no indication of treatment having occurred." (N.T. 188) Mr. Smith testified that the February 18 Order was issued based on the pond bypass, the absence of neutralizing agent in the treatment system box, and because the water in the treatment pond did not meet the effluent limits. (N.T. 175-176, 186)

John Blaschak has been the president and CEO of Fisher since 1989 and has worked with the company since 1973. (N.T. 191-193) He was present at the site on November 3, 1997 and observed

a small amount of water "coming down the ditch with the bulk of the flow headed into the pond and a very small sliver of stream that headed . . . towards the woods." (N.T. 196-197) He stated that he did not see water flow into the woods because it went subsurface. (N.T. 201-203) He testified that the treatment system is designed such that soda ash is introduced into the water as it exits the primary concrete storage/settling basin. (N.T. 207) Since the pipe system which was ordinarily used for holding the soda ash had been disconnected from the outflow of the water, soda ash was added directly into the exit side of the hopper. (N.T. 207-208) Mr. Blaschak testified that there was soda ash in the hopper on November 6, 1997, but neither Mr. McGinness nor Mr. Starner could see it because it was stained black due to spillage when sediment was removed from the concrete sediment traps by a front end loader. (N.T. 210-214) On cross-examination, Mr. Blaschak stated that the nine people, who testified or would have testified, were mistaken about seeing the water flow into the woods and in Mr. Capouillez's case, flow into Buckeye Run. (N.T. 221-222)

Steven Blaschak has been employed at Fisher for twenty years and is currently the vice-president in charge of overseeing operational and maintenance issues. (N.T. 223-224) He was also present at the site on November 3, 1997 and testified that he observed water running down the access road and he saw a small amount that went past the treatment pond and went subterranean. (N.T. 224) However, he was not in the vicinity of the pond when Mr. McGinness collected a sample of the bypass water and he was not in the area of the pond when the nine other individuals, who testified or would have testified, observed the water flow past the pond and into the woods. (N.T. 226-227)

In its post-hearing brief, Fisher asserts that the Department witnesses were inconsistent in their testimony regarding the volume of the flow of the bypass. The witnesses presented by the Department consistently stated that they all observed a continuous flow of water from the tipple down

the pond access road, past the treatment pond which was constructed to catch and treat the water, and flow into the woods. The parties stipulated that four other witness, had they been called, would have testified that water bypassed the treatment pond. All of the Department's witnesses who testified also recognized the water flow path on Officer Nunamacher's photographs (C-Exs. 1-11) even though the witnesses were sequestered during his testimony relating to the photographs. Whether the volume of the flow that was bypassing the treatment pond was between 1.5 and 2 gallons (N.T. 107) or 5 gallons (N.T. 63) per minute does not negate that fact that water indeed bypassed the treatment pond at the site. At least one inch of rain fell in the area of Fisher's treatment system during the period of November 1-3, 1997. (N.T. 230-237) The flow of water down the road was evidently of sufficient strength to have eroded an indented groove prior to the November 3, 1997 observations. (N.T. 33-35, 37; C-Exs. 4, 5, 7) The cumulative effect of even a 1.2 gallon bypass of the treatment pond would obviously constitute a substantial violation of the Department's regulations. Moreover, the analysis of the sample of the bypass established that the water was indicative of acid mine drainage in that it exhibited a low pH, acidity and high concentrations of metal. It therefore did not meet the effluent limits at 25 Pa. Code § 87.102 and constituted a violation of 25 Pa. Code § 87.107.

Fisher also alleges that the meetings between the parties were contentious and the Department's motives behind issuing the notice of violation and February 18 Order were improper. The Department does not dispute that the relationship "had its ups and downs through that whole period, like any other relationship between a regulator and a regulated community" and it "was somewhat strained." (N.T. 182) Mr. Smith was asked by the Department's counsel whether "that order [was] issued for any reason other than the fact that the Department believed there was

inadequate treatment of the water on November 3 and November 6, 1997." His response was "[n]o." (N.T. 186) There is nothing in the record which nullifies the factual basis underlying the violations or supports any inference that the Department acted improperly in performing its duty to administer and enforce its regulations.

Fisher also asserts in its post-hearing brief that "[i]t is uncontroverted that neither on November 3, 1997 nor November 6, 1997, was there any discharge from the treatment system above or the pond below." (Appellant's post-hearing brief at 3) This argument is also irrelevant in that it ignores the fact that the Department cited Fisher for failure to maintain an adequate treatment facility, not for a polluted discharge from the pond. Section 87.107, 25 Pa. Code § 87.107, establishes the requirements for treatment facilities whereas Section 87.102, 25 Pa. Code § 87.102, establishes the effluent limits an operator must meet for discharges from the mine site. In this case, the quality of the water in the treatment pond provided further evidence that effective treatment was not taking place. It corroborated the testimony that there were no neutralizing agents in the hopper.

Finally, the three Department witnesses who testified that there was no neutralizing agent in Fisher's treatment system on November 6, 1997 were more credible than Mr. Blaschak's explanation suggesting that the soda ash was stained black. We also reject Mr. Blaschak's explanation for the holding pond's failure to meet treatment standards. While he testified that the low pH was due to the front end loader failing to remove all of the solids from the pond and the lack of rainfall (N.T. 203-205), we conclude that the circumstances indicate that the primary cause of the pond's failure to meet treatment standards was the failure of the treatment system.[5] In light of the fact that the analyses of

[5] The Department presented rebuttal testimony which confirmed, through the United States Geologic Survey, that rain had fallen on at least November 1 and 2, 1997. (N.T. 235-237)

the samples from both the bypass and treatment pond did not meet the effluent limits at 25 Pa. Code § 87.102 and there was no neutralizing agent in the treatment system, the Department has sustained its burden of proof by establishing the violations underlying the February 18 Order by a preponderance of the evidence.

Accordingly, we find the following:

CONCLUSIONS OF LAW

1. The Department has the burden of proof and proceeding in this matter. 25 Pa. Code § 1021.101(b)(4).

2. The Departments rules and regulations at 25 Pa. Code § 87.107 provide that:

> (a) At a minimum, facilities and measures for treating discharges from disturbed areas shall be designed, constructed and maintained to treat the runoff from a 10-year, 24-hour precipitation event and any groundwater contribution.
> (b) Facilities and measures for treating any discharges shall be based on good engineering design and shall include automatic neutralization processes. The Department may approve a manual neutralization system if the Department finds that:
> (1) Small and infrequent treatment is needed to meet effluent limitations.
> (2) Timely and consistent treatment is ensured.
> (c) The design, construction and maintenance of a treatment facility shall not relieve an operator of his responsibility for complying with effluent standards as provided for in § 87.102 (relating to hydrologic balance: effluent standards).

3. Fisher has failed to provide adequate treatment of water discharges in violation of 25 Pa. Code § 87.107 as evidenced by the absence of soda ash or other neutralizing agent in the treatment box, the broken pipe designed to transport the treated water from the treatment box to the treatment pond, and the failure of both the water bypass and the water in the treatment pond to meet effluent limits at 25 Pa. Code § 87.102. 25 Pa. Code § 87.107.

4. The Department met its burden of proving by a preponderance of the evidence that the February 18 Order was not an abuse of discretion by adducing sufficient evidence to support that order. *Eagle Environmental L.P. v. DEP*, 1998 EHB 896.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FISHER MINING COMPANY	:	
	:	
v.	:	**EHB Docket No. 98-051-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 27th day of May, 1999, IT IS HEREBY ORDERED that the Department's issuance of Compliance Order 984009 is **sustained** and the above-captioned 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

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: May 27, 1999

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

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Southcentral Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ASHLAND TOWNSHIP ASSOCIATION OF CONCERNED CITIZENS, INC.	:	
v.	:	**EHB Docket No. 98-204-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MILESTONE CRUSHED, INC., Permittee	:	**Issued: June 1, 1999**

OPINION AND ORDER ON PETITION FOR ADDITIONAL RELIEF

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A "Petition for Additional Relief" is treated as a petition for supersedeas and is denied for failure to demonstrate irreparable harm to the petitioner. In addition, the relief sought by the petition, suspension of a mining permit, would have no meaningful effect where coal removal has been completed and the permittee is in the process of reclaiming the site.

Although the appellant filed affidavits in support of its petition in an untimely manner, the Board shall consider the affidavits at this time rather than require the appellants to refile their petition.

OPINION

Before the Board is a "Petition for Additional Relief" filed by Ashland Township Association of Concerned Citizens, Inc. (the Association) in its appeal of a mining permit issued by the Department of Environmental Protection (the Department) to Milestone Crushed, Inc. (Milestone). The permit authorizes Milestone to conduct surface mining operations on property known as the Gillingham site in Ashland Township, Clarion County. The Association is comprised of a number of residents in the area of the surface mine.

On November 18, 1998, the Association filed a petition for supersedeas seeking a stay of the mining permit. Following a hearing on the supersedeas petition and a site view of the permit area, the Board granted the petition for supersedeas in part. In an Opinion and Order dated December 18, 1998, the Board suspended that portion of the permit which authorized Milestone to discharge its sedimentation and treatment ponds onto property owned by Theda Kenemuth.

On May 5, 1999, the Association filed what it has labeled a "Petition for Additional Relief." The petition avers that on April 23, 1999, that portion of Ashland Township in which the permit area is located received a significant amount of rain, allegedly causing discharges of silt-laden surface runoff to flow from the mine site onto the Kenemuth property, into a pond on an adjacent golf course, and through a ditch into Little East Sandy Creek. The petition specifies that the discharges did not occur from the sedimentation and treatment ponds covered by the Board's December 18, 1999 order, but, rather, they consisted of runoff from the site itself.

In responses filed on May 18 and 19, 1999, respectively, Milestone and the Department assert that the petition must be denied because it fails to satisfy the requirements of a petition for

supersedeas. Specifically, Milestone noted that the Association failed to support its petition with affidavits in accordance with 25 Pa. Code § 1021.77(a).

On May 19, 1999 the Association submitted to the Board by telecopy the affidavit of Robert Hess, the owner and operator of the Hi-Level Golf Course located adjacent to the mine site. In it, Mr. Hess states that on April 23, 1999 he observed and videotaped muddy water running off the mine site and onto the Kenemuth property. It further states that he observed runoff traveling through roadside ditches and entering Little East Sandy Creek and a pond on his golf course. On May 24, 1999, the Association telecopied to the Board a second affidavit signed by Mr. Hess. In it, he states that during a rain event on May 24, 1999 he again observed and videotaped muddy water running off the mine site and into the same locations as observed on April 23, 1999.

On May 21, 1999, Milestone filed a "Motion to Strike Untimely Affidavit," seeking to strike Robert Hess' May 19, 1999 affidavit.[1] The Department filed a letter concurring with Milestone's motion.

In its motion, Milestone asserts that the Association apparently telecopied the Hess affidavit to the Board after receiving Milestone's and the Department's responses. Milestone points out that the Board's rules provide for the filing of affidavits with a petition for supersedeas, not after the opposing parties' responses have been filed. It further asserts that it has been prejudiced by the Association's failure to comply with Board Rule 1021.77(a) because Milestone has already incurred the expense of responding to the petition as filed, and will incur additional expense if required to file a supplemental response addressing the affidavit. Milestone further contends that it will be

1 On May 28, 1999, Milestone filed a "Second Motion to Strike Untimely Affidavit" seeking to strike Mr. Hess' May 24, 1999 affidavit.

prejudiced by its inability to rely on the Board's rules if the Board allows parties to ignore the rules until their non-compliance is identified in responsive pleadings.

In a response filed on or about May 27, 1999, the Association admits that the original Hess affidavit was prepared after receipt of the Department's response to its motion. However, the Association contends that its petition is not a petition for supersedeas, but is in the nature of a contempt citation, and, as such, is not governed by 25 Pa. Code § 1021.77. The Association further asserts that even if the Board treats its petition as one for supersedeas, the filing of Mr. Hess' affidavit cured any defects. Finally, the Association argues that the Department and Milestone were not prejudiced by the lack of affidavits with the petition because their responses to the petition indicate that they had specific knowledge of the facts.

We agree with Milestone that parties who appear before the Board are expected to comply with the Board's Rules of Practice and Procedure, as set forth at 25 Pa. Code §§ 1021.1 – 1021.161. While extensions of time for compliance with a particular rule may be granted at the discretion of the presiding judge when circumstances warrant it, parties are generally bound to adhere to the rules if they wish to proceed in matters before the Board.

While the Association's petition is not labeled a "petition for supersedeas," it appears to ask for supersedeas relief – the suspension of Milestone's permit. As such, it must comply with the Board's rules at 25 Pa. Code § 1021.77. That section states in relevant part as follows:

> (a) A petition for supersedeas shall plead facts with particularity and shall be supported by one of the following:
>
> (1) Affidavits, prepared as specified in Pa.R.C.P. Nos. 76 and 1035.4...setting forth facts upon which issuance of the supersedeas may depend.

(2) An explanation of why affidavits have not accompanied the petition if no supporting affidavits are submitted with the petition for supersedeas.

As noted by Milestone and the Department, the Association's petition did not contain an affidavit nor an explanation of why an affidavit failed to accompany the petition. Mr. Hess' original affidavit was not submitted to the Board until fourteen days after the filing of the petition and after responses had been prepared by Milestone and the Department.

However, we also recognize that were we to deny the Association's petition on these grounds, the result would simply be for the Association to refile its petition with the accompanying affidavits. We would then be back in the same position of having to decide the petition on its merits. For that reason, we shall consider the affidavits filed by the Association at this time.

Having considered the Association's petition, as supported by Mr. Hess' affidavits, we find that there is no basis for granting it. Among the factors which the Board must consider in deciding whether to grant a petition for supersedeas is that of irreparable harm to the petitioner. 25 Pa. Code § 1021.78(a)(1). The petition does not demonstrate that the Association or any of its members has suffered or will suffer irreparable harm as a result of the alleged runoff from the permit site.

Moreover, the relief requested by the petition would have no practical effect. The petition asks the Board to suspend Milestone's permit until adequately functioning erosion and sedimentation control facilities are installed. According to both the Department and Milestone's responses, however, coal removal is completed and Milestone has substantially completed reclamation of the site. Suspending Milestone's permit would provide no meaningful relief.

Finally, documentation submitted by the Department with its response indicates that the Department took immediate enforcement action following the April 23, 1999 runoff incident. The

Department inspected the site on April 23 and issued a Compliance Order on April 27, 1999 which cited Milestone for failure to maintain adequate erosion and sedimentation controls. (Exhibit to Department's Response) The Compliance Order states that during a follow-up inspection on April 27, 1999, the matter was corrected.

Because the relief sought by the petition would have no meaningful effect and, further, because the Association has demonstrated no irreparable harm, its Petition for Additional Relief is denied.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ASHLAND TOWNSHIP ASSOCIATION OF CONCERNED CITIZENS, INC.	:	
v.	:	**EHB Docket No. 98-204-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MILESTONE CRUSHED, INC., Permittee	:	

ORDER

AND NOW, this 1st day of June, 1999, the Petition for Additional Relief filed by the Association is denied.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: June 1, 1999

Service list attached

DEP Bureau of Litigation:
Attn: Brenda Houck, Library

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Southwest Region

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

BROSCIOUS CONSTRUCTION CO.	:	
	:	
v.	:	**EHB Docket No. 99-066-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 2, 1999**

OPINION AND ORDER ON RULE TO SHOW CAUSE

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

Synopsis:

An untimely appeal is dismissed. A request for allowance of an appeal *nunc pro tunc* is denied.

OPINION

By letter dated February 17, 1999, the Department of Environmental Protection (the "Department") disapproved a revision to the East Chillisquaque Official Sewage Facilities Plan that addressed a project that would have been developed by Russell K. Broscious, Jr. ("Broscious"). The letter was addressed to East Chillisquaque Township with a carbon copy to Broscious (and others). On February 19, Broscious sent a letter to the Department asking it to reconsider its decision. The

letter demonstrates that Broscious had received the Department's February 17 letter at least as of February 19. The Department denied Broscious's request on March 2. Broscious wrote a letter to Secretary Seif on March 22 again asking for reconsideration. There is no evidence of a response.

On April 6, 1999, Broscious sent a letter to this Board under the letterhead of Broscious Construction Co. "requesting a exception to the 30 day rule for filling before the Board." Broscious attached his various correspondence to and from the Department to his April 6 letter.

On April 7, 1999, the Board issued an order directing Broscious to supply additional information, such as the date he received notice of the Department's action and a description of his objections to the Department's action. When Broscious did not respond to the order, we issued a rule to show cause directing Broscious to explain why his appeal should not be dismissed for failure to supply the missing information, failure to submit a timely appeal, and, because the appeal was tentatively docketed as an appeal by Broscious Construction Co., failure to obtain counsel. Neither Broscious nor Broscious Construction Co. has responded to the rule or otherwise communicated in any way with the Board.

We will treat Broscious's April 6 letter as an appeal and a petition for allowance of an appeal *nunc pro tunc*. Broscious's letter concedes (as it must) that Broscious missed the 30-day deadline for appeals to the Board. Therefore, the appeal would ordinarily need to be dismissed. 25 Pa. Code § 1021.52; *Rostosky v. Department of Environmental Resources*, 364 A.2d 761 (Pa. Cmwlth. 1976).

Broscious asks that we disregard the 30-day requirement for two reasons. First, he claims in his letter that he requested but never received appeal documents from the Board. Even if we accept his claim as true, we do not believe that the Board's failure to mail out a notice of appeal form rises to the level of a breakdown in the Board's operations that excuses a late appeal. *See Borough*

of Bellefonte v. Department of Environmental Resources, 570 A.2d 129 (Pa. Cmwlth.), *appeal denied,* 577 A.2d 891 (Pa. 1990). If Broscious did not receive the documents, he had an obligation to follow up. His failure to do so was negligent and does not excuse his late appeal.

Secondly, Broscious argues that his letter to Secretary Seif should suffice. We have held several times, however, that mailing a notice of appeal to an incorrect address for the Board or to the Department instead of the Board are not grounds for allowance of an appeal *nunc pro tunc*. *Cadogan Township Board of Supervisors v. Department of Environmental Resources*, 549 A.2d 1363 (Pa. Cmwlth. 1988); *Tyson v. DER*, 1994 EHB 868.

Accordingly, Broscious's appeal is dismissed as untimely.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BROSCIOUS CONSTRUCTION COMPANY	:	
	:	
v.	:	**EHB Docket No. 99-066-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 2nd day of June, 1999, this appeal is DISMISSED as untimely. Broscious's request for allowance of an appeal *nunc pro tunc* is denied.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 99-066-L

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: June 2, 1999

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BRUSH WELLMAN, INC.	:	
	:	
v.	:	**EHB Docket No. 98-131-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 4, 1999**

OPINION AND ORDER ON THE DEPARTMENT'S MOTION TO COMPEL SPECIFIC ANSWERS TO THE DEPARTMENT'S FIRST SET OF INTERROGATORIES

By George J. Miller, Administrative Law Judge

Synopsis:

The Department's Motion to Compel Specific Answers to Interrogatories is denied where Appellant described the factual basis for its claim by reference to documents attached to the notice of appeal. These documents describe in detail the basis for Appellant's claims. In addition, Appellant filed supplemental answers describing precisely where in the documents attached to the appeal the factual basis for each contention could be found.

BACKGROUND

This appeal filed on July 27, 1998 is from the issuance by the Department of Environmental Protection (Department) of an NPDES permit to Appellant for its manufacturing facility in Perry Township, Berks County, near Reading on June 6, 1998 as revised on July 7, 1998. The permit

regulates waste water discharges from Appellant's facility. This facility manufactures copper-beryllium strip, rod and wire products. It has been owned by Appellant since 1960.

The notice of appeal sets forth 18 objections to the Department's action and attaches as support for those objections comments which it delivered to the Department over a time period from May 3, 1996 through May 15, 1998 which sets forth Appellant's contentions concerning the proper terms of the NPDES permit during the time period when the Department was considering Appellant's permit application.

Information provided to the Board in the comments attached to the appeal and in the material submitted to the Board at a pre-hearing conference held in March, 1999, indicates that Appellant's facility has four outfalls which discharge to a water course which is designated by the Department as an unnamed tributary of the Schuylkill River. Discharges from these outfalls have been regulated since June, 1960 by various wastewater permits issued by appropriate authorities. The existing permit imposes effluent limitations in two stages. The first set of effluent limitations had to be met by January 1, 1999. The final effluent limitations must be met by July 1, 2001. The permit requires the construction of a pipeline from Appellant's facility to the Schuylkill River rather than further discharge to the unnamed tributary after July 1, 2001. The permit requires that all discharge to the unnamed tributary must cease on that date.

Appellant is able to meet the effluent limitations which became effective on January 1, 1999 but will be unable to meet the effluent limitations effective July 1, 2001 unless such a pipeline is

constructed. For reasons not relevant here, Appellant believes that the construction of such a pipeline would be unusually expensive both in terms of capital outlay and operating expense so that Appellant would like to continue the discharges to the unnamed tributary.

Appellant's first five objections contend that the Department's application of water quality-based effluent limitations (WQBELs) to discharges to the unnamed tributary is arbitrary and capricious because, among other things, the unnamed tributary is not an intermittent or dry stream, is not a warm water fishery and is not a warm water fishery to which such limitations might properly be applied. The Appellant's next three objections claim that the application of drinking water standards to ground water beyond the point of discharge as the water flows toward the Schuylkill River is arbitrary and capricious because, among other things, present or potential future ground water uses will not be adversely impacted by the discharge. The next three objections claim that the Department's failure to give Appellant an extension of time to achieve the WQBEL limitations was arbitrary, capricious and abuse of discretion. The remaining objections relate to the Department's application of the WQBEL limitation required by the Delaware River Basin Commission, the use of an osmotic pressure as an effluent limitation parameter, the specification of a Full Effluent Toxicity Test and the imposition of increased monitoring frequencies. These objections also claim that the application of the drinking water standard for beryllium is arbitrary and capricious, that the Department's permit is not based on reliable and ascertainable evidence and is contrary to the substantial evidence submitted to the Department. In the case of most of these objections, the notice

of appeal refers to the attached comments previously submitted to the Department as a basis for the objection.

The Department's motion to compel specific answers claims that the Appellant's answers to many of its interrogatories are insufficient. These interrogatories ask the Appellant to state the factual basis for the contentions raised in its notice of appeal. The Appellant's answer to these interrogatories referred the Department back to the comments attached to the notice of appeal. These comments consist of about two inches of documentary material provided by Appellant to the Department as to why it believed the Department's action to be improper at various stages of the permitting process.

OPINION

The Department filed its motion to file more specific answers to its interrogatories based on the provisions of Rule 4006(a)(2) which requires that each interrogatory is to be answered fully and completely unless objected to. It claims that the reference to the extensive documentary material filed with the appeal is not a sufficient answer. Appellant counters with the provisions of Rule 4006(b) which states:

> Where the answer to an interrogatory may be derived or ascertained from the records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of that party's records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer would be substantially the same for the party serving the interrogatory as for the party served, a sufficient answer to such an interrogatory shall be to specify the records from which the answer may

> be derived or ascertained and to afford the party serving the interrogatory reasonable opportunity to examine, audit or inspect those records and to obtain copies, compilations, abstracts or summaries.

The Board has reviewed the comments attached to the appeal and is inclined to agree with the Appellant that adequate information is provided in those comments to fully advise the Department of the factual basis for the Appellant's claims within the meaning and purpose of Rule 4006(b) of the Pennsylvania Rules of Civil Procedure. The number of records referred to are limited and the burden of ascertaining the answer to the interrogatories is substantially the same for both parties. While the Department's convenience might be served to some extent had Appellant's counsel gone to the trouble of summarizing the same comments in answer to the interrogatories, we hold that is unnecessary.

The Department's answers to interrogatories seeking the basis for its contentions on the Board's decision in *Envirosafe Services of Pa., Inc. v. DER,* 1988 EHB 1026, 1030-1031 is misplaced. In that case the Department directed Envirosafe to the variance proposal, all specified correspondence from 1981 to 1987 and undescribed visual observations of the site in question. Those documents were not tailor-made to address the precise nature of the Department's contentions and did not identify the correspondence over the six years referred to in the answer. In addition, the reference to undescribed visual observations of the site could not properly be an appropriate answer to the interrogatories seeking the basis for a party's contention without a description of the observations relied upon.

Our decision is not based entirely on the conclusion that the Appellant's initial answers to the interrogatories are sufficient under Rule 4006(b). After the motion to compel answers was filed by the Department, Appellant filed supplemental answers to interrogatories which provide a page by page road map to where in the previously submitted comments Department's counsel can find the factual basis for each of the Appellant's claims. For example, the Appellant's supplemental answer to interrogatory 13a directs the Department to pages 3-8 of the 1996 comments and identifies the relevant comments and the heading where those comments may be located. It also specifies the pages of the 1997 comments where that material may be found. The supplemental answers also direct the Department's attention to comment 18 beginning on page 6 of the 1999 comments. The supplemental answer to interrogatory 18a directs the Department's attention to the pages of the various comments and the text under designated headings. In addition, the supplemental answers provide recently acquired factual information. The supplemental answers to the other interrogatories at issue provide the same detailed guide to Appellant's other contentions as set forth in the documents attached to the appeal. Therefore, it appears that the Appellant has fully stated the factual basis for all of its contentions in the appeal as of the date of the service of the supplemental answers. In view of all of this information, we believe that the Department's request for more specific information has been amply satisfied.

According, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRUSH WELLMAN, INC.	:	
	:	
v.	:	**EHB Docket No. 98-131-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 4th day of June, 1999, the Department's motion to compel specific answers to the Department's first set of interrogatories is hereby DENIED.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: June 4, 1999

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

For the Commonwealth, DEP:
Gary L. Hepford, Esquire
Southcentral Region

For Appellant:
John W. Ubinger, Jr.
JONES DAY REAVIS & POGUE
Pittsburgh, PA

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TELECOPIER 412-565-5298

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JUDITH ANNE WAYNE	:	
	:	
v.	:	**EHB Docket No. 98-175-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ROBINSON COAL COMPANY, Permittee	:	**Issued: June 10, 1999**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Department's motion for summary judgment in an appeal of a bond release is denied where material issues of fact exist. Although the Appellant entered into an agreement for the purchase of her property "as is" and signed a stipulation allowing a haul road to remain on her property, questions of fact exist as to the scope of the stipulation and the condition of the property at the time of purchase. Although Department personnel who inspected the mine site and the Appellant's property concluded that conditions for bond release have been met, these are issues involving questions of fact and credibility on which the Board must hear testimony.

Finally, the Appellant's objections regarding post-mining land use, which were first raised in her response to the Department's motion, are waived because they were not raised in the notice of appeal.

OPINION

Before the Board is the Department of Environmental Protection's (Department) motion for summary judgment regarding the appeal of Judith Anne Wayne. Ms. Wayne appealed the Department of Environmental Protection's (Department) approval of bond release for two surface mines operated by Robinson Coal Company (Robinson) in Robinson Township, Washington County, and North Fayette Township, Allegheny County. The surface mines are designated herein as the McWreath I and McWreath II sites. A portion of the permit area for both sites overlaps Ms. Wayne's property.

The background of this matter is not in dispute. Ms. Wayne entered into a Sales Agreement in September 1992 for purchase of the property.[1] The Agreement stated that she accepted the property "as is." (Ex. A to Motion; Ex. B to Motion, Admission 11) At the time of the purchase, Ms. Wayne was aware of the existence of two sedimentation ponds on the property. (Ex. B to Motion, Admission 20) In December 1990, the prior owner of the property had signed a notarized statement requesting that the two sedimentation ponds be allowed to remain on the property as permanent structures to be used as watering ponds for domestic animals. (Ex. D to Motion) Ms. Wayne acquired the ponds as part of the property under the Sales Agreement. (Ex. B to Motion, Admission 20) In addition, Ms. Wayne entered into a Stipulation and Settlement Agreement (Stipulation) with Robinson, in which she agreed that Robinson need not reclaim that portion of the haul road which runs over her property. (Exhibit H to Motion; Ex. B to Motion, Admission 16). She also signed a notarized statement that the haul road could remain on the property "as a permanent

[1] Ms. Wayne actually acquired the property on June 2, 1993 by order of the United States

structure" and "as presently constructed." (Ex. G to Motion)

Ms. Wayne's objections to the bond release center on the following: runoff from the haul road, contamination of her drinking water and water used for her animals, erosion, fuel spillage and pressure caused by the transport of heavy equipment on the haul road.

The Department has moved for summary judgment, asserting that a large portion of Ms. Wayne's appeal is barred by virtue of the agreements into which she entered in connection with her purchase of the property. In addition, the Department contends that the McWreath sites meet the criteria for Stage II and III bond release, as set forth in the regulations.

Summary judgment may be entered where the pleadings, depositions, answers to interrogatories, and admissions of record, together with any affidavits, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997); *Farmer v. DEP*, 1998 EHB 1292, 1296. The record must be viewed in the light most favorable to the non-moving party, and all doubts as to the existence of material fact must be resolved against the moving party. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995); *Farmer*, 1998 EHB at 1296.

We note first of all that Ms. Wayne's response to the Department's motion does not comply with our rules at 25 Pa. Code § 1021.70(e), requiring that responses to motions must set forth in *correspondingly-numbered paragraphs* all factual disputes and objections. (Emphasis added) The Department asserts that the facts set forth in its motion, to which Ms. Wayne has not properly responded in accordance with § 1021.70(e), should be deemed admitted. While it is true that certain

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Bankruptcy Court for the Western District of Pennsylvania.

paragraphs in Ms. Wayne's response do not correspond to their counterpart in the Department's motion, we find that the error is *de minimus* and, therefore, decline to impose such a harsh penalty. We, therefore, shall consider each of the objections set forth in Ms. Wayne's response.

Criteria for Bond Release

The Department approved Stage II and III bond release for the McWreath I site and Stage III bond release for the McWreath II site. The applicable standards for Stage II bond release are as follows: topsoil has been replaced and revegetation has been successfully established; the reclaimed land is not contributing runoff outside the permit area in excess of the applicable statutes, regulations and permit conditions; and a plan for any permanent impoundment has been approved and implemented to the satisfaction of the Department. 25 Pa. Code § 86.174(b). A site qualifies for Stage III bond release when it is capable of supporting the approved post-mining land use; the permittee has achieved compliance with the applicable statutes, regulations and permit conditions; and the applicable liability period has expired. 25 Pa. Code § 86.174(c).

Haul Road Runoff

Paragraphs 2 and 3 of the notice of appeal aver that runoff from the haul road, which Ms. Wayne believes to be toxic, has formed pools in goat and sheep pens which she maintains on her property and has adversely affected the animals. The Department has moved for summary judgment on this issue on two grounds. First, testing by Department personnel has shown the road is not composed of toxic material and second, the Department contends it has no authority to order removal of the haul road due to the Stipulation and notarized statement signed by Ms. Wayne.

The Department states that, in response to a prior complaint by Ms. Wayne, it tested the material of which the haul road is composed. The analysis indicated the material was not hazardous

waste; had low potential to leach metals into surface waters; was below the cleanup standards set forth in the Statewide Health Standards at 25 Pa. Code §§ 250.305 and 250.308; and contained metals within the range of background levels for southwest Pennsylvania soils. (Bates Affidavit, para. 8-10)

However, a sample of the runoff water which the Department provided to the Pennsylvania State University Extension Service indicated that sulfates, iron and manganese were present in amounts above the toxicity level. (Exhibit J to Motion) The Extension Service concluded that the runoff was not safe for livestock consumption. (Exhibit J to Motion) In addition, a September 3, 1993 inspection report by the Department, responding to Ms. Wayne's concerns regarding drainage from the haul road, states that the shale used to construct the road "may not be acceptable." (Exhibit I to Response) Based on the record before us, there clearly exists a factual dispute regarding the toxicity of the haul road composition.

However, the Department takes the position that, regardless of whether the haul road is producing toxic runoff, it lacks the authority to compel Robinson to remove the haul road or deny bond release due to Ms. Wayne's agreement that the haul road can remain in place. Ms. Wayne counters that the agreements signed by her do not restrict the Department from carrying out its duties.

It is well-established that the Board shall recognize private contracts entered into by parties and may evaluate such contracts for the purpose of determining compliance with the applicable statutes and regulations. *Davison Sand & Gravel Co. v. DEP*, EHB Docket No. 96-090-R (Consolidated) (Opinion issued February 3, 1999), p. 4; *Coolspring Stone Supply, Inc. v. DEP* 1998 EHB 209, 212; *Pond Reclamation Co. v. DEP*, 1997 EHB 468, 474. We have also held that it is

within the Department's authority and duty to take cognizance of property-related issues and contracts for the purpose of determining compliance with statutes and regulations. *Coolspring*, 1998 EHB at 212.

While we agree with the Department that Ms. Wayne is bound by her Stipulation with Robinson, there appear to be questions of material fact regarding the scope of the Stipulation. For instance, in the September 1, 1993 inspection report noted earlier, the Department's inspector states as follows:

> Ms. Wayne showed me an affidavit she had signed earlier this year. It stated that she permitted the entrance road to the gate to remain permanently. The affidavit does not state that she accepts responsibility and liability for the road *which is required for final bond release.*

(Exhibit I to Response) (Emphasis added) In an affidavit attached to the response, Ms. Wayne states that she never agreed to maintain the road or absolve Robinson for liability caused thereby. (Exhibit E to Response, para. 18) In addition, attached to Ms. Wayne's response is an internal Department memorandum from Reclamation Coordinator John Meehan to Evan T. Shuster, Chief of the Division of Monitoring and Compliance, dated November 24, 1993. In it Mr. Meehan acknowledges that Ms. Wayne signed an agreement allowing the haul road to remain in place, but states if Department testing shows "the road material is toxic, Robinson Coal will be directed to rectify the problem. If the road material is non-toxic, then the road will stay." (Exhibit J to Response)

While it is clear that Ms. Wayne signed a Stipulation and notarized statement allowing the haul road to remain on her property, it is not clear from the record whether these agreements serve to preclude the Department from taking action with regard to toxic runoff allegedly produced by the

haul road. Because summary judgment may be entered only where the record is clear and free from doubt, we must deny the Department's motion with regard to this issue.

Water Quality

In paragraph 4 of the notice of appeal, Ms. Wayne avers that contamination from Robinson's activities has seeped into the ponds on her property, adversely affecting the water quality and harming the fish therein and the livestock which drink from the ponds. In paragraph 5, she contends that the alleged contaminants have also seeped into her well, making her drinking water unsafe and unhealthy.

The Department seeks summary judgment on these objections on the following grounds. First, Ms. Wayne purchased the property "as is" and was aware of the existence of the sedimentation ponds at the time of the sale, and second, testing by the Department's hydrogeologist determined that Ms. Wayne's well was not adversely affected by Robinson's mining activities. In response, Ms. Wayne argues that the Department has a duty to enforce Pennsylvania's environmental statutes and regulations and is not prohibited from doing its duty based on a private agreement of sale.

As to the first ground stated by the Department, we agree that Ms. Wayne is bound by the terms of her agreement of sale. However, the record is unclear as to whether the condition of the ponds or the well water worsened after her purchase of the property. Ms. Wayne signed the agreement of sale in 1992. The bonds were not released until August 1998. While there is a reference to poor water quality in the ponds as early as the November 24, 1993 memorandum mentioned earlier (Exhibit J to Response), it is not clear whether the water quality of the ponds or her well water worsened after her purchase of the property.

Second, it is the Department's contention that Ms. Wayne's water supply has not been

adversely affected by Robinson's mining activities. Following a series of complaints filed by Ms. Wayne, Scott Jones, a Hydrogeologist II with the Department's District Mining Operations, conducted an investigation of her site beginning in July 1994. (Jones Affidavit) As part of his investigation, he reviewed geologic and hydrologic data, field surveys and interviews with Ms. Wayne. (Jones Affidavit, para. 6) He concluded that the water supply had been affected by surface and deep mining prior to Ms. Wayne acquiring the property; that the surface mining at the McWreath sites did not adversely affect the water supply; that sulfates are the primary contaminant in her water; and that high levels of sulfates are not only common in the area adjacent to the Wayne property but were elevated above drinking water standards for more than five years prior to Ms. Wayne purchasing the property. (Jones Affidavit, para. 9) Ms. Wayne provided no affidavit countering Mr. Jones' conclusions.[2]

However, while the record documents the thoroughness of Mr. Jones' investigation, the determination of whether Robinson's mining activities contributed to the alleged contamination of Ms. Wayne's water supply involves questions of fact and credibility on which the Board must hear testimony. *See, Lucchino v. DEP*, EHB Docket No. 98-166-R (Opinion issued May 10, 1999), p. 9-10 (The Board declined to grant summary judgment based on the conclusions of the Department's mining specialist alone).

Because questions of fact remain, we must deny the Department's motion with regard to the issue of water quality.

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2 Included in her Response, Ms. Wayne provides a letter from William E. Sharpe, Professor of Forest Hydrology at the Pennsylvania State University Environmental Resources Research Institute, which states that the water at the Wayne site "is typical of water contaminated with coal mine drainage." Professor Sharpe's letter offers no opinion as to the source of the contamination.

Erosion

Paragraph 6 of the notice of appeal avers that seepage and runoff created by Robinson's activities have caused silt to wash onto Ms. Wayne's driveway and have caused erosion gullies which, in some instances, are five feet deep. The Department seeks summary judgment on the basis that remediation ordered by the Department has corrected any erosion problems.

Ms. Wayne counters that the remediation ordered by the Department has not corrected the erosion problems and that new gullies were formed subsequent to the remediation efforts. She has attached a series of photographs to her response allegedly depicting the erosion problems.

It is clear that a dispute exists concerning the erosion issue raised by Ms. Wayne. On this basis, we must deny summary judgment on the issue of erosion.

Fuel Spill

In paragraph 7 of her notice of appeal, Ms. Wayne contends that Robinson has dumped substantial amounts of diesel fuel into her ponds, adversely affecting the water quality of the ponds. The Department seeks summary judgment on the basis that sampling showed no presence of petroleum product in the pond sediment, and there was no evidence of fuel oil contamination at the time of the bond release. A copy of the Department's letter to Ms. Wayne enclosing the sampling results is included with the Department's motion. (Exhibit K to Motion)

Ms. Wayne's response does not address this issue. Rule 1035.2(a)(1) of the Pennsylvania Rules of Civil Procedure states that the adverse party may not rest upon the mere allegations of his pleadings but must identify one or more issues of fact controverting the evidence cited in support of the motion. A failure to do so may result in the entry of summary judgment against that party. Pa. R.C.P. 1035.2(d).

While summary judgment could be entered against Ms. Wayne on this issue due to her failure to respond to it, we decline to do so because a material issue of fact exists in the record. The Department has provided the results of testing for the presence of petroleum product. However, the tests appear to apply only to the sedimentation pond for the McWreath II site. While this may have been the only pond complained about by Ms. Wayne to the Department, her notice of appeal states that fuel oil was dumped into the *ponds* on her property. Because the test results provided by the Department appear to address only one pond, we cannot say that the record is clear on this issue. On this basis, we must deny summary judgment to the Department on the issue of the fuel spill.

Pressure Created by Haul Road

Paragraph 8 of the notice of appeal states, "The weight of the haul road constricted [sic] by Robinson Coal Company created pressure on the foundation of Ms. Wayne's barn. With Robinson continually transporting heavy equipment over the haul road, the pressure became too great and the barn collapsed." The Department argues that, even assuming this is true, Ms. Wayne must seek redress from Robinson by means of a private action. It contends there is no "action" of the Department involved over which the Board has jurisdiction. Ms. Wayne's response is silent on this issue.

To the extent Ms. Wayne is seeking redress from Robinson for the collapse of her barn, we agree with the Department that this Board is not the proper forum for resolution of her complaint. The Board's jurisdiction extends only to actions of the Department, which consist of "orders, permits, licenses or decisions" of the Department. Section 4(a) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. § 7514(a); *Conrail, Inc. v. DEP*, 1998 EHB 427, 431.

However, to the extent Ms. Wayne is asserting that the Department should have withheld

bond release due to alleged damage caused to her property by Robinson's use of the haul road, this clearly is an "action" of the Department within the scope of the Board's review. While this claim may be limited by her Stipulation with Robinson, it clearly is subject to the Board's jurisdiction.

Because the extent of her claim remains unclear and because there are factual issues surrounding the extent of the haul road Stipulation, we decline to grant summary judgment on this issue.

Post-Mining Land Use

In her response, Ms. Wayne asserts that the post-mining land use of pasture and land occasionally cut for hay has not been achieved. This issue was not raised in the notice of appeal and, therefore, is waived. 25 Pa. Code § 1021.51(e); *Pennsylvania Game Commission v. Department of Environmental Protection*, 509 A.2d 877 (Pa. Cmwlth. 1986).

In conclusion, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JUDITH ANNE WAYNE	:	
	:	
v.	:	**EHB Docket No. 98-175-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 10th day of June, 1999, the Department's motion for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 98-175-R

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: June 10, 1999

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

For the Commonwealth, DEP:
Barbara Grabowski, Esq.
Southwest Region

For Appellant:
John Lacher, Esq.
Pittsburgh, PA

For Permittee:
David Aloe
Robinson Coal Co.
Neville Island, PA

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DAVID DOMIANO	:	
	:	
v.	:	**EHB Docket No. 98-211-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 16, 1999**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

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

Synopsis:

On remand from the Commonwealth Court by way of the Court of Common Pleas, the Board's jurisdiction in this appeal is limited to determining whether the Department's actions effected a taking that entitles the appellant to just compensation. Those objections of the appellant that go beyond the scope of the Commonwealth Court's remand order are dismissed.

In order for there to be a taking that requires just compensation or other appropriate relief, a party must first have a compensable property interest. Second, that property interest must have been taken in the literal sense, such as through a reduction in value. Third, even where there has been a loss, a taking that occurs pursuant to the Commonwealth's exercise of its police powers can only result in relief if the Commonwealth "goes too far." The Board will apply a balancing test using certain defined criteria on a case-by-case basis to determine whether the Commonwealth goes too far.

The Department's motion for summary judgment is denied because a factual record must be developed in order to determine (1) whether the appellant has a compensable property interest that (2) has been taken in the literal sense, and if so, (3) whether the appellant is entitled to just compensation or other relief as a result.

OPINION

Background

The Department of Environmental Protection (the "Department") notified David Domiano ("Domiano") on July 22, 1993 that it would be entering a parcel located in Jessup and Olyphant Boroughs, Lackawanna County (the "Site") in order to remove sediment and stabilize a stream channel. The notice of entry included a "finding of fact" signed by former Secretary Arthur A. Davis which found that the abandoned mine hazard on the Site was "at a stage where, in the public interest, action should be taken" due to a hazardous "clogged stream problem." The notice also included a project description and maps. According to the project description, the Department planned to remove a culvert beneath a spoil bank, utilize spoil material for backfilling a nearby strip pit, construct a new channel for Sterry Creek, stabilize the side slopes of the new stream channel, and grade spoil and refuse banks. The notice contained a notification that Domiano had the right to appeal from the Department's action to this Board. Domiano did not file an appeal, and work at the site went forward. The nature of the work performed is not yet a matter of record.

About three years later, Domiano filed a petition for appointment of a board of viewers before the Lackawanna County Court of Common Pleas pursuant to Section 502 of the Eminent Domain Code, 26 P.S. § 1-502. Domiano alleged in the petition that he "was the owner of a

proprietary interest in a culm dump" located on the Site. The petition stated that "MBO Corporation, a Pennsylvania corporation, has an interest in royalties received from the sale of coal from said culm dump. MBO is the owner of the land on which the culm dump is located. The property of Plaintiff [Domiano] taken by Defendant [the Department] consists of a culm dump which was used by Defendant to fill strip mine pits." Domiano asked the common pleas court to appoint viewers to ascertain just compensation.

The Department filed preliminary objections asserting that the common pleas court did not have jurisdiction and that Domiano failed to allege a *de facto* taking. The Department appealed from the common pleas court's denial of those preliminary objections to the Commonwealth Court.

The Commonwealth Court's opinion is reported at *Domiano* v. *Commonwealth, Department of Environmental Resources*, 713 A.2d 713 (Pa. Cmwlth. 1998). The Court held as follows:

> When the government entity is DEP and its preliminary objections make out a claim on their face that DEP acted, not under its eminent domain powers, but under its police powers, the court should allow the EHB to exercise its primary jurisdiction. Under that authority, EHB adjudicates the lawfulness of DEP enforcement orders or actions that are challenged on the grounds that they are constitutionally impermissible takings without just compensation. A record can be fully developed before the EHB, which can then determine, under a traditional analysis of the regulatory takings question, whether in fact such a taking has occurred, and whether, in appropriate cases, DER's orders should be set aside. It is at that point that the government agency "retains the whole range of options" available to it. *First*[*English Evangelical*] *Lutheran Church* [*v. County of Los Angeles,* 482 U.S. 304, 107 S. Ct. 2378 (1987)]. "The jurisdiction of the courts of common pleas under the Eminent Domain Code might then be invoked in order to determine the amount of damages, if any, that might have occurred as a result of the taking while it was ongoing." *Beltrami* [*Enterprises Inc. v. Department of Environmental Resources*], 632 A.2d [989], 993[, *pet. for allowance of appeal denied,* 645 A.2d 1318 (Pa. 1994)].
>
> Normally, we would vacate the common pleas court's order

> denying DEP's preliminary objections and remand this case for the consideration of evidence. However, it is our judgment here that, as a legal matter, DEP has established that its actions were regulatory and not in the exercise of its eminent domain powers. We will therefore reverse the common pleas court's order and remand the case to that court to transfer Domiano's petition to the EHB, with instructions to that tribunal to commence proceedings to determine whether DEP's actions effected a taking under the Fifth Amendment that requires just compensation.

Domiano, 713 A.2d at 717. The Commonwealth Court's remand order thus quite clearly defines the task that is before us: Our assignment is to determine whether the Department's actions effected a taking that requires just compensation.

On October 20, 1998, the Court of Common Pleas issued an order transferring the proceeding to this Board as directed by the Commonwealth Court. We issued an order on November 4 directing Domiano to file a statement of claim on or before November 30. Domiano filed his "statement of claim/appeal" on the Board's standard notice-of-appeal form on November 20, 1998.

The Department has filed a motion for summary judgment. The Department asserts that it is entitled to judgment in its favor because the appeal is untimely and because Domiano has no compensable property interest. Domiano filed an answer that denies all of the averments in the Department's motion and characterizes them as conclusions of law. The Department's motion is granted in part and denied in part for the reasons that follow.

I. Summary Judgment Standard

The Board may grant a motion for summary judgment where the pleadings, depositions, answers to interrogatories, and admissions, together with any affidavits submitted in support, 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. 25 Pa. Code § 1021.73; Pa. R. Civ. P. 1035.2; *County of Adams v. Department of Environmental Protection,* 687 A.2d 1222 (Pa. Cmwlth. 1997); *Marilungo v. DEP*, EHB Docket No. 96-271-R (March 31, 1999). The record must be viewed in the light most favorable to the nonmoving party. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995). If judgment is denied or not rendered upon the whole case, the Board may enter judgment as to one or more of the claims asserted, or may issue an order specifying the facts that are without controversy and those which remain controverted. Pa. R. Civ. P. 1035.5; *Boyertown Oil Co. v. Osan Mfg. Co.*, 514 A.2d 938 (Pa. Super. 1986), *petition for allowance of appeal denied,* 531 A.2d 426 (Pa. 1987).

II. Timeliness of the Appeal

The Department argues that this appeal should be dismissed because it is untimely. The Department argues that Domiano was required to file his appeal within thirty days of receiving notice of the land entry in 1993. According to the Department, Domiano's failure to do so precludes this Board from proceeding any further.

We decline the Department's invitation to disregard the explicit remand instructions and order of the Commonwealth Court, as well as the order of the Lackawanna County Court of Common Pleas. Those orders establish the jurisdiction of this Board, and we will not shirk our responsibility to determine whether there has been a taking.

The Department is correct, however, to the extent that Domiano's statement of claim/appeal goes beyond the specific task that has been set before us. The court orders require us "to determine whether DEP's actions effected a taking under the Fifth Amendment that requires just compensation." We will do no more and no less. To the extent that the objections set forth in Domiano's statement

of claim/appeal go beyond that determination, they are dismissed. For example, Domiano's assertion that he was not given proper notice of the Department's plans is precisely the sort of objection that should have been raised in 1993. His claim that DEP did not act in accordance with its plans is also outside the scope of our jurisdiction at this time.

Along the same lines, we will not hear Domiano's objection that the Department's actions "constituted an exercise of the eminent domain power rather than an exercise of the police power." The Commonwealth Court found "that, as a legal matter, DEP has established that its actions were regulatory and not an exercise of its eminent domain powers." The court's finding establishes the law of the case, and we are bound accordingly.

In sum, there is only one issue to be decided in this appeal: Did the Department's actions effect a taking that requires just compensation? The Department's motion is granted with respect to those objections in Domiano's statement of claim/appeal that go beyond that issue.

III. The Takings Analysis

A. Compensable Property Interest

The Fifth Amendment to the United States Constitution states that private property may not be taken for public use without just compensation. Article I, Section 10 of the Pennsylvania Constitution states that private property may not be taken or applied to public use without authority of law and without just compensation being first made or secured. These constitutional provisions place restrictions on the taking of **property**. Thus, before doing anything else, a party who would pursue a takings claim must demonstrate that he has a compensable property interest. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027, 112 S. Ct. 2886, 2889 (1992); *Tri-State Transfer*

Company v. Department of Environmental Protection, et al., 722 A.2d 1129, 1132 n.3 (Pa. Cmwlth. 1998) ("A taking generally occurs when an entity with the power of eminent domain deprives an owner of the use and enjoyment of **property**." (emphasis in the original)); *Wasson v. DEP*, 1998 EHB 1148, 1152 (an individual claiming that the government has taken his property must first establish that he has a compensable property interest). This Board must take great care to determine precisely what right, if any, is the subject of an alleged taking. *See In re Condemnation by Delaware River Port Authority,* 667 A.2d 766, 767-68 (Pa. Cmwlth. 1995), *appeal dismissed as improvidently granted,* 684 A.2d. 120 (1996).

Domiano has repeatedly described the property that is the subject of his takings claim as "an interest" in the culm on the Site, as distinct from the Site itself. In his statement of claim/appeal, he complains of the Department's "[t]aking of a culm dump in which appellant had an interest . . . and use of the same to fill strip mining pits, thereby causing an intermingling of valuable culm with waste materials from which it cannot be separated." In his petition for appointment of a board of viewers, Domiano asked for compensation for the culm which was used by the Department to fill strip mine pits.

It is important to repeat that Domiano is **not** seeking compensation for the loss of rights regarding the Site in and of itself. Domiano does not own the Site; MBO Corporation does. Domiano's claim relates soley to the culm.

In fact, Domiano never asserts that he actually owns the culm. Rather, he speaks of "a proprietary interest" (petition for appointment of viewers), or simply "an interest" (statement of claim/appeal) in the culm. In its motion for summary judgment, the Department urges that this

proprietary interest is nonexistent, or at least too remote and insubstantial to constitute a compensable property interest.[1]

Domiano's interest is defined by an agreement dated October 11, 1990 between himself and MBO Corporation, the owner of the Site and of the culm (the "Agreement"). (*See* DEP motion, Ex. 5 (Domiano's anwers to interrogatories).) The Agreement assigns Domiano the exclusive right to remove "coal and/or coal materials" from the Site. (*See, e.g.,* Preamble; Articles III, IV, IX.) "Coal and/or coal materials" are defined to mean the culm and silt "above original surface contours as differentiated from subsurface coal and place." (Article II.) (Article II should probably read "subsurface coal **in** place".) Domiano is granted virtually unlimited access to the Site to work the culm bank. (*E.g.,* Article III.) MBO is to be paid a royalty for each ton of material removed. (Article VI.) Domiano is to act as an independent contractor (Article XI), and as the producer of the culm (Article V). As such, he is responsible for obtaining all necessary governmental approvals and otherwise complying with all applicable laws. (Articles IV, V.) Article XII provides in part as follows:

> This agreement shall be for a period of three years commencing from the date the Department of Environmental Resources and/or other governmental bodies approves and issues permits and licenses required for the removal of coal and/or coal materials. After three years, Lessee shall have options to renew for additional one year periods.

In other words, Domiano has no immediate right to actually enter the Site and remove the culm.

---

[1] The Department also argues that Domiano only has a license to enter the Site, which it argues is not a compensable property interest. The argument is misplaced because Domiano's interest in the Site itself, as opposed to the culm piled up on top of the Site, is not at issue. Our sole focus is on the culm that Domiano believes was misappropriated.

That right will begin only, if, and when all necessary permits are issued. Domiano has a future right to remove culm, subject to the condition precedent of all necessary governmental approvals having been obtained.

Although semantic distinctions are not particularly relevant or helpful in a takings analysis, *see Schuster v. Pa. Turnpike Commission*, 149 A.2d 447, 455 (Pa. 1959) (giving a name to the property rights that are taken is not important), we believe that Domiano's right to the culm is in the nature of an exclusive option. Domiano has the exclusive right, but not the duty, to remove all of the culm on the Site.

There is no question that an option can constitute a substantial property interest. *In re Powell's Appeal*, 123 A.2d 650 (Pa. 1956); *Hennebont Co. v. Kroger Co.*, 289 A.2d 229 (Pa. Super. 1972). Thus, in *Synes Appeal*, 164 A.2d 221 (Pa. 1960), Harry Synes agreed to purchase fifteen acres of land. He was given, in effect, an exclusive option in exchange for a downpayment of $9,000. His obligation to consummate the deal was subject to a rezoning of the property. Before the property was rezoned, however, the local school authority condemned the property. Synes sought eminent domain damages. One of the issues in the case was whether Synes's option gave him a compensable property interest.

The Supreme Court held that, "there having been no obligation on Synes' part to purchase because of the failure of the borough to rezone, all Synes had was an option, a continuing offer which terminated upon the condemnation of the subject premises by the School Authority, the condemnation itself having rendered an exercise of the option to purchase impossible." 164 A.2d at 224. As a result, Synes never obtained legal or equitable title to the land.

The Court went on to hold, however, that the right to elect to purchase in and of itself had some value. The condemnation caused a loss of that right. Accordingly, the case was remanded for a hearing to determine the value of the option. 164 A.2d at 224-225. *Contrast S.E.P.T.A. v. Frankford 5206 Bar*, 587 A.2d 855, 859 (Pa. Cmwlth. 1991) (right of first refusal not compensable because it had expired before a claim was filed).

In keeping with *Synes*, we are unable to conclude based on the current record that Domiano's exclusive contractual right to remove culm cannot possibly constitute a compensable property interest. We cannot agree with the Department that Domiano could not have had anything taken from him here as a matter of law. To the contary, based on the limited record that is now before us, we believe that it is likely that Domiano will be able to establish that he does have a compensable interest. The key will be whether Domiano's rights as embodied in the Agreement are valuable rights that can be bargained for and sold. Do they have a distinct fair market value? Would anybody be willing to pay Domiano for his rights? Generally speaking, if property rights can be **sold** in the private context, they can be **taken** in the public context.

The Department argues that Domiano cannot maintain a takings claim because his interest relates to personal, as opposed to real, property, and it would undoubtedly attempt to distinguish *Synes* on that basis. The Department is correct in asserting that culm is personal property under Pennsylvania law. *Gilbertson Coal Co.* v. *Shuster,* 169 A.2d 44 (Pa. 1961); *Coal Co. v. Railroad Co.*, 41 A. 37 (Pa. 1898). That fact, however, does not preclude Domiano's constitutional takings claim. The takings clause in the federal and state constitutions protect against the uncompensated loss of any property, personal or real, including contract rights. *Andrus v. Allard*, 444 U.S. 51, 100

S. Ct. 318 (1979)(Court applies takings analysis to artifacts); *Armstrong v. United States*, 364 U.S. 40, 80 S. Ct. 1563 (1960) (liens on boat hulls and construction and manufacturing materials are a compensable property interest); *Lynch v. United States,* 292 U.S. 571, 54 S.Ct. 840 (1934) (valid contracts are property that can be subject to a taking); *Perry v. United States*, 294 U.S. 330 55 S. Ct. 432 (1934) (same); *Alexander v. Polk*, 750 F.2d 250, 260 (3rd Cir. 1984) (interest in a governmental benefit is a compensable property interest); *Roth v. Pritkin*, 710 F.2d 934 (2d Cir. 1983) *cert. denied*, 464 U.S. 961 (1983) (interest in copyright is a compensable property right); *Maritrans, Inc. v. U.S.*, 43 Fed. Cl. 86, 48 ERC 1506 (1998) and 40 Fed. Cl. 790, 47 ERC 1051 (1999) (takings claims can apply to personal property); *Ohio Casualty Insurance Co. v. Insurance Department of the Commonwealth of Pennsylvania,* 585 A.2d 1160, 1164-65 (Pa. Cmwlth. 1991) (insurance companies have property right to charge a rate that provides an adequate rate of return)(dicta). *See generally Redevelopment Authority of Philadelphia v. Lieberman*, 336 A.2d 249, 254 (Pa. 1975) (quoting *United States v. General Motors*, 323 U.S. 373, 377-78, 65 S.Ct. 357, 359 (1945)) (The term "property" denotes "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use, and dispose of it.... The constitutional provision is addressed to every sort of interest the citizen may possess.")

DEP's citation to *Holmes Protection of Pittsburgh v. Port Authority of Allegheny County*, 495 A.2d 630 (Pa. Cmwlth. 1985), *petition for allowance of appeal denied*, 546 A.2d 60 (Pa. 1988) is inapposite. *Holmes* holds that there usually can be no compensation for unaffixed personal property **under the Eminent Domain Code**. 495 A.2d at 633. It does not stand for the proposition that there can be no compensable takings of personal property under the federal and state

constitutions. As noted above, there clearly can be.

The Department cites *Holmes* for the proposition that Domiano will have no remedy under the Eminent Domain Code if this Board finds that there has been a taking. First, we are not sure that that is the case. The Eminent Domain Code might be applicable if culm is determined to be a "fixture." Although there is some case law to that effect, we do not need to decide the issue. Even if we assume that Domiano will have no remedy under the Eminent Domain Code, he may have other legal vehicles for recovery. That issue is also beyond our jurisdiction. Still further, even if we assume that Domiano will have no ability to recover monetary damages in any forum, the lack of a remedy does not excuse our duty to determine whether there has been a taking. Finally, aside from financial relief that may or may not be available in another forum, this Board has the authority to "set aside" the Department's actions in appropriate takings cases. *Domiano*, 713 A.2d at 717.

The Department also argues that Domiano has no immediately compensable property interest because the Agreement "commences" from the date that all necessary governmental approvals are obtained, and Domiano admits that those approvals have not yet been obtained. Once again, we are not willing at this juncture to hold on that basis as a matter of law that Domiano has no immediately compensable right. Although Domiano's actual right to enter the Site to remove culm is subject to a condition precedent, he does, in effect, already hold an option. In *Synes,* the court found that the option, even though subject to the condition precedent of rezoning, could have some value.

Here, Domiano at least arguably would have the ability to protect his right to remove the culm in court if MBO tried to sell removal rights to another party, even though the Agreement says it "commences" after permits are obtained. The Agreement might be interpreted to mean that the

right to actually enter the Site to remove culm commences after permits are obtained, but Domiano's exclusive removal rights began the day the Agreement was signed. Although we will accept evidence and/or further argument on this question, it would appear that the immediate exclusivity granted by the Agreement means that Domiano's contracts rights constitute an immediately compensable property interest.

B. Has There Been An Actual Taking?

The second step in our analysis is to determine whether anything has been taken in the literal sense. Of course, a complete seizure of a property interest is not a prerequisite to a takings claim. In the context of this appeal, Domiano's contractual right has been taken in the literal sense if its fair market value has been reduced as a result of the Department's actions. *See In re: Condemnation by Commonwealth of Pennsylvania, Department of Transportation*, 709 A.2d 939 (Pa. Cmwlth. 1998); *In re Condemnation of Penn Township*, 702 A.2d 614 (Pa. Cmwlth. 1997); *Paul Wasson v. DEP*, 1998 EHB 1148, 1153.

It is at least theoretically possible that the value of Domiano's contract right to remove culm from the Site has been reduced by the Department's actions. Whether there actually has been such a reduction will require the development of a factual record, and perhaps, expert testimony. For example, the value may have been reduced if there is now less culm to be removed. On the other hand, even if there is less culm, the Department's actions may have left what culm is still on Site more accessible, and therefore, less expensive to remove. Aside from the effects of the field work, direct evidence regarding the change in value of the exclusive option, if any, will certainly be appropriate. The existence of a substantial condition precedent and what effect, if any, that condition

has on value would also seem to be highly pertinent.

It is important to point out that our task going forward is to determine whether there has been more than a *de minimus* diminution in the value of Domiano's rights. Our task will **not** necessitate the assignment of any particular numerical value to any loss that has occurred. If that task ever needs to be performed, it will fall upon some other tribunal, possibly a board of viewers acting under the auspices of the common pleas court, but not us.

C. Has There Been A Taking That Requires Just Compensation Or Other Relief?

Whether there has been a diminution in value, i.e., a taking in the literal sense, does not complete our analysis. If there has been a literal taking, we must then decide whether it is the sort of taking that requires just compensation and/or other appropriate relief (e.g. setting aside the Department's action). Not all takings require such relief. Where, as here, a taking occurs pursuant to the Commonwealth's exercise of its police powers, as opposed to the exercise of its eminent domain power, the person who is affected is only entitled to relief if the Commonwealth's exercise of its police power "goes too far." *Domiano*, 713 A.2d at 716 n. 4 (citing *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 393, 43 S. Ct. 158 (1922)).

In deciding whether the Commonwealth has gone too far in exercising its police power, we must employ a balancing test. As with all balancing tests, there are no bright lines and no dispositive factors. Instead, we must view all of the relevant facts on a case-by-case basis with the ultimate goal being to weigh the state's right and obligation to protect the public welfare against a citizen's right to own and enjoy private property free from unreasonable interference. We must consider the following factors:

1) whether the interest of the general public, rather than a particular class of persons, requires governmental action;

2) whether the means employed are necessary to effectuate that purpose; and

3) whether the means are unduly oppressive upon the property holder, considering the economic impact of the exercise of the police power, and the extent to which the government physically intrudes upon the property.

Miller & Son Paving, Inc. v. Plumstead Township, 717 A.2d 483 (Pa. 1998), *cert. denied*, 119 S. Ct. 903 (1999); *Machipongo Land and Coal Company v. Department of Environmental Resources*, 719 A.2d 19 (Pa. Cmwlth. 1998); *Paul Wasson v. DEP,* 1998 EHB 1148, 1152. *See also Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131, 2146, (plurality decision) (takings analysis involves consideration of several factors, including the economic impact of the police action, its interference with reasonable, investment-backed expectations, and the character of the governmental action).

In order to address these factors, perform our balancing exercise, and fulfill the remand instructions of the Commonwealth Court, we need to develop a factual record. In addition to defining the "economic impact" of the Department's actions, if any, as discussed above, we must assess the extent of the government's physical intrusion. We must also consider what interest was served by the project, and whether the means used were necessary. Accordingly, except as set forth above, the Department's motion for summary judgment is denied, and this matter will be scheduled for further proceedings consistent with this opinion.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

DAVID DOMIANO	:	
	:	
v.	:	**EHB Docket No. 98-211-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 16th day of June, 1999, the Department's motion for summary judgment is GRANTED with respect to those objections of Domiano that go beyond the Commonwealth Court's remand instructions. In all other respects, the Department's motion is DENIED.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **June 16, 1999**

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

For the Commonwealth, DEP:
David J. Gromelski, Esquire
Northeastern Region

For Appellant:
P. Timothy Kelly, Esquire
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SCOTT TOWNSHIP ENVIRONMENTAL PRESERVATION ALLIANCE	:	
v.	:	**EHB Docket No. 98-209-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, SCOTT TOWNSHIP BOARD OF SUPERVISORS AND SCOTT TOWNSHIP SEWER AUTHORITY	:	**Issued: June 17, 1999**

OPINION AND ORDER ON MOTION TO DISMISS AND IN THE ALTERNATIVE, MOTION TO STRIKE

By George J. Miller, Administrative Law Judge

Synopsis:

The Department's motion to dismiss is granted. The Board has no jurisdiction over an appeal from a letter from the Department which neither changes the *status quo ante* of its previous approval of the Township's Sewage Facilities Plan nor imposes new obligations through its issuance. The Appellant's failure to appeal the Department's prior approval of the Township's Plan under the Pennsylvania Sewage Facilities Act[1] bars the Board from granting relief.

[1] Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20(a).

BACKGROUND

On July 28, 1993, the Department of Environmental Protection (Department) approved Scott Township's Sewage Facilities Plan Update Revision (1993 Sewage Plan). (Appellant's Notice of Appeal, Exhibit B) The 1993 Sewage 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. On February 28, 1996, in a meeting with representatives from the Department, the Scott Township Board of Supervisors (Board of Supervisors), the Scott Township Water and Sewer Authority (Sewer Authority), the Scott Township Planning Commission, and Scott Township's engineering consultant, the Township indicated that it was going to delay the implementation of the 1993 Sewage Plan in order to assess the cost associated with the 1993 Sewage Plan in comparison to the cost of potential alternative sewage treatment systems. (Department's motion, ¶ 6)

The Department received a letter dated May 29, 1998 from the Township which stated that the Township's Board of Supervisors had decided to move forward to implement the alternative adopted in the 1993 Sewage Plan without modification. (Appellant's Notice of Appeal, Exhibit F) On June 10, 1998, the Department sent a response letter to the Board of Supervisors stating that the Department would like to schedule a meeting so that it could understand the basis for the Township's decision, especially in light of the amount of time the Township took to further study the Township's sewage problems. (Appellant's Notice of Appeal, Exhibit G) The parties met on June 19, 1998 and the Department sent a follow-up letter dated June 30, 1998

requesting more details regarding the findings of the re-examination of the 1993 Sewage Plan, which the Township later supplied. (Appellant's Notice of Appeal, Exhibit H)

In a letter dated September 11, 1998, counsel for the Scott Township Preservation Association (Preservation Association)[2] requested "a brief meeting and/or conference call with [Mr. Brunamonti, Chief of the Technical Services and Finance Section of the Department's Water Management Program], to discuss the status of Scott Township's Act 537 Plan." (Department's motion, Exhibit A; Appellant's Notice of Appeal, Exhibit D) Mr. Brunamonti faxed to counsel for the Preservation Alliance a letter which referenced the letters of June 30, July 29 and August 28, 1998 and included a message stating that "[t]he attached documents should provide you with a better understanding of the current status of the [Township]'s Plan." (Appellant's Notice of Appeal, Exhibit L). Counsel for the Preservation Alliance telephoned the Department's counsel on September 18, 1998 regarding his inquiry as to Scott Township's Plan.

In a follow-up letter sent to the Preservation Alliance dated September 28, 1998, the Department's counsel indicated that "at this time the Department does not intend to take any additional action regarding Scott Township's existing Act 537 Plan which was approved by the Department on July 28, 1993." (Appellant's Amended Notice of Appeal, Exhibit A)[3] On October 23, 1998, the Preservation Alliance appealed from the Department's letter. On November 23, 1998, the Preservation Alliance filed an amended notice of appeal. The amended notice of appeal made no changes that are material to the

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[2] The Preservation Alliance is comprised of residents and home owners in the areas covered by the Scott Township Official Sewage Facilities Act Plan.

[3] The same exhibit exists in the Appellant's original notice of appeal, but it is not marked with an exhibit number.

Department's motion to dismiss.

Currently before the Board is the Department's motion to dismiss and in the alternative, motion to strike the Preservation Alliance's amended notice of appeal. The Board of Supervisors and the Sewer Authority joined in the Department's motion. The Preservation Alliance filed a response, and with permission from the Board, an amended response (response) was also filed. The Department filed a reply to the response and the Board of Supervisors and the Sewer Authority jointly filed a reply brief.

The Board issued an Order on May 7, 1999 which directed counsels' attention to three Commonwealth Court decisions dealing with the Board's jurisdiction under the Sewage Facilities Act and requested any comments regarding the relevancy and applicability of those cases to the present matter be filed on or before May 21, 1999. All parties filed comments and the Preservation Alliance additionally filed a reply to the comments.

DISCUSSION

The Department's Letter

The jurisdiction of the Environmental Hearing Board is established by Section 7514 of the Environmental Hearing Board Act,[4] which states that "no action of the [D]epartment adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the [B]oard . . . ." Section 1021.2(a), 25 Pa. Code § 1021.2(a), of the Board's rules of practice and procedure defines an "action" as:

[4] Act of January 13, 1988, P.L. 530, 35 P.S. §§ 7511-7514, at § 7514.

> An order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person, including, but not limited to, a permit, license, approval or certification.

The Preservation Alliance identifies the letter dated September 28, 1998 from the Department's attorney as the "action" for which review is sought. In its motion to dismiss, the Department asserts that the letter is not an appealable action over which this Board has jurisdiction because the letter neither changes the *status quo ante* nor imposes new obligations on Scott Township or the Preservation Alliance through its issuance. We must view a motion to dismiss in the light most favorable to the non-moving party. *See Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995).

The Pennsylvania Sewage Facilities Act (Sewage Facilities Act or Act)[5] assigns every Pennsylvania municipality the responsibility for developing and implementing a current and comprehensive sewage facilities plan in conformance with the requirements enumerated at Section 5(d), 35 P.S. § 750.5(d). It is well-settled that primary decision-making responsibility regarding sewage facilities plans lies at the municipal level. It is a municipality's decision to adopt a treatment alternative in accordance with the terms and conditions of the Sewage Facilities Act. The Department plays a supervisory role, being charged with approving or disapproving plans and plan revisions and ensuring that the systems are in conformity with local planning and consistent with statewide supervision. The Department has broad authority to issue orders, revoke permits, and approve or deny requests to revise sewage facilities plans. *See* 35 P.S. §§ 750.5(e), 750.10; *Township of Upper Saucon v. DEP*, 1998 EHB 1122; *Force v. DEP*, 1998 EHB 179, *aff'd*, 977 C.D.

[5] Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20(a).

1998 (Pa. Cmwlth. filed December 30, 1998) (the Department was without the authority to order the municipality to connect the petitioners to the public sewers without prohibitive costs).

The Preservation Alliance argues that the Department's letter is a final determination or a culmination of events confirming the Department's final approval. We disagree. The letter reads as follows:

> This letter is a follow-up to our recent telephone conversations regarding the above-referenced matter. As I indicated to you by telephone, at this time the Department does not intend to take any additional action regarding Scott Township's existing Act 537 Plan which was approved by the Department on July 28, 1993.
>
> As a result of the aforementioned discussions, it is my understanding that it is no longer necessary for you to meet with Michael Brunamonti of our Water Management Program in accordance with the request in your September 11, 1998 correspondence.
>
> If this is not an accurate description of your understanding of our discussions, please call me at your earliest convenience. If you have any additional questions or concerns regarding this matter, do not hesitate to call me at the above-referenced number.

The appealability of a particular Department letter is dictated by the language of the letter itself. *Township of Upper Saucon v. DEP*, 1998 EHB 1122, 1125. The letter in this case is merely a response to a request for clarification regarding the status of a case. The language of the Department's letter explicitly states that the Department is not taking an action regarding the Township's existing sewage facilities plan. The statements contained in the letter do not affect the personal or property rights, privileges, immunities, duties, liabilities or obligations of either Scott Township or the Preservation Alliance. *See Associated Wholesalers, Inc. v. DEP*, 1997 EHB 1174. The letter does not impose a specific course of conduct. *See Costanza v. DER*, 1991 EHB 1132. The letter, therefore, cannot be construed as an appealable action.

The Preservation Alliance also contends that the purpose of its appeal is to force the Department to require Scott Township to prepare a cost analysis of alternative sewage collection and treatment options. In its reply, the Department denies that its approval for the 1993 Sewage Plan was "conditional" upon the submission of additional information to the Department. We agree. At no time did the Township ever revise, modify or change its 1993 Sewage Plan and submit proposals for the Department's review or approval. The Department similarly never advised the Township that the 1993 Sewage Plan was waived, amended, suspended, revoked or re-approved. The Township seemingly conducted an alternatives analysis on its own initiative and simply kept the Department advised as to its progress. In an exercise of enforcement discretion, the Department did not require Scott Township to implement its adopted 1993 Sewage Plan in accordance with the identified schedule. The Township eventually informed the Department that it intended to implement the 1993 Sewage Plan without any modification. 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. *See Force v. DEP*, 1998 EHB 179, *aff'd*, 977 C.D. 1998 (Pa. Cmwlth. filed December 30, 1998).

The Failure to Appeal the Department's Approval of the Township's Plan

Three Commonwealth Court cases add further support to the position that the Board does not have jurisdiction over the Preservation Alliance's objections relating to Scott Township's 1993 Sewage Plan. The cases hold that where an appeal is filed as an attack to a previously adopted and approved comprehensive sewage facilities plan, the only way to change a municipality's official sewage facilities plan is to follow the

specific revision procedures set forth in Sections 5(a) and 5(b) of the Sewage Facilities Act, 35 P.S. §§ 750.5(a), 750.5(b) by having the Township submit a revision to the plan for Department approval or pursuing a private request for a revision.

In *Kidder Township v. Department of Environmental Protection*, 399 A.2d 799 (Pa. Cmwlth. 1979), the Department ordered the Authority to construct and operate the sewage facilities described in the Water Quality Management Permit. The Authority appealed the Department's Order to this Board, arguing that its previously adopted sewage facilities plan was larger and more expensive than what would be required to cure the township's sewage disposal problems. The court affirmed the Board's holding that "[the township's] remedy was not to attack the [Department]'s order that the Authority comply with the permits issued on its own application, but to 'initiate and submit to the [D]epartment revisions' of the plan, as allowed by Section 5(a) of the [Act] . . . ." *Id.* at 802.

In another case, the township submitted a comprehensive facilities plan to the Department which was subsequently approved and scheduled for gradual implementation. *Carroll Township v. Department of Environmental Resources*, 409 A.2d 1378 (Pa. Cmwlth. 1980). When the township halted its implementation, the Department issued an order directing the township to commence implementation which the township first appealed to the Board and then to the Commonwealth Court. On appeal, the court concluded that:

> . . . the revision procedures of the [Act] provide an exclusive procedural course for a municipality which finds its official approved plan to be unsuitable . . . . Absent any attempt by the township here to revise its official plan, therefore, we must also conclude that the township has not exhausted its administrative remedies under the [Act], and cannot appeal the [Department]'s order to implement its plan.

Id. at 1381.

The fact that this interpretation of the Act applies to a third-party appeal is demonstrated in *Toro Development Co. v. Department of Environmental Resources*, 425 A.2d 1163 (Pa. Cmwlth. 1981). In that case, a revision to a borough's sewage facilities plan was approved by the Department in November of 1977. A trunk sewer permit was issued in June of 1978 to convey sewage from Toro's residential development to the borough's pre-existing sewage treatment plant. This permit was appealed by third parties to this Board, which set aside and remanded the permit. On appeal to the Commonwealth Court, Toro claimed that the Board did not have the authority to set aside the permit because no timely appeal had been taken from the sewage plan revision approval. The court agreed, stating that the "evidence essentially attacked the original sewage plan revision approved by [the Department], rather than the trunk line sewer permit." *Id.* at 1167.

Although the factual background in each of the above cases is different from the facts of the case before us, each of the cases stands for the proposition that this Board does not have jurisdiction to re-open, by way of an untimely appeal, a previously adopted sewage facilities plan which was approved by the Department. If an objection is being made by a property owner who contends that the official sewage facilities plan is inadequate to meet that property owner's sewage disposal needs, the owner's remedy is to submit a private request to revise the plan in accordance with Section 5(b) of the

Sewage Facilities Act, 35 P.S. 750.5(b).[6] *See Carroll Township v. Department of Environmental Resources*, 409 A.2d 1378 (Pa. Cmwlth. 1980); *Force v. DEP*, 1998 EHB 179, *aff'd*, 977 C.D. 1998 (Pa. Cmwlth. filed December 30, 1998). Similarly, since the Preservation Alliance is attempting to attack the previously approved 1993 Sewage Plan by arguing that it is more expensive than is required to cure Scott Township's sewage disposal problems, it must follow the remedies prescribed by the Act. This might include persuading the Township to submit a plan revision to the Department for approval. If that effort is unsuccessful, the Appellant might pursue a private request. Because the Preservation Alliance did not appeal the Department's approval of the 1993 Sewage Plan, the Board has no jurisdiction over this appeal.[7]

We do not need to reach the Department's argument concerning the Preservation Alliance's failure to amend its notice of appeal in accordance with the Board's rules of practice and procedure. The amended notice of appeal adds nothing material to the Department's motion to dismiss.

Accordingly, we enter the following:

---

[6] On March 5, 1999, the Appellant filed an "Amended Notice of Appeal/Petition for Mandamus" at EHB Docket No. 99-048-MG seeking review of the Department's alleged failure to respond to a letter dated October 22, 1998 from the Preservation Alliance requesting the Department to require revisions to the 1993 Sewage Plan.

[7] We have reached the same result under the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, 53 P.S. §§ 4000.101-4000.1904 (Act 101) through application of the preclusive principle of administrative finality. *See Tinicum Township v. DEP*, 1996 EHB 816, 822-826.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SCOTT TOWNSHIP ENVIRONMENTAL PRESERVATION ALLIANCE	:	
v.	:	EHB Docket No. 98-209-MG
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, SCOTT TOWNSHIP BOARD OF SUPERVISORS AND SCOTT TOWNSHIP SEWER AUTHORITY	:	

ORDER

AND NOW, this 17th day of June, 1999, it is hereby ordered that the Department's motion to dismiss and in the alternative, motion to strike, is **GRANTED** and the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **June 17, 1999**

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

HRIVNAK MOTOR COMPANY, JOHN HRIVNAK, and PEARL HRIVNAK	:	
v.	:	**EHB Docket No. 99-052-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 21, 1999**

OPINION ON
ABILITY TO PREPAY CIVIL PENALTY

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

Synopsis:

The appellants are excused from posting a bond or prepaying a civil penalty where they proved that it would cause an undue financial hardship for them to do so.

OPINION

On February 24, 1999, the Department issued an order and civil penalty assessment to Hrivnak Motor Company, John G. Hrivnak, and Pearl E. Hrivnak for violations of the Storage Tank and Spill Prevention Act, 35 P.S. § 6021.101, *et seq.* (the "Storage Tank Act") and the Clean Streams Law, 35 P.S. § 691.1, *et seq.* (the "Clean Streams Law") arising from the operation of a retail gasoline station in East Pikeland Township, Chester County (the "Facility"). The Department

assessed a civil penalty of $163,000. Hrivnak Motor Company and the Hrivnaks appealed.[1] The Board held an evidentiary hearing on May 12 to consider the appellants' claim that they are financially unable to prepay the penalty or post a bond as would normally be required under Section 1307 of the Storage Tank Act, 35 P.S. § 6021.1307. The Department moved for a nonsuit at the conclusion of the Hrivnaks' case-in-chief, which we took under advisement. The parties submitted briefs on June 9. We issued an order on June 14 excusing the appellants from the need to prepay the civil penalty or post an appeal bond. This opinion is issued in support and explanation of that order.

The Standard For Inability To Pay

Before turning to the issue at hand, we need to be very clear about what we are **not** deciding today. First, we are not addressing the merits of the appeal. In particular, we have not so much as looked at the issue of whether the amount of the civil penalty that was assessed by the Department is appropriate. Second, we are not addressing the appellants' ability to pay whatever penalty is finally assessed. The only issue before us is whether the appellants should be excused from **prepaying** the penalty or posting a bond as a condition to their prosecution of this appeal.

Somewhat surprisingly, this Board has never had occasion to define exactly what it means to be financially unable to prepay a penalty. The operative statute, Section 1307 of the Storage Tank Act, 35 P.S. § 6021.1307, is not helpful. In fact, unlike some other environmental statutes, the Storage Tank Act does not explicitly excuse the prepayment of civil penalties under any

[1] The Department states that only Hrivnak Motor Company appealed. The Hrivnaks argue that they also appealed as individuals. The appeal papers are ambiguous, but we will give the Hrivnaks the benefit of the doubt and include them as appellants. The caption has been changed accordingly.

circumstances.

There are no determinative rules or regulations. Neither the Board's rules nor the general rules of administrative practice and procedure address the issue. The Pennsylvania Rules of Civil Procedure do not generally apply to proceedings before this Board, but we can certainly look to them for guidance. The rule that comes closest to the situation at hand is Rule 240, which allows parties in most civil actions to proceed *in forma pauperis* if they do not have sufficient financial resources to pay the costs of litigation. Pa. R. Civ. P. 240. That rule, however, requires a party to show that it is indigent or poverty-stricken, *Crosby Square Apartments v. Henson*, 666 A.2d 737, 738-39 (Pa. Super. 1995), which makes sense if the standard is inability to pay **any** litigation costs but is too strict if the standard is inability to pay what may be a sizable penalty. Indigence and poverty define a condition that is being measured against a normative standard of living. Our focus is upon the amount of an assessed penalty and the party's ability to prepay that particular amount at a particular point in time, irrespective of general living standards. In short, a party need not necessarily prove that it is destitute to be excused from the prepayment obligation. As a result, Rule 240 is not particularly helpful.

Our research has not disclosed any controlling judicial precedents. The Commonwealth Court has instructed that we are to tread carefully in this area because parties generally should not be deprived of access to the courts and due process of law simply because of their impecunity. *Twelve Vein Coal Co. v. Department of Environmental Resources*, 561 A.2d 1317, 1319 (Pa. Cmwlth. 1989), *pet. for allowance of appeal denied*, 578 A.2d 416 (Pa. 1990). When a party alleges that it is financially unable to prepay a penalty, we are to hold a hearing "to determine whether the party is, in fact, impecunious and unable to comply with the prepayment condition." *Pilawa v.*

Department of Environmental Resources, 698 A.2d 141, 143 (Pa. Cmwlth. 1997); *Twelve Vein Coal Co.*, 561 A.2d at 1319. In other words, the party must be afforded an opportunity to explain why it can not comply with the financial requirements for filing an appeal. *Pilawa*, 698 A.2d at 144. These cases describe our mission but provide no guidance on how we are to define impecunity in this context.

Since we appear to be working from a clean slate, we turn to the underlying policies involved. We are faced with two important policies that are somewhat at odds with each other and must be reconciled. On the one hand, requiring the prepayment of civil penalties or the posting of an appeal bond serves several valuable functions. It discourages frivolous appeals. It helps ensure that appeals from civil penalty assessments will not be filed simply to obtain the time value of a deferred payment. By requiring payment up front, the Commonwealth receives $100 for a $100 penalty, as opposed to the reduced present value of a payment made only at the conclusion of possibly protracted litigation. In other words, it reflects a legitimate policy decision that appeals should be taken and pursued on the appellant's dime. As a result, appeals are likely to be prosecuted more quickly and efficiently. Requiring prepayment also would tend to increase the likelihood that the Commonwealth gets paid, not only because payment sooner rather than later always increases that likelihood, but also because the Commonwealth is relieved of potentially problematic collection efforts.

On the other hand, there is an absolutely fundamental, deep-seated right grounded in our federal and state constitutions that parties should have access to the courts and be afforded due process of law. In the final analysis, that fundamental right can not be sacrificed to the otherwise noble goals underpinning the prepayment requirement. If a party would be deprived of access to

otherwise appropriate administrative review solely because it is truly unable to prepay a penalty, access to that review must take precedence. *Twelve Vein Coal Co.*, 561 A.2d at 1319.

Of course, a party who would avoid prepayment or posting a bond should be put to the test. In the absence of a stipulation, we will hold evidentiary hearings in these cases. The party must produce hard evidence. As we stated in *Heston S. Swartley Transportation Co. v. Department of Environmental Protection*, EHB Docket No. 99-017-L (April 8, 1999):

> [A] party claiming financial inability cannot simply appear and state that it has no money. It must produce hard evidence that gives the Department a reasonable opportunity to challenge the claim and this Board a reasonable opportunity to independently assess the claim. That evidence must, among other things, include proof of the appellant's assets and liabilities. In the absence of hard evidence, the Legislature's objective in requiring prepayment could too easily be thwarted without sufficient proof or substantial justification.

Slip op. at 6. *See also Goetz v. DEP*, 1998 EHB 955, 963.

There is also no question that the party alleging impecunity has the burden of proving it. *Goetz*, 1998 EHB at 965, n. 6; *Heston S. Swartley Transportation Co. v. DEP*, Docket No. 99-017-L (March 15, 1999). The Board's rules ordinarily place the burden of proof on the party asserting the affirmative of an issue, 25 Pa. Code § 1021.101, and that rule is particularly justified here where a party will obviously have vastly superior access to information concerning its own financial condition than the Department will have, even allowing for expedited discovery. We will not require the Department to attempt to prove a negative in this context.

Requiring the appellant who would be excused from prepayment to put forth these efforts provides for process that is constitutionally due without unnecessarily or carelessly defeating the goals underlying the prepayment obligation. But having enunciated the proper procedures, we are

still left to fashion an appropriate substantive standard in light of the underlying policies involved.

Clearly, a party that quite literally cannot come up with the necessary funds will be excused from prepayment. The standard of impecunity, however, must go beyond a literalist interpretation of ability to pay. If we were to define financial inability in the literal sense alone, an individual could be required to sell his house, cars, and jewelry -- whatever it takes to produce the money. Similarly, a business that could sell off all of its inventory and production equipment to generate enough cash would be required to do so in order to challenge a civil penalty assessment, even if it meant going out of business. We are not willing to adopt such a draconian stance.

Instead, balancing the need to provide access to administrative review with the goals underlying the prepayment requirement, we conclude that an appellant will be excused from the prepayment/bonding obligation if making the prepayment would result in undue financial hardship. An undue financial hardship occurs if making the prepayment or submitting a bond would interfere with the appellant's ordinary and necessary expenses, considering the appellant's current and reasonably anticipated future needs. Our rulings need to recognize the value of permitting a functioning business to continue as a productive component of our economy earning money and employing workers, and we need to have compassion for individuals and their unique circumstances. *Cf. United States v. Bay Area Battery*, 895 F. Supp. 1524, 1529-30 (N.D. Fla. 1995) (regarding ability to pay a penalty but same considerations apply here); EPA Memorandum, "General Policy on Superfund Ability To Pay Determinations," September 30, 1997 (same).

Finally, in performing our review, we must bear in mind that the prepayment obligation is an all-or-nothing, short-term requirement. Either the appellant can pay the exact amount assessed (or post a bond for that amount) or not. There is no allowance for partial payments or payments over

time. Secondly, the appellant must either have available or obtainable liquid assets, or assets that can be converted into cash or used as collateral to obtain cash, relatively quickly. An appellant will normally have only about thirty days to come up with the prepayment, either in conjunction with filing its notice of appeal or no more than thirty days after an order of this Board rejecting a claim of impecunity. With these principles in mind, we turn to the facts before us.

The Appellants' Financial Condition

The Appellants' financial statements and tax returns were admitted as exhibits at the hearing. We also heard testimony from the Department's financial expert, James Bixby, as well as Pearl Hrivnak and the Hrivnaks' bonding agent.

There are four individuals and entities relevant to the appellants' ability to prepay the civil penalty: John G. Hrivnak, Pearl E. Hrivnak, Hrivnak Motor Company, and Hrivnak Motors Corporation. Hrivnak Motors Corporation is not a party in this appeal because it was not listed on the Department's order or assessment. John and Pearl Hrivnak are husband and wife. John Hrivnak is the sole shareholder of Hrivnak Motors Corporation. John Hrivnak is the president and Pearl Hrivnak is secretary of Hrivnak Motor Company.

John Hrivnak, Pearl Hrivnak, Hrivnak Motor Company, and Hrivnak Motors Corporation operated a gasoline filling station at the Facility. Hrivnak Motor Company owns the tanks, pumps, and monitoring systems at the Facility, and leases the tanks, pumps, and monitoring system to Hrivnak Motors Corporation. There have been various loans and other financial dealings back and forth between the four parties. We do not hesitate to consider the financial condition of all four parties in resolving the issue before us.

The appellants together have about $40,000 in cash. They do not have any other liquid assets

to speak of. Therefore, the question becomes whether, based on their other assets and financial condition in general, the appellants can either convert or collateralize other assets quickly enough to generate the remaining funds necessary to meet the prepayment obligation.

The appellants' wealth, such as it is, is primarily tied up in real estate. Four of the five parcels of real estate owned by John and Pearl Hrivnak are located in Chester County. The other property is located in St. Petersburg, Florida. The four properties in Chester County were assessed in 1997 or 1998 at market value. John and Pearl Hrivnak's personal residence has an assessed value of $185,000. Two residential rental properties located on Walnut Street in Phoenixville, Chester County have a combined assessed value of $90,440. The 8.9 acre Facility property, which is the subject of this appeal, has an assessed value of $1,088,350. The property located in St. Petersburg has a market value of about $77,500 (using the figure set forth in the appellants' brief).

John and Pearl Hrivnak have several outstanding loans, some of which were received from the Commonwealth. One loan has a balance of $33,928. A second loan was received from the Small Business First Fund and has a balance of $28,445. The third and fourth loans were received from the Storage Tank Loan Fund, and have a balance of $15,251 and $24,732. Two of these four loans are secured by liens on the Hrivnaks' personal residence. The fifth loan was received from Phoenixville Federal and has a balance of $70,804. This loan is also secured by a lien on the Hrivnaks' personal residence. In addition to the five loans, a neighboring property owner has a lien on Hrivnaks' properties in the amount of $60,000. The Hrivnaks owed their environmental contractor $11,700 as of the hearing date.

In 1998, John and Pearl Hrivnak received interest income in the amount of $7,430, net (after tax) rental income in the amount of $9,104, wages in the amount of $12,000, and social security

payments in the amount of $18,296 (Mr. Hrivnak is 70 years old). For that same year, the Hrivnaks' expenses were approximately $22,971.

Hrivnak Motor Company approached a property and casualty insurance agency in an effort to obtain an appeal bond. Hrivnak was advised and we find it credible that it would be required to post collateral in the nature of cash or other liquid assets for the full amount of the bond.

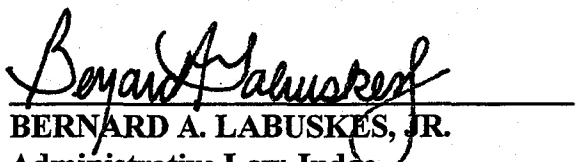
The Hrivnaks' most valuable asset on paper is the Facility itself. The Facility, however, is heavily contaminated and is the subject of the Department's enforcement action. In fact, the filling station has been shut down by the Department's order. The tanks and dispensing equipment in place at the Facility have virtually no value independent of the ongoing site operation.

Hrivnak Motor Company has reported a carry-forward loss of $452,710 as of the most recent available tax return. The Hrivnaks' personal returns show very low income levels, typical more of a retired than a working couple.

Having carefully reviewed the record regarding the totality of the appellants' financial condition, we conclude that they should be excused from the bonding or prepayment obligation. We are not convinced that the appellants could generate $163,000 in thirty days even if they turned over every penny they have and fire-sold all of their other assets. But even if they could, we are satisfied that it would cause them undue financial hardship to require them to do so. We are not convinced that the appellants are required to obtain a loan in excess of $100,000 to prepay a penalty in their circumstances, but even if they were, we are satisfied that a reasonable lending institution would not approve such a loan without imposing conditions or requirements that would themselves cause undue financial hardship. We will not require the appellants to hand over virtually everything they have simply to obtain due process of law. Therefore, the Department's motion for a nonsuit is

denied, the Hrivnaks have carried their burden of proving financial inability, and this appeal shall proceed without the necessity for bonding or prepayment in accordance with our Order of June 14, 1999.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: June 21, 1999

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

GREGORY & CAROLINE BENTLEY	:	
	:	
v.	:	**EHB Docket No. 98-058-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DONALD AND JOAN SILKNITTER, Permittee	:	**Issued: June 28, 1999**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

The Board denies a motion for summary judgment filed by downstream landowners of adjacent property in an appeal of a Limited Power Permit issued for the operation of a dam and minor power project. The Department is not precluded from issuing a permit which requires access to property not owned by a permittee without requiring proof of consent to use adjacent property unless there is an explicit regulatory provision which requires proof of consent. There are questions of material fact in dispute as to whether the regulations of the Dam Safety and Encroachments Act require the consent of the appellants as downstream landowners.

OPINION

Before the Board is a motion for summary judgment filed by Gregory and Caroline Bentley (Appellants) which seeks revocation of a Limited Power Permit issued by the Department of Environmental Protection to Donald H. and Joan L. Silknitter

(collectively, Permittee). This permit, issued on February 11, 1998, authorizes the Permittee to operate and maintain an existing dam and hydroelectric generating plant on Buck Run in West Marlborough Township, Chester County.

Many of the basic facts which are relevant to this appeal are not in dispute. The Appellants own a tract of land downstream from a small dam and hydroelectric generating plant mostly owned by the Permittee. There is a channel which diverts water from Buck Run over the dam. This channel then runs roughly parallel to Buck Run, through a culvert under Pennsylvania Route 82 where it continues east to a confluence with Buck Run. (See Appellants' Ex. D) The Appellants own the portion of the channel that is east of Route 82.[1] The dam itself, the hydroelectric generating plant, and the portion of the channel that is west of Route 82 are owned by the Permittee and a family which is not a party to this appeal.

On March 30, 1998, the Appellants filed an appeal from the Department's issuance of a permit to operate and maintain the dam and the plant charging, among other things, that the Department had abused its discretion by issuing the permit without gaining the consent of the Appellants as adjacent landowners, which they argue is required by the Dam Safety and Encroachments Act (Dam Safety Act), Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1- 693.27.[2] The Appellants further argue that the permit was improperly issued without securing their consent for

[1] The Department disputes that both Appellants own the property because only Caroline Bentley's name is on the deed. (See Department Ex. B at 40). Because the Department has not moved to dismiss Gregory Bentley for lack of standing, nor has it otherwise explained why this question of ownership is relevant, for the purposes of this opinion we will ignore this point.

[2] The Appellants sought to amend their notice of appeal to include claims that the permit violated the Limited Power Act, Act of June 14, 1923, P.L. 704, *as amended*, 32 P.S. §§ 591-625. The Board denied their motion and limited their objections to the permit to those related to the Dam Safety and Encroachments Act. *Bentley v. DEP*, EHB Docket No. 98-058 (Opinion issued February 12, 1999).

maintenance of a portion of the project which they allege is on their property. In their motion they seek judgment in their favor on these issues. In response, the Department and the Permittee contend that the consent of the Appellants was unnecessary and that consent was provided for the maintenance of the channel east of Route 82 by an agent of the Appellants.

Because there are factual matters in dispute and the Appellants are not entitled to judgment as a matter of law, we deny their motion.

Summary judgment is only appropriate where the depositions, answers to interrogatories, admissions of record and 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. No. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa.Cmwlth. 1997). The Board will only enter judgment in favor of a moving party in those cases where the right to judgment is clear and free from doubt. *Martin v. Sun Pipe Line Company*, 666 A.2d 637 (Pa. 1995). We will view the record in the light most favorable to the nonmoving party and resolve all doubts as to the existence of a material fact against the moving party. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995). With these principles in mind, we turn to our consideration of the Appellants' motion.

The Appellants first contend that the Department issued the permit without properly considering the effect of the project upon their property rights. Specifically, the Appellants argue that the permit unlawfully authorizes trespass and interferes with the use and enjoyment of their land.

The Board has addressed the question of what is authorized by permits issued by the Department many times where adjacent landowners appeal a permit on the ground that it appears to authorize activity on their property to which they did not consent. We have held that a permit does not independently give a permittee the right to enter the property of another, it merely allows activity that is otherwise prohibited by the Commonwealth. *Miller v. DEP*, 1997 EHB 335; *see also* Appellants' Ex. F at Condition 1. Furthermore, a permit does not shield a permittee from liability for damage to other property. *Id.* Therefore, absent a statute or regulation which requires proof of ownership or the consent of other landowners, the Department is not precluded from issuing a permit for an activity that requires use of the property of another. *Bernie Enterprises, Inc. v. DEP*, 1996 EHB 239. The right to enter or use the land of another must be independently established by the permittee and disputes regarding such use must be resolved in the courts of common pleas. *Id.* In this case, the Appellants must establish that their consent to use their portion of the "millrace" [3] was required by the Dam Safety Act or its regulations as a prerequisite for issuance of the permit.

The Appellants argue that the Department was precluded from issuing the permit because it ignored the property interest of the Appellants knowing that the project would encroach upon their property. In support of this argument they cite *Cooper v. DER*, 1982 EHB 250, and *Abod v. DEP*, 1997 EHB 872. Neither of these decisions supports this argument.

[3] The Department states that the Appellants use of the word "millrace" for the portion of the channel which runs from the mill to the confluence of Buck Run is imprecise, and that the channel is more properly referred to as a "tailrace." However, for the purposes of this opinion we will use the word "millrace" to refer to the channel.

In *Cooper* the Board held that the appellants were required to obtain a release from a property owner before they could construct a dock on property that they did not own. Such a release was necessary because it was *explicitly* required by the Dam Safety Act regulations in effect at the time. Conversely, in *Abod*, the Board held that the Department did not abuse its discretion in issuing a small projects permit without proof of a property interest in the permit site because neither the Dam Safety Act nor its regulations required such proof. These decisions are consistent with our earlier discussion inasmuch as they support the conclusion that the Department need only consider property interests when a statute or regulation explicitly require it to do so.

The Appellants contend that since they own 1300 feet of the1500-foot millrace, the Permittee was required to secure their consent before a permit could be lawfully issued by the Department by 25 Pa. Code § 105.82(a)(10).

Section 105.82(a)(10) of the regulations provides, in relevant part:

> [A] permit application for the operation and maintenance of existing dams and reservoirs shall give the following information:
>
> . . .
>
> (10) Proof of title or flowage easements for land areas below the top of the dam elevation that is subject to inundation.

25 Pa. Code § 105.82(a)(10). The Department argues that Section 105.82(a)(10), does not apply to any property *downstream* from the project, but only to property *upstream*.

Normally, the Department's interpretation of its own regulations is entitled to great weight and will not be disregarded unless clearly erroneous. *Hatchard v. Department of Environmental Resources*, 612 A.2d 621 (Pa. Cmwlth. 1992), *petition for allowance of appeal denied,* 622 A.2d 1378 (Pa. 1993). The Appellants admit that it is

more typical for upstream properties to be subject to inundation, but that the regulation nevertheless applies to their downstream parcel. (Appellants Reply Brief to the Department's Response to the Motion for Summary Judgment at 8.) On the record before us now, we cannot say that the Department's interpretation is clearly erroneous. We note, however, that there does not seem to be any language in the regulation which would limit its application to upstream properties.

Even if the regulation is not limited to upstream properties, it is unclear that it applies to the Appellants' property. Although the Appellants in their motion allege that their land is "subject to inundation," as stated in the regulation, the evidence is unclear on this point. The exhibits used to support this allegation discuss the flow of water created by the use of the turbines in the hydroelectric plant, but do not specifically state that the result is that water will inundate the Appellants' land. The Department contends that there will be no inundation of the Appellants' property, but cites no specific evidence to support this conclusion. Since the Appellants have not demonstrated that their right to judgment is clear, we will deny their motion and leave this question to resolution at hearing. *Martin v. Sun Pipe Line Company*, 666 A.2d 637 (Pa. 1995).

The Department also argues that it was required to issue the permit regardless of the consent of the Appellants by an order of the federal court, and that to order revocation of that permit would violate the federal order. We disagree.

Part of the lengthy litigation history surrounding the Permittee's project (which we will not impart in detail here), involved a suit in federal court which resulted in an order requiring the Department to accept a permit application from the Permittee "for processing without regard to any refusal by the [Appellants] to sign the application . . . ."

Bentley v. Ellam, Civil Action No. 3:CV-90-1138 (M.D. Pa. filed March 22, 1993). This order was essentially affirmed by the Third Circuit. In its opinion, the Third Circuit emphasized that the permitting process within the Department involved two steps: (1) acceptance of the application and (2) action upon the application. *Bentley v. Ellam*, No. 93-7427 (3d Cir. filed February 24, 1994), slip op. at 6. The court further noted that "[t]he district court's order expressly states that [the Department] must accept the application for processing, but says nothing about issuing the permit without regard to the [Appellants] refusal to sign the application." *Id.* The court also stated that the lower court's order did not "intend any limitation on how the [Department] should handle the further disposition of the application . . . ." *Id.*, slip op. at 7 (quoting *Bentley v. Ellam*, Civil Action No. 3:CV-90-1138 (M.D. Pa. filed March 22, 1993), slip op. at 6 n.2)(emphasis omitted). We believe that this language is quite explicit and that the Department was not *required* to issue the permit, nor would the Board be violating the federal order were we to order the permit revoked.

Next, the Appellants argue that the permit was unlawfully issued because Condition 13 of the permit requires the Permittee to maintain the entire millrace, including the portion which is owned by the Appellants without requiring the Permittee to produce some right of access to the Appellants' property. (See Appellants' Ex. F, Condition 13). Relying upon the Board's recent decision in *Chestnut Ridge Conservancy v. DEP*, 1998 EHB 217, the Appellants contend that this constitutes an abuse of the Department's discretion as a matter of law because the effect of the condition is to produce an illegal action. We disagree.

In *Chestnut Ridge Conservancy*, the Board held that the Department had abused its discretion in issuing a permit because the permittee failed to demonstrate that it had a legal means of accessing its mine site from a township road. The permit issuance was erroneous because the noncoal mining regulations *explicitly required* the information. Thus, the illegal result was a specific violation of the Department's mining regulations, not a violation of the law in general. As explained above, the permit does not convey access rights to the Permittee. Nor does it authorize the Permittee to violate the law by trespassing upon the Appellants' property. Therefore, unless there is a statutory or regulatory requirement which requires proof of access as a prerequisite to issuance of the permit, we cannot say as a matter of law that the Department abused its discretion in issuing the permit.

The Department in its response further contends that consent was given to maintain the millrace by Mr. Terry Muto who was acting as the representative of the Appellants. It avers that in a meeting at the site Mr. Muto stated that it would be "no problem" for the Permittee to maintain the entire millrace. Therefore, the Department contends, to the extent that the Appellants' consent was necessary, the Department reasonably believed that it had been received. In their reply the Appellants deny that Mr. Muto was acting on their behalf or that he consented to the maintenance of the millrace. Obviously this raises a question of fact which must be resolved at hearing.

We finally turn to the argument of the Permittee that we must dismiss the Appellants' appeal because it was untimely filed. The Appellants object to this argument on the merits, but also because is was not raised by a motion but was simply addressed in the Permittee's brief in response to the motion for summary judgment. While we do not

normally address such requests to dismiss appeals, timeliness is a question of jurisdiction and it would be within our authority to dismiss the appeal *sua sponte*.

The Permittee contends that the Appellants received personal notice of the issuance of the permit on February 12, 1998. Their appeal was not filed until March 30, 1998, which was within thirty days of publication of the permit's issuance in the *Pennsylvania Bulletin*. The Permittee seems to suggest that since federal court required the Department to involve the Appellants in the permitting process that they should now be considered a "party" and required to file their appeal within thirty days of when they received actual notice of the permit. This argument is without merit.

The Board's rules on when appeals must be filed are very clear. Persons to whom an action of the Department is directed or issued must file their appeal within thirty days of written notice of the action. 25 Pa. Code § 1021.52(a). In the case of a permit, clearly this rule only applies to the permittee. All other persons aggrieved must file their appeals within thirty days of publication in the *Pennsylvania Bulletin*. 25 Pa. Code § 1021.52(a). The Appellants clearly fall into this category. There is no other rule which would allow the Board to require them to file their appeal within a shorter period of time because of the unique circumstances surrounding the litigation between the Permittee and the Appellants.

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GREGORY & CAROLINE BENTLEY	:	
	:	
v.	:	**EHB Docket No. 98-058-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DONALD AND JOAN SILKNITTER, Permittee	:	

ORDER

AND NOW, this 28th day of June, 1999, the motion of Gregory and Caroline Bentley for summary judgment in the above-captioned matter is hereby **DENIED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: June 28, 1999

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

For the Commonwealth, DEP:
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Southeast Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PEOPLE UNITED TO SAVE HOMES and PENNSYLVANIA AMERICAN WATER COMPANY	:	
v.	:	**EHB Docket No. 95-232-R (Consolidated with 95-233-R; 96-223-R and 96-226-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY, Permittee and INTERNATIONAL UNION UNITED MINE WORKERS OF AMERICA AND DISTRICT 2 UNITED MINE WORKERS OF AMERICA, Intervenors	:	**Issued: July 2, 1999**

ADJUDICATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

In this appeal of a permit revision for a longwall mining operation, the Board sustains the appeal with regard to the subsidence bond issue and dismisses it with regard to the following issues: protection of historic and archeologic sites and public parks, compliance history, protection of perennial streams and water supplies, presumptive evidence of potential pollution, written permit review findings, surface and groundwater monitoring, restoration and replacement of water supplies, protection afforded to homes, and whether a taking has occurred.

With regard to the issue of the amount of subsidence bond posted by the mining company, the Board finds that the Department of Environmental Protection's (Department) approval of a bond in the amount of $10,000 was arbitrary and an abuse of its discretion. Where the statute and

regulations require that the Department conduct an analysis as to the proper amount of bond required for the activity in question, the Department may not simply apply a uniform bond amount for all permit applications.

With regard to the issue of historic and archeologic sites, the permit application properly sets forth measures which will be taken to prevent or minimize subsidence damage to these structures. The Department and the mining company properly considered and addressed the concerns of the Pennsylvania Historic and Museum Commission with regard to historic and archeologic sites. Even where the Commission made conflicting representations and was not diligent in submitting its concerns to the Department, the Department properly addressed those concerns.

With regard to the issue of public parks, the National Road Heritage Park is not a park within the protection of 25 Pa. Code § 89.38, and, therefore, the mining company was not required to identify it in its permit application or to provide support for it. However, the company did identify historic features along the National Road and will provide protection for certain features.

With regard to the issue of the Department's compliance review, the testimony demonstrates that the Department conducted a full and thorough review of the mining company's compliance history in accordance with the regulations.

With regard to the issue of perennial streams, the evidence strongly demonstrates that perennial streams will be protected from dewatering.

With regard to the issue of potential pollution, the evidence strongly supports the Department's conclusion that the proposed mining will not cause pollution to waters of the Commonwealth. We accord little weight to the testimony presented by the appellant's expert on this issue because it fails to meet the requisite standard of a reasonable degree of certainty.

With regard to the Department's written findings concerning its permit review, we find that the Department acted properly and in accordance with the law. Although its written findings do not track the exact language of the regulations, the evidence demonstrates that the Department nonetheless conducted its review in accordance with the standard set forth in the regulations.

With regard to the issue of surface and groundwater monitoring, we find the testimony of the mining company's expert to be more credible than that of the appellant's expert due to his experience and knowledge in the relevant field. Based on his testimony and the totality of evidence presented on this matter, we find that the company's surface and groundwater monitoring plan satisfies the statutory and regulatory requirements.

With regard to the issue of restoration or replacement of water supplies, the Permit Revision complies with the requirements of 52 P.S. §§ 1406.5a(a)(1) and 1406.5b(j) by detailing the measures which the mining company will take to replace any affected water supplies.

With regard to the issue of protection afforded to homes, we find that Section 5(e) of the Mine Subsidence Act, 52 P.S. § 1406.5(e), applies to homes. However, nothing in this section prohibits subsidence in a predictable and controlled manner. The coal mining company should strive to prevent subsidence causing material damage to homes to the extent technologically and economically feasible. If mining would result in irreparable damage to dwellings, then under Section 1406.9a(b), the Department *can* prohibit the mining.

The Board finds that it is not technologically and economically feasible to longwall mine and provide support in the mine. Eighty-Four Mining Company, to the extent technologically and economically feasible, planned its full extraction longwall mining operations so as to prevent material damage to homes. Such actions can not constitute a "taking" of property since Eighty-Four

Mining Company is obligated to fully compensate, repair or restore any damages to homes.

With regard to PUSH's objections to evidentiary rulings, we find no error. Further, if a party wishes to preserve objections to evidentiary rulings made at hearing, it may not simply make a general reference to evidentiary rulings in its post-hearing brief, but must provide specific citations to the transcript and to any relevant legal precedent on which it bases its objections.

Finally, we find no merit to Eighty-Four Mining Company's and the Department's argument that we should vacate our Orders of November 27, 1996.

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OPINION

I. INTRODUCTION AND PROCEDURAL HISTORY

This consolidated appeal arises from the Department of Environmental Protection's (Department) approval of a permit revision (1995 Permit Revision) to allow Eighty-Four Mining Company to longwall mine additional areas in Washington County. Following the 1995 Permit Revision, appeals were filed by People United to Save Homes (PUSH), Columbia Gas Company of Pennsylvania, South Strabane Township, Pennsylvania American Water Company, and Eighty-Four Mining Company. Over the strenuous objections of the Department and Eighty-Four Mining Company, these appeals were consolidated. *See Columbia Gas of Pennsylvania, Inc. v. DEP*, 1996 EHB 22. After extensive discovery, Columbia Gas Company of Pennsylvania, South Strabane Township, and Eighty-Four Mining Company all resolved their differences and settled their appeals. The United Mine Workers of America subsequently intervened to support positions advanced by the Department and Eighty-Four Mining Company.

The Board has issued numerous orders and eight previous opinions arising from these appeals. *Columbia Gas of Pennsylvania, Inc. v. DEP*, 1996 EHB 22, (Consolidated five appeals to promote judicial and administrative efficiency and reduce or limit unnecessary costs and expenses to the parties and the Board); *Columbia Gas of Pennsylvania, Inc. v. DEP*, 1996 EHB 1067 (Party may withdraw appeal prior to hearing and Board approval of settlement agreement not required); *PUSH v. DEP*, 1996 EHB 1131 (Denied Motion to Strike Pennsylvania American Water Company's expert witness); *PUSH v. DEP*, 1996 EHB 1411 (Partially granted Pennsylvania American Water Company's Motion for Summary Judgment); *PUSH v. DEP*, 1996 EHB 1428 (Partially granted Eighty-Four Mining Company's Motion for Summary Judgment and dismissed various objections

filed by PUSH); *PUSH v. DEP*, 1996 EHB 1468 (Denied PUSH's Motion for Summary Judgment); *PUSH v. DEP*, 1996 EHB 1623 (Denied Department's and Eighty-Four Mining Company's Petitions for Reconsideration); *PUSH v. DEP*, 1997 EHB 643 (Denied PUSH's Motion for Recusal).

The Department, Eighty-Four Mining Company, and PUSH filed appeals of the Board's Opinions and Orders regarding the summary judgment motions. These appeals were quashed by the Commonwealth Court as interlocutory. In April 1997, Pennsylvania American Water Company filed a Motion to Withdraw the remaining issues set forth in its Notice of Appeal. Following a Board Order and Motion for Clarification, the Board issued an Order which Eighty-Four Mining Company appealed to the Commonwealth Court. The Commonwealth Court quashed the appeal.

The hearing on the merits commenced in Pittsburgh before Administrative Law Judge Thomas W. Renwand. The Board conducted eighteen days of hearing. The hearing transcript numbers 3,550 pages and the record includes hundreds of pages of exhibits. Post-hearing briefs were submitted by PUSH, Eighty-Four Mining Company, the Department, the United Mine Workers of America, and the Citizens Coal Council (*amicus curiae*). Letter briefs were filed by PUSH on June 1, 1999, Eighty-Four Mining Company on June 3, 1999, and the Department on June 7, 1999. After a full and complete review of the record we make the following:

II. FINDINGS OF FACT

1. The Department of Environmental Protection (Department) is the agency of the Commonwealth with the duty and authority to administer and enforce Pennsylvania's environmental statutes and regulations. The Department's permit review process is to ensure compliance with the regulations and laws of the Commonwealth of Pennsylvania. These laws include the Bituminous Mine Subsidence and Land Conservation Act (Mine Subsidence Act), Act of April 27, 1966, P.L.

31, *as amended,* 52 P.S. §§ 1406.1-1406.21, and appropriate amendments; the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1-1396.31; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001; and the coal mining regulations at 25 Pa. Code Chapters 86 and 89.

2. Eighty-Four Mining Company is a Pennsylvania corporation and the operator of Mine 84, a bituminous underground coal mine located in Washington County, Pennsylvania. (Cmwlth. Ex. 3)

3. People United to Save Homes (PUSH) is an incorporated association which appealed the Department's action in this matter. (Notice of Appeal)

4. Mine 84 has been in operation as an underground bituminous coal mine since the late 1890's. (N.T.1002)[1]

5. Mine 84 runs through the Pittsburgh Coal seam. Coal is removed by the longwall mining method. (N.T.1004-1005; Cmwlth. Ex. 3)

6. During the past one hundred years, the Pittsburgh Coal seam has been extensively mined in the vicinity of Mine 84. Much of this mining occurred before modern permits were required for mining operations. These mines are estimated to cover many thousands of acres. (N.T.1000-1004; Cmwlth. Ex. 3)

7. When Eighty-Four Mining Company acquired its interest in Mine 84 in December of 1992, the mine had largely been idled, and the previous owner, BethEnergy Mines, Inc. (BethEnergy), had laid off the majority of the work force. (N.T.3324-3325)

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[1] "N.T.__" refers to a page of the notes of testimony. "Cmwlth. Ex.__" refers to an exhibit introduced by the Department. "EFMC Ex.__" refers to an exhibit introduced by Eighty-Four Mining Company. "PUSH Ex. __" refers to an exhibit introduced by PUSH.

8. BethEnergy operated the mine as two mines, Somerset No. 60 mine and Ellsworth No. 51 mine. (N.T.63)

9. Mine 84 was designed to be a longwall mine because the longwall mining method is the only currently viable and economical way to mine coal within the Pittsburgh Coal Seam in general, and at Mine 84 in particular. (N.T.3287-3288, 3327)

10. Full extraction longwall mining was first used at Mine 84 in the mid-1970's. (N.T.2838)

11. A permit was first issued to BethEnergy on March 30, 1987 when the mine was known as Mine 60. (N.T.2836; EFMC Ex.88)

12. The permit issued to BethEnergy authorized the operator to use full extraction longwall mining methods. (N.T.2838)

13. Eighty-Four Mining Company was formed for the purpose of developing Mine 84 into a modern, state-of-the-art longwall coal mine. (N.T.3324) The total investment in this project has been approximately $160,000,000 through the end of calendar year 1997. (N.T.3364)

14. In 1994, the two mines were consolidated into one permit, Coal Mining Activity Permit (CMAP) No. 63831302, which was transferred to Eighty-Four Mining Company. (N.T.63-64; Cmwlth. Ex.1, pp. E-5, E-6)

Permit Application

15. On or about October 24, 1994, Eighty-Four Mining Company submitted to the Department an application for revision to CMAP No. 63831302 (Permit Application). (N.T.70-71; Cmwlth. Ex. 3)

16. The Permit Application deleted some previously permitted underground acreage, and added additional underground acreage. The net addition of underground acreage was 155 acres. The

permitted surface acreage was unchanged. (N.T.67-69; Cmwlth. Exs. 3a, 3b)

17. The Department reviews a revision application the same way it reviews a new permit application. (N.T.43) The permit, which is the subject of this Appeal, was reviewed as if it were a new permit. (N.T.140)

18. A technical review is conducted by a lead reviewer and other technical staff, including a hydrogeologist and mining engineer. (N.T.55)

19. The permit review, which is the subject of this Appeal was the first permit review conducted of Mine 84 since the passage of the Act 54 Amendments to the Mine Subsidence Act, Act of June 22, 1994, P.L. 357.

20. At the time the Department was reviewing the Permit Application, no regulations which implemented the Act 54 Amendments to the Mine Subsidence Act had been promulgated.[2]

21. During the review of the Permit Application, the Department sent three correction letters[3] to Eighty-Four Mining Company. Eighty-Four Mining Company responded to each letter. (N.T.104-109; Cmwlth. Ex. 31, 37, 42, 44, 46, 48)

22. The Department has developed policies to assist its staff in applying the requirements of various statutes, including the Mine Subsidence Act. (N.T.268)

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[2] The Board may take official notice of this fact. 25 Pa. Code § 1021.109. Under the Commonwealth Documents Law any regulations must be published in the Pennsylvania Bulletin. 45 Pa. C.S. §§ 702, 724. The absence of any final regulations in the Pennsylvania Bulletin establishes that regulations implementing the Act 54 Amendments had not been promulgated at the time of the permit review.

[3] A correction letter sets forth certain deficiencies in the permit application including missing, incomplete, inadequate, or erroneous information.

Longwall Mining

23. Longwall mining is a full extraction technique in which specialized machines remove all of the coal within a previously identified area called a panel. (N.T.722-273; Cmwlth. Ex. 3)

24. Longwall panels are rectangular areas of coal in which the longwall mining machines operate. (N.T.722-723, 1882-1885; Cmwlth. Ex. 3)

25. Longwall mining results in planned subsidence of the surface. (N.T. 287, 740-741, 2992-93; Cmwlth Ex. 3)

26. Planned subsidence allows for the occurrence of subsidence to be predicted, and permits the mining company to undertake measures to minimize damage to structures and promptly perform repairs, if necessary, to homes damaged by subsidence. (N. T.213, 238-239; Cmwlth. Ex. 3)

27. Full extraction mining methods, like longwall mining, may reduce the amount of differential settlement by allowing for more of a uniform subsidence profile on the surface. (N.T.287-288, 307-308; Cmwlth. Ex. 3)

28. The maximum amount of subsidence occurs at the center of the longwall panel, and is typically up to one half of the height of the coal removed. Less subsidence occurs at locations between the center of the panel and the edges of the panel. Virtually no subsidence occurs at the edge of the panel. (N.T.697-698, 741-742, 854-855, 2993-2994; Cmwlth. Ex. 3)

29. Longwall mining is not as labor intensive as conventional continuous mining. (N.T.194)

30. After the coal is removed by the longwall mining method, the roof of the mine immediately collapses. Surface subsidence occurs within a short period after the coal is removed, typically within two weeks of coal removal. (N.T.287, 741-742, 1761-1762, 2072-2073, 2992; Cmwlth. Ex. 3)

31. Stopping a longwall mining machine in what has been planned as a longer panel can cause

unstable roof conditions because it imposes greater than planned pressure on support pillars. (N.T.2984-2985)

32. Longwall mining has been conducted in Mine 84 since 1976. (N.T.2838)

33. The longwall method of mining makes use of longwall mining equipment and continuous mining equipment as follows:

a. Continuous mining equipment is used to develop main entries into the mine by developing a series of side-by-side tunnels which are supported by blocks of unmined coal, roof bolts and cribbing.

b. Once the main entries are developed, continuous mining equipment is again used to lay out large rectangular blocks of coal, known as longwall panels, by developing entries, also supported by unmined coal, roof bolts and cribbing, around the four sides of the panel. These entries serve as a means of ingress and egress for the miners and equipment and as a means to transport coal from the working face to the surface and as the means for ventilating both the active and inactive portions of the mine.

c. Once a longwall panel has been developed, longwall mining equipment is installed at one end of the panel and the continuous mining equipment is moved to an adjoining area where it is used to develop entries around another panel, the development of which is timed to be completed before full extraction longwall mining is completed in the previous panel.

d. The longwall mining equipment then mines all the coal within the panel.

e. The longwall equipment used at Mine 84 was specially designed for use in this mine and consists of a shearer which moves back and forth along the face of the panel, removing approximately 68 inches of the Pittsburgh Coal Seam, beneath a series of hydraulic shields which

protect the equipment and the miners as the equipment moves forward.

f. As the longwall equipment moves through the panel, the strata overlying the panel collapses into the resulting void which results in a lowering of the surface overlying the panel in a planned, controlled, and predictable manner. (N.T.2616-2626, 2972, 3343)

34. It is neither technologically nor economically feasible, once a panel has been developed and mining within a panel is initiated, to repeatedly mine a portion of the panel, stop, "skip'" around the unmined area, and commence mining the same panel again. (N.T.3209-3230, 3458)

35. If for some reason the advance of the longwall equipment is precluded, the only option available is to stop mining and, if another panel has been developed, move the equipment into that area. (N.T.3220-3221) However, this results in the following problems:

a. The costs of moving longwall mining equipment are very high, and during the time when the equipment is idled no coal is being produced by the longwall equipment.

b. Although coal is being "mined" by continuous miner units to develop other panels during the time the longwall equipment is idled, the cost of producing this coal is extremely high and the costs associated with developing the entries around the portion of the panel which cannot be longwall mined are never recovered. (N.T.3286)

36. If the shortening of the active longwall panel is unanticipated and the development of the next panels to be mined in sequence has not progressed far enough to install the longwall mining equipment, the coal mining company must disassemble the equipment because downward roof pressures above the area where the equipment is located can cause the roof to collapse onto the equipment. (N.T.3203-3206)

37. If panels must continually be "shortened" to leave unmined blocks of coal in place, the

problem of not having a new panel ready into which the equipment can be moved becomes progressively more problematic and can reach a point where the mine is no longer able to economically operate. (N.T.3252-3253)

38. It is not feasible to "bend" a longwall panel so as to leave blocks of coal unmined for surface support without stopping the longwall because the entries around the panel must be kept straight to assure proper ventilation and to enable the belt conveyors, which move coal from the working face to the surface, to operate. (N.T. 3328, 3360-3361)

39. It is technically impossible to leave coal in place in a longwall panel because, by definition, the longwall panel requires full extraction of coal. If coal has to be left in place to support a particular structure or surface feature, the only choice is to terminate the panel. This is based on the following:

a. While theoretically an operator could disassemble, move, and reassemble the longwall equipment on the other side of the support pillar and restart the panel, there are many impediments to doing this.

b. These include: lost time, disruption of the overall mining plan (which is necessarily sequentially developed), lack of storage space for equipment, ventilation concerns and restrictions, and safety (roof support) concerns and restrictions.

c. In most situations, the coal mining company would simply abandon the coal rather than leave some coal in place. (N.T.2932-2935, 2940-2942)

Subsidence - Standard of Protection Afforded to Homes

40. Eighty-Four Mining Company's Permit Application proposed to add approximately 130 acres of coal in the northwest corner of the mine and approximately 1,600 acres of coal in the southwest

corner of the mine to Eighty-Four Mining Company's previously approved Subsidence Control Plan Boundary and to delete approximately 1,500 acres from the previously approved Plan Boundary. (N.T.1007; Cmwlth Ex.3b)

41. In reviewing the Permit Application the Department applied a standard of zero damage, that is no tolerance for damage to schools, churches, and other structures, but applied a protection standard requiring only repair and compensation for damage to homes caused by subsidence. (N.T.217)

42. The standard the Department applies with respect to protecting a dwelling against subsidence damage is one of "irreparable harm." (N.T.714)

43. Mr. Jeff Sowers, a mining engineer for the Department, has reviewed approximately 100 permit applications, 25% to 30 % of which were done subsequent to the Act 54 Amendments of 1994. (N.T.702-704)

44. The Department requires a demonstration in an applicant's Subsidence Control Plan of how mining will be conducted below structures to prevent damage. (N.T.716)

45. The Subsidence Control Boundary is the area where an operator must provide detailed information and identify each and every structure and feature above the mine and set forth how the operator is going to mine within the boundary. (N.T.717)

46. The Permit Application modules which contain subsidence control information are Modules 18 and 19. (N.T.718)

47. Other modules in the Permit Application which may contain information relative to subsidence control are Module 4.6, Modules 6.1 and 6.3, and Modules 9.2, 9.4, and 9.5.

48. In reviewing the Permit Application, specifically Module 18.2, Section F, the Department

requires a description of how mining activities will be conducted so as to prevent subsidence damage. The Department attempts to ensure that all structures and features that it determines require protection are documented, and that the mining application satisfies the regulations as construed by the Department to prevent subsidence damage to structures. If an operator is required to protect a structure or feature from damage, generally it will do one of four things: (1) propose to leave 50% coal support; (2) propose to leave a non-mining zone; (3) reserve the right to submit an alternate mining request, or; (4) submit a waiver of support rights from the structure owner. (N.T.725-726)

49. The Act 54 Amendments and the Mine Subsidence Act do not have a definition for "material damage." (N.T.714)

50. In his review of Eighty-Four Mining Company's application, Mr. Sowers made the following determinations:

a. Longwall mining would cause the surface to drop roughly one-half the height of the coal seam, which is consistent with his experience.

b. The Permit Application provided a discussion on the immediate impact of longwall mining which would be the lowering of the ground by as much as two to three and one half feet, and the effects on the structures on the ground surface which could possibly be affected due to the drop.

c. Based on the representations of Eighty-Four Mining Company, there would be no long term effects from subsidence because subsidence is occurring during the mining and not years later; the structures above the mine can be repaired or restored; and the ground surface can be restored to its pre-mining condition.

d. He did not consider any other information or representations with respect to

the impact of longwall mining on structures above the mine, nor did he explain how planned subsidence would prevent material damage, other than the fact that planned subsidence is predictable. (N.T.741-742)

51. The Department does not require an operator to predict subsidence effects for specific structures in its permit application. (N.T.875)

52. There are over 600 dwellings on the surface within or adjacent to the Subsidence Control Plan Boundary. (Cmwlth. Ex. 3; EFMC Ex.70)

53. Eighty-Four Mining Company identified 133 properties over longwall panels and headings, and at the time of the hearing 17 properties had been undermined. Of those 17, seven had been damaged at the time of the hearing. (N.T.2032-2035)

54. Mr. Charles R. Murray, a member and the treasurer of PUSH, prepared PUSH Exhibit R, from maps obtained from the Department which had been submitted by Eighty-Four Mining Company. Exhibit R was prepared by taking separate maps from the Department's permit file and making them the same size. Mr. Murray and Mrs. Funderburk, a member of PUSH, prepared the maps by color coding them. Dwellings are identified by blue dots, barns by red dots, and commercial buildings by green dots. (N.T.2204-2210; PUSH Ex. R)

55. According to the Subsidence Control Plan, proposed longwall panels were planned in such a manner as to place a majority of the dwellings within the Subsidence Control Plan Boundary which have been, or are projected to be, undermined by longwall mining in as favorable a location as possible. (EFMC Ex. 70; Cmwlth. Ex. 100; PUSH Ex. R)

56. Among the factors considered by Eighty-Four Mining Company when developing its current mining plan for Mine 84 was the location of surface features, and where economically and

technologically feasible, it attempted to avoid the use of full extraction longwall mining beneath areas with a high density of structures. (N.T.2640-2641, 2654-2655; EFMC Ex.70)

57. In Module 18.2, Section F of the Permit Application, Eighty-Four Mining Company identified the following structures and features which had to be protected: three churches, the Washington County Humane Society building, various historical properties, and an aquifer which serves as the source of a public water supply. (N.T.726-730, 756-757; Cmwlth. Ex. 3)

58. Eighty-Four Mining Company proposed to provide 50% coal support or to employ other measures equally designed to prevent material damage to the four structures and to the historical properties. As to the aquifer, Eighty-Four Mining Company proposed to leave a no-mining zone for a distance of 1,800 feet from the aquifer and to leave 50% coal support for a distance of one-half mile from the aquifer. (N.T.727-728, 730-731; Cmwlth. Ex. 3)

59. With regard to water wells, the Department deemed satisfactory a response that the Eighty-Four Mining Company would replace any affected water wells in accordance with the requirements of the Mine Subsidence Act. (N.T.733-734)

60. Eighty-Four Mining Company stated in the Permit Application that it would provide six months notice prior to undermining. (N.T.734)

61. Eighty-Four Mining Company stated in the Permit Application that in areas undermined the ground would be lowered by two to three and a half feet, there would be an immediate effect on the surface, and there would be no long-term effects because any affected structures would be repaired or restored. (N.T.741-742; Cmwlth. Ex. 3)

62. Eighty-Four Mining Company stated in the Permit Application that it would repair or compensate in accordance with Act 54. Also, Eighty-Four Mining Company described in the Permit

Application a variety of mitigation measures that it would implement in order to minimize damage to structures, including trenching and leveling. (N.T.743-45; Cmwlth. Ex. 3)

63. PUSH Exhibit B is an index of homes prepared by Mr. Charles Murray. (N.T.2211-2212)

64. Individuals associated with PUSH reside throughout the area covered by the Subsidence Control Plan. (N.T.2220)

65. Based upon economic considerations to the operator, longwall panels can be adjusted if there are many houses in an area where mining will occur. (N.T.2642-2643)

66. Longwall mining was not employed in the early 1900's when the coal severance deeds identified as Exhibits 81, 82, 83 and 84, were executed. (N.T.2803)

67. In determining the measures needed to repair a dwelling after subsidence has been completed, Eighty-Four Mining Company relies, in part, on the property owners to make assessments of damages they believe were caused by the mining operations. (N.T.2857-2858)

68. The mechanisms of subsidence are such that once the coal is removed, all of the strata above the coal all the way to the surface squeezes, bends, twists, compresses, and tenses, and a trough is generated. (N.T.2993)

69. A subsidence trough is created over the area where the coal is removed, and subsidence affects areas beyond the edge of the void, in what is called an angle of draw. The angle of draw can be as much as 15 degrees. (N.T.2998)

70. When subsidence occurs, there is a change to the surface land as follows:

a. The central point of a subsidence trough generally drops down so you have a vertical movement.

b. On the sides of the trough, the surface moves toward the center of the panel,

so there also is horizontal movement toward the center of the panel.

c. Subsidence on the edge of the trough creates a slope and there is either stretching or compression of the land surface.

d. With respect to subsidence caused by longwall mining, there is vertical subsidence and horizontal movement, tension, compression, convex curvature and concave curvature.

e. All of this movement occurs on the surface in the subsidence trough and within the angle of draw. (N.T.3001-3003)

71. On September 22, 1995, following a thorough administrative and technical review, the Department issued the revision to CMAP No. 63831302 (1995 Permit Revision). (N.T.120-1221; Cmwlth. Ex. 1)

72. The Subsidence Control Plan approved by the Department on September 22, 1995 added a total of 5,340 acres to the previously existing subsidence control plan. (N.T.135-136)

73. The Subsidence Control Plan contains more specific information as dictated by 25 Pa. Code Chapter 89 as to what features are shown and how mining is to be conducted, including such things as boundaries, surface owners, public buildings, churches, schools, hospitals, dwellings, parks, utility transmission lines, and other features. (N.T.136-137)

74. The 1995 Permit Revision revised the Permit to include the requested additional acreage. (Cmwlth Ex.1)

75. The 1995 Permit Revision authorized Eighty-Four Mining Company to conduct full extraction longwall mining in the manner described in the Subsidence Control Plan. The mining is within the Subsidence Control Plan Boundary of Mine 84. (Cmwlth Ex.1 and 3; EFMC Ex.70)

76. Eighty-Four Mining Company's approved Subsidence Control Plan sets forth a detailed description of the measures which Eighty-Four Mining Company will implement to prevent material damage to dwellings. Specifically, Eighty-Four Mining Company proposed in Section 18.2(L) of its Subsidence Control Plan the following:

> The mining operations have been designed in an attempt to maximize recovery of the coal reserve while minimizing subsidence damage potential. The longwall panels have been projected to place a majority of the structures that are to be undermined in as favorable locations as possible according to trends of subsidence related damage. The higher density housing areas such as Windsor Highlands and the higher density business locations such as those along State Route 136near Eighty-Four have been located along the periphery of planned mining, where the full retreat extraction mining will not be utilized. The longwall panels have been designed to encapsulate clusters of housing within individual blocks.
>
> Eighty-Four Mining Company will evaluate the subsidence damage potential of property within the extent of the subsidence trough. A representative of the Eighty-Four Mining Company will meet with the individual property owner. The preventive measures may include trenching around the structure, tensioning the structure, and other measures developed or required by specific conditions or circumstances including utility service protection and maintenance as described in 18.2 G(7). Eighty-Four Mining Company will attempt to enter into a voluntary agreement with each affected property owner to permit the implementation of the preventive measures to minimize damage to the property.
>
> In accordance with section 5.4 of Act 54, Eighty-Four Mining Company shall repair or restore such damage or compensate the owner of such properties or structures for the reasonable cost of its repair or the reasonable cost of its replacement where determined as necessary or practical. Compensation in the form of purchase of the property may also be considered where determined as necessary or practical.

(Cmwlth. Ex. 3)

77. Eighty-Four Mining Company sends surface owners a notice of its intention to mine beneath their property at least six months in advance of such mining. The notice describes in general terms when mining is expected to occur and outlines the owner's rights under Act 54. (N.T.1895, 2094-2095; Cmwlth Ex.3)

78. In situations where Eighty-Four Mining Company believes a property is likely to be affected by its proposed mining activities, it will contact the homeowner and attempt to arrange a meeting to discuss its mining plans and to arrange a pre-mining inspection of the property. (N.T.1893)

79. Eighty-Four Mining Company attempts to conduct a pre-mining survey of every home that is located within a 35 degree angle of draw of the proposed longwall mining. Experience at Mine 84 has shown that generally subsidence impacts associated with full extraction longwall mining only occur within a 12 degree to 15 degree angle of draw. (N.T.1898, 2998)

80. Pre-mining inspections are done as closely as possible to the date when mining is projected to commence (2-3 months ahead of the longwall operation). (N.T.1898)

81. Eighty-Four Mining Company hired Mr. Douglas Patterson, a registered Professional Engineer and the Vice-President of a Washington, Pennsylvania engineering firm, to conduct pre-mining inspections. Mr. Patterson was formerly employed as an engineer at Mine 84 when the mine was operated by BethEnergy. He has had extensive experience with mine subsidence related damage in general and, in particular, with such damage at Mine 84. (N.T.2573-2575)

82. Mr. Patterson works independently of Eighty-Four Mining Company. His practice is to contact a homeowner once he is advised by Eighty-Four Mining Company that it believes a pre-mining inspection should be done and arrange, at the homeowner's convenience, a time during daylight hours when he can conduct his inspection. (N.T.2584-2585)

83. Mr. Patterson's practice is to conduct a thorough visual inspection of the property taking still photographs and making a videotape of the pre-mining condition of the property. He actively solicits the input of the homeowners and requests that they show him any features or conditions they believe merit his attention. He also prepares a floor plan of the property which is incorporated in a written

draft report submitted to Eighty-Four Mining Company for its review. (N.T.2582-2587; EFMC Ex. 72)

84. Although Eighty-Four Mining Company is given a copy of Mr. Patterson's pre-mining inspection report before it is submitted to the homeowner, Eighty-Four Mining Company does not make any substantive changes to Mr. Patterson's report. (N.T.2594, 2859)

85. Eighty-Four Mining Company then submits a copy of Mr. Patterson's final report to the homeowner. Eighty-Four Mining Company will incorporate into the report any additional comments or views of the homeowner. (N.T.1898, 2595)

86. Ms. Cynthia Rossi owns a home and barns on a property called Taro Hill Farm on Zediker Station Road. She maintains three horses and thirteen llamas on her property. (N.T.2229-2232)

87. Ms. Rossi's home was subjected to mitigation and subsidence by Eighty-Four Mining Company in the two weeks prior to her testimony on October 1, 1997. (N.T.2243)

88. The mitigation measures which were used by Eighty-Four Mining Company at the Rossi home consisted of a trench on three sides of the home which was thirteen feet deep, four feet below the footer of her home, and filled with gravel. Additionally, two cables were placed around the main house. The cables ran through the inside of the house, and holes were drilled in her sunroom to accommodate cable installation. (N.T.2243-2244)

89. Eighty-Four Mining Company conducted longwall mining operations beneath Ms. Rossi's property. Ms. Rossi remained at her home during the entire course of the longwall mining beneath her property, and observed cracks opening and closing throughout the process. She described cracks which occurred which were "so large that you could look up and see the sky." She testified that these cracks later closed. (N.T.2258-2260)

90. Photographs of Ms. Rossi's basement showed hairline cracks which at one point during mining she described as "outrageous" cracks. However, these cracks also subsequently closed. (N.T.2267)

91. Ms. Rossi observed that many of the cracks looked far less expansive after they had closed. (N.T.2281)

92. Ms. Rossi clearly described the extent of the cracks which occurred during the earlier parts of the subsidence event that were not obvious a week later. (N.T.2282-2283)

93. Ms. Rossi testified that when she purchased her home she did not imagine that the Legislature would pass a law [Act 54] that would allow longwall mining under her home without protection. (N.T.2308-2309)

94. Eighty-Four Mining Company requests that the property owner provide a list of items or areas they believe may have been damaged by mining. (N.T.2916)

95. To determine the potential for subsidence-related impacts to a dwelling for which a pre-mining inspection has been conducted, Eighty-Four Mining Company uses a computer model developed especially for it by Dr. Syd S. Peng. (N.T.1899-1900; EFMC Ex.98)

a. Dr. Peng's Model predicts vertical and horizontal displacement and the types of stresses that may affect a structure during mining. (N.T.1900)

b. The Model enables Eighty-Four Mining Company to reasonably predict if damage is anticipated but does not enable Eighty-Four Mining Company to predict the types of damage or to quantify the amount of money required to repair potential damage. (N.T.1901, 1985)

c. Dr. Peng's Subsidence Model has demonstrated accuracies in practice. (N.T.3032-3035, 3043-3044)

96. Dr. Peng is a professor at West Virginia University where he chairs the Mining Engineering Department. He holds an undergraduate degree, a Master's Degree, and a Ph.D., all in Mining Engineering. His specialty is longwall mining, surface subsidence, and ground control. (N.T.2970-2972)

97. Dr. Peng was accepted by the Board as an expert in the areas of longwall mining, surface subsidence, and ground control. (N.T.2975-2977)

98. Dr. Peng has made more than 40 field visits to Mine 84 and has been underground in the mine at least 10 to 15 times. It is valuable to go into the mine to assess conditions beneath the surface, including roof conditions and the mining pattern, in order to predict surface subsidence. (N.T.2978-2979)

99. Pursuant to 25 Pa. Code § 1021.98, the Board conducted a site view and entered Mine 84. The Board observed various aspects of the longwall mining operation including but not limited to the actual mining of coal, movement of the mining shields, and collapse of the mine roof. The Board also observed the by-pass line and an excavated part of the 30-inch line which had been damaged by mine subsidence; toured a house undermined by Mine 84 and observed first-hand the mitigation methods employed. In addition, the Board toured Ms. Rossi's property prior to its being undermined, and toured various other structures over the mining area. The Board was accompanied by counsel for the parties (and others) during this site view.

100. In Dr. Peng's opinion, it is possible to predict, with a reasonable degree of scientific certainty, the amount of subsidence and the location of the surface stresses associated with subsidence related to longwall mining at Mine 84. (N.T.3006-3007)

101. Dr. Peng's Model can predict subsidence events within 5% accuracy. (N.T.3029-3030)

Before Eighty-Four Mining Company undermined Route 136, Dr. Peng used the Model to predict what subsidence would occur beneath the road. One of the elements that Dr. Peng was trying to predict was whether there would be a bump in the road. While Dr. Peng predicted only one bump and more occurred, they occurred in the precise location he had predicted. (N.T.3029-3035)

102. Longwall mining-induced subsidence is a dynamic process but it has an end. (N.T.2915-2916, 2946-2947)

103. If the Model indicates that subsidence resulting from full extraction longwall mining is likely to cause damage to a dwelling, Eighty-Four Mining Company causes a site specific mitigation plan to be prepared for the structures likely to be so affected. (N.T.1902, 2855, 3035; EFMC Ex.16)

104. Various mitigation techniques, all of which are discussed in Eighty-Four Mining Company's approved Subsidence Control Plan, are utilized by Eighty-Four Mining Company to mitigate the effects of subsidence on structures, including the construction of trenches around structures and cabling of structures. (N.T.1915-1918; EFMC Ex. 78-1 through 78-4; PUSH Ex. T)

105. Entering into a pre-mining mitigation agreement is voluntary, and Eighty-Four Mining Company will still perform, and has performed, pre-mining mitigation measures in instances where property owners are unwilling to enter into a written pre-mining agreement. (N.T.1910)

106. It is generally recognized that these measures minimize the potential for subsidence damage to structures which are undermined by full extraction mining and when implemented, in the uncontroverted opinion of Dr. Peng, minimize adverse subsidence impacts on structures over areas which have been longwall mined. (N.T.1941-1945, 3038; EFMC Ex. 78-5)

107. During mining beneath any mitigated structure, Eighty-Four Mining Company maintains daily communication with the property owner and conducts regular inspections of the structure.

(N.T.1921-1922, 2856, 2935-2936)

108. Generally it takes between one to two weeks to complete mining beneath a structure which has been mitigated. (N.T.1949, 2072-2073)

109. Once mining has progressed 600 to 800 feet past a structure which has been mitigated, Eighty-Four Mining Company will remove the mitigation measures it has installed and return the property to its pre-mining condition. (N.T.1921-1922; Cmwlth. Ex.102)

110. Eighty-Four Mining Company and the homeowner conduct a post-mining inspection and compare the results of this inspection with the pre-mining inspection to determine what subsidence related damage may have occurred. Mr. Wilcox and Mr. Berdine of Eighty-Four Mining Company testified that all structures which had been undermined and which sustained subsidence damage have been (or will be) fully repaired or the owner of the structure has been (or will be) compensated for such damage. (N.T.1957, 2861-2863)

111. Eighty-Four Mining Company repairs the damages identified by the homeowner, and also points out problems which it observes. A structural engineer does not review the damage to assure that there is not more than just visible damage. (N.T.3444)

112. Eighty-Four Mining Company hires contractors to perform the repair work on the structures. (N.T.1923)

113. After August of 1994, the majority of the coal mining companies began doing pre-mining surveys. (N.T.1622)

114. Act 54 recognizes and encourages coal mining companies to do pre-mining surveys. (N.T.1623)

Historical and Archeological Sites

115. The Department's regulations also deal with archeological and historic resources. The coal mining company must describe measures to be taken to accomplish prevention of adverse impacts to historic features which may be adversely affected by its mining operations. (N.T.575-576)

116. In Module 4.6 of the Permit Application, Eighty-Four Mining Company stated that it would provide support for historical and archeological structures. (N.T.752; Cmwlth. Ex.3)

117. In Mr. Sowers' opinion, the information submitted in Module 4.6 of the Permit Application satisfied the applicable regulations. (N.T.752; Cmwlth. Ex.3)

118. A Memorandum of Understanding exists between the Department and the Pennsylvania Historic and Museum Commission. Pursuant to that Memorandum, the Pennsylvania Historic and Museum Commission has the responsibility to identify archeological sites and historic structures that may be eligible or are listed on the National Register of Historic Places and which may require protection. The Department relies upon the Pennsylvania Historic and Museum Commission to perform this work. (N.T.75, 302)

119. During the permit review, the Department notified the Pennsylvania Historic and Museum Commission that Eighty-Four Mining Company had submitted a permit amendment application and solicited comments from that agency. This notice was sent on November 18, 1994, shortly after the application was received by the Department. (N.T.74; Cmwlth. Ex.8)

120. On December 28, 1994, the Pennsylvania Historic and Museum Commission advised the Department in writing that it did not believe that the proposed mining activity of Eighty-Four Mining Company would affect historic resources within the area covered by the permit amendment application. (N.T.76; Cmwlth. Ex.8)

121. Thereafter, the Department received a second letter from the Pennsylvania Historic and

Museum Commission dated January 6, 1995. (N.T.78-79; Cmwlth. Ex.9)

122. After receipt of the January 6, 1995 letter, a meeting was held on February 23, 1995 to discuss the permit amendment application. Representatives of the Pennsylvania Historic and Museum Commission, the Department, Eighty-Four Mining Company, and the Pennsylvania Department of Community Affairs attended this meeting. The Department of Community Affairs was the agency which, in February of 1995, administered the Commonwealth's Heritage Park Program. The Department of Community Affairs' responsibility for this program is now vested with the Department of Conservation and Natural Resources. (N.T.80; 3495, 3504)

123. At the end of the meeting, the Pennsylvania Historic and Museum Commission indicated that it had no concerns regarding the archeological sites and that it would advise the Department later if it had any concerns regarding historic structures. (N.T.80-81, 3504-3505)

124. At the conclusion of this meeting the representatives of the Department felt that the concerns of the Pennsylvania Historic and Museum Commission had been addressed. (N.T.81)

125. Mr. Alan Chase, the representative of the Department of Community Affairs who attended this meeting, and who is now employed by the Department of Conservation and Natural Resources, also believed a consensus had been reached at the meeting regarding the concerns of the Pennsylvania Historic and Museum Commission. (N.T.3506)

126. At the conclusion of this meeting the representatives of Eighty-Four Mining Company which were present also believed a consensus had been reached and that neither the Pennsylvania Historic and Museum Commission nor the Department of Community Affairs had further concerns. (N.T.2773-2775)

127. During the February 23, 1995 meeting, the Department advised the Pennsylvania Historic

and Museum Commission that it was in the middle of its permit review and that if it did have comments, it should submit them promptly to the Department. (N.T.81-82)

128. The Department expected the Pennsylvania Historic and Museum Commission to inform it if that agency had any additional concerns. (N.T.81)

129. As a rule, and under the Memorandum of Understanding between the Department and the Pennsylvania Historic and Museum Commission, comments concerning an application are to be forwarded to the Department within 30 days of receipt. (N.T.81, 177; Cmwlth Ex.70)

130. The Pennsylvania Historic and Museum Commission sent the Department a third letter, dated June 26, 1995, in which it identified various historic resources overlying the Eighty-Four mine which needed to be protected and that the Commission was doing additional surveys. (N.T.676-677; Cmwlth. Ex.96)

131. Each of the new structures discussed in the Pennsylvania Historic and Museum Commission's June 1995 letter was addressed in Eighty-Four Mining Company's Subsidence Control Plan submitted to, and ultimately approved by, the Department. (Cmwlth. Exs. 3, 96)

132. The Department responded to the Pennsylvania Historic and Museum Commission's June 26, 1995 letter by requiring Eighty-Four Mining Company to modify the Permit Application to provide protection to the structures identified in the letter. Eighty-Four Mining Company made the changes. (N.T.677-78; Cmwlth. Ex. 3, 96)

133. The Subsidence Control Plan proposed by Eighty-Four Mining Company and approved by the Department set forth a detailed description of the measures which Eighty-Four Mining Company proposed to implement to prevent damage to structures listed or eligible for listing on the National Register of Historic Places. Specifically, Eighty-Four Mining Company proposed in pertinent part,

in Section 18.2(F), the following:

> A list of properties eligible for and or listed in the National Register of Historic Places has been provided by the Pennsylvania Historic and Museum Commission-Bureau for Historical Preservation. These structures have been identified as such on
> the appropriate Exhibit 19.3 maps and are as follows:
>
> * Moses Little Tavern, c. 1820, Amwell Twp., Survey #125-AM-4.
> * Leslie Carron Tavern Stable, c. 1821, Amwell Twp., Survey #125-AM.-5.
> * John Little House, c. 1860, South Strabane Twp., Survey #125-§-4.
> * Tannehell's Gas Station, c. 1920, Amwell Twp. Survey #125-AM-1.
> * National Road mile marker, c. 1835, Survey #125-§-1.
> * National Road mile marker, c. 1835, Survey #125-§-3.
> * National Road mile marker, c. 1835, Survey #125-§-5.
> * Bridge on Anderson Drive, Amwell and South Strabane Twp., Survey #12 AM-2.
> * Buchanan Blacksmith Shop, c. 1840, South Strabane Twp., Survey #125-§-2.
> * Martin Farm
> * Martin Farm
>
> The...properties eligible and or listed on the National Register within the subsidence control plan area will be protected from material damage by providing support area or other measures to prevent material damage as approved by the Department.
>
> The extraction within the support area shall be less than 50% by area. This support area shall have support pillars which are uniformly distributed over the entire area and are rectangular in shape. This support area shall be determined by projecting a 15 degree angle of draw from the surface to the coal seam, beginning fifteen feet from each side of the structure. For a structure on a surface slope of 5.0 degrees or greater, the support area on the downslope side of the structure shall be extended an additional distance, determined by multiplying the depth of the overburden by the percentage of the surface slope.

(N.T.2819; Cmwlth Exs. 3, 4) In sum, Eighty-Four Mining Company's Subsidence Control Plan proposed no longwall panels beneath the protected structures. (Cmwlth. Exs. 3, 4)

134. PUSH offered no evidence which cast doubt on Eighty-Four Mining Company's statement

that the use of 50% mining, as opposed to longwall mining, beneath "historic" structures is an adequate means of minimizing and/or preventing adverse effects to such structures.

135. After the decision to revise the Permit was made and Section 18.2(F) of Eighty-Four Mining Company's proposed Subsidence Control Plan was approved, the Department received, on October 2, 1995, another letter from the Pennsylvania Historic and Museum Commission dated September 20, 1995, which listed additional structures which the Pennsylvania Historic and Museum Commission believed were either listed or eligible for listing on the National Register of Historic Places. (N.T.82; Cmwlth Ex. 74)

136. It also indicated that there were other features which it still was evaluating. (N.T.83; Cmwlth. Ex. 74)

137. Even though the Pennsylvania Historic and Museum Commission's letter of September 20, 1995 was received after the Department had made its decision to issue the Permit Revision, the Department considered the Commission's after-the-fact comments and made a decision to review the plans to undermine the structures mentioned in the letter when Eighty-Four Mining Company submitted its six month maps pursuant to 25 Pa. Code § 89.38. (N.T.85-86)

138. The Department notified the Pennsylvania Historic and Museum Commission of its issuance of the 1995 Permit Revision. The notification occurred by copying the Pennsylvania Historic and Museum Commission on the transmittal letter issuing the 1995 Permit Revision, which was dated September 22, 1995. (N.T.84-85; Cmwlth. Ex. 1)

139. The Pennsylvania Historic and Museum Commission did not appeal the issuance of the Permit Amendment to Eighty-Four Mining Company despite having been notified of its issuance. (Cmwlth Ex. 1)

140. The Board makes the following findings regarding the actions of the Pennsylvania Historic and Museum Commission in this matter:

a. The Department received conflicting information from the Pennsylvania Historic and Museum Commission, based on the series of letters and the representations made by the Commission at the meeting.

b. The Pennsylvania Historic and Museum Commission failed to complete its review in a diligent and prompt fashion to the detriment of the public, the mining company, and the Department.

c. The actions of the Pennsylvania Historic and Museum Commission in this matter were far below the standards envisioned in the Memorandum of Understanding between the Department and the Pennsylvania Historic and Museum Commission.

141. Module 18.2(L) sets forth measures which will adequately prevent and/or minimize adverse effects to historic or archaeological properties listed, or eligible for listing, on the National Register of Historic Places.

Public Park

142. The Department requires a coal mining company to submit information in Module 4.6 documenting public parks and historic places over the subsidence plan. The Department also requires a description as to how the mining will be conducted to avoid destroying the intrinsic value of these structures. In addition to identifying these structures and features in Module 4.6, they are required to be shown on the Module 19.3 map. (N.T.750)

143. There are original portions of the National Road within the National Road Heritage Park. (N.T.3529).

144. The National Road Heritage Park is not listed on the National Register of Historic Places. (N.T.3541)

145. The Department did not require Eighty-Four Mining Company to develop a specific plan to mitigate potential effects of subsidence on the National Road Heritage Park. (N.T.855)

146. In preparing the permit application, Eighty-Four Mining Company did not consider the National Road Heritage Park as a "park" in the traditional sense. (N.T.2765-2766)

147. A state park is a discrete area of land, with formal, legal surveyed boundaries. It is property owned and managed by the Commonwealth for the public good and for protection of the natural resources. (N.T.3498, 3527)

148. A heritage park is not a park in the traditional sense. It is a process and program. It is an economic development strategy developed by the Commonwealth in which local organizations and agencies create a regional task force to encourage more tourism in Pennsylvania. The Department of Conservation and Natural Resources administers the State Heritage Parks Program by providing grants and technical assistance. (N.T.3498-3499, 3503, 3510)

149. A heritage park does not necessarily have discrete physical boundaries; it has planning boundaries. The boundaries are not identified by the Commonwealth; the region and planning process identifies the boundaries. (N.T.3502, 3527, 3541)

150. One of the purposes of the Pennsylvania Heritage Parks Program is to conserve and enhance the Commonwealth's resources and to promote heritage for tourism development. (N.T.3509-3510)

151. Tourism annually brings millions of dollars into Pennsylvania, and is the second largest industry in the state. (N.T.3509-3510)

152. The Heritage Parks Program receives an appropriation of approximately $2,500,000 a year.

(N.T.3511)

153. The Commonwealth has spent approximately $935,000 on the National Road Heritage Park. (N.T.3529)

154. The National Road Heritage Park encompasses Route 40 and a corridor along it approximately 90 miles in length from the point at which it enters Pennsylvania on the Maryland border to the point where it leaves Pennsylvania on the West Virginia border. (N.T.3503; Cmwlth. Ex. 106)

155. For operational reasons, Eighty-Four Mining Company plans to leave a solid barrier of coal beneath much of Route 40. (N.T.2654-2655; EFMC Ex. 70)

156. No evidence was presented by PUSH which would establish that full extraction longwall mining beneath Route 40 will adversely affect Route 40 or the National Road Heritage Park.

Mine Subsidence Damage Claims

157. Mr. Edward Motycki is a mining engineer who has been employed by the Department since 1981. He has worked in the Department's mine subsidence regulatory program since 1982. He has had responsibility for the review of subsidence control plans, the review of six-month mining maps, and the investigation of subsidence damage claims. From 1993 to the present he has been the Chief of the Mine Subsidence Section which administers the Mine Subsidence Insurance Program. (N.T.1507-1509)

158. The Department employs insurance representatives who perform cost estimates of subsidence damage. (N.T.706)

159. Since 1982, Mr. Motycki has had direct involvement in overseeing the Department's Mine Subsidence Insurance Claim Unit. The majority of the claims filed under the Mine Subsidence

Insurance Act involve mine subsidence damage related to abandoned, not active mines. (N.T.1533-1534)

160. The owners of structures overlying an underground mine can purchase low cost mine subsidence insurance from the Commonwealth to insure against the possibility of losses caused by subsidence damage. (N.T.1534)

161. Prior to the passage of Act 54, home owners had the right to purchase coal support. The right to purchase coal support was not an effective remedy for home owners. Mr. Motycki did not know of any cases where home owners purchased coal support. He estimated that it would cost between five and six thousand dollars to purchase coal support in a room and pillar mine and hundreds of thousands of dollars to purchase support in a longwall mine. (N.T.1523-1525)

162. A person who contends that mine subsidence has damaged a structure can file a subsidence damage claim with the Department. (N.T. 1536-1537)

163. If a person files a mine subsidence damage claim with the Department and the Department concludes that the claim is valid, the coal mining company can file an appeal with the Environmental Hearing Board. However, before the coal mining company is entitled to proceed with its defense, it is required to place in escrow the amount of the estimated cost of repair. If the Board upholds the claim, the escrowed funds are immediately payable to the claimant and thus available to satisfy the claim. This escrow requirement supplements the requirement that a subsidence bond be posted before the permit is issued and is viewed by the Department as the primary tool for assuring compliance with the Act's repair and compensation requirements. (N.T.1177-1178, 1196-1198,1564-1565)

164. The Department maintains an extensive data base on mine subsidence damage claims.

(N.T.1191)

165. The Department's mine subsidence insurance program has been in effect since 1961. (N.T.1534-1536)

166. The Department maintains slightly over 40,000 insurance policies, 30,000 or more of which are in the bituminous coal region. All of the information related to those policies are kept on file at the Department's McMurray, Pennsylvania office. The Department also maintains records on claims which are available to Department employees, including photographs and engineers' reports. These records are also kept in the McMurray office. (N.T.1547-1548)

167. The Department has handled approximately 3,200 insurance claims through the mine subsidence insurance program. (N.T.1550)

168. From the files available to the Department, the Department knows every structure that is going to be undermined, the type of structure it is, and where the structure is located over the mine. (N.T.1590-1591)

169. Mine subsidence insurance premiums are set by the Mine Subsidence Insurance Board (Insurance Board) which consults the Department's McMurray office on the relevant claims history. The Insurance Board, to some extent, attempts to correlate the amount it charges for premiums with the amount that is paid out. The premiums reflect the Department's historical experience and the amount it has had to pay on claims. (N.T.1599-1600)

170. Since 1966, there have been less than 500 valid damage claims processed by the Department involving active mining (an average of 16 per year). The rate of claims has dropped dramatically since 1982. (N. T.1558-1559)

171. Since 1994, there have been only 12 claims submitted to the Department alleging that active

underground mining had caused subsidence damage to structures then covered by the Act. (N.T.565)

172. Mr. Motycki attributes this decline in mine subsidence claims to the fact that the Department requires operators to set forth detailed support plans for protected structures in their six-month mining maps and these support plans must be reviewed and approved by an engineer. (N.T.1562-1563, 1660-1661)

173. Mr. Motycki has seen only three structures where all structural components were damaged by subsidence associated with underground mining. (N.T.1568-1569)

174. The Department interprets the term "irreparable damage" to a structure as being damage to all components of the structure. (N.T.1566-1568)[4]

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[4] In June 1998 regulations were promulgated in which "irreparable damage" and "material damage" are defined as follows:

> *Irreparable damage*- Damage to a structure resulting from subsidence which is in one of the following categories. The term includes:
>
> (i) Damage for which the total cost of repair, including improvements required by Federal, State and local law to meet current standards, would exceed the cost of replacement.
>
> (ii) Damage of such magnitude that Federal, State or local law would prohibit repair of the structure.
>
> (iii) Damage that weakens the strength of a structure's foundation, load bearing walls or other load bearing structural components in a manner which would make it impossible or impractical to restore the structure to its previous strength.
>
> (iv) For structures recognized as historically or architecturally significant:
>
> (A) Damage which would adversely affect the structure's historical or architectural value.
>
> (B) Damage for which the cost of repair to restore the historical and architectural value of the structure with the same craftsmanship and historically and architecturally equivalent

Compliance History

175. An applicant's compliance history is evaluated by Mr. Joseph Leone once a permit application is completed. As a general matter the operator's violation history, outstanding violations, and compliance history are checked. (N.T.55-56)

176. The Department's McMurray Office twice conducted a search of the Commonwealth's Land Use Management Information System (LUMIS) prior to issuing the 1995 Permit Revision. (N.T.334)

177. LUMIS contains information on the current violation record of the applicant, the applicant's related companies and its officers and directors. This information is obtained from the applicant's license application and various Modules from the permit application. (N.T.330-331)

178. The Department's check of LUMIS for Eighty-Four Mining Company did not reveal any current violations which would preclude issuance of the 1995 Permit Revision. (N.T.335-336)

179. On September 21, 1995, LUMIS showed that there were no outstanding violations for Eighty-

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components would exceed the cost of replacement.

(C) Damage which would be impossible to repair to restore the historical and architectural value of the structure with the same craftsmanship and historically and architecturally equivalent components.

Material damage-Damage that results in one of the following:

(i) Functional impairment of surface lands, structures, features or facilities.

(ii) Physical change that has a significant adverse impact on the affected land's capability to support current or reasonably foreseeable uses or causes significant loss in production or income.

(iii) Significant change in the condition, appearance or utility of a structure or facility from its presubsidence condition.

25 Pa. Code § 89.5(a).

Four Mining Company or any of its related parties in Pennsylvania. (N.T.334-337; Cmwlth. Ex. 53)

180. The Department's McMurray office does not review compliance history. Compliance history reviews are done by the Department's Division of Monitoring & Compliance in Harrisburg. The McMurray office sends the chief of the Division of Monitoring & Compliance a copy of Module 3 of the permit application which contains various information. However, Module 3 does not indicate whether Eighty-Four Mining Company is a subsidiary of any other company. (N.T.143-145)

181. The Federal Applicant Violator System check was conducted and indicated no violations which precluded issuing the 1995 Permit Revision. (N.T.3376-3379)

182. PUSH introduced no evidence to demonstrate that Eighty-Four Mining Company or any person/company related to Eighty-Four Mining Company was in violation of any environmental laws or had a history of non-compliance with such laws or that any officer or director of Eighty-Four Mining Company or any related company with which such person was formerly associated, was in violation of any environmental laws or had a history of non-compliance with such laws.

Restoration or Replacement of Water Supplies

183. Dr. Milena Bucek submitted an expert's report on behalf of PUSH pertaining to various hydrologic issues. She did not offer any direct testimony but appeared for cross-examination by counsel for the Department and Eighty-Four Mining Company. (PUSH Ex. M)

184. Dr. Bucek is a practicing geologist. Fifty percent of her work involves surface mining; the remainder involves work with solid waste issues and projects unrelated to coal mining. At the time of the hearing Dr. Bucek had never prepared a permit application or a permit amendment application involving an underground mine. (N.T.1756-1757)

185. Dr. Bucek has not had any prior experience with longwall mines, having been in only one

such mine a number of years ago, primarily for the purpose of observing the technology, not the impacts of mining on hydrology. (N.T.1775)

186. Although Dr. Bucek purported to have familiarity with applicable law, regulations and Department guidelines in the area of underground mining, she believed the 1994 Act 54 amendments amended the Surface Mining Reclamation and Conservation Act, she did not consider Department guidelines when formulating her expert report because she believed they were not applicable, and she was not familiar with the regulatory history of the various regulations dealt with in her report. (N.T.1809-1813)

187. Ms. Laura Kirwan conducted the Department's hydrologic review of Eighty-Four Mining Company's permit amendment application. (N.T.991-992)

188. Ms. Kirwan has conducted hydrologic reviews for the Department for over 9 ½ years. She has a Bachelors Degree in Geology from the University of Pittsburgh and a Masters Degree in Geology from West Virginia University. She is a Registered Professional Geologist in Pennsylvania. She has conducted hydrologic reviews for 18-20 new underground mining permit applications and over 100 applications to amend existing underground mining permits. Many of these reviews involved longwall mining operations in the Pittsburgh Seam. She has also had extensive experience reviewing water loss complaints related to mining operations. She is a past recipient of an award from the Department in connection with her investigation of an underground mine discharge. (N.T.985-990; Cmwlth. Ex. 70)

189. Ms. Kirwan focused her review, in part, on private water supplies. (N.T.1008)

190. Pages 8-15 and 8-16 of Module 8 describe the measures that will be taken to replace or remediate well water supplies which may be impacted by Eighty-Four Mining Company's mining

operations. With respect to replacing private water supplies the permit application indicates three mechanisms suggested by the mine operator for water supply replacement. These are to deepen the existing well, drill a new well, or provide a tap-in to an existing public water system. (N.T.1083-1085)

191. Eighty-Four Mining Company in the Permit Application set forth a thorough, specific and detailed description of how it intended to comply with the requirements to replace water supplies affected by its mining operations. (Cmwlth. Ex. 3, Module 8)

192. In addition to providing an immediate water supply within twenty-four hours of water loss, it would attempt to provide a permanent alternate water supply by: 1) deepening the existing well; 2) drilling a new well; 3) providing a connection to a public water supply system; or 4) entering into an amicable agreement with the water supply user pursuant to Sections 5.1-5.3 of the Mine Subsidence Act, 52 P.S. §§ 1406.5a, 1406.5b and 1406.5c. (N.T. 1082-1085; Cmwlth Ex. 3, Module 8.4(a)(1))

193. The proposed measures to replace water supplies are consistent with the requirements of Act 54. (N.T.1085; Section 5.2 of the Mine Subsidence Act, 52 P.S. § 1406.5b)

194. In conducting her review of the geology and hydrogeology issues associated with the requested acreage addition, Ms. Kirwan focused primarily upon conditions within the additional acreage to be added to the permit. However, in assessing the potential hydrologic impacts of Eighty-Four Mining Company's mining she considered the entire permit area. (N.T.999, 1301; Cmwlth Ex. 3b)

195. In connection with her review, Ms. Kirwan considered, consulted and/or relied upon a number of sources of information, including all of the information contained in the Permit

Application (which included a variety of maps and exhibits), her review of the already existing permit file for Mine 84 (which included three prior geologic and hydrogeologic reviews and extensive information on previously affected areas of the permit which were adjacent to the area to be added), the Pennsylvania Topographic and Geological Survey Coal Resources Publication, a USGS Report pertaining to Greene County known as the Stoner Report, and information from files on adjoining mines such as Vesta, Mathies, and Maple Creek (all of which had already been issued deep mining permits). In addition, Ms. Kirwan made two visits in the field specifically in connection with her review of this application. (N.T.1008-1012)

196. The Permit Application adequately characterized and described the geology of the area added to the permit and the adjacent areas so that a proper review of the Permit Application could be done. (N.T.1037, 3143-3146)

197. The overburden associated with Mine 84 in general and the permit amendment area in particular is characterized by a high shale content, a condition which is protective of overlying water resources. (N.T.1017-1019, 3098; Cmwlth Exs. 3d, 3e)

198. The geology overlying the Pittsburgh Coal Seam is composed of various interbedded sedimentary rocks, including shales, siltstones, clays and sandstones. Shale is the most common type of rock in the overburden. (N.T.1014-19; Cmwlth. Exs. 3, 3d, 3e)

199. Geology is an inexact science. (N.T.3142)

200. Several gentle anticlines and synclines exist within the area covered by the Mine 84 permit. (N.T.1021-22; Cmwlth. Ex. 3, 3c, 3f)

201. No impoundments of greater than 20 acre-feet exist above the Subsidence Control Plan area approved by the 1995 Permit Revision. (N.T.730; Cmwlth. Ex. 3)

202. Most fracturing of rock strata occurs within the upper 100 to 200 feet of the overburden, and most groundwater circulates in this fractured area. The amount of groundwater circulating in this area is estimated to be 95% or more of the total groundwater. (N.T.1027-1028, 1034-1035, 1138-1140, 1308-1312, 3113-3115, 3135-3139; Cmwlth. Ex. 3)

203. At depths below about 200 feet, fractures do not exist or are closed due to overburden pressure and do not readily transmit water. (N.T.1028, 1140, 1308-1312, 1328-1329, 3146)

204. The shallow groundwater system is generally isolated from the deep groundwater system in the Pittsburgh Coal Seam. (N.T.1049-1055, 1064-1066, 1328-1329, 3116-3119; Cmwlth. Ex. 3)

205. Groundwater flows at a very slow rate at and near the level of the mine. (N.T.1434, 1479-1483, 3113-3116, 3137-3139)

206. Eighty-Four Mining Company conducted a comprehensive inventory of water supplies located over the Subsidence Control Plan. (N.T.1059-1062, 1077-1078; Cmwlth. Ex. 3)

207. The only public water supplies located within the amended permit area will be protected by a requirement that Eighty-Four Mining Company either demonstrate that its mining will not affect these supplies or that Eighty-Four Mining Company will leave coal unmined beneath and adjacent to these supplies. (N.T. 1080-1082; Cmwlth. Ex. 3)

208. The community public water supply at Mains Mobile Home Park was protected by prohibiting all mining in a radius of 1,800 feet, and limiting mining to 50% extraction within a ½ mile radius. (N.T.1080-1082; Cmwlth. Ex. 3)

209. Private water supplies in and around Washington County, in general, and in and around the amended permit area, in particular, are often limited in quantity, even in areas where no mining has occurred. Mining at Mine 84 will not affect the foreseeable uses of groundwater in this area.

(N.T.1335, 1358)

210. Despite years of mining in areas adjacent to and similar to the geology of the permit amendment area, the Department has not received a significant number of complaints that mining has adversely affected private water supplies. (N.T.1052)

Perennial Streams

211. Numerous perennial and intermittent streams exist over both mined and unmined portions of Mine 84. (N.T.1042-1043, 1047-1048, 1051-1052, Cmwlth. Ex. 3)

212. Eighty-Four Mining Company identified perennial and intermittent streams in its Permit Application. (N.T.1040-1041; Cmwlth. Ex. 3)

213. The primary concerns associated with protecting perennial streams are preventing water draining into the underground mine and maintaining the existing stream uses. (N.T.1039-1040, 1044-1045, 1138-1143)

214. To assist permit reviewers in processing deep mine applications, the Department has developed a guidance document entitled Perennial Stream Program Guidance Manual. (Cmwlth. Ex. 63)

215. The Perennial Stream Program Guidance Manual was authored by Mr. Harold Miller. (N.T.136)

216. Mr. Miller is the Chief of the Department's Underground Mining Section, having held that job for the last nine years. He is a geologist by training and has nearly 30 years of practical experience. He has been an employee of the Department since 1980. (Cmwlth. Ex. 72)

217. The Perennial Stream Program Guidance Manual is based upon an extensive review by Mr. Miller of available literature on the geology of Southwestern Pennsylvania, the effects of past mining

conducted beneath perennial streams in this area, and Mr. Miller's many years of experience working with the underground mining program and hydrologic issues associated with this program. (N.T.1146-1149)

218. The Perennial Stream Program Guidance Manual focuses upon providing protection to perennial streams in areas where the amount of cover between the stream and the underlying coal seam is less than 400 feet. Available information indicates that when more than 400 feet of cover is present, full extraction mining beneath a perennial stream does not adversely affect stream flow. As a result, the Perennial Stream Program Guidance Manual indicates that no support need be left in place when mining is conducted in areas where the depth of overburden beneath a stream is greater than 400 feet. (N.T.1149-1150)

219. The presence of unmined overburden rock, or cover[5], of 400 feet, is sufficient to prevent dewatering of perennial streams. (N.T.1046, 1149-1151; Cmwlth. Ex. 3)

220. Except for an area beneath Little Chartiers Creek, cover is equal to or greater than 400 feet in all portions of the Revised Subsidence Control Plan area. (N.T.1046-1048, 1892; Cmwlth. Ex. 3)

221. In the area of the permit where less than 400 feet of cover is available under Little Chartiers Creek, the Perennial Stream Program Guidance Manual was applied so as to limit the amount of coal which Eighty-Four Mining Company could extract. In other words, longwall panels were not planned for these areas. (N.T.1046-1048; EFMC Ex. 70)

222. In addition to reviewing the Perennial Stream Program Guidance Manual to arrive at her

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[5] "Cover" refers to the thickness of rock between mine workings and the surface. Bates and Jackson, Glossary of Geology 152 (3d ed. 1987).

conclusion that Eighty-Four Mining Company's proposed mining plan would not adversely affect perennial streams, Ms. Kirwan also considered a variety of site specific information including the following:

a. Water has been shown to infiltrate into Mine 84 at a rate which is of a magnitude less than the typical infiltration rate for a Pittsburgh Coal Seam mine, a fact which indicates that there is a separation between the shallow groundwater flow system and the strata directly above the Pittsburgh Coal Seam.

b. A prior site specific report prepared by a Department hydrologist indicated that static water levels in wells near areas of past mining at Mine 84 had not been lowered after mining was completed, a fact which indicates that mining has not adversely affected the shallow groundwater flow system.

c. Despite past mining, there had been no landowner complaints about insufficient water.

d. The area has abundant surface water resources, and the Department has received no complaints of stream dewatering despite the fact that over 100 years of mining near the permit amendment area has already occurred and over 50,000 acres immediately adjacent to the permit amendment area have been previously mined.

e. Even though a fracture trace along and beneath Little Chartiers Creek was intercepted in Mine 84 during past mining, this area of the mine remained dry. This, together with the fact that geology in this area of the mine is similar to the geology of the permit amendment area, is direct evidence that mining in the permit amendment area will not have an adverse impact on streamflow. (N.T.1049-1053)

223. Mr. Miller supported and concurred in Ms. Kirwan's conclusion that Eighty-Four Mining Company's proposed mine plan will not adversely affect perennial streams. (N.T.1152-1155, 1160-1161)

Potential Pollution to Waters of the Commonwealth

224. A post-mining discharge from an underground mine can occur: (a) when the post-mining pool is higher than the surface elevations overlying the mine; (b) if there are mine entries at lower elevations than the maximum height of the coal seam; or (c) if the coal seam being mined outcrops in the mining area and there is very shallow cover over the mine. (N.T.1058-1059)

225. The Pittsburgh Coal Seam does not outcrop on or near the boundaries of Mine 84. (N.T.1033-1034)

226. The elevation of the coal to be mined in the area added by the Permit Revision is lower than the elevation of the coal which has already been mined at Mine 84 and well below the final anticipated post-mining pool level of 800 feet. (N.T.1071-1072)

227. Mining of the area covered by the Revised Subsidence Control Plan will not affect the previously projected final mine pool elevation of 800 feet. (N.T.1068-70, 1493; Cmwlth. Ex. 3f)

228. The projected final pool elevation and highest elevation of coal mined do not exceed the minimum surface elevation above the mine. Therefore, no post-mining discharge to the surface is predicted to occur. (N.T.1070-1072, 1102-1104, 1447, 3123; Cmwlth. Ex. 3)

229. The combination of barriers and low hydraulic pressure will prevent subsurface discharges which may pollute waters of the Commonwealth. (N.T.1456-1458, 1479-1484; Cmwlth. Ex. 3)

230. The standard of review applied by Ms. Kirwan was that Eighty-Four Mining Company was required to demonstrate that there was no presumptive evidence of pollution associated with its

proposed mining activity. (NT.1280)

231. Mr. Burt Waite is a professional consulting geologist and hydrogeologist with nearly 30 years of experience. He has a Bachelors Degree in Geology from the College of William and Mary and a Masters in Geology from the University of Vermont. He is a Registered Professional Geologist in Pennsylvania, Indiana, and North Carolina. Mr. Waite has had extensive experience in the development of groundwater monitoring plans for underground mine operations in Pennsylvania. Mr. Waite has had substantial experience in assessing the hydrogeologic effects of deep mining in the Pittsburgh Coal Seam, having prepared portions of Module 8 for several mines operating in the Pittsburgh Coal Seam. (N.T.3089-3108; EFMC Ex. 4)

232. Mr. Waite found the presence of brackish water within Mine 84, which indicates a very limited communication between the shallow groundwater zone above the mine and the mine itself. In addition, during his inspection of Mine 84, Mr. Waite observed that the mine was generally dry, including the area beneath Little Chartiers Creek, where mining had intercepted a fracture. (N.T.3119-3138, 3182-3183)

233. Dr. Bucek either was unaware of most of this site specific information available to Mr. Miller, Ms. Kirwan, and Mr. Waite or did not consider it when preparing her expert report. (PUSH Ex. M)

234. Mining within the amended permit area will not cause or contribute to any post-mining pollution. (N.T.1451, 3155)

235. Eighty-Four Mining Company's mining activities will not pollute surface water or groundwater resources over or beneath Mine 84, and the uses of such water resources will not be adversely affected either by mining within the Permit generally or specifically by mining within the

permit amendment area. (N.T.1102)

236. Eighty-Four Mining Company complied with all of the Department's regulations and statutes concerning hydrologic impacts of mining. (N.T.1267)

237. The 1995 Permit Revision does not present a potential to cause pollution to the waters of the Commonwealth. (N.T.1101-1104, 1300-1302, 1494-1495)

Public Utilities

238. The Department has historically interpreted 25 Pa. Code § 89.143 as requiring a coal mining operator to take reasonable measures consistent with its intended method of mining to minimize damage, destruction, or disruption in utility service. These measures will vary depending upon the intended mining method. If an operator is planning to conduct room and pillar mining, the Department requires that some support be left beneath utility structures. If a coal mining operator is planning to conduct longwall mining, the Department requires that the coal mining operator provide the owner of the utility structure with six months notice of its intention to undermine the utility structure. (N.T.364-366)

239. Under the Department's interpretation of 25 Pa. Code § 89.143(c), it would expect the public utility company to determine what surface measures are appropriate to minimize damage to the utility and to avoid any disruption in service. (N.T.366)

240. Historically, the Department has interpreted the general prohibition against creating an imminent hazard as setting a second performance standard with which a mining operator must always comply. (N.T.403)

241. The Department became aware during the permit review process that various controversies existed with regard to utility lines in the permit area. The first was that Columbia Gas of

Pennsylvania would not implement any protective surface measures. The second was that Pennsylvania American Water Company asserted that no measures could be taken to protect its 30-inch waterline. The third was that some residents would not give Eighty-Four Mining Company permission to enter their property for the purpose of performing surface mitigation measures on residential gas lines. (N.T.358)

242. Mr. Jeffrey Jarrett is the Department's Director of District Mining Operations. In this capacity, he is responsible for the overall management of all district mining offices located throughout Pennsylvania. (N.T.350)

243. Mr. Jarrett does not generally participate in permitting decisions. He was involved in the decision to issue the 1995 Permit Revision because of a special assignment. Because of the substantial controversy surrounding the permit, Mr. Jarrett's supervisor, Mr. Robert C. Dolence, Deputy Secretary for Mineral Resources Management, asked Mr. Jarrett to handle the utility protection issue by determining the proper course of action for the Department. (N.T.352-354)

244. Mr. Jarrett determined that there were two issues to be resolved before the 1995 Permit Revision could be issued. The first was to determine if the Department's interpretation of 25 Pa. Code § 89.143(c) as imposing responsibility upon public utilities to protect their structures and imposing responsibility upon coal mining companies to provide utilities with adequate notice of proposed undermining was correct. The second was to determine if an imminent hazard to public health and safety was posed by the proposed mining. (Jarrett Testimony generally)

245. The Department ultimately concluded, based on its policy review, that its historical interpretation of 25 Pa. Code § 89.143(c) was correct and that no change was warranted. (N.T.372, 401)

246. Before his employment with the Department, Mr. Jarrett was employed from 1987 to 1994 as the Deputy Assistant Director of Program Operations for the Federal Office of Surface Mining (OSM). In that position, one of his responsibilities was to review state program amendments which had to be submitted to OSM for its approval. In order to carry out this responsibility, Mr. Jarrett had to review state statutes, regulations and policies, and the state's interpretation of them to make sure they met federal standards for incorporation into the state's program. (N.T.439-447, 462-464)

247. In order to address the potential for an imminent hazard, the Department developed a special permit condition for inclusion in the 1995 Permit Revision. This condition was identified as Special Condition 18. (N.T.404; Cmwlth. Ex. 92)

248. The primary goal of Special Condition 18 was to preclude the creation of an imminent hazard from damage to residential gas service lines. The secondary goal was to preclude the creation of an imminent hazard from an interruption of water service. (N.T.408; Cmwlth. Ex. 92)

249. Special Condition 18 has seven sections. All of them relate either to minimizing a disruption in service or preventing the creation of an imminent hazard. (N.T.415-416; Cmwlth. Ex. 92)

250. In order to resolve Eighty-Four Mining Company's appeal from the 1995 Permit Revision, the Department and Eighty-Four Mining Company entered into a Consent Adjudication which set forth a redrafted version of Special Condition 18 and whereby Eighty-Four Mining Company's appeal from the 1995 Permit Revision was settled. (N.T.417; Cmwlth. Ex. 93)

251. The redraft of Special Condition 18 broke the condition into five separate permit conditions, modified the language of the first two paragraphs so that they more closely paralleled the language of 25 Pa. Code Sections 89.143(c) and 89.143(f), and clarified certain imprecise terminology in the original condition. (N.T.418-421; Cmwlth. Ex. 93)

252. The Department's policy relating to mining beneath utilities is consistent with the Department's understanding of how utilities and mining companies have historically resolved the issue of mitigation during mining and with rules of the Public Utility Commission, which require utilities to provide continual service. It is also based upon the fact that the utilities own their facilities and mining companies have no right of access to such facilities, as well as the Department's interpretation of Act 54, which is that Act 54 did not expand the rights of utility companies or the duties of coal companies. (N.T.367-371, 541-542)

253. The Department sought to confirm that the Public Utility Commission shared its view with respect to the correlative rights and duties of mining companies and utility companies. In responding to the Department, the Public Utility Commission's Chief Counsel indicated that the Public Utility Commission shared the Department's views concerning the correlative rights and duties of mining companies and utility companies. (N.T.373-396; Cmwlth Exs. 12, 13)

254. No evidence was introduced which indicated that any type of mining beneath any gas distribution facility has presented either an imminent danger to human safety or the public generally or resulted in any disruption, diminution or destruction of utility service provided by gas companies.

255. PUSH introduced no evidence that mining beneath those residences with natural gas service has interrupted service or exposed the occupants to any type of hazard.

256. Western Pennsylvania Water Company is the predecessor of appellant Pennsylvania American Water Company. (N.T.2350)

257. On March 21, 1986, BethEnergy notified Western Pennsylvania Water Company that it intended to mine beneath an area where Western Pennsylvania Water Company's 30-inch waterline was located. (N.T.2839, 2850; EFMC Ex. 89)

258. On April 4, 1986, Pennsylvania American Water Company's predecessor acknowledged receipt of BethEnergy's notice. (EFMC Ex. 90)

259. On May 12, 1986 and again on October 28, 1991, BethEnergy sent notices to Pennsylvania American Water Company's predecessor concerning its plans to conduct mining operations at Mine 84. (EFMC Exs. 91, 92)

260. In May of 1992, BethEnergy applied for a revision to the Permit to add acreage to its Subsidence Control Plan Boundary for Mine 84. (N.T.2843; EFMC Ex. 93)

261. In October of 1992, the Department revised the Subsidence Control Plan Boundary for the mine. (N.T.2844; EFMC Ex. 94)

262. As of October 1992, BethEnergy was authorized to conduct full extraction mining beneath approximately 6,100 feet of the 30-inch waterline. (N.T.2848-2858; EFMC Exs. 95, 96, 70)

263. Neither Western Pennsylvania Water Company nor Pennsylvania American Water Company appealed the issuance of the 1992 amendment to the Permit which authorized Eighty-Four Mining Company's predecessor BethEnergy to conduct full extraction longwall mining beneath approximately 6,100 feet of the 30-inch waterline. (N.T.2848)

264. Neither PUSH nor any of the individual appellants appealed the issuance of the 1992 amendment to the Permit which authorized Eighty-Four Mining Company's predecessor, BethEnergy, to conduct full extraction longwall mining at Mine 84 in the area then covered by the Permit, which included the area where many of the individual appellants reside. (EFMC Exs. 70, 96)

265. On June 7, 1994 the area covered by the Permit was consolidated with the area covered by another permit that had been issued to BethEnergy. (Cmwlth. Ex. 1)

266. No appeals were filed from the Department's approval of a permit transfer/consolidation to Eighty-Four Mining Company.

267. Eighty-Four Mining Company is bound to comply with the terms of its approved Subsidence Control Plan. (N.T.1920)

268. Eighty-Four Mining Company gave Pennsylvania American Water Company notice of its intent to conduct longwall mining beneath the 30-inch waterline on July 3, 1995. (N.T.2808; EFMC Ex. 97)

269. Pennsylvania American Water Company's 30-inch waterline is the main water supply line for the City of Washington and surrounding communities. (N.T.2386)

270. The 30-inch waterline serves approximately 40,000 people. (N.T.2355)

271. The 30-inch waterline serves both residential and industrial customers. It also serves the Washington Hospital, schools, nursing homes, fire departments, and Washington and Jefferson College. (N.T.2355-2356)

272. Pennsylvania American Water Company was concerned that Eighty-Four Mining Company's longwall mining operations would destroy the 30-inch waterline and the utility would not be able to convey the average of six million gallons of water per day used by the 40,000 customers served by the line. (N.T.2356)

273. Mr. Jeffrey Maze is an Operations Engineer and professional land surveryor employed by Pennsylvania American Water Company. Mr. Maze was involved in the water company's efforts to maintain service to its customers. He also helped develop the 20-inch-by-pass waterline employed by the water company to maintain service. (N.T.2349-2350)

274. Pennsylvania American Water Company constructed a temporary above-ground 20-inch by-

pass waterline to convey water while the 30-inch waterline was out of service. (N.T.2363)

275. Prior to full extraction mining beneath the 30-inch waterline and after notice to the water company that such mining would occur in accordance with the terms of the Permit, Pennsylvania American Water Company installed on the surface above the 1 North Panel the temporary by-pass line. (N.T.2363)

276. The 20-inch by-pass waterline was in service on July 5, 1996. (N.T.2474-2475)

277. When Eighty-Four Mining Company longwall mined beneath Pennsylvania American Water Company's 30-inch waterline in July of 1996, the 20-inch by-pass line was in place on the surface and was operational. (N.T.2388-2389, 2724-2725; EFMC Ex. 70)

278. The by-pass waterline maintained service during the mining operations of the 1 North Panel. (N.T.2731)

279. The 20-inch by-pass waterline *was not included* in Eighty-Four Mining Company's Permit Application or Subsidence Plan. Neither the Department nor Eighty-Four Mining Company *had any knowledge* of such a line at the time the Department reviewed the Permit Application or issued the 1995 Permit Revision. (Cmwlth. Ex. 3)

280. During the first two underminings of the 30-inch waterline, there was no interruption in service. The only interruption occurred when the 20-inch by-pass waterline was installed. Each time, approximately thirty customers were without water for roughly a twelve to fifteen hour period. (N.T.2389-2390, 2400)

281. Through November of 1997, Eighty-Four Mining Company had mined virtually all the coal beneath the portion of the 30-inch waterline located above the 1 North Panel without any interruption in water service to Pennsylvania American Water Company's customers (other than a short period

when the by-pass waterline was installed). (N.T.2389) In addition, steps had been taken by Pennsylvania American Water Company to cause the by-pass line to be relocated above the 2 and 3 North Panels before full extraction mining was scheduled to take place beneath the portion of the 30-inch waterline located above these panels.

282. Without the installation of the by-pass line, service to Pennsylvania American Water Company's customers would have been interrupted by subsidence damage to the 30-inch waterline. (N.T.2411)

283. Because of the existence and operation of the 20-inch by-pass waterline, Pennsylvania American Water Company was able to replace the portions of the 30-inch waterline which were damaged by subsidence. The 30-inch line was then placed back in service. Pennsylvania American Water Company expects to be able to do this with regard to future underminings of the waterline as well. (N.T.2396, 2410-2411, 2456-2457)

284. In areas where Pennsylvania American Water Company's 30-inch waterline had been undermined by Eighty-Four Mining Company's longwall mining operations, as much as 4 ½ feet of subsidence occurred. (N.T.2383)

285. This subsidence was measured by Mr. Jeff Maze, an engineer and professional land surveyor. (N.T.2383-2384)

286. Pennsylvania American Water Company's 30-inch waterline was extensively damaged by Eighty-Four Mining Company's longwall mining operations. Pennsylvania American Water Company had to replace the 30-inch waterline over the two panels that had been mined at the time of the hearing. (N.T.2375-2377, 2385)

287. If Pennsylvania American Water Company had not installed the 20-inch by-pass waterline,

the mining operations would have caused a catastrophic failure of the 30-inch waterline. (N.T. 2377)

288. Pennsylvania American Water Company replaced the 30-inch waterline over panels 1 and 2 with 30-inch Class 56 ductile iron cement lined pipe with restraint joints. (N.T. at 2404)

289. Pennsylvania American Water Company replaced approximately 5,100 feet of the 30-inch waterline over panels 1 and 2. (N.T. 2385)

290. Pennsylvania American Water Company had concerns that the 20-inch by-pass waterline could be damaged by lightning. In order to prevent this from occurring, Pennsylvania American Water Company bonded the joints and installed grounding rods so that if lightning did strike the line, it would be safely discharged to the ground. The line was never struck by lightning. (N.T.2450)

291. The Department orally advised Eighty-Four Mining Company that it would order it to cease mining if no appropriate surface measures had been taken to ensure continuous water service when the mining operation reached the 30-inch waterline. (N.T.407-408)

292. Full extraction mining beneath the by-pass waterline is not projected to cause the types of stresses which will damage the line or adversely affect service provided by the line. (N.T.3049-3052)

293. It was not, and is not, economically or technologically feasible to leave multiple pillars of coal within a longwall panel to provide support for the 30-inch waterline. (N.T.3209-3230)

294. It was not, and is not, economically or technologically feasible to backstow areas mined at Mine 84 so as to support the 30-inch waterline. (N.T.2931, 2982-2983, 3282)

295. It was not, and is not, economically or technologically feasible to leave large blocks of coal unmined in a longwall mine beneath the 30-inch waterline to provide support. (N.T.3209-3220; EFMC Exs. 70, 71). Other than employing full extraction mining techniques which provide for

planned and predictable subsidence, there were no, and are no, economically or technologically feasible measures which can be taken in Mine 84 itself to provide support for the 30-inch waterline. (N.T.3209-3220)

296. Mitigation measures were taken, and will be taken, on the surface above Mine 84 which have eliminated, and will eliminate, any potential that the residences of Washington County served by the 30-inch waterline will have their water service interrupted, disrupted or destroyed. (N.T. 3209-3230)

297. Eighty-Four Mining Company owned all the coal beneath the 30-inch waterline and the right to subside the surface beneath the area where the 30-inch waterline was located.

Subsidence Bond

298. Since 1966, the Mine Subsidence Act, has required mine operators to repair or compensate for subsidence damage caused to surface structures and features specified by the Act.

299. The 1966 version of the Mine Subsidence Act provided that the Department *may* require operators to post a bond to assure compliance with the obligation to repair or compensate for subsidence damage to structures and features covered by the Act's repair and compensation provisions.

300. The 1980 amendments to the Mine Subsidence Act provided for the first time that the Department s*hall* require operators to post a bond to assure compliance with their obligations under the Act.

301. The Department's Program Guidance Manual does not provide any guidance as to how a bond would be calculated under Act 54. (N.T.155-156; PUSH Ex. 9)

302. Since at least 1984 the Department has construed the subsidence bond requirement so as to impose upon all underground coal mining companies a uniform obligation to post a $10,000 bond.

(N.T.565-566, 1166; Cmwlth. Ex. 61)

303. Since at least 1984, the Department has required all permittees to post a uniform $10,000 bond pursuant to Section 6 of the Mine Subsidence Act. (N.T.566, 1166; Cmwlth. Ex. 61)

304. The purpose of the subsidence bond authorized by Section 6 of the Mine Subsidence Act is to ensure that permittees will satisfy the subsidence requirements of the Mine Subsidence Act. (N.T.563, 1165; 52 P.S. § 1406.5(b))

305. A knowledgeable mining engineer can make a general prediction about possible damages from underground mining, and the Department has had extensive experience with mine subsidence. The Department also has a great deal of information concerning costs to repair damage from mine subsidence. (N.T.168-169)

306. The Department prepared a project cost summary of subsidence damage to areas over Mine 84. (N.T. 468; PUSH Ex. E) The document, prepared before the 1995 Permit Revision was issued, was a general analysis of the structures that would be potentially damaged by longwall mining over a five-year period and estimated costs of repair. (N.T.469-47) Exhibit E was prepared based on information available from the Mine Subsidence Insurance program.

307. The Department estimated the average cost of subsidence damage over six years at Mine 84 to be $1,565,850. (N. T. 592)

308. The Department did not make any calculations or require the operator to submit calculations to determine whether or not the amount of bond was less than the total calculated liability of Eighty-Four Mining Company. (N.T. 629-630)

309. The Department's explanation for only requiring a mine operator to post the minimum $10,000 bond was that it would be "difficult" for the Department to calculate the dollar amount of

subsidence to individual structures. (N.T.1169)

310. In performing the analysis of the adequacy of a $10,000 bond, the Department did not review Eighty-Four Mining Company's financial statements to determine whether it had the financial capability to repair subsidence damage which its mining operations might cause. (N.T.1183)

311. Eighty-Four Mining Company estimated its liability for addressing the surface effects to structures located over the first five panels of Mine 84 at $356,000. (N.T.1962)

312. Joseph Wilcox, Manager of Engineering for Eighty-Four Mining Company, considers the method used by Eighty-Four Mining Company for calculating the dollar amount of potential subsidence damage to dwellings to be a reasonable way of estimating potential damage. (N.T.2028)

313. The Department has never requested any of the information Eighty-Four Mining Company uses to make reasonable estimates of potential subsidence damage. (N.T.2029)

314. At the time of the hearing Eighty-Four Mining Company had spent $160,000 for damage and mitigation to five structures and dwellings which had been undermined.

315. Eighty-Four Mining Company takes into account the potential obligations to repair subsidence damage in developing budgets for its operations. (N.T.3366)

316. There has never been an instance where the Department has been required to forfeit the $10,000 Subsidence Bond because a coal mining company failed to comply with its obligations to repair or compensate for subsidence damage to a structure. (N.T.1167, 1180)

317. Eighty-Four Mining Company's Permit requires it to implement an elaborate pre-mining and post-mining program to provide for mitigation of potential damage in appropriate situations and to ensure that any damage which does occur is promptly repaired or the owner compensated for such damage. (N.T.1920)

318. Eighty-Four Mining Company leases the right to mine approximately 175 million tons of Pittsburgh Seam bituminous coal, of which approximately 75 million tons is dedicated to the current operation. The quality of this coal enables it to qualify as Phase I Compliance Coal under the Clean Air Act, a fact which makes this coal highly marketable. (N.T.3325-3326, 3369, 3422)

319. Eighty-Four Mining Company owns or controls the right to subside the surface overlying Mine 84 except for a few limited areas where it does not own or control the right to mine coal. (N.T.217, 3358; Cmwlth. Ex. 3; EFMC Exs. 81, 82, 83)

320. Eighty-Four Mining Company also owns approximately 600 acres of surface land, a fully modernized coal preparation plant and coal loading facility valued at $40,000,000, warehouse facilities, three portals where mineworkers enter the mine and ancillary plant, machinery and equipment necessary to mine, prepare and market bituminous coal. (N.T.3368-3369)

321. Eighty-Four Mining Company currently has in place various coal supply contracts which obligate it to supply, and its customers to purchase, coal from Mine 84. (N.T.3369-3370)

322. Mine 84 is projected to produce between seven and eight million tons of coal each year. (N.T.3364)

323. Eighty-Four Mining Company described in Module 18.2(J) of its proposed Subsidence Control Plan the manner in which it proposed to comply with the following Acts: (a) Act of December 22, 1959 (Act No. 729, Mining in Safety Zones); (b) Section 419 of the State Highway Law (Act No. 428); and (c) Act of June 1, 1933 (Act No. 296, State Mining Commissions.) (Cmwlth Ex. 3)

324. The Act of December 22, 1959 (Act No. 729, Mining in Safety Zones) is a law designed to protect the safety of men and women working in a mine; it is not a law designed to protect the

environment.

325. Appellants introduced no evidence which would establish that there exist within the Subsidence Control Plan Boundary any surface water bodies of a size sufficient to justify imposing restrictions on coal extraction to ensure the safety of the men and women working within Mine 84.

III. DISCUSSION

Burden of Proof and Standard of Review

PUSH raised various objections to the 1995 Permit Revision. Under 25 Pa. Code § 1021.101(c)(3) of the Board's rules of practice and procedure, PUSH has the burden of proof where it appeals the issuance of the 1995 Permit Revision. *Snyder Township Residents for Adequate Water Supplies v. DER*, 1988 EHB 1208. The doctrine of administrative finality bars PUSH from raising issues in the appeal of the 1995 Permit Revision where it could have raised the same issue with respect to previous Department actions but failed to do so. *Reading Anthracite Company v. DEP*, 1998 EHB 112; *aff'd*, No. 2188 C.D. 1998 (Pa. Cmwlth. filed May 11, 1999); *Yourshaw v. DEP*, 1998 EHB 37. Moreover, although the Department's interpretation of its own regulations is entitled to great weight and will not be disregarded by the Board unless clearly erroneous, *Hatchard v. Department of Environmental Resources*, 612 A.2d 621 (Pa. Cmwlth. 1992) *petition for allowance of appeal denied*, 622 A.2d 1378 (Pa. 1993), the Board is not bound by the Department's interpretation where that interpretation is inconsistent with the underlying statute. *DER v. Franklin Plastics Corporation*, 1996 EHB 645, *aff'd*, No. 2046 C.D. 1996 (Pa. Cmwlth. filed April 17, 1997). As recently reaffirmed and instructed by the Commonwealth Court, where the Board finds "based on the evidence presented at hearing, that the Department has abused its discretion then the Board may properly substitute its discretion for that of the Department and order the relief requested."

Pequea Township v. Herr, 716 A.2d 678, 698 (Pa. Cmwlth. 1998). The Commonwealth Court explicitly held that the Board has the power to modify the Department's action and direct the Department in what is the proper action to take. *Id. See also Warren Sand & Gravel Co v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975).

PUSH filed more than 200 objections in its Notice of Appeal. Some were dismissed in our earlier Opinions and Orders. With regard to certain other issues, PUSH neither introduced evidence nor advanced arguments relating to these other issues in its post-hearing brief. Accordingly, PUSH has waived its right to contest these issues. *T.R.A.S.H. v. DER*, 1988 EHB 487. In addition, Pennsylvania American Water Company, by deciding not to participate further in the proceedings and by filing no post-hearing brief has abandoned all issues in its Notice of Appeal not earlier decided by the Board in our previous Opinions and Orders. *DER v. Landis*, 1994 EHB 1781.

The following are the issues which remain for our review:

- the adequacy of the subsidence bond required by the Department;
- whether historic and archeological structures and public parks are adequately protected;
- whether the Department conducted a proper compliance review;
- whether perennial streams are adequately protected;
- whether the mining company adequately demonstrated there is no presumptive evidence of potential pollution to waters of the Commonwealth;
- whether the Department's written findings of the results of its permit review comply with the regulations;
- whether the surface and groundwater monitoring plan devised by Eighty-Four Mining Company and approved by the Department is adequate;

- whether the Permit Revision adequately provides for the restoration or replacement of water supplies affected by mining; and
- whether the Department's application of the Act 54 amendments constitutes a taking of private property in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

Brief History of Mining Regulation in Pennsylvania

It is necessary to first briefly review the history of mining regulation in Pennsylvania before moving to a discussion of the objections raised by PUSH in its Appeal. A knowledge of the history and evolution of the Mine Subsidence Act and the implementing regulations is necessary to understand the position of the parties. Furthermore, an understanding of the technical differences between longwall mining and traditional room and pillar mining is required to fully comprehend how the General Assembly has addressed the regulation of coal mining in Pennsylvania.

During much of the past 50 years, coal was mined using the traditional room and pillar method which left various pillars of coal in the mine for support of the surface. This method of mining involves mining "rooms" off the main entries which are supported during the first phase of the mining by pillars of coal and artificial roof supports. In recent years, the longwall method of mining coal has become increasingly popular, especially in southwestern Pennsylvania. Longwall mining involves the development of panels of coal. (N.T. 722-723) These panels of coal may be several thousand feet long and a thousand feet wide. As observed by the Board in this case, longwall mining machines move back and forth across the face of the coal and shear the coal directly onto conveyor belts which transport the coal to the surface. As the longwall equipment shears the coal it is protected by moving shields. The equipment slowly moves forward across the face of the coal.

As the equipment moves forward the roof of the already mined area collapses into the void. (N.T.2616-2626, 3343) This results in the lowering of the ground over the panel in a planned, controlled and somewhat predictable manner. (N.T. 287, 740-741, 2992-2993; Cmwlth. Ex. 3) The resulting subsidence usually occurs within weeks or months of the mining. (N.T. 213, 238-239) In contrast, mine subsidence caused by room and pillar mining can occur years later. However, the mine subsidence associated with longwall mining is often more pronounced on the surface than with traditional mining where the surface effects are often more subtle and may occur much later.

Longwall mining allows the mining company to mine much greater quantities of coal in a much more cost effective manner than traditional mining. However, to be most cost effective, the mining company needs to mine a panel in its entirety. (N.T. 3252-3253) It is impossible to room and pillar mine with a longwall miner. (N.T. 3214) It is a full extraction machine that cuts back and forth across the face of the coal. (N.T. 3214) It is technically very difficult, if not impossible, to leave coal support in panels or stop and start the mining operations in the same panel of coal. (N.T. 3215) These stops can be extremely expensive. (N.T. 3217) It is also not usually possible to "bend" a panel to leave coal support. Moreover, if the mining is stopped short of the projected end of a panel, downward roof pressures can result in the collapse of the roof of the mine. (N.T. 3204-3206)

There are currently nine longwall mines operating in Pennsylvania. They are all located in either Washington or Greene counties in the southwestern corner of the Commonwealth. Each of these operations mine the very rich Pittsburgh seam of coal.

Pennsylvania recognizes three separate estates in land: 1) surface; 2) underlying minerals (including coal) (sometimes referred to as "mineral rights"); and 3) the right to support. *Machipongo Land and Coal Company, Inc. v. Department of Environmental Resources,* 719 A.2d 19, 28 (Pa.

Cmwlth. 1998). The common law of Pennsylvania has long recognized that title to the surface land and title to the mineral rights can be severed and thus owned by different people. In Pennsylvania, many of these estates were severed long ago. This is reflected through deeds which relieved the mineral owners, in this case coal companies, from the obligation to leave support allowing them to remove all the coal beneath the surface without incurring liability for mine subsidence damage to the surface land owner. When a coal mining company owned or controlled title to both the mineral estate and the support estate the mining company had no obligation to prevent subsidence damage or duty to restore or repair subsidence damage. *Klein v. Republic Steel Corp.*, 435 F.2d 762 (3rd Cir. 1970) (applying Pennsylvania law). This principle was recognized by the Pennsylvania Supreme Court in 1962 as follows:

> Where, however, the surface is granted to one and the underlying coal to another, the surface includes whatever earth, soil or land which lie above and is superincumbent upon the coal [citation omitted]. It would follow, therefore, that what the parties intended by the removal of "surface support" was the removal of that subterranean geological matter which supports the "earth, soil and land," to wit, the removal of the coal and the rocky or sand strata which lies between the coal measures.... To reiterate, the release for damage done to the Company's pipelines was for damages caused by the weakening of the surface strata upon which the pipelines rested by the removal of the lower supporting strata of coal and other mineral matter.... Surface support, known in Pennsylvania as the "third estate" of land ownership, is simply the support of the surface strata during the course of or following the removal of the lower strata.

Merrill v. Manufacturer Light & Heat Co., 185 A.2d 573, 576-577 (Pa. 1962).

Over the years, the interests of coal mining companies and surface owners collided as mining took place and mine subsidence damaged surface structures. Often, the mineral rights had been sold years earlier by previous land owners. Although this information was contained in the

surface owner's deeds many land owners never realized that a mining company might actually mine beneath their property.

1966 Act

The first comprehensive law enacted in Pennsylvania to regulate the subsidence effects of bituminous underground coal mining was the Mine Subsidence Act passed in 1966 (1966 Act). It was enacted in response to the concerns of the public regarding the adverse effects of mine subsidence on surface structures. After the passage of the 1966 Act, coal mining companies, regardless of their common law rights, were required to prevent subsidence damage to a limited class of surface structures and features described in Section 4 of the Act. This class included structures in place on April 27, 1966, including: 1) any public building or noncommercial structure customarily used by the public, including but not limited to schools, hospitals, churches, municipal utilities or municipal public service operations; 2) dwellings used for human habitation; and 3) cemeteries. Coal mining companies were thus required by statute to repair or compensate for subsidence damage to Section 4 structures.

Coal mining companies were not required by the 1966 Act to repair or compensate the owners of structures not listed in Section 4. This would include homes built after April 27, 1966. Section 15 of the 1966 Act gave the owners of such non-Section 4 structures the right to purchase support from the coal mining companies. However, this right was not an effective means for non-Section 4 owners to prevent damage to their structures as the cost of purchasing such support was often too expensive to be a viable remedy. Mr. Edward Motycki, a Department mining engineer and Chief of the Mine Subsidence Section which administers the Mine Subsidence Insurance Program, did not know of any cases where home owners purchased coal support. He estimated that

it would cost between five and six thousand dollars to purchase coal support in a room and pillar mine. However, it would cost hundreds of thousands of dollars to purchase support in a longwall mine. (N.T. 1507-1509, 1523-1525) Moreover, the coal mining industry looked at this remedy as a problem, at least in theory, as the purchase of such coal support had the potential to seriously disrupt their mining operations.

All property owners were treated alike in one respect. Pursuant to Section 10 of the 1966 Act, the coal company was required to give them six months notice of intended undermining.

1980 Amendments

The 1966 Act was first amended in 1980 in response to the passage of the Federal Surface Coal Mining Control and Reclamation Act (Federal SMCRA). Federal SMCRA regulates both surface mining and underground mining. However, Federal SMCRA contains specific statutory requirements governing the grant of primary jurisdiction (primacy) to the states to regulate coal mining within their borders. A state seeking primacy submits a "state program" of laws and regulations for approval by the Federal government. The state program must be consistent with Federal SMCRA and the supporting federal regulations. 30 U.S.C. § 1253 and 39 C.F.R. Part 730. Upon achieving primacy, the state receives federal funding to aid in implementing its state program. The Federal government still retains oversight authority.

Shortly after the enactment of Federal SMCRA in 1977, Pennsylvania moved to obtain primacy. The legislature amended four existing statutes in October 1980. Included were significant amendments to the 1966 Act (the 1980 Amendments). These amendments, however, did not add to the class of structures and features described in Section 4 of the Mine Subsidence

Act. The Environmental Quality Board[6] also promulgated five new chapters of regulations applicable to mining operations in general, and specifically to the mining of bituminous coal and the disposal of coal refuse. On July 30, 1982 the Federal government granted conditional approval to the Commonwealth's program.

The major changes to the Mine Subsidence Act in 1980 were: 1) amending Section 4 to allow for mining beneath protected structures providing the current owners consented to such mining; 2) adding provisions to Section 5 requiring the submission of information on compliance history, requiring public notice and participation in the permit process, and adding the language of Section 5(e); and 3) adding Section 7(b) which gave authority to the Department to promulgate regulations.

The most important change was the addition of new Section 5(e).[7] The section reads as follows:

> (e) An operator of a coal mine subject to the provisions of the Act shall adopt measures and shall describe to the Department in his permit application measures that he will adopt to prevent subsidence causing material damage to the extent technologically and economically feasible, to maximize mine stability, and to maintain the value and reasonable foreseeable use of such surface land. Provided, however, that nothing in this subsection shall be construed to

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[6] The Pennsylvania Environmental Quality Board is an administrative board which has the power and duty to formulate, adopt and promulgate the rules and regulations of the Department. Once the Environmental Quality Board establishes the regulations, the Department has the duty of administering and enforcing the regulations. *Duquesne Light Company v. Department of Environmental Protection*, 724 A.2d 413, 415, n.1 (Pa. Cmwlth. 1999).

[7] This section is central to PUSH's argument that the mining company's permit application is not in conformance with the Mine Subsidence Act. PUSH mistakenly states, or at least implies, that this section was part of the amendments enacted in 1994 by Act 54. This section predated Act 54 by fourteen years.

> prohibit planned subsidence in a predictable and controled manner or the standard method of room and pillar mining.

52 P.S. § 1406.5(e)

In evaluating these 1980 Amendments the General Assembly made it crystal clear that these statutory changes were not to result in wholesale changes to pre-existing Pennsylvania law. Instead, only such regulatory changes as were necessary to obtain primacy were authorized.

> It is hereby determined that it is in the public interest for Pennsylvania to secure primary jurisdiction over the enforcement and administration of Public Law 95-87, the Federal Surface Mining Control and Reclamation Act, and that the General Assembly should amend [the 1966 Act] in order to obtain approval of the Pennsylvania program by the United States Department of the Interior. It is the intent of the [1980 amendments] to preserve existing Pennsylvania law to the maximum extent possible.

52 P.S. § 1406.20a.

Although the 1980 Amendments did not expressly expand the class of protected structures under Section 4 or expand the Section 6 obligation to repair or compensate for subsidence damage caused to Section 4 structures, the regulations implementing the 1980 Amendments did expand, somewhat, the category of protected structures from material damage and the obligation to repair or compensate. Specifically, based on a federal requirement, now codified at 30 C.F.R. § 817.121(d), that all public buildings, all buildings customarily used by the public such as churches, schools and hospitals, any impoundment holding a large amount of water and all significant sources of public water shall be protected from material subsidence damage, the Department's regulation implementing the 1980 Amendments extended to these structures and features the same protection as was statutorily given to Section 4 structures. Also, because the federal regulations required in certain circumstances that subsidence damage had to be repaired, the Department promulgated a

regulation that required coal mining companies to repair material damage to the extent economically and technologically feasible. *Compare* 25 Pa. Code § 89j.145(a) with 30 C.F.R. § 817.121(c).

The "coal fields" of southwestern Pennsylvania have been mined for over one hundred years. However, as the 1980's progressed it became increasingly apparent within the coal mining industry that to maximize profits, longwall mining would be the preferred method to mine coal in southwestern Pennsylvania. The requirement to provide support to Section 4 structures impeded the large scale development of longwall mining. This is because the Department required mining companies to leave 50% of the coal beneath a home to provide support. This so-called 50% Mining Policy was applied to all Section 4 structures plus all federally protected structures and features listed in 30 C.F. R. § 817.121(d). The 50% Mining Policy effectively precluded the use of longwall mining in many instances, because it is impossible, as the testimony in this Appeal demonstrated, to leave pillars of coal in place within longwall panels. It is also not technologically and economically feasible to plan a longwall mine so as to locate the longwall panels only in areas where no homes are present. (N.T. 2932-2935, 2940-2942, 3209-3230, 3458)

Since the 50% Mining Policy greatly impeded the development of longwall coal mining, members of the coal mining industry and various special interests formed a working group to develop proposed amendments to the Mine Subsidence Act. This was accomplished by a structured mediation process, known as the Deep Mining Mediation Project (Project). The Project was led by Mr. Arthur Davis prior to his appointment as the Secretary of the Department of Environmental Resources. Various and diverse entities participated in the Project including the Pennsylvania Coal Association, the Pennsylvania League of Women Voters, the Pennsylvania

Federation of Sportsmen's Clubs, the Pennsylvania Farmer's Association, Citizens Against Water Loss due to Longwall Mining, the Pennsylvania Environmental Council, USX Corporation, BethEnergy Mines, Inc., Rochester & Pittsburgh Coal Company, and Consolidation Coal Company. The Project proposed various amendments to the Mine Subsidence Act. These proposals formed the genesis for Act 54 which was passed by the General Assembly and signed into law by Governor Robert Casey in 1994. (N.T. 2577-2581)

Act 54

The Mine Subsidence Act was substantially amended in 1994 by the enactment of what is commonly referred to simply as Act 54, Act of June 22, 1994, P.L. 357. Act 54 repealed Sections 4, 6(a) and 15 of the Mine Subsidence Act. These were the sections which prohibited mining companies from damaging certain structures (such as homes built before April 27, 1966), which required the mining companies to repair damage to a protected structure, and which gave the owners of non-Section 4 or unprotected structures the right to purchase coal support.

The changes significantly changed the law regarding the protection of homes. The amendments eliminated the artificial distinction between pre-1966 and post-1966 homes. All homes are now treated equally under the Mine Subsidence Act. The standard for protection of homes, which will be discussed later in greater detail, is the prevention of material damage to homes. If mining would result in irreparable damage, then the Department can prohibit such mining. *See* 52 P.S. § 1406.9a(b). It also required coal companies to repair or compensate *all* homeowners for *any subsidence damages* to their homes.

Act 54 required, for the first time, a coal mining company to replace or restore any water supply which is adversely affected by its mining operations. The Act also established a new

standard of protection for public buildings and facilities, churches, schools, hospitals, impoundments with a storage capacity of twenty acre feet or more, and bodies of water with a volume of twenty acre-feet or more. Such structures and features *must be* protected from material damage. Accordingly, a mining company is required to provide support for these structures.

Act 54 also contained another important protection measure found at 52 P.S. 1406.9a(b):

> If the Department of Environmental Resources determines and so notifies the mine operator that a proposed mining technique or extraction ratio will result in subsidence which creates an imminent hazard to human safety, utilization of such technique or extraction ratio shall not be permitted unless the mine operator, prior to mining, takes measures approved by the Department to eliminate the imminent hazard to human safety.

Act 54 did not expand a coal mining company's obligation to repair or compensate for mine subsidence damage to investor owned utilities. The new regulations approved in June 1998 by the Environmental Quality Board also "made clear that the mining company *may*, but is not required to, take measures in the mine as part of its program to minimize damage to utilities...." *Wheeling & Lake Erie Railway v. DEP*, EHB Docket No. 97-252-R (Opinion issued May 26, 1999).

Standard of Protection Afforded to Homes

PUSH's most vigorous objection concerns the standard of protection afforded to homes pursuant to the Mine Subsidence Act. PUSH contends that all structures are entitled to protection from material damage based on the provisions of Section 5(e) of the Mine Subsidence Act. 52 P.S. § 1406.5(e). PUSH mistakenly argues that this section was part of the Act 54 amendments enacted in 1994. As indicated earlier in our adjudication, Section 5(e) of the Mine Subsidence Act was added as part of the 1994 amendments. PUSH contends that this section "is similar to the 50% support requirement found in the Department's exisiting regulation at 25 Pa. Code Section

89.146(b)(5)."

The Department, on the other hand, fashions a narrow argument that Section 5(e) only applies to land and not to dwellings. It argues that PUSH's interpretation that the section applies to homes nullifies certain sections of the Mine Subsidence Act including Section 1406.9a(b). This section prohibits the mining company from mining under homes if mine subsidence will cause irreparable damage.

We are troubled by the Department's contention that this section applies only to surface land. Section 5(e) is not by its terms limited to just surface land. Likewise, we do not see Section 5(e)'s requirement that coal mining companies adopt measures to prevent subsidence causing material damage to the extent technologically and economically feasible as conflicting with the Department's obligation under Section 1406.9a(b) to prevent coal mining companies from irreparably damaging homes by mine subsidence. There is no reason in law or logic why Section 5(e)'s requirements should not also apply to dwellings.

The United States Court of Appeals for the District of Columbia Circuit recently upheld all but two of the Federal Office of Surface Mining's regulations promulgated to enforce the provisions of Federal SMCRA. *See National Mining Association v. Department of Interior*, 172 F.3d 906 (D.C. Cir. 1999). Although not controlling on the issues before us, the decision is instructive. In that case, the National Mining Association objected to a regulation which was drafted to enforce the Federal version of Section 5(e). 30 U.S.C. § 1266(b)(1). The regulation, 30 C.F.R. § 817.121(a)(2), provides as follows:

> If a permittee employs mining technology that provides for planned subsidence in a predictable and controlled manner, the permittee must take necessary and prudent measures,

> consistent with the mining method employed, to minimize material damage to the extent technologically and economically feasible to non-commercial buildings and occupied residential dwellings and structures related thereto....

The National Mining Association argued that the regulation's minimization requirement was contrary to Section 1266(b)(1) of Federal SMCRA. The Federal Court of Appeals disagreed and upheld the regulation.

Although Pennsylvania currently has no identical regulation, the Department's argument concerning the non-applicability of Section 5(e) to dwellings is based heavily on what the Department contends Federal law requires. Federal law now requires companies to employ measures to minimize material damage to homes to the extent technologically and economically feasible. This interpretation has now been affirmed by a United States Court of Appeals based on its interpretation of the statute on which Section 5(e) is modeled.

We believe the key to understanding the protections afforded to homes pursuant to the Mine Subsidence Act is to give it neither the overly broad reading advanced by PUSH nor the restrictive interpretation argued by the Department. Both miss the point. The Legislature intended to allow longwall mining under homes. This is made crystal clear by the concluding language in Section 1406.5(e): "Provided, however, that nothing in this subsection shall be construed to prohibit subsidence in a predictable and controlled manner...." It is also clear by changes made by Act 54 such as the repeal of Section 4 and the addition of the phrase "or restoration" to the policy declaration found in paragraph 3 of 52 P.S. Section 1406.3: "(3) the prevention or restoration of damage from mine subsidence is recognized as being related to the economic future and well-being of Pennsylvania."

As the Department correctly points out, the requirements set forth in Section 1406.5(e) should be viewed as overarching goals. The coal mining company should strive to prevent subsidence causing material damage to the extent technologically and economically feasible, to maximize mine stability, and to maintain the value and foreseeable use of such surface land. However, this section cannot be used to prevent a coal mining company from longwall mining. If subsidence from longwall mining occurs and causes material damage (or *any* damage, for that matter) to a dwelling, the coal mining company is obligated to repair the damage. If mining would result in irreparable damage to the dwelling, then under Section 1406.9a(b), the Department *can* prohibit the mining.

PUSH argues that 50% mining would harmonize the Legislature's intent to prevent subsidence causing material damage to homes with its intent to foster longwall mining. We strongly disagree. PUSH's interpretation of the Mine Subsidence Act would effectively prohibit longwall mining in areas under homes. It would also void the last sentence of Section 1406.5(e). The Board finds, based on the extensive testimony and evidence presented at the hearing, that it is not technologically and economically feasible to longwall mine and provide 50% support. It is feasible to provide 50% support in limited areas. However, these areas will not be mined using the longwall method.

We realize that PUSH and others may not be pleased by this interpretation of the Mine Subsidence Act. However, the interpretation is required by the plain language of the Act. Moreover, it must be emphasized that it was the General Assembly, and not the Environmental Hearing Board, that made the determination by enacting Act 54 that longwall mining should be allowed unless the homes undermined will be irreparably damaged. Many of the arguments

advanced by PUSH at the hearing and in its post-hearing brief are policy arguments that should be addressed to the Pennsylvania General Assembly.

PUSH is wrong in its assertion that Eighty-Four Mining Company did not plan its mining so as to prevent material damage to homes from mine subsidence. PUSH contends that the Department's program is one only of compensation and repair. The evidence heard by the Board does not support this contention.

There are over 600 dwellings within or adjacent to Eighty-Four Mining Company's Subsidence Control Plan Boundary. (Cmwlth. Ex. 3) Eighty-Four Mining Company identified 133 properties over longwall panels and headings, and at the time of the hearing 17 properties had been undermined. Of these 17, seven had been damaged. (N.T.2032-2035)

Eighty-Four Mining Company has a substantial economic incentive to plan its mining operations so as not to cause material damage to homes. The Mine Subsdience Act requires the mining company to repair, compensate or replace any damage caused to homes by longwall mining. 52 P.S. § 1406.5d. The evidence and testimony at the hearing established that Eighty-Four Mining Company, to the extent economically and technologically feasible, planned its full extraction longwall mining operations so as to prevent material damage to dwellings. (EFMC Ex. 70)

It accomplished this in various ways. It planned its longwall panels in a manner so as to place a majority of the dwellings within the Subsidence Control Plan Boundary in as favorable a location as possible to be undermined. It also attempted to avoid the use of full extraction longwall mining, where economically and technologically feasible, in areas with a high density of dwellings. (N.T.2640-2641, 2654-2655; EFMC Ex. 70) For example, Windsor Highlands, a high density housing area, was located along the edge of planned mining, where full extraction longwall mining

will not be utilized. (Cmwlth. Ex. 3)

Eighty-Four Mining Company attempts to conduct extensive pre-mining surveys to learn as much as possible concerning the homes that may be affected by its mining operations. It contacts the homeowner and attempts to arrange a pre-mining inspection of the property. (N.T. 1893) Eighty-Four Mining Company hired a registered Professional Engineer and Vice-President of a Washington, Pennsylvania engineering firm, Mr. Douglas Patterson, to conduct detailed pre-mining inspections. Mr. Patterson was formerly employed as an engineer at Mine 84 when BethEngergy operated the mine. He has extensive experience with mine subsidence related damages in general and, in particular, with such mine subsidence damage at Mine 84. (N.T.2573-2575) Mr. Patterson meets with the homeowners, takes various measurements and pictures of the property, and prepares a written report. A copy of the final written report is given to the homeowner. (N.T.1898-2595)

The coal mining company also employs one of the foremost longwall mining subsidence experts in the country, Dr. Syd Peng, to help it develop effective pre-mining mitigation methods. Dr. Peng is a professor at West Virginia University where he chairs the Mining Engineering Department. He developed a computer model especially for Eighty-Four Mining Company that has been quite successful in predicting vertical and horizontal displacement and the type of stresses that may affect a structure during longwall mining. (N.T.1899-1900, 2970-2972; EFMC Ex. 98)

Dr. Peng and his associates then provide and perform, if permitted by the homeower (and at the coal mining company's sole expense), extensive mitigation efforts to limit the subsidence damage caused by longwall mining. Dr. Peng will develop a site specific mitigation plan to attempt to prevent material damage to a dwelling. (N.T.1902, 2855, 3035; EFMC Ex. 16) If recommended

by Dr. Peng, the coal mining company will perform mitigation measures including the construction of trenches, bracing, cabling, and taping of windows, removal of decks, and other similar measures. (N.T.1915-1918; EFMC Exs.78-1 through 78-4)

Entering into a pre-mining mitigation agreement is voluntary. Eighty-Four Mining Company will still perform, and has performed, pre-mining mitigation measures in instances where property owners are unwilling to enter into a written pre-mining agreement with the coal mining company. (N.T.1910) During mining beneath any mitigated structure, the coal mining company maintains daily communication with the property owner and conducts regular inspections of the structure. (N.T.1921-1922, 2856, 2935-2936)

Once the mining is completed, Eighty-Four Mining Company will remove the mitigation measures it has installed and return the property to its pre-mining condition. (N.T.1921-1922; Cmwlth. Ex. 102) A post-mining inspection is then conducted with the homeowner. Eighty-Four Mining Company hires competent contractors to perform any repair work on the dwelling. (N.T.1923) The coal mining company repairs the damages identified by the homeowner, and also repairs damages it observes. (N.T.1957, 2861-2863, 3444)

Taking

PUSH asserts that the Department's application of the Act 54 amendments constitutes a taking of private property without compensation in violation of the United States Constitution. Both the Fifth Amendment to the United States Constitution and Article 1, Section 10 of the Pennsylvania Constitution prohibit the taking of private property under the powers of eminent domain without just compensation. *Machipongo Land and Coal Company, Inc. v. Department of Environmental Resources*, 719 A.2d 19, 23 (Pa. Cmwlth. 1998).

PUSH argues that the Department's failure to require Eighty-Four Mining Company to follow the standard set forth in Section 5(e) of the Mine Subsidence Act, 52 P.S. § 1406.5(e) (i.e. "to prevent subsidence-causing material damage") when mining under the homes of PUSH's members constitutes a taking. As we have outlined in the previous section of this Discussion, Eighty-Four Mining Company planned its mining in accordance with the requirements set forth in Section 5(e) and the Mine Subsidence Act in general.

Second, PUSH argues that homeowners have no guarantee of compensation for any damage which may occur to their homes. Again, we disagree. The Permit Revision requires Eighty-Four Mining Company to fully comply with the "repair or compensation" provisions set forth in the Mine Subsidence Act at 52 P.S. §§ 1406.5d, 1406.5e, and 1406.5f. Should its mining operations cause damage to any home, Eighty-Four Mining Company is required to "repair such damage or compensate the owner of such building for the reasonable cost of its repair or the reasonable cost of its replacement where the damage is irreparable." 52. P.S. § 1406.5d(a).

PUSH argues that any such compensation will be insufficient because the Department authorizes the mining company to provide compensation based solely on damage which is apparent to homeowners, most of whom are lay people. This is simply untrue. The Permit Application approved by the Department sets forth a thorough system for ensuring that homes are fully repaired or homeowners fully compensated pursuant to the provisions of the Mine Subsidence Act. Although Eighty-Four Mining Company relies, in part, on the homeowners to make assessments of damages they believe were caused by mine subsidence, the mining company employs a number of professionals and contractors to make their own assessments. (N.T. 23857-2858) The evidence presented at the hearing demonstrates that Eighty-Four Mining Company conducts extensive pre-

and post-mining surveys of homes in the mining area to determine the extent of damage resulting from mining. (N.T. 2573-2575, 2584-2585, 2861-2863, 2916)

Because we find that the Department has properly applied the provisions of the Mine Subsidence Act which provide protection to homeowners, we conclude that there is no merit to PUSH's argument that the Department's application of the Mine Subsidence Act, including the Act 54 amendments, constitutes an improper taking.

Adequacy of Subsidence Bond

PUSH argues that the subsidence bond approved by the Department in this matter is inadequate. The Department required that Eighty-Four Mining Company post a bond in the amount of $10,000.

Section 5(b) of the Mine Subsidence Act requires that an applicant for an underground mining permit file a bond or other security "to insure the applicant's faithful performance of mining or mining operations." 52 P.S. § 1406.5(b). Section 6(b) of the Act further requires that an applicant file a bond "conditioned upon the applicant's faithful performance of mining or mining operations, in accordance with the provisions of sections 5, 5.4, 5.5 and 5.6 [of the Act]." *Id.* at 1406.6(b).[8] Section 6(b) states that "[s]uch bond shall be in a reasonable amount as determined by the Department." *Id.*

The regulations governing bonding are found at 25 Pa. Code Chapter 86, Subchapter F. The

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[8] Section 5 deals with permit applications, bonds, filing, general rulemaking authority of the Department, prevention of damage, mine stability, and maintenance of use and value of lands. 52 P.S. § 1406.5. Section 5.4 deals with the restoration or compensation for structures damaged by underground mining. *Id.* at § 1406.5d. Section 5.5 contains procedures for securing repair and/or compensation for damage to structures caused by underground mining. *Id.* at § 1406.5e. Section 5.6 deals with voluntary agreements for repair or compensation for damages to structures caused by underground mining. *Id.* at § 1406.5f.

provisions contained therein set forth "the minimum requirements for bonding and insuring mining and reclamation operations." *Id.* at § 86.141. No permit to conduct mining may be issued by the Department until a bond has been approved for said operation. *Id.* at § 86.143(a). Liability on said bond shall be determined as follows:

> Liability on the bond shall cover mining and reclamation operations and other activities conducted within the permit area, and effects resulting from the mining of the permit area, including amendments thereof, during the course of mining activities and continuing for a period of time as provided in this subchapter.

25 Pa. Code § 86.143(c).

Section 86.149 sets forth the manner in which the bond amount is to be calculated. It states as follows:

> (a) The standard applied by the Department in determining the amount of bond will be the estimated cost to the Department if it had to complete the reclamation, restoration and abatement work required under the acts, regulations thereunder and the conditions of the permit. The Department may establish bonding rate guidelines which utilize the factors in § 86.145(c) (relating to Department responsibilities).
>
> (b) This amount will be based on, but not limited to, the following:
>
> > (1) The estimated costs submitted by the permittee in accordance with § 87.68, § 88.96, § 88.492, § 89.71 or § 90.33.
> >
> > (2) Reclamation costs for surface mines related to the specific size and geometry of the proposed mining operation, the topography and geology of the permit area, the potential for water pollution or hydrologic disturbances, the availability of topsoil and the proposed land use.

(3) The costs related to distinct differences in mining methods and reclamation standards for bituminous surface mines, anthracite surface mines and underground mines.

(4) The cost of relocating or reconstructing roads or streams within the permit area.

(5) The cost of sealing shafts or other mine openings, removal of buildings, facilities or other equipment, constructing, operating and maintaining treatment facilities and correcting surface subsidence.

(6) The additional estimated costs to the Department which may arise from applicable public contracting requirements or the need to bring personnel and equipment to the permit area after its abandonment by the permittee to perform reclamation, restoration and abatement work.

(7) The amount of fees, fines or other payments made to the Department and dedicated by the Department for reclamation restoration and abatement of defaulted permit areas.

(8) Additional estimated costs necessary, expedient and incident to the satisfactory completion of the requirements of the acts, regulations thereunder and the conditions of the permit.

(9) An additional amount based on factors of cost changes during the preceding 5 years for the types of activities associated with the reclamation to be performed.

(10) Other cost information as required from the permittee or otherwise available to the De-artment.

25 Pa. Code § 86.149.

Section 86.150 specifies that the *minimum* amount of the bond shall be $10,000. *Id.* at § 86.150.

The amount of bond which the Department required in this case was $10,000. When asked how it arrived at this figure, the Department responded that it uniformly requires $10,000 bonds for all underground mining applications. (N.T. 565) In defense of its decision, the Department asserts:(1) that the uniform $10,000 bond has accomplished the statutory mandate of insuring compliance with the Mine Subsidence Act; and (2) that it is not technologically feasible to reliably predict the cost of potential subsidence damage.

The Department and Eighty-Four Mining Company initially point out that the Mine Subsidence Act grants discretion to the Department to determine the amount required for a subsidence bond. While this is true, the exercise of that discretion is reviewable by this Board. Where the Board determines that the Department has abused its discretion, the Board may substitute its own discretion for that of the Department. *Warren Sand & Gravel Co. v. Department of Environmental Resources*, 341 A.2d 556, 565-66 (Pa. Cmwlth. 1975); *Pequea Township v. Herr*, 716 A.2d 678, 686 (Pa. Cmwlth. 1998).

The Mine Subsidence Act requires that a subsidence bond "shall be in a *reasonable* amount as determined by the Department." 52 P.S. § 1406.6(b) (emphasis added). The Department asserts that the uniform figure of $10,000 is reasonable because it has never failed to insure compliance with the requirements of the act or regulations. District Mining Manager William Plassio testified that the Department has never had to order an underground mining operator to comply with its obligations to repair or compensate for damage due to subsidence. (N.T. 575-576) Since 1966, the

Department has never had to forfeit a subsidence bond due to an operator's failure to address a subsidence claim. (N.T. 577-78)[9] On only five occasions has the Department been required to forfeit a subsidence bond for non-subsidence related matters. (N.T. 578) In the words of the Department's Chief of the Underground Mining Section, Harold Miller, if the system "isn't broke, don't fix it." (N.T. 1197)

The problem, however, is that this assumes all mining operators will continue to perform as diligently as they have in the past and be in a financial position to comply with the repair or compensation provisions of the statute and regulations. While the Department's underground mining program has been fortunate, thus far, to deal with mining operators who understand their obligations under the law and are scrupulous in performing them, the bonding provisions are in place for those occasions when an operator will not or cannot perform its obligations. It is not so much that the existing system is not broken, but that it has never been tested.

This situation is similar to that in *City of Philadelphia v. DEP*, 1996 EHB 47, which involved the Act 339 subsidy program for sewage treatment plants. In determining the amount of the subsidy, the Department applied an interest rate of 1.5%. The City of Philadelphia sought to recover its actual interest expense, which was significantly higher. Neither the applicable statute nor regulations contained the 1.5% figure. When asked how the Department had arrived at this figure, the staff administering the program did not know, but testified that it dated back to 1953. The Board rejected the Department's selection of 1.5% as the proper interest rate to be applied in that case, holding as follows: "As DEP's choice of the 1.5% interest rate was not mandated by Act

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[9] In comparison, the Department states in its post-hearing brief that it has been required to forfeit hundreds of bonds under its surface mining program. (Department's Post-Hearing Brief p.121)

339 or the regulations, the decision to use it was of a discretionary nature. As this is true we may substitute our discretion for that of DEP where the evidence fails to support DEP's choice, i.e., where the choice was arbitrary." *Id.* at 87.

As in the *City of Philadelphia*, we find that the Department's choice of $10,000 as the amount of the subsidence bond was arbitrary and an abuse of its discretion. Although the Department here, unlike the *City of Philadelphia*, can point to the $10,000 figure in the regulations, this amount is meant to act only as a *minimum*, not as a uniform figure to be applied across-the-board with every underground mining permit. 25 Pa. Code § 86.150. That the Department is expected to calculate the bond amount, and not simply use a standard amount, is more fully demonstrated by Section 86.149 of the regulations, which lists ten costs which the Department is to take into consideration in arriving at an appropriate bond amount. 25 Pa. Code § 86.149(b).

The Department argues that the legislature has not directed that the amount of the bond should be equal to the potential costs of subsidence damage. While the Act does not so specify, it does require that the bond be conditioned upon the mining operator's "faithful performance" of its duties under Sections 5.4, 5.5 and 5.6 of the Act, among others. These sections govern a mine operator's duty to repair or compensate for subsidence damage. *See* 52 P.S. §§ 1406.5d, 1406.5e, and 1406.5f. Thus, the amount of the bond *must be sufficient to insure compliance* with these sections.

Finally, the Department and Eighty-Four Mining Company argue that it is difficult, if not impossible, to reliably predict the cost of potential subsidence damage. In support of their argument, they cite to the case of *National Wildlife Federation v. Hodel*, 839 F.2d 694 (D.C. Cir. 1988), which involved challenges to federal mining regulations promulgated by the United States

Department of the Interior. The regulations at issue did not require bonding for subsidence damage at the outset of mining operations, but called for bonding if and when damage actually occurred. The Secretary of the Interior explained that the regulation was drafted in this manner because, in his opinion, the extent of land restoration required as a result of subsidence could not be calculated with any degree of reliability. The Court of Appeals agreed with the Secretary and upheld the regulation.

Like the Court of Appeals in *National Wildlife Federation*, we agree that calculating the cost of potential subsidence damage to any degree of reliability is no easy task. However, the issue presented in *National Wildlife Federation* is different from that of the present case. In *National Wildlife Federation*, the court was called upon to determine whether the Secretary of the Interior was justified in adopting regulations which required bonding as the damage occurred rather than at the commencement of mining. In contrast, in the present case, both the statute and regulations require bonding at the outset of mining, and the regulations set forth specifically how the amount of bond should be calculated. Our role in this case is to determine whether the amount set by the Department under these provisions was arrived at properly.

Moreover, there is evidence in the present case that the estimated cost of potential subsidence damage *can* be calculated. PUSH Exhibit E is a document entitled "84 Mining Company Projected Bond Costs Due to Subsidence Damage." It was prepared by William Plassio at the request of the Department's Director of the Bureau of District Mining Operations, Jeffrey Jarrett. (N.T.465-466, 469-470) The document contains a six-year analysis of structures to be undermined by Eighty-Four Mining Company and the estimated cost of repair. (N.T. 465-466, 469-470; PUSH Ex. E) The "cost estimates for repair were derived from actual damage claims in

the Washington and Greene County areas." (PUSH Ex. E) According to the calculations, the average yearly cost of repair was estimated at $2,109,800. It was Mr. Jarrett's belief that the calculations were done *prior* to the permit issuance. (N.T.469-470, 555-556) Thus, while the Department asserts that it is difficult to estimate repair costs from potential subsidence damage, it did just that in this case.

Eighty-Four Mining Company also makes cost estimates as to potential subsidence damage. Manager of Engineering, Joseph Wilcox, testified that the company makes budget projections, taking into account potential damage due to subsidence from longwall mining. (N.T. 1957-1959, 2025-2026) The amount budgeted is approximately one-percent of the company's cost of operation, or between $1 million to $2 million. (N.T.3436-3438) In addition, Eighty-Four Mining Company's expert, Dr. Syd Peng, testified regarding a computer model which he helped develop to predict subsidence due to longwall mining. (N.T.3007) In his opinion, it is possible to predict the amount of subsidence and the location of the surface stresses associated with longwall mining. (N.T.3006) Eighty-Four Mining Company uses Dr. Peng's model to develop a mitigation plan to minimize the effects of subsidence. (N.T.1902) The Department's Chief of the Mine Subsidence Section, Ed Motycki, testified that models are generally used for predicting mine subsidence. (N.T.1592)

While Dr. Peng's model is a method of predicting where, when and how subsidence may occur, Eighty-Four Mining Company points out that no model exists to calculate the dollar amount of the subsidence damage which may occur. In addition, Mr. Wilcox testified that the company's actual cost of repairing or compensating for subsidence damage was less than its estimated liability by a factor of 3 to 1. (N.T.1962) While these methods may not calculate the potential cost of

subsidence damage to an absolute degree of certainty, they, nonetheless, provide an estimate which the Department may use in arriving at an appropriate bond amount.

Our ruling is not intended to hold the Department to an impossible standard in calculating bond amounts. The Mine Subsidence Act requires that bonds be set in a "reasonable" amount to insure compliance with the provisions of the statute and regulations. However, "reasonable" requires that the Department do something more than simply select an arbitrary figure to be applied in every case. It requires that the Department take into consideration the factors in its own regulations at 25 Pa. Code § 86.149.

Having concluded that the Department acted arbitrarily and abused its discretion in setting a bond amount of $10,000, there remains the question of whether the Board should remand this matter to the Department to calculate an appropriate bond amount in accordance with the statute and regulations or substitute our discretion to determine an appropriate bond amount pursuant to our *de novo* authority. After reviewing the record, we find that there is insufficient evidence for the Board to make this determination. Therefore, we shall remand this matter to the Department to calculate an appropriate bond amount in accordance with the statutory and regulatory requirements and our holding herein. *See Oley Township v. DEP*, 1996 EHB 1098, 1123 (Where evidence is insufficient to make a determination, the Board shall remand to the Department).

Historic Structures and Public Parks

Mining operators are required to identify any historic structures and public parks in the permit area. They are then required to demonstrate that measures will be taken to prevent or minimize subsidence damage to these structures and parks. See 25 Pa. Code § 89.38. In Module 4.6 of the Permit Application, Eighty-Four Mining Company stated that it would provide support

for the historic structures. PUSH contends that the Department failed to honor requests of the Pennsylvania Historic and Museum Commission concerning certain properties. It further contends that the National Road Heritage Park is a state park which is entitled to protection under the law.

The Department has various agreements with other state agencies so that it can obtain expert assistance from those agencies where appropriate. For example, the Department receives input from the Pennsylvania Fish & Boat Commission in evaluating a mine's impact on rivers and streams. Regarding historical structures, the Department receives input from the Pennsylvania Historic and Museum Commission. These agreements are memorialized in writing in Memoranda of Understanding. These documents formally set forth the areas in which the Department will utilize the expertise of other state agencies and how the information will be delivered and used.

Pursuant to the Memorandum of Understanding between the Department and the Pennsylvania Historic and Museum Commission, the latter has the responsibility to identify archeological sites and historic structures that may be eligible or are listed on the National Register of Historic Places and which may require protection. In evaluating mine applications, the Department relies upon the Pennsylvania Historic and Museum Commission to perform this important task. (N.T. 75, 302) During the Department's review of the Permit Revision, the Department notified the Pennsylvania Historic and Museum Commission that Eighty-Four Mining Company had submitted a permit amendment application and solicited comments from the agency. This notice was sent shortly after the Permit Revision was received by the Department. (N. T. 74; Cmwlth. Ex 8) As a rule, and under the Memorandum of Understanding between the Department and the Pennsylvania Historic and Museum Commission, comments concerning an application are to be forwarded to the Department within 30 days after receipt by the Commonwealth. (N.T. 81,

177; Cmwlth. Ex. 70)

Approximately one month later, on December 28, 1994, the Pennsylvania Historic and Museum Commission advised the Department by letter that it did not believe that the proposed mining activity of Eighty-Four Mining Company would affect any historic structures within the area covered by the Permit Revision. (N.T. 76; Cmwlth. Ex. 8) Following receipt of a second letter from the Pennsylvania Historic and Museum Commission, the Department scheduled a meeting on February 23, 1995 to discuss the Permit Revision. Representatives of the Pennsylvania Historic and Museum Commission, Eighty-Four Mining Company, the Pennsylvania Department of Community Affairs, and the Department attended this meeting.[10] At the conclusion of the meeting, the Pennsylvania Historic and Museum Commission indicated that it did not have any concerns regarding the archeological sites and that it would advise the Department later if it had any concerns regarding historic structures. (N.T. 80-81, 3504-3505)

Mr. Alan Chase, who also attended the meeting, together with representatives of the Department and Eighty-Four Mining Company believed a consensus had been reached. Neither the Pennsylvania Historic and Museum Commission nor the Pennsylvania Department of Community Affairs voiced any further concerns about the proposed revision to Eighty-Four Mining Company's permit. (N.T. 2773-2775, 3506) The Department further advised the Pennsylvania Historic and Museum Commission that it was in the middle of its permit review and that if it did have comments, it should promptly so advise them. (N.T. 81-82)

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[10] The Department of Community Affairs, represented by Mr. Alan Chase, was the agency in February 1995 which administered the Commonwealth's Heritage Park Program. The responsibility for this program is now vested with the Department of Conservation and Natural Resources.

In a third letter dated June 26, 1995, the Pennsylvania Historic and Museum Commission identified various historic resources which needed to be protected. It also advised the Department that it was doing additional surveys. (N.T. 676-677; Cmwlth. Ex. 96) Each of these structures identified in the June 26, 1995 letter was addressed in Eighty-Four Mining Company's Subsidence Control Plan approved by the Department. (Cmwlth. Ex. 3 and 96) The Subsidence Control Plan proposed by Eighty-Four Mining Company and approved by the Department, set forth a detailed description of the measures which Eighty-Four Mining Company proposed to implement to prevent damage to these structures. Basically, Eighty-Four Mining Company proposed to leave approximately 50% coal support under these areas. (N.T. 2819; Cmwlth. Exs. 3, 4) PUSH offered no evidence which cast doubt on Eighty-Four Mining Company's proposal that such a plan would adequately support the structures so as to prevent or minimize any material damage. (Findings of Fact No. 134)

After the Department's approval of the Permit Revision, the Department received a fourth letter from the Pennsylvania Historic and Museum Commission. This letter, dated September 20, 1995, and received by the Department on October 2, 1995, listed additional structures which the Pennsylvania Historic and Museum Commission believed were either listed or eligible for listing on the National Register of Historic Places. The letter further advised the Department that there were other features it still was evaluating and considering. Even though the Department had already issued the 1995 Permit Review, the Department considered the Commission's after-the-fact comments. It decided to work with the mining company to address these concerns when Eighty-Four Mining Company submitted its six month maps as the mining progressed.

The Pennsylvania Historic and Museum Commission was notified of the Department's

issuance of the 1995 Permit Revision. The Commission did not appeal the Department's action to the Board. A review of the testimony and evidence at the hearing shows that the 1995 Permit Revision sets forth measures which will adequately prevent or minimize adverse effects to historic or archeological properties listed, or eligible for listing, on the National Register of Historic Places. The evidence clearly shows that the Department and Eighty-Four Mining Company worked closely with the public, the Pennsylvania Historic and Museum Commission, and the Pennsylvania Department of Community Affairs to insure that all appropriate historic features were protected.

The Board finds that it is vital that agencies such as the Pennsylvania Historic and Museum Commission attempt to follow the time limits set forth in its Memorandum of Understanding with the Department. This is especially critical regarding longwall mining as the mining plans need to be developed in advance. It is very difficult, if not impossible, to "bend" a longwall panel or leave support in a panel of a longwall mine. If the Department and mining company are advised of historic structures early in the process it is much easier to adjust the mining plan in order to protect the structures.

In this case, the Department received conflicting information from the Pennsylvania Historic and Museum Commission, based on the series of letters and representations made by the Commission at the meeting. The Pennsylvania Historic and Museum Commission failed to complete its review within the 30 day period set forth in its Memorandum of Understanding with the Department. This failure to complete its review in a diligent and prompt fashion was detrimental to the public, the mining company, and the Department. Nevertheless, the Department professionally addressed the concerns of the Commission to protect these historic structures.

The Department's regulations also deal with archeological and historic resources. The coal

mining company, in its application, must set forth any public parks and historic places over the subsidence plan. It must then describe the measures it will take, consistent with the Mine Subsidence Act and the Department's regulations, to protect these public parks and historic structures which might otherwise be materially damaged by its mining operations. (N.T.575-576) Eighty-Four Mining Company set forth the required information in Module 4.6. It also listed these structures and features on the Module 19.3 map.

There was extensive testimony during the hearing about the National Road Heritage Park. In preparing its permit application, Eighty-Four Mining Company did not consider the National Road Heritage Park as a "park" in the traditional sense. (N.T. 2765-2766) PUSH contended that the application was thus deficient. The Board, in deciding this issue, finds the testimony of Mr. Alan Chase most credible. Mr. Chase, as previously mentioned, is the person responsible at the state level for administering the Pennsylvania Heritage Parks Program in Western Pennsylvania. Mr. Chase is the Western District supervisor. (N.T. 3492)

Mr. Chase testified that a heritage park, such as the National Road Heritage Park, is not a park in the traditional sense of the term. Instead, a heritage park is a "process and program." (N.T. 3509-3510) This should be contrasted with a state park. A state park is a discrete area of land, with formal, legal surveyed boundaries. It is property owned and managed by the Commonwealth for the public good and for the protection of the Commonwealth's natural resources. (N.T. 3498, 3527)

A heritage park is a concept. It is an economic development strategy fostered by the Commonwealth in which local organizations and agencies create a regional task force to promote tourism. Tourism attracts millions of dollars to Pennsylvania every year and is the state's second

largest industry. (N.T. 3509-3510) The Pennsylvania Department of Conservation and Natural Resources administers the State Heritage Parks Program by providing grants and technical assistance. (N.T. 3498-3499, 3502, 3510) The Heritage Parks Program receives an annual appropriation of approximately $2,500,000. (N.T. 3511) The Commonwealth has allocated approximately $935,000 to the National Road Heritage Park. (N.T. 3529)

A heritage park does not necessarily have discrete physical boundaries, it has planning boundaries. (N.T. 3502) The Board believes that the Department's interpretation of the word "park," as used in 25 Pa. Code § 89.38, is correct in accordance with its common usage, which is a state park. 1 Pa. Code § 1503. The National Road Heritage Park is simply not a park entitling it to protection pursuant to 25 Pa. Code § 89.38. Neither is it listed on the National Register of Historic Places. Therefore, Eighty-Four Mining Company was not required to identify it and provide support for it.

Nevertheless, Eighty-Four Mining Company identified specific historic features along the old National Road. Its application indicates that it will protect three National Road mile markers. Moreover, for operational reasons, the mining company planned the development of its longwall panels so that it will leave a barrier of coal beneath much of Route 40. (N.T. 2654-2655; EFMC Ex. 70). Finally, PUSH did not present any testimony establishing that full extraction longwall mining will adversely affect Route 40 or the National Road Heritage Park. Therefore, we find no abuse of discretion on the Department's part in not requiring Eighty-Four Mining Company to identify the National Road Heritage Park in its Permit Revision.

Compliance Review

The Mine Subsidence Act and the Department's regulations require the Department to

investigate the mining company to make sure it is in compliance with the Mine Subsidence Act. It must also investigate the coal mining company to make sure it has not shown a "lack of ability or intention to comply" with the Mine Subsidence Act as evidenced by "past or continuing violations." *See* 52 P.S. §1406.5(f); 25 Pa. Code § 86.37(a)(8). PUSH argues that the investigation performed by the Department was deficient in that the Department merely paid "lip service" to the requirements of Section 1406.5(f). We disagree.

There are two computer database systems, which are utilized as part of the Department's compliance review. The Commonwealth's Land Use Management Information System (LUMIS) provides information on Pennsylvania mining violations and mining operators. (N.T. 329-331, 3376-3378) The federal government maintains the Applicant Violator System (AVS) which contains information on enforcement actions and operators across the country. (N.T. 327-328, 3376-3379) When a compliance check is conducted on an applicant, both systems check the compliance status of the applicant and any related parties through "links" in the systems. (N.T. 332-333, 3389-3390)

LUMIS contains information on the current violation record of the applicant, the applicant's related companies, and its officers and directors. (N.T. 327-331) This information is obtained from the applicant's license application and various Modules from the permit application. In performing its review, the Department conducted two searches of LUMIS. The searches revealed no outstanding Pennsylvania violations for Eighty-Four Mining Company or any of its related parties.

Ms. Holly Martin of the Department testified that she was responsible for adding any Department enforcement actions (orders, civil penalties, bond forfeitures) to the AVS system. She further testified that each state was responsible for entering its enforcement actions into the system.

(N.T. 3375) Any long term non-compliance violations or issues would be recorded in both LUMIS and AVS. (N.T. 347) The federal AVS did not contain any violations by Eighty-Four Mining Company or any related entity which would preclude the Department from issuing the Permit Revision. (N.T. 3376-3379)

As the Department emphasized at the hearing, the compliance check is not solely a computer exercise. The AVS recommendation was verified by an investigator employed at the federal Office of Surface Mining's national AVS Center in Kentucky. (N.T. 3381-3382) An employee in Harrisburg in the Department's Division of Monitoring and Compliance, who has been responsible for hundreds of compliance reviews, reviewed the information created by LUMIS regarding Eighty-Four Mining Company, before making his recommendation to approve the Permit Revision. (N.T. 333-337, 339)

The Department does a yearly "AVS Review." It consists of an annual review of the operator's compliance history. (N.T. 345-347) One of the purposes of this review is to identify a pattern of violations or other regulatory problems.

Prior to approving the Permit Revision, all of this information was reviewed by Mr. Joseph Leone. He looked at the coal mining company's violation history, any outstanding violations, and its compliance history. Eighty-Four Mining Company consistently passed all of these reviews. Nor did PUSH offer any evidence to show that Eighty-Four Mining Company, any related company, or any officer or director of Eighty-Four Mining Company was in current violation of any environmental law. PUSH also presented no evidence that either Eighty-Four Mining Company or any related company had a history of non-compliance with any environmental law. We therefore find no merit to PUSH's contention that the Department failed to comply with the requirements

of 52 P.S. § 1406.5(f) and 25 Pa. Code § 86.37(a)(8).

Perennial Streams

The Department's regulations require that the coal mining company demonstrate in its application that it will protect perennial streams from dewatering caused by Eighty-Four Mining Company's longwall operations. *See* 25 Pa. Code §§ 89.35, 89.36. The longwall mining activities must be planned so as to prevent subsidence damage to aquifers and perennial streams. PUSH contends that the Department failed to ensure that the requirements of the regulations were met by the mining company.

Ms. Laura Kirwan, an experienced and articulate Department hydrogeologist, testified concerning the extensive field review she conducted in this matter. (N.T. 1042-1043, 1371) Her testimony highlighted the important fact that there is a wealth of information concerning mining in the Pittsburgh seam and the minimal effect the mining has had on perennial streams and groundwater in this area. Mine 84 was first opened in the 19th century. (N.T. 1002) It has been operated almost continuously since that time. Over 35, 000 acres have been mined since Mine 84 was opened. There are also many active underground mines surrounding Mine 84 that are mining the same Pittsburgh seam of coal and are regulated by the Department. (EFMC Ex. 70) The Department records constitute a literal "treasure trove" of important mining data which is extremely useful as a benchmark in evaluations of new applications. As succinctly stated by the coal mining company in its post-hearing brief, a review of this historical data shows that "[t]he sky is not falling, the streams are not drying up, and the groundwater is not disappearing or becoming polluted."

The applicable regulation, 25 Pa. Code § 89.141(b)(2) defines perennial stream as follows:

> [A] perennial stream is a stream or part of a stream that flows continuously through the calendar year as a result of groundwater discharge or surface runoff. The term does not include intermittent or ephemeral streams.

The protection of perennial streams was one of the chief components of Ms. Kirwan's hydrologic review. Moreover, since the Department's policy for protecting perennial streams is relatively new, she applied the policy to the entire Subsidence Control Plan Area. (N.T. 1007-1008, 1038; Cmwlth. Ex. 6)

Eighty-Four Mining Company provided detailed information on perennial streams in its application. (N.T. 1040-1042; Cmwlth. Ex. 3, Modules 8, 19.2, 19.3) Ms. Kirwan reviewed the information in minute detail. In fact she personally verified in the field the location of all the perennial streams identified by the mining company. (N.T. 1042-1043; 1371) She conducted her review not only in conformance with the applicable regulations but also applied the Department's Program Guidance Manual section on Perennial Stream Protection. (Perennial Stream Protection Guidance) (Cmwlth. Ex. 63) This section of the guidance manual was primarily written by Mr. Harold Miller. Mr. Miller is Chief of the Department's Underground Mining section. He is also a hydrogeologist who has been qualified as an expert witness in previous Board cases.

Mr. Miller explained how he, in conjunction with other Department hydrogeologists, developed the Perennial Streams Protection Guidance. He testified that up to 95% of groundwater circulates within 175 feet of the surface. This is also the zone where the greatest fractures occur. This groundwater zone recharges perennial streams and most water supplies, such as wells and springs. (N.T. 1138-1411)

Dewatering caused by underground mining occurs when the mine or fractures caused by

subsidence reach this shallow groundwater zone and divert the water downward. Extensive field investigation and research shows that groundwater supplies, including perennial streams, can be protected if the mine is far enough away from the groundwater zone so as not to divert the water. Dewatering of perennial streams is usually prevented if the underground mine workings are at least 400 feet below the stream. In areas where there is not 400 feet of cover, leaving 50% of the coal in the ground has proven successful in limiting the occurrence of fractures which would act as conduits to divert the water downward. (N.T. 1148-1152, 1231-1233; Cmwlth. Ex. 97)

Ms. Kirwan found that except for a small area near Little Chartiers Creek where there is less than 400 feet of cover, the cover over the entire Subsidence Control Plan area averages between five hundred feet to six hundred feet. (N.T. 1046-1048; Cmwlth. Ex. 3, Modules 8.6(c)(6), 18.2(I), 18.3(a); Cmwlth. Ex. 3b, Module 6.2, 8.3) In some areas the cover is as great as eight hundred feet. (N.T. 1892-1893) In the small area where the cover is less than 400 feet, Eighty-Four Mining Company planned its mining program so it would leave 50% of the coal in place.

Ms. Kirwan testified to site specific data to support her conclusions. Her conclusions were also buttressed by the strong testimony of Mr. Burt Waite. Mr. Waite testified on behalf of the mining company. Mr. Waite has testified as an expert before the Board on numerous occasions. He has acted as a consultant to not only coal and oil companies but also citizen groups. (N.T. 3108) He was found to be qualified by the Board as an expert in mine hydrology and the prediction of the hydrologic consequences of longwall coal mining in the Pittsburgh seam of coal. (N.T. 3090, 3108)

Mr. Waite has a Bachelor's Degree in Geology from the College of William & Mary and a Master's Degree in Geology from the University of Vermont. He has been employed by Moody

and Associates since January 1974. He directs a team of eight geologists in a broad and detailed practice pertaining to geologic and hydrogeologic investigations and issues. (N.T. 3091) Mr. Waite is heavily involved in the area of mine hydrology which "is a study of the interrelation between [coal] mining activities and the groundwater flow regime." (N.T. 3095) He has performed investigations and consultations in not only Mine 84 but other longwall mines in the immediate vicinity including the Bailey, Enlow Fork, Emerald, and Vesta mines. (N.T. 3099) He visited both the surface and underground areas of Mine 84. (N.T. 311)

Mr. Waite strongly supported the testimony of Ms. Kirwan and the Department's conclusions that the perennial streams would not be adversely affected by the mining company's underground mining operations. (N.T. 3120-3132) The mining is far below the zone of groundwater circulation, there is limited communication between Mine 84 and the other mines, and once the post-mining phase is entered the "hydraulic heads between the mines [will] equilibrate." (N.T. 3121) Mr. Waite opined that the effects of the mining on the shallow groundwater flow zone would be minimal. He predicted in some areas, particularly on hilltops and hillsides, a temporary lowering of the water table would occur which could affect the yield of any wells or the flow of any perennial streams in these limited areas. In most instances, the effects would be "very temporary."

Mr. Waite predicted negligible effects on the water table and perennial streams in the valley areas of the Subsidence Control Plan. (N.T. 3127) He reiterated that there is very little communication between the water in the zone of groundwater circulation and the mine body. In addition, the evidence established that Mine 84 is very dry and has remained dry even in locations where mining has intercepted fractures which lie beneath one of the largest continuously flowing streams in the area, Little Chartiers Creek. (N.T. 3182-3183)

PUSH further contends that the application is deficient and the Department's review flawed because of the alleged failure to identify some streams in the area. The Department and mining company strongly dispute this assertion. They contend that all perennial streams were in fact identified. In addition, they contend that PUSH is confusing intermittent and ephemeral streams with perennial streams.[11]

Assuming *arguendo* that PUSH is correct, the Board believes the evidence supports the Department's assertion that even these hypothetical streams are protected. This is because of the adequacy of the cover, the composition of the rock strata, and the shallow zone of groundwater circulation. Accordingly, all streams over the Subsidence Control Plan, whether perennial or otherwise, identified or omitted, are protected.

Potential Pollution to the Waters of the Commonwealth

One of the most important steps in the Department's review of a permit revision is its determination of whether there is any presumptive evidence of potential pollution to the waters of the Commonwealth, within the meaning of 25 Pa. Code § 86.37. An applicant for a coal mining permit (or in this case a permit revision) must demonstrate that the proposed mining will not cause any pollutional discharges. *See* 25 Pa. Code § 86.37(a)(3); *Harman Coal Company v. Department of Environmental Resources*, 384 A.2d 289, 291 (Pa. Cmwlth. 1987); *Rand Am, Inc. v. DEP*, 1997 EHB 351, 360; and *Hepburnia Coal Company v. DER*, 1992 EHB 1315, 1328. The Department,

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[11] Moreover, the Department's regulations do not require that the mining company list every stream and water resource within the permitted area. The regulations require that "representative" information be provided. *See Nottingham Network of Neighbors v. DEP*, 1996 EHB 4. Mr. Waite testified that the information in the permit application and otherwise available to the Department relating to surface water resources was more than sufficient to allow the Department to assess the likely effects Eighty-Four Mining Company's mining operations would have on the perennial streams. (N.T. 3111-3115)

in its review of Eighty-Four Mining Company's Permit Revision, was very much aware of its important constitutional and statutory responsibilities to ensure that the potential for any pollution to the waters of the Commonwealth does not exist. Ms. Kirwan found that there was "no presumptive evidence of potential pollution" to the waters of the Commonwealth. (N.T. 1102-1103)

Post-mining discharges usually occur when the post-mining pool is elevated or there exists sufficient hydraulic head to cause discharges. In this case: (1) the Pittsburgh coal seam mined by Eighty-Four Mining Company does not outcrop to the surface; (2) the elevation of the coal to be mined within the Permit Revision is actually lower than the elevation of any area of Mine 84 which was previously mined. It is also much lower than the final anticipated mine pool elevation of eight hundred feet; and (3) the mining will generally be downward along the syncline. Therefore, the potential for water accumulating in the mined out areas of the Permit Revision to move uphill and adversely affect the surface water is non-existent. (N.T. 1021-1022, 1033-1034, 1066-1072)

When the mining is completed in the area covered by the Permit Revision, water accumulating in the entries will be at the lowest point in the Mine. This water will be hundreds of feet below the ground, surrounded by thick barriers[12] of coal or gob on all sides, and literally miles from any point on the surface where the Pittsburgh seam outcrops. Moreover, due to the bowl shaped configuration of the coal, the nearest outcropping is at a higher elevation than the coal in the mine or the final mine pool elevation and separated from the mine by an anticline. (N.T. 1455-1456; Cmwlth. Ex. 3, Module 8.6(c)(4))

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[12] Barriers are portions of rock and coal which separate the mine from the surface, coal outcrops, other mines, or bodies of water. Barriers must be designed based upon site specific geologic and hydrologic information.

The 1995 Permit Revision will leave an unmined barrier and a fifty percent mining barrier around the community public water supplies. (N.T. 1080-1082; Cmwlth. Ex. 3, Modules 8.4(a)(1), 18.2(f)(96). This barrier will prevent any pollutional discharges to the public water supply.

PUSH incorrectly contends that the federal Clean Water Act is somehow relevant to the issue of how the coal mining company's mining operations might affect groundwater. The federal Clean Water Act does not regulate the effects of industrial activity on groundwater. *Kelly v. United States*, 618 F.Supp. 1103 (D.C. Mich. 1985) (the term "navigable waters" as used in the Clean Water Act does not include "groundwater.")

The Department correctly determined that the mining company's operations would not cause pollution to the shallow groundwater or otherwise cause any pollution which would create a nuisance, be harmful to the public welfare or wildlife, or otherwise adversely affect the uses of groundwater. (N.T. 1101) This determination is consistent with the definition of "pollution" in the state Clean Streams Law, 35 P.S. § 691.1. *See also* 25 Pa. Code § 93.2 (which states that the standards established by Chapter 93 are "based upon water *uses* which are to be protected").

The private wells and springs tap the shallow water bearing zones where the vast majority of the groundwater circulates. (N.T. 1060-1063, 3114-3116) This shallow water zone is isolated from the deep flow system where the mining will occur. Therefore, no pollutional impacts from the mining will affect the private water supplies.

Water in the deep flow area has high concentrations of sodium and high levels of dissolved solids. (N.T. 1440-1441, 3117-3119) However, water wells are not drilled to this depth. Moreover, there will be no discharges of this water. Although the mining will not improve the already poor quality of the small amount of water in this deep flow zone, it will not cause pollution

to the waters of the Commonwealth.

PUSH is mistaken in its argument that the Board's decision in *Oley Township v. DEP*, 1996 EHB 1098, mandates a different result. *Oley Township* involved the third-party appeal of a Safe Drinking Water Act permit issued to a water bottler for the construction of a well and the use of the well as a source of water for its bottling facility. 1996 EHB at 1100. The case concerned the effect the permitted activity would have upon surface waters. More importantly, the surface waters involved were not just any surface waters; but had been designated as exceptional value wetlands.

The Board remanded the case because the Department had failed to consider the effect of the proposed activity upon these exceptional value wetlands. In this case, the Department *specifically* considered the effect of the mining on the waters of the Commonwealth. The Board in *Oley Township* did not hold that "pollution" exists absent an adverse impact upon "uses" of the waters of the Commonwealth. Instead, we held that "any degradation which would adversely affect the existing uses of these water resources would violate the Clean Streams Law." 1996 EHB at 1117.[13]

PUSH's contention that the Board's holding in *Rand Am*, 1996 EHB 351, supports its position is misplaced.[14] The Board, in *Rand Am*, dismissed the coal mining company's appeal of the Department's refusal to issue a coal mining permit because the coal company failed to demonstrate that its underground mining operations would not result in pollution of discharges to

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[13] The Board's use of "would" in this opinion in stating that "any physical or biological alteration of water resources *would* constitute pollution" was inadvertently broader than the definition of "pollution" in the Clean Streams Law permits. The sentence should have read "may" constitute pollution.

[14] The same administrative law judge who presided over this hearing presided over the hearing in *Rand Am*.

the surface waters of the Commonwealth. Unlike this case, there was strong site specific evidence supporting this determination of the Department.

Dr. Milena Bucek, a hydrogeologist retained by PUSH, opined that the potential exists for post-mining discharges to cause pollution to the waters of the Commonwealth. After a careful review of Dr. Bucek's testimony, we find that PUSH has failed to meet its burden of proof and we accord her testimony little weight. In Pennsylvania, an expert must testify to a reasonable degree of certainty. *McMahon v. Young*, 276 A.2d 534 (Pa. 1971). (In cases where expert testimony is necessary, the expert must testify that her opinion is made with a reasonable degree of certainty.); *Duquesne Light Co. v. Woodland Hills School District*, 700 A.2d 1038 (Pa. Cmwlth. 1997) (While it is clear that an expert's opinion need not be based on an absolute certainty, an opinion based on mere possibilities is not competent evidence.) *Childers v. Power Line Equip. Rentals, Inc.*, 681 A.2d 201 (Pa. Super. 1996). The expert's testimony can not be about mere possibilities or conjecture. *Hoffman v. Brandywine Hospital*, 661 A.2d 397 (Pa. Super. 1995). In *Kravinsky v. Glover*, 396 A.2d 1349 (Pa. Super. 1979), the Superior Court found that an expert who used terms such as "very highly probable," "could have," and "possibly," did not meet the requisite standard. The Superior Court held that this testimony was too vague and constituted incompetent expert testimony. *Kravinsky*, 396 A.2d at 1356-1357.

A close review of Dr. Bucek's testimony reveals similar examples of impermissible vagueness.[15] She made such equivocal statements as: "water generated in Mine 84 may move toward points of discharge" (Ex. PUSH-M (Bucek Testimony) at 24); the Permit Revision

[15] Dr. Bucek's direct testimony was written, and therefore, she had the opportunity to conform her testimony to the applicable standard free from the tensions of a courtroom setting.

"suggest[s] that polluted water will remain in the deep mine" (*Id.* at 22); the Waynesburg syncline and the Pittsburgh coal cropline in the Monongahela River "may be another factor controlling the deep mine complex flooding levels" (*Id.* at 23); and that certain facts "suggest that deep mine entries will serve as regional discharge spillways." (*Id.* at 24) We, therefore, conclude that PUSH did not establish that there was any presumptive potential for pollution to the waters of the Commonwealth as a result of the approval of the Permit Revision.

Written Findings

25 Pa. Code § 86.37(a) requires that the Department make written findings concerning its review of various aspects of the Permit Revision. The Department's review of the application took many months and involved numerous Department personnel and resources. The process included the evaluation of thousands of pages contained in the Modules, the review of voluminous public comments and concerns, meetings with various public agencies and groups, and the review of additional materials submitted in response to multiple correction letters.[16] At the conclusion of this extensive process, the Department prepared written findings. (N.T. 117-119; Cmwlth. Ex. 2) These written findings were signed by Mr. Joseph Leone, Chief of the Department's Underground Mine Permit Section.

PUSH claims that the written findings are defective because one portion dealing with "potential pollution" does not precisely track the words of the regulation.

§ 86.37. Criteria for permit approval or denial.

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[16] "Correction letters" are sent by the Department to the coal mining company during the Department's review of the application. They usually set forth certain questions or deficiencies in the application including missing, incomplete, inadequate, or erroneous information. The coal company must adequately respond to the correction letters or risk denial of its application. Correction letters are an important part of the Department's review process.

> (a) A permit or revised permit application will not be approved unless the application affirmatively demonstrates and the Department finds, in writing, on the basis of the information in the application or from information otherwise available, which is documented in the approval, and made available to the applicant, 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 § 86.37(a).

Mr. Leone explained that he and the other Department reviewers interpret a provision in the written findings to mean the same thing as set forth in the above regulation. Indeed, despite PUSH's effort to charge that the Department applied a less stringent standard of review than that required by the regulations, the person who performed the hydrologic review, Ms. Laura Kirwan, testified without qualification that she applied the standard set forth in the regulations in performing her hydrologic review. (N.T. 1271) Both Ms. Kirwan and Mr. Leone, her supervisor, clearly understood that this was the standard.

PUSH erroneously cites *Forwardstown Concerned Citizens Coalition v. DER*, 1995 EHB 731, in arguing that the Department's failure to track the exact language of the regulations constitutes a violation that the findings be written. The Department's written findings here simply did not mirror the exact language found in the regulation. However, the Department conducted its review pursuant to the standard set forth in the regulations. Thus, PUSH's argument is without merit. If we adopted it, we would be exalting form over substance while ignoring the essence of the detailed and lawful permit review performed by the Department. This we decline to do.

Surface and Groundwater Mining Plans

The mining company is required to devise a plan for the monitoring of surface and groundwater in the Subsidence Plan area. The purpose of surface and groundwater monitoring is to assess whether or not mining has impacted either surface or groundwater. The evidence established that Eighty-Four Mining Company set forth an extensive monitoring plan. (N.T.1086-1088) Any changes in flow to the perennial streams caused by the mining company's operations would be readily observable by the monitoring stations set forth in the application. The mining company is required to review the surface water monitoring points on a quarterly basis. (N.T. 1090)

Dr. Bucek disagreed. She opined that the plan was defective. However, her criticisms of the plan were relatively minor and not persuasive. Moreover, Mr. Waite testified that the monitoring system was entirely sufficient. According to Mr. Waite, the wells are well-placed in a variety of topographic positions with an emphasis on placing those wells in the vicinity of higher density groundwater use and as close as possible to homes that have wells as their water supply "so that if they are impacted, we will have the baseline data to know what we are dealing with and direct us in correcting those." (N.T. 3132) Mr. Waite also believed the stream monitoring system to be sufficient to pinpoint any changes that might occur in stream flows.

We find Mr. Waite's testimony to be more credible than Dr. Bucek's. Mr. Waite has rich and varied experience in this field and his testimony reflected it. He has extensive and first-hand knowledge concerning most, if not all, of the longwall mines in the area. He did not sway from his opinions even under intense cross-examination by experienced counsel. On the other hand, Dr. Bucek has very limited experience regarding longwall (and underground) mining. Although this fact alone is not critical, her lack of experience did not seem to be offset by a corresponding

knowledge of the field. For example, Dr. Bucek testified that Act 54 amended the Surface Mining and Reclamation Act. (N.T. 1811) More importantly, Dr. Bucek seemed to be unaware of most of the site specific information available to Mr. Waite, Ms. Kirwan and Mr. Miller. At times she was visibly confused on the witness stand. (N. T. 1824-1829)

A careful review of the competing expert testimony leads us to the conclusion that the monitoring plan in the permit revision is in compliance with what the law requires.

Restoration or Replacement of Water Supplies

Act 54 provided, for the first time, for the restoration or replacement of water supplies affected by underground mining.

> **§ 1406.5a Restoration or replacement of water supplies affected by underground mining.**
>
> (a)(1) After the effective date of this section, any mine operator who, as a result of underground mining operations, affects a public or private water supply by contamination, diminution or interruption shall restore or replace the affected supply with an alternate source which adequately services in quantity and quality the premining uses of the supply or any reasonably foreseeable uses of the supply.

52 P.S. § 1406.5a.

Once an affected landowner notifies the mining company of the contamination, diminution, or interruption of a water supply the mining company must conduct a prompt investigation. Moreover, if the water user loses a significant portion of his water supply as a result of mining operations, the mining company is obligated to provide a temporary water supply within twenty-four hours. 52 P.S. § 1406.5b(a)(1) and (2). The Department has various duties and obligations under these new provisions, especially if the mining company does not restore the water supply or

provide an alternate source.

If the affected water supply can not be restored or an alternate permanent supply can not be provided within three years, the mine operator and the water user, through a written agreement, can agree to acceptable compensation for the loss of the water. If no agreement is reached, then the water user has the option of requiring the mine operator to: (1) purchase the property for a sum equal to its fair market value immediately prior to the time the water supply was affected; or (2) make a one-time payment equal to the difference between the property's fair market value immediately prior to the time the water supply was affected and at the time payment was made. 52 P.S. § 1406.5b(g)(1) and (2). These are important and substantive benefits to landowners that they did not enjoy before passage of Act 54.

The Mine Subsidence Act defines a permanent alternate water supply. It includes any well, spring, municipal water supply system or other supply approved by the Department. This permanent alternate water supply must be adequate in quantity, quality, and of reasonable cost to serve the premining uses of the affected water supply. 52 P. S. § 1406.5b(i).

PUSH contends that the Permit Revision is deficient because it violates the first sentence of the following subsection of Act 54.

> (j) The Department shall require an operator to describe how water supplies will be replaced. Nothing contained therein shall be construed as authorizing the Department to require a mine operator to provide a replacement water supply prior to mining as a condition of securing a permit to conduct underground coal mining.

52 P.S. § 1406.5b(j).

According to PUSH, Eighty-Four Mining Company failed to set forth in its application how it

would replace any affected water supplies. PUSH, in a letter brief filed with the Board on June 1, 1999, "invites the Board's attention" to the April 26, 1999 Commonwealth Court decision rendered in *Stoystown Borough Water Authority v. Department of Environmental Protection*, 729 A.2d 170, (Pa. Cmwlth. 1999).

Stoystown involved an appeal by the Stoystown Borough Water Authority (Authority) to a 1997 deep coal renewal permit issued to Solar Fuel Company (Solar Fuel). The Authority supplies water for approximately 450 residential and 12 business customers within Stoystown Borough. Three of these wells, which are between 260 to 302 feet deep, are adjacent to the mining company's deep mine operations.

The Authority appealed the Department's 1997 renewal of the permit to the Environmental Hearing Board. The Department filed a Motion for Summary Judgment. The Board granted the Motion. On appeal to the Commonwealth Court, the Authority argued that the Board erred in granting the Department's Motion because: (1) the 1997 permit application failed to comply with Act 54; and (2) there were genuine issues of material fact which were in dispute.

In its permit renewal application, Solar Fuel described how it intended to "replace" water supplies affected by underground mining as follows:

> In the event of a water interruption, diminution, or contamination, the operator will abide by the requirements of Act 54 as stated below. If any water losses or contamination occur within the 35 degree angle of assumption from mining that has been conducted since August 21, 1994 the Operator will provide one of the following within 24 hours:
>
> a temporary water supply to the complainant; or information documenting that the operator was denied access to the water supply to conduct a pre-mining or

> post-mining survey after following the notification requirements specified in Section 5.9(c); or information documenting that the supply is still adequate in quantity and quality to serve the pre-mining uses of the supply or any reasonably foreseeable uses of the supply.

The Commonwealth Court concluded that the application language quoted above did not "describe" how the mining company would attempt to "replace" water supplies adversely affected by its mining activities. Instead, Solar Fuel only stated that if its mining activities adversely affected a water supply, and it had previously not been denied access to prepare a pre-mining or post-mining survey, it would provide the landowner with a temporary supply of water. Solar Fuel did not set forth a specific description of how it would actively attempt to permanently replace an affected water supply. Therefore, the Commonwealth Court reversed and "remanded to the Board for further consideration and to take such action as the Board deems necessary to enforce the provisions of the [Mine Subsidence Act] consistent with the opinion of this Court."

In marked contrast to the application language at issue in *Stoystown*, the Permit Revision submitted by Eighty-Four Mining Company set forth a thorough, specific and detailed description of how it intended to comply with the requirements to replace water supplies affected by its mining operations. (Cmwlth. Ex. 3, Module 8) Unlike what was set forth in Solar Fuel's application, Eighty-Four Mining Company promised, in addition to providing an immediate temporary water supply within twenty-four hours of water loss, that if the water supply did not recover, then it would attempt to provide a permanent alternate water supply by: 1) deepening the existing well; 2) drilling a new well; 3) providing a connection to a public water supply system; or 4) entering into an amicable agreement with the water supply user pursuant to Sections 5.1-5.3 of the Mine Subsidence Act, 52 P.S. §§ 1406.5a, 1406.5b and 1406.5c. (N.T. 1082-1085; Cmwlth. Ex. 3,

Module 8.4(a)(1)) Furthermore, unlike the application in *Stoystown*, the Permit Application at issue here sets forth specific descriptions of the water supplies of various private water users and states specifically how the mining company will replace water supplies affected by mining operations. For example, the Permit Revision includes the following detailed description of the Olde Trails Tavern water supply and how it would be replaced.

> The Olde Trails Tavern water supply consists of a 3,590 gallon holding tank fed by a spring and serves the Tavern and the dwelling on the property. During the inventory it was reported that the spring does not go dry but the yield decreases seasonally. No site specific usage or yield is available at this time. DEP Division of Water Supplies documents indicate the volume of water used at the Tavern to be unknown. Conversations with local water haulers indicates that water is hauled to the Olde Trails Tavern on a seasonal basis. Mining is presently not projected under the Olde Trails Tavern property. Mining to the north and south of this property will not occur until the years 2000 to 2003. Further inquiry in advance of mining will be performed at the Olde Trails Tavern to determine the actual yield of the supply, and the volume of water used by the establishment. A protection zone is being established around the approximate recharge are of the spring until a replacement supply which adequately services in quantity and quality the pre-mining uses of the supply is documented. Refer to Attachment 8-14 for an explanation of how the protection zone was established. Eighty-Four Mining Company reserves the right to request revision of this protection zone consistent with applicable laws, rules and regulations or guidance documents. Alternate sources of supply to the Olde Trails Tavern in the event the primary source is disrupted by mining are as follows:
>
> Eighty-Four Mining Company will provide within 24 hours temporary potable water. Eighty-Four Mining Company will provide a water tank and fill it with potable water to support the needs of the Olde Trails Tavern until the primary water supply can be restored or

> developed. Bottled water may be supplied immediately as preparations are made to deliver and install the water tank.
>
> [Eighty-Four Mining Company will] drill a well as appropriate to provide the volume of water needed to support their usage.
>
> [Eighty-Four Mining Company will enter into an] amicable agreement with the surface owner as provided for under Sections 5.1, 5.2, and 5.3 of Act 54 of the Mine Subsidence Act.

(Cmwlth. Ex. 3; Module 8).

Moreover, the procedural posture of this Appeal is much different than *Stoystown*. The Board now has before it a full and complete record following an 18 day hearing with lengthy testimony, both factual and expert, on this issue. The Board finds relevant to the replacement issue the extensive factual record detailing that most of the water used by domestic water users circulates in the shallow groundwater zone. Both Ms. Kirwan and Mr. Waite testified that water in this shallow groundwater zone would not be diverted to the deep flow zone by Eighty-Four Mining Company's mining operations. (N.T. 1049-1055, 1064-1066, 1328-1329, 3116-3119; Cmwlth. Ex. 3) Mr. Waite's testimony concerning the minimal communication between the shallow groundwater zone and the deep flow system insures that there should be substantial water available in the shallow groundwater zone to tap for alternate replacement water supplies. (N.T. 3160-3161)

This factual record developed at the hearing confirms that Eighty-Four Mining Company's plans on how to provide replacement water supplies are sound and supported by the evidence. The record also shows that Eighty-Four Mining Company has responded promptly when private water supplies have been affected by its mining operations.

Eighty-Four Mining Company attempted to inventory all private water supply users by

door-to-door surveys. During these surveys questionnaires regarding water supplies were completed and water samples were taken. Furthermore, the mining company contacted Pennsylvania American Water Company who advised that "in general, our public water system is capable of serving the additional homes...." (Cmwlth. Ex. 3, Module 8-16)

Our review of the evidence leads us to the inescapable conclusion that the Permit Application prepared by the mining company and approved by the Department fully complies with the requirement imposed by Act 54 to state how affected water supplies will be replaced by Eighty-Four Mining Company.

Board's November 27, 1996 Orders

In its post-hearing briefs, Eighty-Four Mining Company and the Department assert that the Board should vacate its Orders of November 27, 1996. In the first of these Orders, the Board held that PUSH was not barred by the doctrine of administrative finality from challenging the impact of mining on utility lines in the Permit Revision area. *People United to Save Homes v. DEP*, 1996 EHB 1428, 1446-47. In the second Order, the Board granted partial summary judgment to Pennsylvania American Water Company. *People United to Save Homes v. DEP*, 1996 EHB 1411.

Prior to the issuance of the aforementioned Orders, the Board approved a Consent Adjudication which amended a condition in the Permit Revision dealing with mining beneath utilities. Both PUSH and Pennsylvania American Water Company filed appeals of the Consent Adjudication. These appeals were consolidated with all of the appeals of the Department's approval of the Permit Revision. It is Eighty-Four Mining Company's contention that neither party introduced any evidence or advanced any arguments concerning issues germane to the decision to modify the Permit Revision, and therefore, PUSH and Pennsylvania American Water Company are

precluded from pursuing challenges to the amended condition. It follows, argues Eighty-Four Mining Company, that the Board should vacate its November 27, 1996 Orders with respect to mining beneath utility lines, and specifically Pennsylvania American Water Company's waterline.

We disagree with Eighty-Four Mining Company for several reasons. First, our November 27, 1996 Orders were in no way affected or altered by the Consent Adjudication which modified the Permit Revision. As Eighty-Four Mining Company itself points out, our Orders were issued *after* the filing of the Consent Adjudication.

Second, while the Orders were interlocutory procedurally, the matters ruled upon therein were final. As a result, there was no reason for PUSH, or Pennsylvania American Water Company had it participated, to present evidence on these matters at the hearing or to re-argue them in their post-hearing brief. Both the Department, which earlier admitted all 45 paragraphs of the water company's Motion for Summary Judgment, and Eighty-Four Mining Company are simply trying to get a "second bite at the apple."

Third, we disagree with the contention that no evidence germane to the modified permit condition dealing with utilities was presented at the hearing. PUSH presented the testimony of Jeffrey Maze, Pennsylvania American Water Company's Operations Engineer, who testified extensively regarding the impact of mining on the company's 30-inch waterline and the company's efforts to maintain sevice to its customers during the mining. Indeed, this Adjudication contains numerous findings of fact based on Mr. Maze's testimony.

Although not fully relevant to the issue of vacating our earlier orders, no mention of Pennsylvania American Water Company's above ground 20-inch-by-pass waterline appears in the Permit Application. Neither the Department nor Eighty-Four Mining Company had any knowldege

of the by-pass line when the Department approved the Permit Revision. The Department is correct in stating that under our *de novo* power to review Department actions we can consider facts that occured after the Department's action. That is not the point. Pennsylvania American Water Company's 30-inch waterline was extensively damaged by mine subsidence. (N.T. 2375-2377, 2385) If Pennsylvania American Water Company had not installed the 20-inch-by-pass waterline, the destruction of the 30-inch waterline would have resulted in a loss of water to thousands of Pennsylvanians. Thus, the 20-inch-by-pass line was the critical component in the maintenance of vital water service to citizens of the Commonwealth and it *does not even appear* in the Subsidence Plan approved by the Department. The Board is cognizant of the need for the Department, mining company, and utilities to respond to problems encountered in the field. However, these problems are usually ones that arise after the permit stage and were not anticipated. This problem was anticipated and no solution was reached at the permit stage. The testimony at this hearing revealed that the intent of the Department is to address problems such as this one at the permit stage. That is one of the reasons the Department's procedures and review at this stage are so thorough.

Finally, the Department is incorrect in its assertion that our failure to vacate our earlier Orders has expanded the protections afforded utilities under the Mine Subsidence Act and the Department's regulations. Our ruling concerning Pennsylvania American Water Company was based on the unique circumstances and facts set forth in the opinion including the Department's admission of all forty-five heavily-laden factual paragraphs of the water company's Motion for Summary Judgment. As stated in the mining company's post-hearing brief (albeit in a different context), "the sky is not falling." *See Wheeling and Lake Erie Railway v. DEP*, EHB Docket No. 97-252-R (Opinion issued May 26, 1999).

We, therefore, find no basis for re-opening or vacating our Orders of November 27, 1996.

Evidentiary Rulings

PUSH contends that the Board erred in ruling on evidentiary objections at the hearing of this Appeal. Unfortunately, except for two instances, PUSH does not cite to the transcript or even identify the specific Board rulings it believes to be in error. Instead it incorporates these objections "by reference as if fully set forth." (Appellant's Post Hearing Brief, p. 164)

There were several hundred evidentiary rulings[17] made by the Board during the course of this lengthy hearing. Although a review and discussion of each of the Board's rulings on objections might be an interesting academic exercise, the Board is not inclined to painstakingly discuss each of its individual rulings.

If counsel wish to raise an objection to an evidentiary ruling for post-hearing review by the

---

[17] One such evidentiary ruling was rendered by the Board during the cross-examination of Dr. Peng:

Attorney Ging:	Professor, you would agree, would you not, that one way of protecting a home would be to leave coal beneath the home?
Attorney Reed:	Objection. Asked and answered.
Judge Renwand:	Is this a setup for another question? I mean is this a segue?
Attorney Ging:	Your Honor, I don't do the boogaloo. I don't do the bunny hop and I don't segue.
Judge Renwand:	All right. I will sustain the objection then.
Attorney Ging:	Thank you, your Honor.

(N.T. 3075-3076).

Board, then they need to specifically identify it in their post-hearing brief. This requires counsel to cite the specific page number in the transcript where they raised the objection. Counsel then need to set forth their legal argument with any appropriate citations to legal precedent that support their argument. This is the only meaningful way that the Board can intelligently review such issues.

PUSH argues very generally that the Board erred by limiting the testimony of its expert witness, Dr. Bucek. It then cites to several pages of the trial transcript without any explanation or amplification. PUSH also claims that the Board did not so limit the testimony of Ms. Kirwan of the Department.

It should first be noted that Dr. Bucek's direct testimony was entirely written. The Board allowed the Appellant to submit its expert's direct testimony in this fashion over the strenuous objections of counsel for the mining company. The Board also overruled various objections of opposing counsel to the direct testimony and redirect testimony of Dr. Bucek.

A review of the pages cited by Appellant shows that the Board did not unfairly limit Dr. Bucek's testimony. This is clear by a review of some of the pages cited by PUSH for the proposition that counsel for Eighty-Four Mining Company unfairly interrupted Dr. Bucek's answers:

Attorney Ingram:	Dr. Bucek, do you have a copy of your written testimony in front of you?
Dr. Bucek:	Yes, I do.
Attorney Ingram:	I think it is PUSH Exhibit M. Now, who prepared the text?
Dr. Bucek:	I wrote it. Are you talking about my testimony,

my written testimony?

Attorney Ingram: Yes.

Dr. Bucek: I signed it. I wrote it.

Attorney Ingram: It was not prepared by somebody else for you and then you read through it and signed it?

Dr. Bucek: No.

Attorney Ingram: Now, at various locations in your written testimony, you refer to violations of various sections of the regulations, is that correct?

Dr. Bucek: Can you tell me, for example?

Attorney Ingram: Certainly. For example, on Page 4, you talk about a violation there. And I believe in other portions of your testimony, you talk about violations of the regulations, but there is an example of one.

Dr. Bucek: Okay, on Page 4 --

Attorney Ingram: Yes.

Dr. Bucek: I am saying the ---

Attorney Ingram: I understand that, but you do talk about violations of the regulations, is that correct? On Page 4, in the answer to the question on Line 1, you talk about violations of Section 89.34(a), is that correct?

Attorney Ging: Your Honor, may it please the Board. Mr. Ingram has continually cut the witness off during her testimony and not allowed her to explain her answers. The Board was very generous with allowing other witnesses in this case to explain their answers. I would ask that when he asks a question, she be permitted to give her entire answer.

Judge Renwand: Mr. Ging, the witness will be allowed to give her

entire answer, but there is a difference between giving her entire answer and adding some things that are not responsive to the question. Once in awhile Dr. Bucek seems to do the latter. I will look at each individual question, but you do not have to remind me that the Board was very generous to other witnesses, because I do not think the Board was that generous to other witnesses.

Attorney Ging: Thank you, your Honor.

Attorney Ingram: Now, Dr. Bucek, do you agree with me that beginning on Line 1 on Page 4 of your testimony, you state that DEP violated 25 Pa. Code Section 89.34(a)?

Dr. Bucek: Yes, I am saying that.

Attorney Ingram: Now, Dr. Bucek, in connection with your activities in your profession, have you had occasion, for example, to read the decisions of the Environmental Hearing Board that interpret sections of the regulations, such as Section 89.34?

Dr. Bucek: I have read quite a few opinions on cases that are relevant to this. But I cannot tell you whether they were in particular relating to that code.

(N.T. 1806-1809).

Dr. Bucek was PUSH's expert and she was being cross-examined by experienced counsel. One of the marks of good cross-examination is to ask questions in such a manner so that the witness is responding to specific questions. Counsel, in such situations, attempt to elicit short narrow answers. The expert witness, in the same situation, typically wants to answer more broadly and explain her answers. A witness, under proper circumstances, can explain her answer. However, upon proper objection, the Board has a duty to strike nonresponsive answers or answers

beyond the fair scope of the question. This is simply what the Board did in this case. Accordingly, we find no error.

Conclusion

We shall enter an Order dismissing all of PUSH's objections, except the objection dealing with the adequacy of the subsidence bond. We will not revoke the permit, but will remand the matter to the Department in order that it may calculate a reasonable subsidence bond as set forth in this opinion. As a condition of further mining, we will require the permittee to post a bond in the amount so calculated by the Department within 120 days of the date of our Order. *Pequea Township v. Herr*, 716 A.2d 678, 698 (Pa. Cmwlth. 1998).

Therefore, we make the following:

IV. CONCLUSIONS OF LAW

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

2. PUSH has the burden of proving that the Department's issuance of the 1995 Permit Revision was an abuse of discretion. 25 Pa. Code § 1021.101(c)(3).

3. The doctrine of administrative finality bars PUSH from appealing any matter which could have been raised in an earlier appeal. *Reading Anthracite Co. v. DEP*, 1998 EHB 112; *aff'd* No. 2188 C.D. 1998 (Pa. Cmwlth. filed May 11, 1999).

4. The Department's interpretation of its regulations is entitled to great weight unless clearly erroneous. *Hatchard v. Department of Environmental Resources*, 612 A.2d 621 (Pa. Cmwlth. 1992).

5. The Board is not bound by the Department's interpretation of its regulations where that interpretation is inconsistent with the underlying statute. *DER v. Franklin Plastics Corp.*, 1996

EHB 645, *aff'd*, No. 2046 C.D. 1996 (Pa. Cmwlth. filed April 7, 1997).

6. Where the Board finds that the Department has abused its discretion based on the evidence at hearing, the Board may properly substitute its discretion for that of the Department. *Pequea Twp. v. Herr*, 716 A.2d 678, 698 (Pa. Cmwlth. 1998); *Warren Sand & Gravel Co. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975).

7. Any issue on which PUSH failed to present evidence at the hearing or argue in its post-hearing brief is waived. *T.R.A.S.H. v. DER*, 1989 EHB 487.

8. The Department's approval of a subsidence bond in this matter in the amount of $10,000 was arbitrary and capricious and an abuse of its discretion.

9. The Permit Revision properly provides for the protection of historic and archeological sites, as required by the Mine Subsidence Act and the regulations.

10. The National Road Heritage Park is not a park entitling it to protection pursuant to 25 Pa. Code § 89.38. Therefore, there was no abuse of discretion on the part of the Department in not requiring Eighty-Four Mining Company to identify the Heritage Park in its Permit Revision.

11. The Department properly conducted a compliance review, as required by 52 P.S. § 1406.5(f) and 25 Pa. Code § 87.37(a)(8).

12. The Department properly determined that perennial streams are adequately protected from mining operations, in accordance with 25 Pa. Code §§ 89.35, 89.36.

13. The Department properly concluded that there is no presumptive evidence of potential pollution to waters of the Commonwealth, in accordance with 25 Pa. Code § 86.37(a)(3).

14. In Pennsylvania an expert's testimony must be to a reasonably degree of scientific certainty. *McMahon v. Young*, 276 A.2d 534 (Pa. 1971). An opinion based on mere possibilities is not

competent evidence. *Duquesne Light Co. v. Woodland Hills School District*, 700 A.2d 1038 (Pa. Cmwlth. 1997).

15. The testimony of Dr. Bucek regarding potential pollution did not meet the requisite standard of reasonable certainty.

16. Although the Department's written findings regarding its review of the permit application did not track the exact language of the regulations, the evidence nonetheless indicates that the Department conducted its review in accordance with the standard set forth in the regulations.

17. The Department did not abuse its discretion in approving Eighty-Four Mining Company's surface and groundwater monitoring plan.

18. The Permit Revision complies with 52 P.S. § 1406.5b(j), by setting forth how Eighty-Four Mining Company will replace any affected water supplies in accordance with 52 P.S. § 1406.5a(a)(1).

19. Section 5(e) of the Mine Subsidence Act, 52 P.S. § 1406.5(e), applies to homes.

20. The coal company should strive to prevent subsidence causing material damage to homes to the extent technologically and economically feasible. If longwall mining would result in irreparable damage to homes, then the Department *can* prohibit the mining. 52 P. S. § 1406.9a(b).

21. Section 5(e) does not prohibit subsidence in a predictable and controlled manner.

22. The Department's application of the Mine Subsidence Act, including the Act 54 Amendments, does not constitute a taking.

23. The Department and Eighty-Four Mining Company have demonstrated no basis for re-opening or vacating the Board's Orders of November 27, 1996.

24. If a party wishes to preserve objections made at hearing to evidentiary rulings of the

Administrative Law Judge, it may not merely incorporate the objections by general reference in its post-hearing brief. Rather, the party must cite to specific pages in the transcript and must cite to any relevant legal precedent in its discussion of the issues.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PEOPLE UNITED TO SAVE HOMES and PENNSYLVANIA AMERICAN WATER COMPANY	:	
v.	:	**EHB Docket No. 95-232-R (Consolidated with 95-233-R 96-223-R and 96-226-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY, Permittee and INTERNATIONAL UNION UNITED MINE WORKERS OF AMERICA AND DISTRICT 2 UNITED MINE WORKERS OF AMERICA, Intervenors	:	

ORDER

AND NOW, this 2nd day of July, 1999, PUSH's appeal is sustained with regard to the issue of the adequacy of the subsidence bond approved by the Department. This matter is remanded to the Department to calculate an appropriate subsidence bond in accordance with the applicable provisions of the Mine Subsidence Act and the regulations, as set forth in our opinion. As a condition of further mining, Eighty-Four Mining Company must file a bond in the amount so calculated by the Department within 120 days of the date of this Order. PUSH's appeal is dismissed with regard to all remaining issues.

ENVIRONMENTAL HEARING BOARD

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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

DATED: July 2, 1999

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

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 97-099-L (Consolidated with 98-169-L and 98-078-CP-L)**
WHITEMARSH DISPOSAL CORPORATION, INC. and DAVID S. MILLER	:	**Issued: July 7, 1999**

OPINION AND ORDER
ON MOTION TO DISQUALIFY COUNSEL
AND DISMISS APPEALS

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

Synopsis:

Although the Board has the authority to disqualify a lawyer from acting as an advocate in a matter where the lawyer is likely to be called as a witness, the Board declines to exercise that authority in this case considering the limited degree of prejudice the opposing party may suffer, the hardship it would cause the lawyer's clients, and judicial economy.

OPINION

Background

In the midst of protracted discovery, counsel for the appellants in this matter, Whitemarsh Disposal Corporation, Inc. ("Whitemarsh") and David Miller, filed a motion to withdraw. We granted that motion. We then sent a letter to Whitemarsh, a corporation, directing it to secure legal counsel as required by Section 1021.22(a) of the Board's Rules of Practice and Procedure, 25 Pa.

Code § 1021.22(a) (a corporation must be represented by an attorney in actions before the Board). When Whitemarsh failed to secure legal representation the Board issued a rule to show cause why Whitemarsh's appeal should not be dismissed.

Mitchell W. Miller, ("Attorney Miller") of the law firm of Miller, Turetsky, Rule & McLennan entered an appearance on behalf of Whitemarsh and David Miller, his son, on May 5, 1999. The Department has filed a motion to disqualify counsel asserting that Attorney Miller's entry of appearance is defective. The Department states that it subpoenaed, deposed, and identified Attorney Miller as a potential witness in the present appeals. Due to Attorney Miller's affiliation with Whitemarsh, along with his knowledge that he would likely be called as witness in this matter, the Department contends that Attorney Miller's entry of appearance is invalid. The Department argues that Whitemarsh's appeal should be dismissed for failure to properly respond to the rule to show cause.

Discussion

The Department's motion to disqualify is based primarily upon Rules 1.7 and 3.7 of the Pennsylvania Rules of Professional Conduct. The Department assumes that this Board has the authority to enforce those rules in the context of appeals that are filed before it. The appellants also do not question our authority.

The "Scope" section of the preamble to the Rules of Professional Conduct instructs as follows:

> The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct **through disciplinary agencies.** They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing counsel as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer

> **under the administration of a disciplinary authority**, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the **extra-disciplinary consequences** for violating such a duty. (Emphases added.)

Notwithstanding this language, Pennsylvania courts have never hesitated to enforce the rules when they are necessarily implicated in a particular case. *See, e.g., Commonwealth v. Gibson*, 670 A.2d 680, 683 (Pa. Super. 1996) (court may order attorney to withdraw if he is to appear as witness). Similarly, we conclude that the Board has the authority to disqualify counsel in a particular case, not for purposes of imposing discipline or even necessarily for purposes of protecting the interests of a represented party, but rather, for purposes of protecting the interests of the opposing party and ensuring the orderly and just conduct and disposition of proceedings that are before it.

Turning to the merits of the Department's motion, Pa. R.P.C. 3.7 provides that a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except in limited, defined circumstances. "Ordinarily . . . the appearance of an attorney as both advocate and witness at trial is considered highly indecent and unprofessional conduct to be avoided by counsel and to be strongly discountenanced by colleagues and the courts." *Commonwealth v. Willis*, 552 A.2d 682, 695-96 (Pa. Super. 1988). On the other hand, we are loath to interfere with a party's choice of counsel, no matter how ill-advised it may appear to be.

The Official Comment to Rule 3.7 indicates that the key to determining whether to interfere with an attorney-client relationship in the context of a particular case is whether there **the opposing party** will be prejudiced:

> Combining the roles of advocate and witness can prejudice the opposing party and can involve a conflict of interest between the

> lawyer and client.
>
> The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation.

In other words, it is not the Department's place to protect the interests of the appellants. The key is whether **the Department** will be prejudiced if Attorney Mitchell is allowed to continue as counsel.

In determining whether the Department will be prejudiced, as in many other areas, we must perform a balancing test:

> [Rule 3.7] recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the possibility that the testimony will conflict with that of other witnesses. Even if there is a risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client.

Official Comment to Pa. R.P.C. 3.7.

The Official Comment directs us to look at the importance of the lawyer's testimony. The Department asserts that Attorney Miller has personal knowledge regarding financial issues, the legal relationship of the various persons and entities connected to the sewer plant in question, and details concerning the purchase of the plant. The appellants respond that these issues are undisputed, irrelevant, or at least collateral. Although we have an insufficient basis for ruling on the importance or relevance of these matters in the context of this motion, and we otherwise have little to go on at this juncture in the appeal, we do not have the sense that Attorney Miller is likely to be a central witness. It is telling that the Department in its brief never states that **it** intends to call Mr. Miller as

a witness, or that Mr. Millers's testimony is unique, or that the testimony is essential **to the Department.** At least for now, we are persuaded by the appellants' assertion that Attorney Miller's personal knowledge as a potential witness relates to matters that are somewhat collateral to the central issues in the case.

With regard to the nature of the case, this is an administrative proceeding. No jury is involved. Unlike most of the cases cited in the Department's brief, this is not a criminal matter where constitutional concerns relating to effective counsel are implicated. Furthermore, we have considerable flexibility in conducting hearings to ameliorate the potentially harmful effect of Attorney Miller's dual role. For example, the appellants have suggested that "separate or special counsel could enter an appearance solely for the purpose of representation during the very limited period of time that Attorney Miller would be on the stand; or, simply by waiver of the right to cross-examination by [the appellants]." (Brief, p.22.) We may very well hold the appellants to this suggestion.

With regard to the other side of the equation - - the interest of the appellants - - the appellants' prior counsel withdrew from representation in this appeal with the Board's permission because he was not being paid. Attorney Miller has represented that he has tried unsuccessfully to find other counsel for the appellants. In other words, to put it quite simply, if we were to grant the Department's motion, the appellants might be left with no counsel at all, which would then necessitate a dismissal of the corporate appellant's appeal.

Finally, although prejudice to the opposing party is the key factor, the effect of a forced disqualification upon the orderly progression of the litigation is also important. Here, Attorney Miller's involvement has actually helped advance a matter that has been mired in prehearing

maneuvering and discovery wrangling for too long. The disqualification of Attorney Miller would only lead to further delay in these already drawn out proceedings.

The interests of an opposing party are even more remote when it comes to Pa. R.P.C. 1.7, which prohibits conflicts of interest. The Official Comment to that rule provides:

> Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

For the reasons discussed in connection with Rule 3.7 above, we do not believe based on the current record that Attorney Miller's involvement "clearly calls in question the fair and efficient administration of justice."

Although we are denying the Department's motion, we are not unsympathetic to its concerns. We urge Attorney Miller to continue his search for alternate trial counsel. More importantly, if specific problems do arise as a result of Attorney Miller's assumption of the roles of advocate and witness, we reserve our right to exercise judicial discretion in the interest of fairness to address those issues as they arise. The appellants are warned that some limitations and controls may be placed on procedural rights that they might otherwise have, and they assume the risk of going forward on that basis.

COMMONWEALTH OF PENNSYLVANIA

EVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 97-099-L (Consolidated with 98-169-L and 98-078-CP-L)**
WHITEMARSH DISPOSAL CORPORATION, INC. and DAVID S. MILLER	:	

ORDER

AND NOW, this day of 7th July, 1999, the Department's motion to disqualify counsel and dismiss pending appeals is DENIED.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: July 7, 1999

See next page for a service list.

EHB Docket No. 97-099-L
(Consolidated with 98-169-L and
98-078-CP-L

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

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

BRUSH WELLMAN, INC.	:	
	:	
v.	:	**EHB Docket No. 98-131-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 7, 1999**

OPINION AND ORDER ON MOTION TO COMPEL

By George J. Miller, Administrative Law Judge

Synopsis:

The Appellant's motion to compel answers to interrogatories is granted in part and denied in part. The motion is granted for interrogatories which seek the sources of the Department's authority for determinations it made during the process of issuing a permit. The motion is denied for interrogatories which require the Department to assume the truth of many facts resulting in a hypothetical question. The motion is also denied where it seeks to require the Department to provide a specific statutory citation to an interrogatory.

OPINION

Before the Board is a motion to compel answers to interrogatories by Brush Wellman, Inc. (Appellant). The Appellant generally seeks answers to interrogatories that the Department of Environmental Protection objected to on the basis of attorney work-product. The Board recently issued an opinion which denied a motion to compel answers

to interrogatories by the Department. As part of that opinion we included a detailed recitation of the factual background of this case, and we will not repeat it here. *Brush Wellman, Inc. v. DEP*, EHB Docket No. 98-131-MG (Opinion issued June 4, 1999).

The Appellant posed a series of interrogatories to the Department which generally sought the Department's legal position given a set of "facts" related to the Department's issuance of an NPDES permit regulating waste water discharges from the Appellant's facility. The Department objected to these interrogatories because they "request the mental impressions, conclusions, opinions, legal research or legal theories" of Department counsel. The Appellant counters that the interrogatories are properly posed "contention" interrogatories seeking the Department's source of authority under certain factual circumstances to which the Department must respond pursuant to the Board's decision in *Willowbrook Mining Co. v. DER*, 1991 EHB 376.

Rule 4003.1(c) of the Pennsylvania Rules of Civil Procedure provides that: "[e]xcept as otherwise provided by these rules, it is not a ground for objection that the information sought [by discovery] involves an opinion or contention that relates to a fact or the application of law to fact." Pa. R.C.P. No. 4003.1(c). While the Board did not apply this specific rule in *Willowbrook Mining Co. v. DER*, 1991 EHB 376, we held that the Department can not refuse to answer interrogatories on the basis of attorney work product where the questions posed seek the Department's source of authority for decisions made in the permitting process even where Department counsel was involved in those decisions. The Board noted that in rendering decisions in the permitting process, the role of counsel and the role of the client cannot be separated. Therefore the Board refused to create a rule which would bar discovery of the Department's decisionmaking

process. The Board further held that where the current "theory of the case" in an appeal is the same as the legal position the Department took in acting on the permit, the Department cannot assert a privilege to avoid answering interrogatories.

We turn, then, to our consideration of the interrogatories which are the subject of the Appellant's motion to compel.

The Department objected to Interrogatory Nos. 17, 18, 19, and 20, 22, 23 and 24 on the basis of attorney work product. In its response to the motion to compel the Department contends that these interrogatories went beyond asking for the sources of departmental authority to act in the permitting process, but effectively posed hypothetical questions by requiring it to assume the truth of facts asserted by the Appellant in its question. We note that even though the Department objected, it nevertheless provided answers to these interrogatories.

We will deny the Appellants motion to compel answers to Interrogatory Nos. 18 and 22. Both of these questions require the Department to assume a long list of "facts" which it may or may not agree are true. At this early stage of discovery, the interrogatories as posed require the Department to essentially answer hypothetical questions. *See Kendrick v. Sullivan,* 125 F.R.D. 1 (D.D.C. 1989) (interpreting the analagous federal rule of civil procedure to require that facts be established by the record before an opposing party can be required to provide legal opinions or contentions related to those facts). Once the basis for the facts posed in the questions can be provided by citation to the depositions, answers to other interrogatories, admissions, affidavits or expert reports, these interrogatories, if properly phrased, may be permissible discovery. Cf. Pa. R.C.P. No. 1035.1 (defining record).

We will also deny the Appellant's motion to compel a more specific answer to Interrogatory No. 21. The Department did not object to this interrogatory even though it is in a style similar to Interrogatory Nos. 18 and 22, inasmuch as it asks the Department to provide a legal opinion for a set of "facts" provided by the Appellant. The Appellant argues that the Department's answer is not sufficiently specific because it does not provide specific statutory or regulatory citations. We find that the Department provided an answer which sufficiently states the source of its position and provides a list of documents which it believes support its contentions concerning its authority to issue the permit.

We will grant the Appellant's motion to compel answers to Interrogatory Nos. 17, 19, 20, 23 and 24. Those interrogatories seek the Department's position concerning its authority to impose effluent limitations in NPDES permits to protect groundwater quality, specify drinking water standards as effluent limitations to protect groundwater, its non-discretionary duty to impose such standards, the authority to order construction of a pipeline over property that the Appellant does not own or have a right of access to, and the authority to order a property owner to grant access to the Appellant to build the pipeline. Each of these questions is a straightforward application of the law to the facts of the case. Certainly these matters would have been considered by departmental employees when making the decisions surrounding the terms of the permit or are part of the factual background of the appeal. *See Willowbrook.* We have reviewed the Department's answers to these interrogatories and find them to be adequate.

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRUSH WELLMAN, INC.	:	
	:	
v.	:	**EHB Docket No. 98-131-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 7th day of July, 1999, Brush Wellman, Inc.'s motion to compel answers to its First Set of Interrogatories in the above-captioned matter is hereby **GRANTED** as to Interrogatory Nos. 17, 19, 20, 23 and 24, consistent with the foregoing opinion. The motion to compel is **DENIED** as to Interrogatory Nos. 18, 21 and 22.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: **July 7, 1999**

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

For the Commonwealth, DEP:
Gary L. Hepford, Esquire
South Central Region

For Appellant:
John W. Ubinger, Jr., Esquire
JONES, DAY, REAVIS & POGUE
Pittsburgh, PA

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

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	:	**Issued: July 16, 1999**

OPINION AND ORDER ON MOTION TO TERMINATE STAY AND TO SUSTAIN APPEAL

By George J. Miller, Administrative Law Judge

Synopsis:

The Board denies a motion to terminate the stay and sustain an appeal of a solid waste permit. The permit is currently suspended by the Department, a decision which we upheld in a previous adjudication which is now on appeal before the Commonwealth Court. The appellants have failed to demonstrate that our factual determination that certain wetlands were exceptional value and that the landfill needed to be redesigned is *res judicata* on the question of whether the Department should have been aware of the presence of these wetlands when it issued the solid waste permit. Also, granting the appellants' motion does not serve judicial economy or avoid duplicitous litigation.

OPINION

Before the Board is a motion by the Jefferson County Commissioners, the Jefferson County Solid Waste Authority, and certain individuals (collectively,

Appellants) to terminate a stay of proceedings entered in this case and to sustain its appeal of a solid waste permit.

The relevant facts are as follows. On February 9, 1996, the Department issued a series of permits including a solid waste permit, an encroachment permit, an air plan approval and an NPDES permit, to Eagle Environmental, L.P. (Permittee) for the operation of a solid waste landfill in Washington Township, Jefferson County, Pennsylvania, known as the Happy Landings Landfill. The Appellants filed a timely appeal from the issuance of the solid waste permit, contending, among other things, that the Department had abused its discretion in issuing the permit because the application failed to adequately evaluate the nature and extent of wetlands on the site. Specifically, the Appellants contended that the "Department failed to investigate and confirm the full extent of wetland resources and the impact of the facility on those resources, including wetland resources which . . . are more extensive and 'of higher quality than represented by the application.'" (Appellants' Motion ¶ 8 (quoting Notice of Appeal ¶ 31)).

During the pendancy of this appeal, in the summer and fall of 1996, the Department discovered that the Pennsylvania Fish and Boat Commission believed that several streams in the area were wild trout streams and therefore some of the wetland areas where the Permittee intended to build disposal cells were exceptional value wetlands. On September 25, 1996, the Department issued an order which suspended the solid waste permit in order to give the Permittee the opportunity to redesign the landfill to avoid encroachment upon the wetland areas.[1] This order was appealed by the Permittee and docketed by the Board at EHB Docket No. 96-215-MG.

[1] The other permits which had been issued for the construction of the landfill were also suspended or revoked.

After consultation with the parties, on January 22, 1997, the Board entered a joint case management order which stayed the Appellants' appeal of the issuance of the solid waste permit. The appeal of the permit suspension moved forward and on September 3, 1998, the Board issued an adjudication which found that the Department had appropriately suspended the solid waste permit based on information obtained during stream surveys conducted during the summer and fall of 1996. *Eagle Environmental, L.P. v. DEP*, 1998 EHB 896. That adjudication was appealed by the Permittee to the Commonwealth Court which has not yet rendered a decision.[2]

The Appellants seek to terminate the stay of their appeal of the issuance of the solid waste permit and for the Board to sustain their appeal, arguing that the Board's September adjudication was determinative of the question of whether the information in the Permittee's permit application appropriately represented the status of the wetlands on the site because the Board concluded that due to the presence of wild brook trout in area streams, two wetland areas qualified as exceptional value wetlands. Therefore, the appellants argue, applying the doctrine of *res judicata* to the present appeal, the Permittee can not build the landfill as proposed in the permit, the permit should be revoked.

The Appellants' motion to sustain its appeal is in the nature of summary judgment, and we will treat it as such. Summary judgment is only appropriate where the depositions, answers to interrogatories, admissions of record and 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. No. 1035.2; *County of Adams v. Department*

[2] The appeal was docketed at 2704 C.D. 1998. The Permittee has informed the Board that the Court is scheduled to hear oral argument in the matter in November, 1999. (Permittee Surreply at 5).

of Environmental Protection, 687 A.2d 1222 (Pa.Cmwlth. 1997). The Board will only enter judgment in favor of a moving party in those cases where the right to judgment is clear and free from doubt. *Martin v. Sun Pipe Line Company*, 666 A.2d 637 (Pa. 1995). We will view the record in the light most favorable to the nonmoving party and resolve all doubts as to the existence of a material fact against the moving party. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995). For the reasons that follow, we will not enter judgment in favor of the Appellants.

The Appellants first argue that we must sustain their appeal because the Permittee has made no effort to submit a new landfill design to the Department for its approval, and under our recent decision in *Chestnut Ridge Conservancy v. DEP*, 1998 EHB 217, the permit should be revoked. We disagree.

In *Chestnut Ridge* we held that the Department erred in issuing a noncoal surface mining permit when the permittee failed to demonstrate that it could legally access its mine site as required by the Department's regulations. We declined to remand the permit to the Department because the permittee had failed to secure a judgment in its favor concerning a property dispute involving the access road in two actions before the court of common pleas. Moreover, the permittee had been granted a nine-month stay after the Board had conducted a hearing and was prepared to issue an adjudication in the matter. Given those circumstances, the Board observed that there did not seem to be a resolution to the property issue in the foreseeable future and concluded that a remand would serve no purpose.

We do not believe that *Chestnut Ridge* requires us to sustain the Appellants' appeal simply because the Permittee has not resubmitted a new landfill design.

Obviously, the Permittee has not gone to the considerable expense to do so first because of its appeal before the Board, and later because of its appeal pending in the Commonwealth Court. We do not believe that either of these appeals was frivolous or intended solely to protract litigation. Although the Permittee failed to prove that the Department erred in suspending its solid waste permit before the Board, the Commonwealth Court may reach a different result in the foreseeable future.

The Appellants next argue that the doctrine of *res judicata* requires us to sustain their appeal. We do not believe that our factual conclusions in the *Eagle Environmental* adjudication are necessarily determinative of the appeal of the issuance of the permit.

Res judicata is a judicially created doctrine which precludes parties from relitigating matters which have already been decided. *Eastern Consolidation and Distribution Services, Inc. v. DEP*, EHB Docket No. 94-200-C (Adjudication issued May 27, 1999). Whether applied as a doctrine of issue preclusion (collateral estoppel) or claim preclusion, the facts or claims must be identical in order for the principle to apply. *Id.; see also Patel v. Workmens Compensation Appeal Board (Sauquoit Fibers Co.),* 448 A.2d 1177 (Pa. Cmwlth. 1985).[3]

We do not believe that the wetlands issue in the appeal of the permit is identical to the wetlands issue we resolved in the appeal of the suspension of the permit. The question in the suspension hearing was whether the Department abused its discretion by suspending the solid waste permit based upon the evidence acquired in July and September, 1996, *after* the permit was initially issued, which led to the conclusion that

[3] The fact that the permit suspension is on appeal to the Commonwealth Court has not precluded the Board from applying these doctrines. *Shafer v. Smith,* 673 A.2d 872 (Pa. 1996); *Yonkers v. Donora Borough,* 702 A.2d 618 (Pa. Cmwlth. 1997).

certain wetlands were exceptional value wetlands and could not be filled. This is a slightly different question than the one we would answer concerning the issuance of the permit in the first instance. There we would need to determine whether the permit application was so defective that the Department was on notice that there was a question concerning the status of the wetlands and failed to conduct an appropriate investigation. We have heard no evidence concerning the execution of any duty of the Department and the Permittee to investigate the extent and quality of the wetlands in a solid waste permit application. It may very well be that both the Department and the Permittee made a reasonable and adequate investigation, to determine whether or not exceptional value wetlands would have to be filled because of the characteristics of nearby streams. In that event, the Board might reasonably find that the Department acted properly in issuing the permit. *Compare North Pocono Taxpayer Ass'n v. DEP*, 1994 EHB 449 (events which occurred after the issuance of a permit do not demonstrate that the Department abused its discretion in issuing the permit), *with Oley v. DEP*, 1996 EHB 1058 (holding that the Department abused its discretion in ignoring the presence of wetland indicators when it issued a Safe Drinking Water Act permit where there were obvious indications of the presence of wetlands). The Board did not reach the question on this issue in the hearing on the permit suspension. Indeed, the Board declined to hear evidence concerning the Permittee's alleged mischaracterization of the wetlands in the permit application.[4]

The legal arguments notwithstanding, we fail to see how sustaining the Appellants' appeal serves the efficient administration of justice and avoids duplicitous

[4] The Permittee implies that by approving the Department's suspension of the solid waste permit rather than requiring that permit to be revoked, the Board somehow settled the wetlands question in the appeal of the issuance of the solid waste permit. As explained above, our decision concerning the propriety of the

litigation. The Department has remedied the wetland question by suspending the solid waste permit pending submission of a modified design which will avoid encroachment on the exceptional value wetlands. No construction of the landfill can occur. The Appellants' have not asked us to rule on any other issues which were raised in their notice of appeal. The only result of revoking the suspended permit would be to force the Permittee to submit an entirely new permit application. We fail to see how that outcome benefits anyone, particularly if the Commonwealth Court decides to reinstate the same permit. We see nothing but a morass of confusing litigation which would result from sustaining the current appeal.

Because we deny the Appellants' motion to sustain its appeal, we will not terminate the stay of their appeal of the issuance of the solid waste permit to the Permittee at this time. The Appellants' counsel has represented to the Board that the relief it sought was judgment on the appeal and did not wish to proceed with discovery at this time.

We therefore enter the following:

Department's decision to suspend the permit because of the wetlands does not answer the question of the propriety of the Department's decision to issue the permit in the first place.

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 16th day of July, 1999, the Appellants' motion to terminate the stay and sustain the appeal in the above-captioned matter is hereby DENIED.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: July 16, 1999

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

FOR THE COMMONWEALTH, DEP:
Michael Buchwach, Esquire
Southwest Region

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Clearfield-Jefferson Counties Regional Airport Authority
Robert P. Ging, Jr., Esquire
Confluence, PA

Washington Township:
John H. Fordora, Esquire
FORDORA & FORDORA
Ridgway, PA

FOR CERTAIN INDIVIDUAL APPELLANTS:
Richard S. Ehmann, Esquire
Pittsburgh, PA

UNREPRESENTED INDIVIDUAL APPELLANTS:
(See attached list of names and addresses)

FOR PERMITTEE:
David R. Overstreet, Esquire
KIRKPATRICK & LOCKHART
Harrisburg, PA

FOR INTERVENORS:
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Jefferson County Solid Waste Authority
Clearfield-Jefferson Counties Regional Airport Authority
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JAMES PATTI t/a PATTI'S TERRA NOVA FARM	:	
v.	:	**EHB Docket No. 98-124-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 19, 1999**

ADJUDICATION

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

Synopsis:

When the Department of Environmental Protection establishes that it is authorized and justified in issuing compliance orders for malodor and litter control violations at a yard waste composting facility and the corrective actions required by the orders are reasonable and appropriate, the Board will dismiss the appeal of the violating party.

PROCEDURAL BACKGROUND

The Department of Environmental Protection issued separate compliance orders on June 11 and June 25, 1998 to James Patti for violations at his yard waste composting and land application facility. Patti filed a timely appeal from both orders to this Board on July 11, 1998. The parties filed a stipulation of facts and exhibits with the Board on March 16, 1999. A hearing on the merits was held on March 24, 1999 before Administrative Law Judge Bernard A.

Labuskes, Jr. Following the hearing, the Department filed a post-hearing brief that included proposed findings of fact and conclusions of law. Patti failed to submit a post-hearing brief after being given every opportunity to do so. After a thorough review of the record, we make the following:

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency of the Commonwealth charged with the duty and responsibility to administer and enforce the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§6018.101-6018.1003; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§691.1-691.1001; the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §§4001-4106; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §510-17 (Administrative Code), and the rules and regulations promulgated thereunder. (J.S. No. 1.)[1]

2. In July 1996, the appellant, James Patti ("Patti") submitted an application to the Department to operate a yard waste composting/land application facility at a site in Washington Township, Northampton County known as "Patti's Terra Nova Farm" (the "Facility"). The application consisted of a completed "Land Application of Yard Waste Application Form" and several attachments. (J.S. Nos. 2, 3 and 7; J.E. No. 2.)

3. Patti also submitted a document to the Department entitled "Yard Waste Composting and Land Application Form with Standard Operating Procedure" (the "SOP

[1] Reference to the parties' joint stipulation of facts is denoted by "J.S. No. __", while the joint exhibits are referred to as "J.E. No.___." Reference to the transcript of the hearing is denoted by "N.T. ___."

Document"). Patti has resubmitted the SOP document to the Department on numerous occasions with various revisions. (J.S. No. 8; J.E. No. 3.)

4. The SOP document included, among other things, a narrative describing intended operations at the Facility, proposed maximum amounts of yard waste that would be present at the Facility, proposed sources of yard waste, a map delineating the areas of the Facility to be used for composting and land application activities, and a notice from Patti to the Washington Township Board of Supervisors. (J.S. No. 9.)

5. By letter dated October 31, 1996, the Department granted approval for the yard waste composting/land application facility to Patti. (J.S. No. 11; J.E. No. 4.) The parties have stipulated that the Facility constituted a "yard waste composting facility" as defined at 25 Pa. Code §271.1. (J.S. No. 4.) "Yard waste" includes "leaves, grass clippings, garden residue, tree trimmings, chipped shrubbery, and other vegetative material" under 25 Pa. Code §271.1. (J.S. No. 5.)

6. Three acres of the property were designated for composting of incoming yard waste which, after composting, was to be land-applied to approximately 47 acres of fields at the site. (J.S. No. 6; J.E. No. 1.)

7. The October 31, 1996 approval letter included the following conditions:

> The facility is to be operated in accordance the Department's "Leaf and Yard Waste Guidelines (revised 5/93)."
>
> Grass clippings shall not be brought to or received at a leaf composting facility unless the grass clippings are delivered to the yard waste composting facility in bulk. Bags or other collection containers must be emptied of all grass clippings which are delivered to the facility by the end of each day.
>
> The grass clippings are to be incorporated into the windrows of partially composted leaves within three days of delivery to the site at a ratio not to exceed one part grass clippings to three parts yard waste, by volume.

> The Department may prohibit the use of grass clippings at the facility if there are nuisances, or if the site is adversely affecting – or has the potential to adversely affect – the citizens or environment of the Commonwealth.
>
> The operator shall not cause or allow conditions that are harmful to the environment or public health or which create safety hazards, odors, noise and other public nuisances.

(J.S. Nos. 13, 14 and 15; J.E. Nos. 23 and 24.)

8. By letter dated September 5, 1997, the Department authorized Patti to accept yard waste from additional sources and reminded Patti to comply with the conditions stated in the October 31, 1996 approval letter. (J.S. Nos. 17-19.)

9. On February 13, 1998, Departmental representatives conducted an inspection of the Facility in the company of Patti. (J.S. No. 20.)

10. The inspection revealed that Patti had failed to (1) remove noncompostable residues, (2) empty bags of grass clippings, (3) incorporate grass clippings into windrows, (4) prevent litter from blowing off-site, (5) prevent the accumulation and intermingling of noncompostable materials, and (6) otherwise in several respects comply with the Department's approval letter, Patti's own SOP document, and the Department's Yard Waste Composting Guidelines. (N.T. 48-51; J.E. No. 8.)

11. The Department sent Patti an inspection report which directed Patti to submit a schedule for alleviating the violations at the Facility, an operational narrative for the land application of the yard waste, and an updated site plan. (J.S. No. 21.)

12. Patti responded with a letter to the Department stating that he would remove "foreign matter in the compost area" by March 11, 1998. (J.E. No. 9.)

13. The Department sent a letter dated March 11, 1998 in response to Patti's correspondence, which stated in part as follows:

> This is the second meeting we have had at your site and have emphasized the need for you to comply with your leaf and yard

> waste approval. We have also stated if you don't comply with your approval in the future we will terminate your leaf and yard waste approval and require you to apply for a composting permit. Several non-compliant issues were observed when we were at your farms on February 12, [sic] 1998. You have failed to remove non-compostable materials including bags, tree trunks and branches and other solid waste. Several bags of grass clippings have not been emptied into and incorporated into your composting windrows. Non-compostable residuals have been blown or otherwise deposited off site. Excessive amounts of plastic bags, solid waste and other non-compostable materials were observed in your compost windrows. Land application areas also have non-compostable residues. Please understand your responsibility to bring these matters into compliance by today's date.
>
> You have also discussed the issue of bringing grass clippings on your site. Please understand the possibility exists of severe odors emanating from these grass clippings. Your requirement for nuisance controls includes preventing these odors. If odors are verified off site from these grass clippings, this will again be in violation of your leaf and yard waste approval. As discussed above, this violation would force us to terminate your leaf and yard waste approval.

(J.E. No. 10.)

14. The Department conducted inspections in March 1998 that indicated that Patti had brought the Facility into compliance. (J.S. Nos. 25, 26; J.E. No. 17.)

15. On May 21, 1998, the Department conducted another inspection of the composting Facility in the company of Patti. The Department performed the inspection in response to a public complaint regarding Patti's composting operations. (J.S. No. 27.)

16. Prior to entering the Patti property for inspection, the Department conducted an odor investigation in the vicinity of the Facility and detected a "rotten grass" odor downwind from the Facility. (J.S. No. 11, N.T. 54-60.)

17. During the May 21, 1998 inspection, strong odors were emanating from damp, partially decomposed grass being unloaded and stored in a stockpile on the property. The

odor previously detected off-site was the same as the odor emanating from the stockpile of grass clippings. (J.E. No. 11, N.T. 60-64.)

18. The Department sent Patti an inspection report listing its findings and recommending that Patti take several measures to prevent malodors. (J.S. No. 28, J.E. No. 11.)

19. On June 11, 1998, the Department issued Field Compliance Order No. 2980036 to Patti due to continued operational problems and public complaints about malodors emanating from the Facility (the "June 11 Order"). (J.S. No. 30.)

20. The June 11 Order stated that Patti had failed to operate the Facility in compliance with the Solid Waste Management Act, the Department's regulations, and the Yard Waste Composting Guidelines, and that the Facility created conditions, including malodors, that harmed the environment and caused a public nuisance. (J.E. No. 12.)

21. The June 11 Order required Patti to cease the acceptance, storage, dumping or depositing of any grass clippings on the property, commence measures to control and abate off-site malodors, apply yard waste to approved fields in a timely fashion, and submit progress reports every fifteen days. (J.E. No. 12.)

22. The Department conducted another inspection on June 18, 1998. Patti attended. (J.S. No. 32, N.T. 70.)

23. During the June 18, 1998 inspection, the Department discovered that the Facility had accepted fourteen truckloads of yard waste since the issuance of the June 11 Order. The Department also observed litter in nearby fields and noted a malodor originating from yard waste that had recently been turned in the windrows. The Department supplied another inspection report to Patti documenting its findings. (J.S. No. 35, J.E. No. 14, N.T. 71-74.)

24. The Department conducted yet another inspection on June 20, 1998, at which it photographed the conditions at the Facility. (J.E. No. 13.)

25. On June 25, 1998, the Department issued Field Compliance Order No. 2980039 to Patti (the "June 25 Order"). (J.S. No. 37, J.E. No. 15.)

26. The Department issued the Order due to malodors originating from the Facility, the failure of the Facility to correct operational problems noted during prior Department inspections, and the Facility's failure to comply with the June 11 Order. (N.T. 76, 195-196.)

27. The June 25 Order directed Patti to stop accepting yard waste, commence measures to control and abate off-site malodors, remove all noncompostable wastes from areas where composting or land-application of yard waste had occurred, properly dispose of all non-compostable wastes, and submit a plan to the Department addressing the management of the yard waste in a way that did not create odors or other nuisances, ensured that the yard waste was free from noncompostable material, and described the volume of yard waste to be handled on a daily basis. (J.E. No. 15.)

28. On numerous occasions between February and June 1998, the Facility emitted serious malodors that were detected off-site, sometimes at a considerable distance. The malodors were detected by several neighbors and Department representatives. (N.T. 61-62, 73-74, 129-140, 162-163, 179-181, 184, 331-332, 342, 346.)

29. The Facility repeatedly allowed noncompostable debris to accumulate on the site and to blow off of the site. (N.T. 152, 158, 173, 280-281, 287-288.)

DISCUSSION

Patti's unexcused, unexplained failure to submit a post-hearing brief results in the waiver of all issues raised in his notice of appeal. *John Van Meter v. Department of Environmental Protection*, 1995 EHB 1085, 1091-1092. *See also Lucky Strike Coal Co. and Louis J. Beltrami v. Department of Environmental Resources*, 547 A.2d 447, 449 (Pa. Cmwlth. 1988), *petition for allowance of appeal denied*, 555 A.2d 117 (Pa. 1988). Thus, Patti has, among other things, waived his assertion that the Department acted unlawfully and abused its discretion. Accordingly, there is nothing left for the Board to adjudicate, and the appeal could be dismissed on that basis. Nevertheless, out of an abundance of caution, we alternatively conclude that the

appeal is dismissed on the merits as well. In appeals from compliance orders, the Department must prove by a preponderance of the evidence that the orders were authorized by law and constituted an appropriate exercise of the Department's discretion. 25 Pa. Code §1021.101(b)(4); *Yablon v. Department of Environmental Protection*, 1997 EHB 11, 14. We are satisfied that the Department has satisfied that burden here.

A party who operates a yard waste composting facility must comply with general regulations relating to the handling of municipal waste and the Department's Yard Waste Composting Guidelines. 25 Pa. Code §271.103(h). The Guidelines require a party who wishes to operate a composting facility to apply for approval to do so. (J.E. 23.) (Patti did not challenge this requirement.) Patti obtained such an approval, which contained numerous conditions. Of relevance here, the approval letter required Patti to properly dispose of noncompostable materials (J.E. No. 4, ¶¶ I.C.1 and 2), prevent off-site litter (J.E. No. 4, ¶ II.B.4), and prevent conditions that create odors (J.E.No. 4, ¶ I.D.2). The Composting Guidelines themselves contain the same requirements (J.E. No. 23), as do the applicable regulations governing the storage of waste, 25 Pa. Code §285.115.

There was abundant, uncontradicted testimony and documentary evidence presented at the hearing that Patti had failed to comply with these requirements on many occasions. Accordingly, it was entirely appropriate and well within the Department's authority and discretion to issue the June 11 and 25 Orders. The corrective actions required by the Orders, which essentially required Patti to cease accepting new waste until he submitted a plan to describe how he will get the malodor and noncompostable debris problems under control, are eminently reasonable and appropriately tailored to the problems that gave rise to the issuance of the Orders in the first place. Patti's appeal has no merit and it is dismissed.

CONCLUSIONS OF LAW

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

2. It is the Department's burden to prove by a preponderance of the evidence that the compliance orders were authorized by law and were an appropriate exercise of the Department's discretion.

3. Section 602 of the Solid Waste Management Act, 35 P.S. §§6018.602, grants the Department the authority to issue compliance orders that direct a person to cease operation of its solid waste facility if it is in violation of any provision of the Solid Waste Management Act, any rule or regulation of the Department, or any terms or conditions of a permit issued under the Act. That Section provides statutory authority for the issuance of the orders that are the subject of this appeal.

4. Patti violated the terms of his approval letter, the Department's Yard Waste Composting Guidelines, and the municipal waste regulations.

5. The Department did not abuse its discretion or otherwise act contrary to the law by issuing the subject orders.

6. The remedial actions prescribed in the orders are reasonable and appropriate given the malodor and litter problems at Patti's yard waste composting facility.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES PATTI t/a	:	
PATTI'S TERRA NOVA FARM	:	
	:	
v.	:	**EHB Docket No. 98-124-L**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 19th of July, 1999, the appeal of James Patti 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

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **July 19, 1999**

c: **For the Commonwealth, DEP:**
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Northeast Regional Counsel

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JH/bap

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TELECOPIER 412-565-5298

WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ASHLAND TOWNSHIP ASSOCIATION OF CONCERNED CITIZENS, INC.	:	
v.	:	**EHB Docket No. 98-204-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MILESTONE CRUSHED, INC., Permittee	:	**Issued: July 20, 1999**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Association's motion for summary judgment is denied based on mootness and the existence of issues of material fact. With regard to the Department's approval of an alternative post-mining land use for a mine site, the issue is now moot where the request for an alternative land use has been withdrawn and the mine site will be restored to its pre-mining usage. With regard to the Department's approval of discharges from a sedimentation pond to property bordering the mine site, there is no evidence that such a discharge has occurred or will occur. In addition, based on the Association's motion and the Department's and Milestone's responses, questions of material fact exist as to whether a watercourse exists on the neighboring property.

OPINION

This matter involves an appeal by Ashland Township Association of Concerned Citizens, Inc. (the Association) from the Department of Environmental Protection's (Department's) issuance of a surface mining permit to Milestone Crushed, Inc. (Milestone). The permit authorizes the mining of a site known as the Gillingham mine in Ashland Township, Clarion County.

Before the Board is a motion for summary judgment filed by the Association. The motion seeks summary judgment on two grounds: first, that the Department's approval of the mining application failed to comply with the regulations governing post-mining land use and second, that the permit authorizes the unlawful concentration and discharge of storm water runoff and surface water. Summary judgment may be granted where the pleadings, depositions, answers to interrogatories, and admissions, together with any affidavits submitted in support, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 25 Pa. Code § 1021.73(b); Pa.R.C.P. 1035.2; *Domiano v. DEP*, EHB Docket No. 98-211-L (Opinion issued June 16, 1999), p. 4-5.

Post-Mining Land Use

The Association first asserts that the Department's approval of the permit failed to comply with the regulations governing post-mining land use, specifically 25 Pa. Code §§ 86.37(a)(14) and 87.159(c). Section 86.37(a)(14) states that a permit application may not be approved unless it demonstrates that the proposed post-mining land use meets specific requirements, including those set forth in Section 87.159, which governs post-mining land use for surface mines. Where an applicant for a mining permit intends to change the post-mining use of the land from its pre-mining

usage, it must comply with Section 87.159(c), dealing with alternative land uses. That section states that "[a]lternative land uses may be approved by the Department after consultation with the landowner or the land management agency having jurisdiction over the lands" and after determining that specific criteria are met. Those criteria include insuring that the proposed post-mining land use is compatible with adjacent land use; applicable land use policies, plans, and programs; and federal, state and local law, and that the proposed post-mining land use is reasonably likely to be achieved. 25 Pa. Code §§ 87.159(c)(1) and (3).

Prior to mining, the Gillingham site was comprised of forestland. Milestone's permit application originally sought to change the post-mining land use of the mine site from forestland to residential. This alternative post-mining land use was approved by the Department. However, Milestone subsequently applied to delete the alternative land use and to return the post-mining land use to forestland. This request was approved by the Department on May 7, 1999. (Exhibit A to Department's Response)

It is the contention of the Department and Milestone that any objections the Association has with regard to alternative post-mining land use are now moot since the land will be returned to its pre-mining usage.

We agree with the Department and Milestone. A matter becomes moot when an event occurs which deprives the Board of the ability to provide effective relief. *RJM Manufacturing, Inc. v. DEP*, 1998 EHB 436, 439-40; *New Hanover Corp. v. DEP*, 1991 EHB 1127, 1129. One of the fundamental purposes of the mootness doctrine is to avoid having a tribunal expend its resources in the resolution of matters which are no longer in controversy. *New Hanover*, 1991 EHB at 1130.

Here, the Association has objected to the Department's approval of an alternative post-mining land use. Since Milestone has withdrawn its request to change the post-mining land use of the Gillingham site, there is no relief which the Board can provide and, therefore, the Association's objections are moot. Nor do we find that this matter falls within any of the established exceptions to the mootness doctrine. Therefore, summary judgment is denied with regard to the issue of alternative post-mining land use.[1]

Discharge of Storm Water Runoff and Surface Water

The Association contends that the Department's approval of Milestone's erosion and sedimentation control plan was improper because it authorizes discharges from the mine site's sedimentation pond to neighboring property owned by Theda Kenemuth. Both the Department and Milestone assert that summary judgment may not be granted because issues of material fact exist.

The issue of discharges onto Mrs. Kenemuth's property was examined in a supersedeas opinion issued on December 18, 1998. *Ashland Township Association of Concerned Citizens, Inc. v. DEP*, 1998 EHB 1361. Based on the evidence presented at the supersedeas hearing, the Board found that a "water of the Commonwealth," as defined in Section 1 of the Clean Streams Law, Act of June 22, 1937, P.L. No. 1987, *as amended*, 35 P.S. § 691.1 – 691.1001, at § 691.1, did not exist on that portion of Mrs. Kenemuth's property bordering the mine site and, therefore, the Department

[1] In its reply, the Association argues that the Department and Milestone may not raise the issue of "mootness" in a response to a dispositive motion but must raise it in a timely-filed dispositive motion of their own. Were the Department and Milestone seeking to dismiss this portion of the Association's case on the basis of mootness, we would agree with the Association that this must be done in a properly filed dispositive motion. However, we are aware of no authority which supports the Association's proposition that mootness may not be raised as a defense to a motion for summary judgment, and the Association has provided us with none.

had erred in authorizing Milestone to discharge overflow from its sedimentation pond onto the Kenemuth property. *Ashland Township*, 1998 EHB at 1363. However, because the evidence indicated that no discharge had occurred or was likely to occur, the Board elected not to suspend the permit but only that portion of the permit which authorized discharges onto the Kenemuth property.

According to affidavits presented by the Department and Milestone, in the time following the supersedeas hearing no discharge has ever occurred from the sedimentation pond (Exhibits C and D to Department's Response; Exhibit C to Milestone's Response) and none is likely to occur. (Exhibit A to Milestone's Response) Further, according to the conclusions of their engineers, in the unlikely event such a discharge did occur, it would consist of a slow release of water over time and would result in less peak flow of water to the Kenemuth property than would have occurred during pre-mining conditions. (Exhibit A to Milestone's Response; Exhibit D to Department's Response) In addition, mining is now concluded at the site, backfilling and regrading to approximate original contour were completed as of March 4, 1999, topsoil has been replaced, and the site has been seeded and mulched. (Exhibit C to Milestone's Response; Exhibit C to Department's Response)

The Department and Milestone also continue to assert that a "water of the Commonwealth," in the form of a natural drainage swale, exists at the point where the Kenemuth property borders the Gillingham site. This is based on the observation of Jonathan Hiser, a registered professional engineer and the president and owner of Hiser Engineering, which prepared the permit application in question. According to Mr. Hiser's affidavit, he was present at the Gillingham mine site on January 24, 1999 following a heavy rainfall. At that time, he observed surface water flowing in the alleged swale on the Kenemuth property south of the Gillingham site. In addition, although he

observed surface water flowing in the collection ditches to the sedimentation pond, the level of water in the pond was not near the discharge level. (Exhibit A to Milestone's Response)

In its reply, the Association states that Mr. Hiser's affidavit raises the question of whether water which should have been flowing to the sedimentation pond was, instead, bypassing the pond and flowing directly onto the Kenemuth property. The Association also argues that contrary to the Department's and Milestone's assertions, water has been discharged from the mine site onto the Kenemuth property, as set forth in its previously-filed Petition for Additional Relief. *See Ashland Township Association of Concerned Citizens, Inc. v. DEP*, EHB Docket No. 98-204-R (Opinion issued June 1, 1999) (denying the Association's Petition for Additional Relief). In the Department's response to the petition, the Department admitted that a collection ditch had breached and caused water to flow along the area on the Kenemuth property where the Department contends there is a drainage swale. The breach resulted in immediate enforcement action by the Department. *Id.* at 5-6. However, while the Association's petition contended that storm water runoff from the mine site had flowed onto the Kenemuth property, it admitted there were no discharges from the sedimentation pond. *Id.* at 2.

Thus, while the permit originally authorized Milestone to discharge overflow from its sedimentation pond into the alleged swale on the Kenemuth property, there has been no allegation made or evidence presented that such a discharge has occurred. In addition, the evidence indicates that such a discharge is not likely to occur.

As to the question of whether a drainage swale exists on the Kenemuth property where it borders the Gillingham site, there remains a factual dispute. Certainly, the evidence presented by

the Association at the supersedeas hearing indicated that a watercourse did not exist. Now, in response to the Association's motion for summary judgment, the Department and Milestone have presented the affidavit of engineer Jonathan Hiser, attesting to his observations that a watercourse does exist. Indeed, the Association itself appears to concede that a factual dispute exists on this issue. In its brief in support of its motion for summary judgment, the Association states as follows:

> In raising this issue in this Motion [the Association] is not challenging [the Department's] conclusion that there is a watercourse on the border of the mine site adjacent to the Kenemuth property to receive this discharge [footnote omitted]. [The Association] believes that at the merits hearing the evidence will show there is no watercourse at this point just as the evidence showed this at the Supersedeas Hearing. However, the dispute of facts on this point is such that [the Association] recognizes it is unlikely that the Board could decide a Motion for Summary Judgment on this issue in [the Association's] favor as long as material facts are disputed [citation omitted].

(Association's Brief, p. 16).

Because issues of material fact exist on this issue, summary judgment may not be granted. We, therefore, enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ASHLAND TOWNSHIP ASSOCIATION OF CONCERNED CITIZENS, INC.	:	
v.	:	**EHB Docket No. 98-204-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MILESTONE CRUSHED, INC., Permittee	:	

ORDER

AND NOW, this 20th day of July 1999, Ashland Township Association of Concerned Citizens' Motion for Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: July 20, 1999

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

For the Commonwealth, DEP:
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Southwest Region

For Permittee:
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Pittsburgh, PA

For Appellant:
Richard S. Ehmann, Esq.
Pittsburgh, PA

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

STOYSTOWN BOROUGH WATER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 97-174-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SOLAR FUEL COMPANY, INC., Permittee	:	**Issued: July 28, 1999**

OPINION AND ORDER ON MOTION TO SUSTAIN APPEAL

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A motion to sustain appeal is granted. A mining permit application is remanded to the Department so that additional information can be submitted to satisfy the language of Act 54. Act 54 directs the Department to require a mining operator to describe how water supplies will be replaced in the event that underground mining operations affect a public or private water supply by contamination, diminution or interruption.

BACKGROUND

Currently before the Board is the Stoystown Borough Water Authority's (Stoystown) motion to sustain its appeal from the Department of Environmental Protection's (Department) approval of a permit renewal and revision of Solar Fuel Company, Inc.'s (Solar Fuel) Bituminous Coal Mining Activity Permit No. 56841318. Only the Department filed a response to Stoystown's motion.

In its notice of appeal, Stoystown contends that the permit fails to assure that Stoystown's water supply and the aquifer from which it is derived will not be degraded, diminished or polluted in the event that the water supplies are affected by Solar Fuel's underground mining operation. On July 13, 1998, this Board granted the Department's motion for summary judgment and dismissed Stoystown's appeal. *Stoystown Borough Water Authority v. DEP*, 1998 EHB 754.[1]

Stoystown filed a timely appeal with the Commonwealth Court.[2] Stoystown argued that the Board erred in granting the Department's motion for summary judgment because: (1) the 1997 permit application failed to comply with Act 54[3]; and (2) there were genuine issues of material fact which were in dispute. Stoystown asserted that the 1997 permit application did not provide adequate information concerning the replacement of Stoystown's water supply if mining activity diminished or degraded it, as required under Act 54. In its permit renewal application, Solar Fuel identified no-mining zones and structures and water supplies to be protected. In addition, Solar Fuel stated:

> . . . In the event of a water interruption, diminution or contamination, the operator will abide by the requirements of Act 54 as stated below. If any water losses or contamination occur within the 35 degree angle of assumption from any mining that has been conducted since August 21, 1994 the operator will provide one of the following within 24 hours:
>
> - a temporary water supply to the complainant; or
>
> - information documenting that the operator was denied access to the water supply to conduct a pre-mining or post mining survey after following the notification requirements specified in Section 5.9(c); or
>
> - information documenting that the supply is still adequate in quantity and

[1] The Board issued a previous Opinion and Order in this case denying motions to dismiss filed by both the Department and Solar Fuel. *Stoystown v. DEP*, 1997 EHB 1089.

[2] Solar Fuel did not participate in the litigation before the Commonwealth Court.

[3] The 1994 amendments to the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, P.L. 31, *as amended*, 52 P.S. §§ 1406.1-1406.21, are commonly referred to as "Act 54".

quality to serve the premining uses of the supply or any reasonably foreseeable uses of the supply. . . .

DISCUSSION

Act 54 provides for the restoration or replacement of water supplies affected by underground mining and requires that:

> . . . any mine operator who, as a result of underground mining operations, affects a public or private water supply by contamination, diminution or interruption shall restore or replace the affected supply with an alternate source which adequately services in quantity and quality the premining uses of the supply or any reasonably foreseeable uses of the supply.

54 P.S. § 1406.5a.(a)(1).

The provision of Act 54 called into question by this appeal directs the Department to "require an operator to describe how water supplies will be replaced." 52 P.S. § 1406.5b.(j). According to the Commonwealth Court, "[w]hat Solar Fuel failed to provide (and what the Department is required to seek) is a description of ***how*** contaminated water supplies will be ***replaced***." *Stoystown Borough Water Authority v. Department of Environmental Protection*, 729 A.2d 170, 174 (Pa. Cmwlth. 1999)(emphasis in original). In its permit application, Solar Fuel merely stated that it *would* provide a landowner with a temporary supply of water in the event that water supplies were adversely affected by its mining activities. It did not set forth a specific description of *how* it would actively attempt to permanently replace an affected water supply. The Commonwealth Court reversed the Board's grant of summary judgment to the Department and remanded the case to the Board.

In its motion to sustain its appeal before this Board, Stoystown argues that since the Commonwealth Court has ruled that the Department erred in its interpretation of Act 54 and ruled as a matter of law that the information submitted in the permit application was inadequate,

Stoystown is entitled to have its appeal sustained. Subsequent to the filings of the motion and the Department's response, Stoystown and the Department filed a joint stipulation with the Board. This stipulation states that Stoystown and the Department are willing to stipulate to a remand of the permit to the Department by the Board for the Department to consider additional information which Stoystown and the Department believe was required by the Opinion and Order of the Commonwealth Court. (Joint Stipulation, ¶ 4) While Solar Fuel did not file a response to Stoystown's motion to sustain appeal, it filed a response opposing the joint stipulation. In viewing Stoystown's motion to sustain appeal, we must view the evidence in a light most favorable to the Department and Solar Fuel. *Chestnut Ridge Conservancy v. DEP*, 1998 EHB 217, 222.

The Board recently decided in *PUSH v. DEP*, EHB Docket No. 95-232-R (Adjudication issued July 2, 1999), that the Permittee (Eighty-Four Mining Company) adequately set forth a thorough, specific and detailed description in its permit application of how it would replace any affected water supplies as a result of its underground mining operations. We noted that:

> Unlike what was set forth in Solar Fuel's application, Eighty-Four Mining Company promised, in addition to providing an immediate temporary water supply within twenty-four hours of water loss, that if the water supply did not recover, then it would attempt to provide a permanent alternate water supply by: 1) deepening the existing well; 2) drilling a new well; 3) providing a connection to a public water system; or 4) entering into an amicable agreement with the water supply user pursuant to Sections 5.1-5.3 of the Mine Subsidence Act, 52 P.S. §§ 1406.5a, 1406.5b and 1406.5c. . . . Furthermore, unlike [Solar Fuel's application], the Permit Application at issue here sets forth specific descriptions of the water supplies of various private water users and states specifically how the mining company will replace water supplies affected by mining operations.

PUSH v. DEP, EHB Docket No. 95-232-R (Adjudication issued July 2, 1999), *slip op.* at 114, 115.

In contrast to Eighty-Four Mining Company's application, Solar Fuel's application did not reveal or demonstrate how contaminated water supplies would be replaced or how alternate water

supplies would be provided. It also failed to cite to specific water supplies and explicitly state how those affected water supplies would be replaced. A mining operator cannot describe how a water supply will be replaced by merely stating that it will temporarily replace the supply. The additional information, as identified in the joint stipulation, that the Department will require upon remand of Solar Fuel's permit application will specifically describe how Solar Fuel intends to replace contaminated water supplies in accordance with the language of the statute and the Commonwealth Court's recent decision.

Accordingly, we remand the permit application to the Department and enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STOYSTOWN BOROUGH WATER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 97-174-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SOLAR FUEL COMPANY, INC., Permittee	:	

ORDER

AND NOW, this 28th day of July, 1999, the Appellant's motion to sustain appeal is **granted**. It is hereby ordered as follows:

1. The Solar Fuel No. 10 Permit which is the subject of this appeal is remanded to the Department in light of the Opinion and Order of the Commonwealth Court, *Stoystown Borough Water Authority v. Department of Environmental Protection*, 729 A.2d 170 (Pa. Cmwlth. 1999) and the joint stipulation signed by both the Appellant and the Department.
2. The Appellant, in the event of any future appeal from the issuance of the Solar Fuel No. 10 Permit, agrees that it will not raise any issue which the Board has previously ruled is barred by res judicata, collateral estoppel or administrative finality.
3. This Order resolves only the matter of the procedure for remand and Stoystown's motion to sustain appeal. This Order does not address any other issue which may be raised in this case and specifically does not dispose of any requests for attorney's fees which could or may be

made by the Stoystown Borough Water Authority.

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

DATED: July 28, 1999

(See following page for service list.)

c: **DEP Bureau of Litigation**
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Confluence, PA 15424-2371

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

PETER BLOSE	:	
	:	
v.	:	**EHB Docket No. 98-034-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SEVEN SISTERS MINING COMPANY, INC., Permittee	:	**Issued: July 28, 1999**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A petition for supersedeas is denied without a hearing where: 1) the petitioner fails to plead facts and cite legal authority with particularity; 2) fails to state grounds sufficient for granting a supersedeas; and, 3) the hearing on the merits will be held within five weeks.

OPINION

This case involves a third party appeal by Mr. Peter Blose of the issuance of SMP No. 03950113 by the Department of Environmental Protection (Department) to Seven Sisters Mining Company (Seven Sisters). The mine site is commonly known as the Laurel Loop mine. The Board partially granted Seven Sister's motion for summary judgment and dismissed Issue No. 4 included in Mr. Blose's notice of appeal. *Blose v. DEP*, 1998 EHB 635. A hearing was held on the only other remaining issue on July 1, 1998. The Board dismissed that issue in an Adjudication. *Blose v. DEP*, 1998 EHB 1340. On appeal, a panel of the Commonwealth Court held that the Board improperly

granted summary judgment on Issue No. 4 and remanded the matter to the Board to hold a hearing. *Blose v. Department of Environmental Protection*, No. 287 C.D. (Pa. Cmwlth. filed July 1, 1999).[1] The Board promptly scheduled a hearing on the merits for September 3, 1999. The only remaining issue in the above captioned appeal pertains to the feasibility of mining the Laurel Loop site.

On July 12, 1999, Mr. Blose filed a petition for supersedeas with the Board and filed an amended petition for supersedeas (petition) on July 13, 1999. He filed a supplemental affidavit in support of his petition on July 20, 1999. After incorporating the record in this matter, Mr. Blose argues in his petition for supersedeas that he is entitled to a supersedeas because: (1) Seven Sisters can begin mining operations at the Laurel Loop mine site any time, thus causing irreparable harm to the petitioner; (2) a supersedeas will cause no harm to Seven Sister or the public and the petitioner will prevail on the merits with the use of "irrefutable documentary evidence"; and (3) a supersedeas will preserve the status quo.

The Department simultaneously filed a response to the amended petition for supersedeas and a motion to deny petition for supersedeas without a hearing. Seven Sisters filed a response and motion to deny petition for supersedeas without a hearing incorporating by reference the Department's response and motion. The Department also filed a response to Mr. Blose's supplemental affidavit and a supplement to its motion. The Department asserts that Mr. Blose's petition for supersedeas is deficient and a supersedeas is inappropriate in light of the hearing scheduled for September 3, 1999. We agree and grant the Department's motion to deny petition for supersedeas without a hearing.

The Board's Rules set forth the required contents of a petition for supersedeas. Under 25 Pa.

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[1] The Commonwealth Court opinion is not reported and therefore not published.

Code § 1021.77(c), a petition may be denied upon motion made before a supersedeas hearing for one of the following reasons:

(1) Lack of particularity in the facts pleaded.
(2) Lack of particularity in the legal authority cited as the basis for the grant of the supersedeas.
(3) An inadequately explained failure to support factual allegations by affidavits.
(4) A failure to state grounds sufficient for the granting of a supersedeas.

In granting or denying a supersedeas, the Board will consider: (1) irreparable harm to the petitioner; the likelihood of the petitioner prevailing on the merits; and (3) the likelihood of injury to the public or other parties, such as the permitee.

Mr. Blose fails to plead facts with particularity. The only facts mentioned in Mr. Blose's petition are those incorporated by reference from the record and the fact that "Seven Sisters has not yet commenced mining activity." Although Mr. Blose states that "[t]imber has been removed from the mine site in anticipation" of mining activity, this is unsubstantiated and contradicted by the Department's Mining Inspector. Mr. Blose's supplemental affidavit repeats his concern that mining activity at Laurel Loop could begin at any time and contains facts that are not relevant to a supersedeas since they do not show how Mr. Blose will be irreparably harmed or that he is likely to succeed on the merits.

According to the affidavit of the Department's Mining Inspector assigned to the Laurel Loop mine site, the Permittee has not commenced surface mining activities at the site, including construction or upgrading haul roads, constructing erosion and sedimentation controls, overburden and topsoil removal and storage or coal removal. (Department's motion, Exhibit A) It is necessary for haul roads and erosion and sedimentation controls to be constructed before any overburden

removal or coal extraction can occur. The Board agrees with the Department that Mr. Blose's situation lacks the urgency which is often the impetus for requesting a supersedeas. He has failed to show that it is likely that any mining will commence before the hearing is held just five weeks from now.

Mr. Blose fails to state with particularity how the legal authority cited in his petition serves as the basis for granting a supersedeas. The sole remaining allegation, that Seven Sister's mining operation is not feasible, is not addressed in any of the cases cited by Mr. Blose in his supplemental affidavit. Neither *Forwardstown Concerned Citizens Association v. DEP*, 1995 EHB 731, nor *PUSH v. DEP*, EHB Docket No. 95-232-R (Adjudication issued July 2, 1999), addressed the feasibility of a proposed mining operation. In *Chestnut Ridge Conservancy v. DEP*, 1998 EHB 217, the Board revoked a permit for a proposed limestone quarry that had no means of access to a public road. Mr. Blose fails to explain how these cases support his argument for a supersedeas..

Mr. Blose also fails to plead specific facts which show that he is likely to succeed on the merits. Although Mr. Blose alleges that he will rely on "irrefutable documentary evidence" and "numerous documents from the permit review of Laurel Loop Mine" to prove his case regarding the feasibility of mining, he fails to specifically identify the documents or explain in any way how these documents will prove his case.

Any one of these deficiencies would, by itself, justify denial of Mr. Blose's petition. *Hrivnak Motor Company v. DEP*, EHB Docket No. 99-052-L (Opinion issued April 6, 1999). Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PETER BLOSE	:	
	:	
v.	:	**EHB Docket No. 98-034-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and SEVEN SISTERS MINING	:	
COMPANY, INC., Permittee	:	

ORDER

AND NOW, this 28th day of July, 1999, the Appellant's petition for supersedeas is **denied.**

The Department's Motion to Deny Petition for Supersedeas Without a Hearing is **granted.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: July 28, 1999

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

D-Y-M CORPORATION	:	
	:	
v.	:	**EHB Docket No. 99-122-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	**Issued: July 30, 1999**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Although the Board has the authority pursuant to 25 Pa. Code § 1021.22(a) to order a corporate appellant represented by an attorney in the State of New York to retain Pennsylvania counsel, the Board declines to exercise that authority in this matter considering the economic hardship it would impose on the appellant, the lack of prejudice to the Department, and the fair and efficient administration of justice.

OPINION

The Department of Environmental Protection (Department) issued an administrative order on May 12, 1999 to D-Y-M Corporation (DYM), ordering the company to plug 159 abandoned wells in McKean County. On May 16, 1999, DYM filed an appeal with the Environmental Hearing Board through its attorney, Joseph P. Murphy. Mr. Murphy is a licensed attorney in the State of New York. He is not, however, admitted to practice in Pennsylvania.

On July 6, 1999, the Department filed a motion to dismiss DYM's appeal, citing the Board's rule of practice and procedure at 25 Pa. Code § 1021.22(a) which states that "[a] corporation shall be represented by an attorney admitted to practice before the Supreme Court of Pennsylvania." DYM filed an answer and cross motion in which it states that Mr. Murphy is the sole acting officer of DYM and that he filed the appeal as the acting president *pro tempore* and as attorney for DYM. The answer further states that DYM does not have sufficient financial resources to retain separate counsel in Pennsylvania for this proceeding. In its cross-motion, DYM moves to allow Mr. Murphy to be admitted to practice before the Board or in the alternative to allow Mr. Murphy to be admitted to practice *pro hac vice* in Pennsylvania for the sole purpose of defending DYM in this proceeding. In response, the Department argues that Mr. Murphy has not made proper application for admission *pro hac vice* because this may only be done upon motion of a member of the bar of Pennsylvania pursuant to Pa.B.A.R. 301(b).

While the Board has the authority to dismiss a corporate appellant's appeal for failure to properly retain counsel in accordance with the Board's rules, we decline to do so here. *See* Pa.R. C.P. 126 ("The rules shall be liberally construed to secured the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.")

Here, DYM has alleged and the Department has not refuted that DYM lacks the financial ability to retain a separate attorney for this proceeding. Were the Board to order DYM to retain counsel in Pennsylvania, it is quite possible that DYM would be left with no counsel at all, which

would then necessitate a dismissal of its appeal. The Department, on the other hand, has not alleged that it will suffer any prejudice by allowing Attorney Murphy to represent DYM in this proceeding.

Considering the lack of prejudice to the Department, the hardship which would result to DYM were we to order it to comply with Board Rule 1021.22(a), and the fair and efficient administration of justice, we deny the Department's motion. *See DEP v. Whitemarsh Disposal Corp.*, EHB Docket No. 97-099-L (Opinion issued July 7, 1999) ("Although the Board has the authority to disqualify a lawyer from acting as an advocate in a matter where the lawyer is likely to be called as a witness, the Board declines to exercise that authority in this case considering the limited degree of prejudice the opposing party may suffer, the hardship it would cause the lawyer's clients, and judicial economy."), *slip op.* at 1.

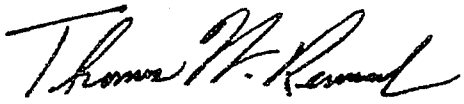
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

D-Y-M CORPORATION	:	
	:	
v.	:	**EHB Docket No. 99-122-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 30th day of July, 1999, the Department's Motion to Dismiss is denied.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: July 30, 1999

Service list next page

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Attention: Brenda Houck, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

GLOBAL ECO-LOGICAL SERVICES, INC. and ATLANTIC COAST DEMOLITION AND RECYCLING, INC.	:	
v.	:	**EHB Docket No. 99-055-L (Consolidated with 99-057-L and and 99-058-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 4, 1999**

OPINION AND ORDER
ON PETITION FOR SUPERSEDEAS

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

Synopsis:

After balancing the applicable supersedeas criteria, a petition for supersedeas from revocation of the petitioner's solid waste permit and forfeiture of its bond is granted with special conditions designed to minimize any potential threat to the environment.

OPINION

The Department of Environmental Protection (the "Department") issued an order and civil penalty assessment to Atlantic Coast Demolition & Recycling, Inc. ("Atlantic") on November 19, 1998. The order cited a long list of violations at Atlantic's construction and demolition waste processing and transfer facility (the "facility") in Philadelphia. It directed Atlantic to supply missing reports and documents and pay a civil penalty of $135,000. Atlantic neither appealed from nor complied with that order.

The Department issued a second order to Atlantic on March 3, 1999. The order revoked Atlantic's permit for the facility and assessed a civil penalty of $74,000. Atlantic and Global Eco-Logical Services, Inc. ("GES"), Atlantic's parent corporation, filed notices of appeal and petitions for a temporary and permanent supersedeas from the order.

The Board held the first of four days of a supersedeas hearing on March 23. Following the first day's proceedings, the Board entered a stipulated order for temporary supersedeas from the Department's March 3, 1999 order and the March 16, 1999 bond forfeiture for a period of 90 days. The stipulated order directed Atlantic and GES (hereinafter jointly referred to as "Atlantic" unless otherwise stated) to submit to the Department complete annual operation reports for 1995, 1996, and 1997, written notification identifying the person responsible for the facility's day-to-day operations, and the information that the Department had requested in a five-year review letter dated November 19, 1998. (These were the documents demanded in the Department's November 19 order.) The order also required Atlantic to pay the civil penalties assessed in the November 19 and March 3 orders. In return, Atlantic was permitted to reopen its site.

Atlantic paid the civil penalties and supplied some documentation, but because the Department did not believe that the documentation was adequate and the facility was operated in accordance with Atlantic's permit, it would not agree to a continuation of the order after the 90 days expired. Therefore, the Board held further hearings on the petitions for supersedeas on July 7, 8, and 9, 1999. At the conclusion of the hearing, the Board issued an order denying the extension of the temporary supersedeas. The parties filed their respective briefs on the petition for supersedeas on July 30, 1999.

This Board may grant a supersedeas upon cause shown. 35 P.S. §7514(d)(1). In making its decision, the Board must follow relevant judicial and Board precedent. *Id.*; 25 Pa. Code§1021.78. Among the factors to be considered are whether the petitioner will be irreparably harmed without a supersedeas, the likelihood that the petitioner will ultimately prevail on the

merits of its appeal, and whether there is a likelihood of injury to the public or other specific parties if a supersedeas is or is not issued. *Id.* Although the decision to issue a supersedeas is ordinarily within the Board's discretion, a supersedeas may never issue 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. 35 P.S. § 7514(d)(2).

Where the mandatory prohibition against issuance of a supersedeas does not apply, the Board ordinarily requires that all three statutory criteria must be satisfied. *Svonavec, Inc. v. DEP,* 1998 EHB 417, 420; *Kane Gas Light and Heating Co. v. DEP,* 1997 EHB 961, 962; *Oley Township v. DEP*, 1996 EHB 1359, 1362. There have, however, been exceptions. *See, e.g. Mundis, Inc. v. DEP,* 1998 EHB 766, 774 (no irreparable harm or absence of harm to the public needs to be shown where Department acted without authority); *202 Island Car Wash v. DEP* 1998 EHB 443, 450 (same); *Gary L. Reinhart, Sr. v. DEP*, 1997 EHB 401, 419 ("On occasion, we have been persuaded to grant a supersedeas even though we believed that the petitioner would not prevail on the merits."); *Keystone Cement Co. v. DER*, 1992 EHB 590 (same); *Wazelle v. DER*, 1985 EHB 207 (no likelihood of success but harm to the public if supersedeas not issued). In the final analysis, the issuance of a supersedeas is committed to the Board's discretion based upon a balancing of all of the statutory criteria. *See Pennsylvania PUC v. Process Gas Consumers Group*, 467 A.2d 805, 809 (Pa. 1983)(each criterion should be considered and weighed relative to the other criteria).

It is helpful to remember that the Board is not called upon to decide the case on the merits in the context of a supersedeas application. The Board is, at most, required to make a prediction based upon a limited record prepared under rushed circumstances of how an appeal might be decided at some indeterminate point in the future. Based upon that prediction, as well as an assessment of who will be hurt the most if the status quo is maintained during the litigation process, the administrative law judge is simply called upon to decide whether that status quo

should be maintained until the case can be decided based upon a proper record by the full Board. Of course, it is worth repeating that all bets are off if there is ongoing harm to the environment.

In this appeal, Atlantic has, not surprisingly, made a strong case of irreparable harm given the fact that the Department has shut it down completely and permanently. We also find that any potential harm to the environment presented by the continued operation of this site can be reduced to a tolerable risk level if a supersedeas is conditioned upon full compliance with the Department-issued permit (with an added margin of safety as discussed below). We are thus faced with a case where the petitioner will suffer severe harm and it is unlikely that the public or the environment will suffer any harm if a supersedeas is issued. Given this balance, Atlantic has made enough of a showing of likelihood of success on one issue to justify the issuance of a conditional, tightly controlled supersedeas.

Irreparable Harm to the Petitioner

The Department's order shuts Atlantic down, puts it out of business at its only site permanently, requires it to remove all waste and otherwise regulatorily close the facility, and forfeits its bond. If allowing that order to stand during the pendency of the appeal would not cause irreparable harm, it is difficult to imagine what would. Atlantic's potential severe economic loss for which it has no recourse is unquestionably adequate to constitute irreparable harm. *See Mundis, Inc. v. DEP*, 1998 EHB 766, 774-775; *202 Island Car Wash v. DEP*, 1998 EHB 443, 450; *Consolidated Penn Labs v. DEP*, 1997 EHB 908.

The Department argues that GES will not suffer irreparable harm for several reasons. We need not address those reasons because it is enough that Atlantic, a separate corporation, would be irreparably harmed. If a supersedeas of the order as to Atlantic should issue and the site should, therefore, be reopened, whether GES would have independently been irreparably harmed is academic.

Likelihood of Injury to the Public

This is not a case where ongoing pollution prohibits issuance of a supersedeas. Under the discretionary criterion, the likelihood of injury to the public or of pollution occurring during a supersedeas is low if Atlantic is required to operate in full compliance with its permit. Although no operation can ever be risk-free, the permit defines that level of risk which is acceptable to the Department. The Department has never argued that the permit was issued in error. The Board has the authority to issue a conditional supersedeas, 25 Pa. Code § 1021.78(c), and the supersedeas issued in this matter will be conditioned upon Atlantic's operation in full compliance with the permit. Given Atlantic's demonstrated propensity to exceed its permit limits, as discussed below, this Board will add an extra margin of safety by prohibiting Atlantic from exceeding 4,000 tons of waste on site as a condition of the supersedeas. Of course, if Atlantic ultimately prevails in this matter, its actual permit limit will obviously apply. Although the Department has argued that Atlantic cannot be counted upon to comply with its permit, its compliance during the supersedeas period will be closely monitored through the submission of status reports. If Atlantic falls out of compliance, the supersedeas will be terminated.

Likelihood of Success on the Merits

The Department initially argues that Atlantic cannot continue operating because the Atlantic who was issued the permit no longer exists as a result of a merger. This issue arose for the first time during the supersedeas hearing. The Department did not cite it as a basis for the revocation order.

The Department refers to a transaction whereby Atlantic Coast Demolition and Recycling, Inc. merged with Atlantic Acquisition Company, Incorporated. (Cmwlth. Ex. 51, Transcript ["T."] 859-61.) The articles of merger specified Atlantic Acquisition as the surviving company, but on the same day, Atlantic Acquisition changed its name to Atlantic Coast Demolition and Recycling, Inc. (Cmwlth Ex. 51; T. 861-62.)

The question in the context of this proceeding is whether a supersedeas that should otherwise issue should be withheld because today's Atlantic is technically different than the Atlantic who was issued a permit and the Department was never informed of that fact. In any other situation, it is hard to believe that the Department would revoke a permit on this basis, particularly if the corporate principals remained the same throughout the corporate transformations and the matter was reported in the permittee's next-following compliance history. *See K&J Coal Company v. DER,* 1980 EHB 454, 457 (surviving company following a merger automatically succeeds to the permit rights of the predecessor). A full legal and factual analysis of this sticky issue will need to await a hearing on the merits if the Department chooses to pursue it. In the meantime, the supersedeas will be conditioned upon Atlantic submitting a compliance history that describes its current corporate status and explains whether there have been any previously unreported, material changes from the original Atlantic. For present purposes, this should ensure that the Department knows exactly who it is dealing with, which has understandably been the cause of some of its frustration in the past. We are confident that the Department will review the information in good faith and avoid elevating form over substance.

Turning to the main issue at hand, the Department may suspend, modify, or revoke a solid waste facility's permit if the permittee either has failed or continues to fail to comply with the environmental protection statutes, rules, regulations, permit conditions, or Departmental orders. Section 503(c) and (e) of the Solid Waste Management Act, 35 P.S. §§ 6018.503(c) and (e). The Department may also suspend, modify, or revoke a permit if it finds that the permittee has shown a lack of ability or intention to comply with the law as indicated by past or continuing violations. 35 P.S. § 6018.503(c). The Legislature has conferred this power upon the Department because "improper and inadequate solid waste practices create public health hazards, environmental pollution, and economic loss, and cause irreparable harm to the public health, safety and welfare ...." 35 P.S. § 6018.102.

If a permittee has failed to comply with the law or it is unwilling or unable to do so, whether and how the Department choses to exercise the authority that the Legislature has granted it under Section 503 is committed to its sound enforcement discretion. *Swatara Contractors, Inc. v. DER*, 1982 EHB 75, 87. This Board will only reverse the Department's exercise of its discretion if it abuses that discretion or acts arbitrarily. *Concerned Residents of the Yough, Inc. v. DER*, 1995 EHB 41, 77. The Department bears the burden of proving that it did not abuse its discretion at the hearing on the merits. 25 Pa. Code § 1021.101(b)(3). In the context of this supersedeas proceeding, however, Atlantic bears the burden of proving that the Department is ultimately unlikely to be able to show by a preponderance of the evidence that it acted properly. *See Oley Township v. DEP,* 1998 EHB 1359, 1361-62.

Atlantic has disputed few if any of the violations that the Department has found to have occurred. In fact, the time for disputing the fact of the vast majority of the violations has long since past. Most of the historic violations were listed as findings of fact in the November 19, 1998 order, which Atlantic did not appeal. Instead, Atlantic's argument is based almost entirely upon its assertion that the Department's choice of permit revocation and bond forfeiture was simply too extreme given that violation history. Atlantic also denies that its violation history demonstrates that it is unwilling or unable to comply with the law.

The list of Atlantic's violations is distressingly long and goes back to soon after the permit was issued in 1992. We will not repeat the entire list of violations now. Of particular relevance here, Atlantic has historically and repeatedly violated permit conditions that require it to (1) not exceed 5,000 tons of waste on site, (2) stop accepting waste once it reaches 5,000 tons until on-site waste is reduced to 4,000 tons, (3) notify the Department at any time that the facility has more than 4,000 tons on site, (4) confine waste to the site's concrete storage pad, (5) maintain proper records, and (6) maintain the site's access road.

Atlantic argues that these violations should not be counted against it because it now has new shareholders and new management. Whether this assertion is true will require

further development of the facts. But accepting for current purposes that it is true, we do not believe that Atlantic is likely to prevail on this argument for two reasons.

First, there is a serious question as to whether corporate shareholders ought to be allowed to have their cake and eat it too. At the risk of oversimplification, it may be said that in any corporate acquisition involving a Department-permitted site, potential buyers are faced with a choice: They can form a new corporation with a clean record and apply for transfer of the permit, or they can buy the shares of the existing corporation and usually avoid the difficulties associated with a permit transfer. If they chose the second course, however, they typically should and do inherit the record of the preexisting corporate entity with all of its blemishes.

Here, Atlantic chose the latter course. While it may occasionally be appropriate to discount past violations because of a change in ownership, *FR&S v. DEP*, 573 A.2d 241, 246-47 (Pa. Cmwlth. 1990), *appeal dismissed*, 615 A.2d 734 (Pa. 1992), we do not believe it is likely that Atlantic will convince us to ignore them here.

Secondly, and we believe quite remarkably, Atlantic's **new management** (if it is new management) repeated every one of the six violations listed above over the last few months. We characterize the violations as remarkable because they occurred **after** the Department's revocation order and while Atlantic was operating purely under a period of grace created by a stipulated order of temporary supersedeas issued by the Board.

Of greatest concern, Atlantic does not seriously or credibly dispute that it exceeded its 5000-ton permit limit from June 2 through June 12, 1999. (Cmwlth. Ex. 39.) Atlantic did not stop accepting waste as of June 2 as it was required to do by its permit, but continued operating at full speed. (Id.) Atlantic did not give the Department notice that it had exceeded the 4,000-ton threshold until after the Department discovered the exceedance on its own. (T. 557, 672-73.) Such notice was not timely or consistent with an intent to work with the Department and comply with the law. In addition, there was ample evidence shown at the

hearing to convince us that Atlantic failed to confine waste storage to the storage pad, maintain its access road, and maintain and submit complete paperwork. (Cmwlth. Exs. 35, 41, 42, 58.)

Atlantic's exceedance of its permit limit is a very serious, inexcusable violation. It is when Atlantic approaches or exceeds its limit that it seems to have difficulty operating the site in accordance with its permit (e.g. keeping waste on the pad, maintaining the access road). Also, at least a portion of the site is in a floodway and the waste pile itself is in a floodplain. Neither the Department nor this Board should be expected to tolerate even the slightest exceedance of the 5,000-ton limit.

A reasonable operator operating under the intense scrutiny of a post-revocation stipulated supersedeas order would take abundant care to operate in accordance with its permit. If Atlantic was unable or unwilling to comport itself with its permit requirements under such circumstances, we must seriously question whether it will ever be able to do so. Based upon the current record, Atlantic is unlikely to prevail on its argument that it is able and willing to comply with the law.

The only question left, then, is whether the Department's choice of permit revocation and bond forfeiture as the appropriate remedy will withstand full Board scrutiny. Given the unique juxtaposition of relative harm (or lack thereof) to the petitioner and the public in this case, we have just enough hesitation regarding the Department's likelihood of success on the propriety of choosing the ultimate remedy to justify issuance of a conditional supersedeas.

Although Atlantic has a long list of strikes against it, there are a few facts that may eventually militate in its favor; namely, some improved compliance with several regulatory requirements (e.g. site security, fire prevention), adequate insurance and bonding, payment of $209,000 in civil penalties, "near misses" on some of its paperwork violations, the absence of actual harm to the environment, the minor nature of some if its violations (which fact is itself counterbalanced however, by Atlantic's frequent and self-destructive unwillingness to fix those minor problems in a timely manner), the limited amount of off-pad waste, and a comparison of

Atlantic's site to the other cases where the Department has revoked permits. There is also an open question in our mind of whether the Department's actions vis-à-vis Atlantic both before but particularly after the entry of the temporary supersedeas order have been motivated at least in party by ill-will, as opposed to an objective, dispassionate implementation of the regulatory program, which could if true constitute an abuse of discretion. *Concerned Residents of the Yough, Inc. v. DER*, 1995 EHB 41, 77. We do not think that this has been the case, but the Department's actions pursuant to the supersedeas order that we are issuing today may shed further light on this question, just as Atlantic's conduct under that order may prove to be the final test of its ability and willingness to comply with the law. Finally, it is at least worth noting that Atlantic has been shut down for the last several weeks during the height of the construction season as a result of this Board's denial of its petition for a temporary supersedeas, and complying with the preconditions of today's supersedeas order is likely to take still more time.

When all is said and done, there is no question that a good working relationship between a solid waste permittee and the Department is absolutely essential. There is also no question that the working relationship between Atlantic and the Department has suffered badly, and may indeed be beyond repair. Perhaps naively, we can only hope that that is not necessarily the case.

Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GLOBAL ECO-LOGICAL SERVICES, INC. and ATLANTIC COAST DEMOLITION AND RECYCLING, INC.	:	
v.	:	**EHB Docket No. 99-055-L (consolidated with 99-057-L and 99-058-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 4th day of August, 1999, the petition for supersedeas is GRANTED with the following conditions:

1. The supersedeas shall not take effect until Atlantic Coast Demolition and Recycling, Inc. ("Atlantic") demonstrates to the Department's reasonable satisfaction that all of the following have occurred:

a. The access road to the site has been repaired and/or upgraded to bring it into compliance with Atlantic's permit;

b. Atlantic has provided an acceptable engineering evaluation and certification regarding the condition of the concrete waste storage pad;

c. Atlantic has a system in place for recording and reporting daily waste volumes and site inspections at the site on forms that are acceptable to the Department;

d. Atlantic's emergency preparedness plans are complete and up to date;

e. The sump for the concrete waste storage pad is clear and the pad is otherwise properly drained;

f. Atlantic submits a complete and up-to-date compliance history to the extent that it has not done so already which, among other things, describes the current corporate and legal status of Atlantic; and

g. Atlantic demonstrates that it is capable of removing waste from its site in a timely manner in accordance with condition 11 of its permit.

2. The parties shall notify the Board by telecopier if and when the above conditions have been satisfied and the facility is open for accepting new waste.

3. Atlantic may petition the Board for a modification of this Order if the Department fails to reasonably and expeditiously review the submittals required by Paragraph 1 of this Order.

4. This supersedeas shall automatically terminate if the Department submits an affidavit to the Board stating that the quantity of waste at the site at any one time exceeds four thousand (4,000) tons. Atlantic may then petition to have the supersedeas reinstated if it believes that the Department's affidavit is inaccurate.

5. This supersedeas may be terminated at any time upon petition of the Department if Atlantic violates any term or condition of its permit or any applicable environmental statute, rule, or regulation.

6. The forfeiture of Atlantic's bond is superseded effective immediately pending a hearing on the merits.

7. Until further order, the parties shall file status reports with the Board by telecopier every ten days beginning on August 13.

8. Counsel shall on or before September 10 submit a joint proposed schedule for completing all further proceedings in this appeal. The schedule shall describe the parties' respective positions if counsel are unable to agree on specific dates.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: August 4, 1999

c: **(Via FAX and 1st class mail)**

DEP Bureau of Litigation:
Attention: Brenda Houck, Library

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Southeastern Regional Counsel

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

NICKIFOR N. GROMICKO, JR.	:	
	:	
v.	:	**EHB Docket No. 98-199-MG**
	:	**(consolidated with 99-128-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 10, 1999**

OPINION AND ORDER ON DEPARTMENT'S MOTION TO COMPEL DISCOVERY AND TO STRIKE APPELLANT'S RESPONSE TO THE MOTION

By George J. Miller, Administrative Law Judge

Synopsis:

Appellant is directed to fully respond to the Department's interrogatories and requests for production of documents at the risk of the imposition of severe sanctions. Appellant's response to the Department's motion to compel discovery will not be considered because Appellant's response is not verified as required by law. In addition, Appellant's response is stricken by reason of its inconclusion of unsupported, scandalous and impertinent statements.

BACKGROUND

These proceedings consolidate both an appeal from the denial by the Department of Environmental Protection (Department) of Appellant's application for renewal of his radon testing certificate and an enforcement action brought by the Department against the Appellant involving a penalty assessment of $17,762.00 for improper installation of radon mitigation equipment at

residences serviced by Appellant. The Department's motion to compel discovery (motion to compel) seeks a full, complete and verified answer to its Interrogatory No. 21. This interrogatory asks that Appellant identify all photographs, videotapes or other depictions of radon mitigation systems in the residences listed in the Department's amended denial of radon testing certification. The Appellant's only written response to this was "none other than those PADEP previously provided." Appellant's response did not specify what the Department was supposed to have previously provided and the Department states that it has not been provided with any videotapes by Appellant. The Department further states that the interrogatory responses were not verified by the Appellant.

The Department also filed requests for production of certain documents but Appellant produced no documents at the time of his deposition in the case. The Department's motion to compel states that in early July, 1999 the Appellant telephoned Department's counsel and told him that he was in possession for non-litigation purposes of previously unearthed videotapes which depict radon mitigation conditions at at least two of the homes whose improper mitigation is the basis for the Department's action in these proceedings. In that conversation, Appellant claimed that the videotapes support his case. However, the Appellant refused to turn over the videotapes to the Department without a substantial concession to which the Department claims Appellant was not entitled. The Department further states that during a July 6, 1999 conference call with the Board and the parties, the Department raised the issue of the Appellant's failure to make the videotapes available. The presiding administrative law judge recalls that, in that conference call, an issue was

raised with respect to evidence which the Appellant had not delivered to the Department. The Appellant stated during the course of that call that he would not produce this evidence because that evidence might be the only source of his exoneration from the Department's charges if he were not to prevail in these proceedings.

The Department's motion also states that in a telephone call after this conference call the Appellant again demanded a concession to which the Department believes he is not entitled before he would produce the videotapes.

The Appellant's response to the Department's motion to compel discovery claims that he never described the evidence which he possesses as using the word "videotape" but rather used the word "proof." The Department has moved to strike (motion to strike) this response on the ground that it is not verified as required by both the Board's Rules and the Pennsylvania Rules of Civil Procedure. The motion to strike also is based on the inclusion in the response of unsupported, scandalous and impertinent matter relating to the character of Department counsel.

DISCUSSION

Rule 4006(a)(1) of the Pennsylvania Rules of Civil Procedure requires that answers to interrogatories be in writing and be verified. "Verified" means supported by oath or affirmation or made subject to the penalties under 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities. Rule 76 of the Pennsylvania Rules of Civil Procedure. Interrogatories may relate to any matter, not privileged, which is relevant to the subject matter involved in the pending action as defined by Rule 4003.1 of the Pennsylvania Rules of Civil Procedure. Rule 4009.11 of the Pennsylvania Rules of Civil Procedure authorizes a request for the production of documents and

things, and Rule 4009.12 requires a party upon whom the request is served to produce the documents described in the request to the extent that the request is relevant to any matter involved in the litigation. The failure of a party to respond to proper interrogatories or a proper request for production of documents may result in the imposition of sanctions under the Board's Rules of Practice and Procedure at 25 Pa. Code § 1021.125 and Rule 4019 of the Pennsylvania Rules of Civil Procedure. The failure to respond to interrogatories or produce documentation may result in an order from the Board which, among other things, would preclude the offering of any evidence not revealed in responses to discovery or, more seriously, an order specifying that the defaulting party may not produce any evidence at all in support of that party's claim or defense.

In this case, the Department's interrogatory with respect to photographs, videotapes or other depictions of radon mitigation systems in the residences listed in the Department's amended denial of radon testing certification is clearly proper discovery. The Appellant's answer to this interrogatory is evasive in that it says none other than those previously provided to the Department. However, he presented nothing to the Department in response to the answers to interrogatories or in response to other discovery requests. In addition, the answers to the interrogatories were not verified as required by the Rules of Civil Procedure. The request for production of documents and the interrogatories are comprehensive and would include any videotapes or other documents as broadly defined in these requests which may be in the Appellant's possession.

It is clear from the statements made by the Department and the statements made by the Appellant himself during the conference call with the Board on July 6, 1999 that Appellant has failed to disclose some form of documentary evidence which is relevant to the subject matter of this

litigation. In that conference call the Appellant himself stated that he was not producing information which would in his view exonerate him from the claims being made by the Department. Since Appellant must produce the documentation which he has failed to produce, including videotapes if that is the documentation being withheld, we will enter an order requiring their production and the filing of verified answers to the Department's interrogatories. This verification must state that the answers are true and correct to the Appellant's information, knowledge and belief and must be sworn to or affirmed before a notary public. In the alternative, Appellant may use an alternative certification of the truth of the matters contained in the answers if the certification meets the applicable requirements of Pennsylvania law. *See* Rule 76 of the Pennsylvania Rules of Civil Procedure and 18 Pa. C.S. § 4904.

In entering this order, we disregard the factual statements contained in the Appellant's response to the motion to compel. Those factual statements are not verified as required by the Board's Rules of Procedure and the Pennsylvania Rules of Civil Procedure. In addition, Appellant's response will be stricken from the record for the further reason that it contains unsupported, scandalous and impertinent matter.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NICKIFOR N. GROMICKO, JR.	:	
	:	
v.	:	**EHB Docket No. 98-199-MG**
	:	**(consolidated with 99-128-MG)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

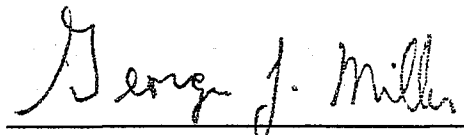
AND NOW, this 10th day of August, 1999, IT IS HEREBY ORDERED that the Department's motions to compel discovery and to strike Appellant's responses are **GRANTED** and IT IS FURTHER ORDERED as follows:

1. Appellant shall file amended answers to the Department's interrogatories with respect to Interrogatory No. 21 and file a verification of his answers to the interrogatories and serve a copy thereof on the Department on or before **August 18, 1999**.
2. Appellant is directed to produce the documentary information requested by the Department's interrogatories and its request for production of documents, including any videotapes of the installation of radon equipment at structures owned or occupied by his customers on or before **August 18, 1999**.
3. Failure to comply with this order may result in severe sanctions, including the exclusion of any evidence not revealed in answers to the Department's discovery and conceivably even sanctions depriving the Appellant of an opportunity to present

evidence on his behalf in this proceeding.

4. Appellant's response to the Department's motion to compel is stricken from the record for the reasons set forth in the Opinion accompanying this Order.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: August 10, 1999

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JOSEPH CONNERS	:	
	:	
v.	:	**EHB Docket No. 99-138-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, STATE CONSERVATION COMMISSION and DAUPHIN COUNTY CONSERVATION DISTRICT	:	**Issued: August 20, 1999**

OPINION AND ORDER ON PETITION TO INTERVENE

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

Synopsis:

A citizen group is permitted to intervene in a hog farmer's appeal from the disapproval of his nutrient management plan. The group's members have a substantial, immediate, and direct interest in whether the plan is approved by virtue of their close proximity to the site and other factors. The intervenor will not be limited in what arguments it can present simply by virtue of its intervenor status.

OPINION

Joseph Conners has appealed from the disapproval of his nutrient management plan by the Dauphin County Conservation District (the "District"). The District was acting as the delegate of the State Conservation Commission pursuant to Section 4(8) of the Nutrient Management Act (the "Act"), 3 P.S. § 1704(8). Section 15 of the Act, 3 P.S. § 1715, provides that persons aggrieved by

actions of the Commission (or, presumably, its delegate) may appeal to this Board. Conners's management plan addresses how he intends to manage manure generated by his hog farm on Powells Valley Road in Wayne Township, Dauphin County.

The Powell's Valley Conservation Association, Inc. ("PVCA") has petitioned to intervene in the case in support of the management plan's disapproval. The County Conservation District has not expressed a position. The State Conservation Commission does not oppose the petition. Conners does. He argues that PVCA is not an interested party. He adds that, if PVCA is allowed to intervene, it should not be permitted to expand the scope of the appeal. For the reasons that follow, we will allow PVCA to intervene in defense of the disapproval.

Section 4(e) of the Environmental Hearing Board Act, 35 P.S. § 7514(e), provides that "[a]ny interested party may intervene in any matter pending before the board." The Commonwealth Court has 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." *Browning Ferris, Inc. v. DER*, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991)(*"BFI"*). 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 gain or lose by direct operation of the Board's ultimate determination. *Jefferson County v. DEP*, 703 A.2d 1063, 1065 n. 2 (Pa. Cmwlth. 1997); *Wheelabrator Pottstown, Inc. v. DER,* 607 A.2d 874, 876 (Pa. Cmwlth. 1992); *BFI*, 598 A.2d at 1060-61; *Wurth v. DEP*, 1998 EHB 1319, 1322-23.

Gaining or losing by direct operation of the Board's determination is just another way of saying that an intervenor must have standing. Stating the Commonwealth Court's holdings another

way, a party who has standing must be permitted to intervene. *Fontaine v. DEP,* 1996 EHB 1333, 1346. Considerations concerning whether the intervenor's rights will be adequately protected by existing parties and whether the intervenor will add anything new to the proceedings are irrelevant. *General Glass Industries Corp. v. DER*, 1995 EHB 353, 355 n.2.

A person or entity seeking to intervene has standing if its interests in the matter are substantial, direct, and immediate. *Borough of Glendon v. DER*, 603 A.2d 226, 233 (Pa. Cmwlth. 1992), *petition for allowance of appeal denied*, 608 A.2d 32 (Pa. 1992); *Tortorice v. DEP*, 1998 EHB 1169, 1170. For an interest to be considered "substantial," the interest must "surpass the common interest of all citizens seeking obedience to the law." *Darlington Township Board of Supervisors v. DEP,* 1997 EHB 934, 935. A "direct" interest articulates a harm caused by the action of a named party. *Id.* An "immediate" interest must demonstrate a "casual connection, not remote in nature," between the named party's action and the alleged harm. *Id.*[1]

An organization can have standing and, therefore, intervene either in its own right or derivatively through the standing of at least one of its members. *Raymond Proffitt Foundation v. DEP*, 1998 EHB 677, 680; *Barshinger v. DEP*, 1996 EHB 849, 858. *See also Rand Am, Inc. v. DER,* 1995 EHB 998, 1000 (in ruling upon an organization's petition to intervene, the organization's interest is measured by its members' interest); *Lobolito, Inc. v. DER*, 1992 EHB 889, 892-893(same).

Turning to the facts of the matter before us, we first note that Conners's answer does not

[1] Although the *BFI* line of cases speaks of gaining or losing from the **Board's** ruling and the *Glendon* line of cases speaks of harm caused by the **Department's** action, because the Board reviews what the Department has done, we do not expect that there will be any practical difference between the two standards in the overwhelming majority of cases.

dispute any of the factual averments set forth in PVCA's verified petition.[2] Based on the undisputed facts, PVCA is a nonprofit corporation dedicated to protecting the environment in Powells Valley, a narrow, 20-mile valley in northern Dauphin County. The petition states that "[a]ll of the directors, officers, contributors, and other individuals who have been active in the affairs of PVCA are residents of the Powells Creek Valley. . . ." (Paragraph 1.) In fact, all of the directors and officers of PVCA live within approximately one mile of the proposed operation. (Paragraph 9.) Of course, the Commonwealth Court and this Board have repeatedly held that mere ownership of property near a subject site is not enough by itself to confer standing or justify intervention. *Tessitor v. DER*, 682 A.2d 434, 437 (Pa. Cmwlth. 1996), *petition for allowance of appeal denied,* 693A.2d 591 (Pa. 1997); *Darlington Township v. DEP*, 97 EHB 934, 935; *P.A.S.S. v. DEP,* 1995 EHB, 940, 942. But it is certainly a start.

In addition, PVCA asserts that its members are substantially, directly, and immediately threatened by the proposed operation because the operation will result in (1) increased truck traffic on the valley's narrow roads, (2) odors and the emission of air contaminants, (3) an increased risk of water contamination, and (4) decreased property values. The petition, despite its length, never specifically states that PVCA's members use the roads, breathe the air, or use the water resources of the valley, but we believe that those conclusions may be fairly implied given the undisputed facts regarding the nature of the valley and the PVCA members' close proximity to the site.

[2] PVCA has objected to Conners's answer on procedural grounds. Because we are ruling in favor of PVCA on the merits of its petition, there is no need to address PVCA's procedural arguments. PVCA is correct, however, in pointing out that Conners did not dispute PVCA's factual assertions.

We are satisfied that PVCA's members have enough of an interest in whether Conner's management plan is approved to allow PVCA to intervene. The members' interests are substantial and personal. They live in close proximity to the site in a virtually islandish setting. They use the same roads that could be forced to bear increased truck traffic from vehicles carrying manure. They are most likely to bear the direct consequences of any potential impacts from the generation and spreading of manure in the valley that would allegedly create a threat of pollution of the air and water resources shared by the appellant and the members of PVCA. These interests certainly surpass the interest of other Pennsylvanians who would like to see people held to compliance with the environmental laws. *Contrast Commonwealth of Pennsylvania v. Phillip Morris, Inc.*, 1999 Pa. Cmwlth. Lexis 624 (August 10, 1999) (doctor denied intervention in tobacco litigation because he did not want to do anything more than seek relief "on behalf of the public at large"). In addition, these potential threats, to the extent they exist, are posed directly and immediately by implementation of the nutrient management plan.

We are not suggesting that implementation of Conners's plan will necessarily cause any untoward effects. That remains to be determined. What we are saying is that, if such effects do occur, PVCA's members stand to suffer as a direct result. They have enough of a personal stake in the outcome of the proceedings to assure the sort of concrete adverseness that will sharpen the presentation of the issues. *See Barshinger v. DEP*, 1996 EHB, 849, 854; *S.T.O.P., Inc. v. DER*, 1992 EHB 207, 208-09; *Funk v. DER*, 1988 EHB 745.

Conners cites several state and federal court cases in support of his position that standing (and intervention) should be rarely conferred and certainly denied in this case. The problem with

Conners's argument is that intervention in administrative proceedings is different from intervention in courts of general jurisdiction. In an administrative proceeding, intervention depends upon controlling administrative rules and the agency's enabling legislation. *Appeal of Municipality of Penn Hills,* 546 A.2d 50, 53 (Pa. 1988) *("Penn Hills").* As already noted, the Commonwealth Court has sent this Board a clear signal that intervention should be granted to any interested, "i.e., concerned" party. *BFI, supra.* Furthermore, no matter how great the temptation may be, this Board may not consider such factors as whether the petitioner's interests are already adequately represented or whether intervention will otherwise unnecessarily complicate the proceedings. *Id.; Wurth,* 1998 EHB at 1321-1322. Yet, these are precisely the sort of factors that courts are required to consider, Pa.R.Civ. P. 2329, and which often and traditionally drive decisions concerning intervention.[3]

Conners also argues that PVCA's petition is premature because PVCA may seek to appeal any future approval of Conners's plan. This Board, however, might conclude that the plan was improperly disapproved, substitute its discretion for that of the appellees, and order the plan approved. *See City of Harrisburg v. DEP,* 1996 EHB 1518, 1523. PVCA would have no opportunity to appeal from such a ruling. If PVCA is to be assured of being heard, it must participate in this proceeding or, potentially, not at all. Its intervention is not premature.

Finally, Conner argues that PVCA's intervention must not be permitted to expand the scope of the appeal. There are a couple of difficulties with this argument. First, unlike the many cases

[3] A court or agency may also be influenced by a unique statutory scheme that actually defines the interests of various potential parties. Thus, the Supreme Court recently denied standing to foster parents in a case regarding their charges in *In the Interest of G.C.,* 1999 Pa. Lexis 2246 (July 22, 1999), because of the unique statutory scheme defining the rights of foster parents. Although Conners has relied heavily on the case, we see it as having virtually no applicability here.

where an intervenor seeks to add challenges to a Departmental action not raised by the original appellant (*see, e.g.*, *Patterson v. DEP*, 1995 EHB 385), PVCA seeks to intervene on the side of the appellees in this case. PVCA could not have appealed itself.[4]

Further, the appellees are not required to plead, so the basis for their action has not yet been defined. We do not consider the appellees' disapproval letter to necessarily define the limits of the appellees' case. *See Harbison-Walker Refractories v. DEP*, 1996 EHB 116, 160-162 (statements of fact or law in DEP order are not controlling). Even if it did, the disapproval letter sent to Conners is broadly worded and open-ended. To say that PVCA "cannot expand the scope of the appeal" would be meaningless at this point.

More fundamentally, this Board's review is *de novo*. *Pequea Township v. Herr*, 716 A.2d 678, 686 (Pa. Cmwlth. 1998); *Warren Sand & Gravel Co. v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975). *City of Harrisburg v. DEP*, 1996 EHB 1518. We do not act as an appellate body with a limited scope of review attempting to determine if the Department's action can be supported by previous factfinding hearings and/or legal arguments. Rather, we start from scratch. We consider any relevant evidence regarding the propriety of the Department's action regardless of when it was generated and whether or not the Department considered it first. We must make our own independent determination in light of all the facts and the law. There is no reason why any person, once it obtains standing regarding an issue, should be limited, simply because its status as an

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[4] Thus, this appeal should be distinguished from the situation where the Department issues an order to two persons and only one of them appeals. In such cases, this Board has been very hesitant to allow the non-appealing party to intervene in the other order recipient's appeal because it flies so directly in the face of the requirement that appeals be filed within thirty days. *Robinson Coal Company v. DER*, 1995 EHB 370.

intervenor, on what evidence it can produce or what arguments it can make regarding that issue. Just as an intervenor can present evidence different than that presented by the original parties, it can make different arguments. Stated from a different perspective, we see no reason why this Board as a *de novo* agency should be precluded from considering valid arguments properly raised by a party to the litigation simply because the agency whose action is being reviewed did not cite the argument in support of its decision.

Thus, Conners argues that PVCA may not argue about odor concerns because they are beyond the scope of this appeal. The argument really confuses standing with relevance. Whether odor concerns can come into the case will depend on the statutes involved and the rules of evidence, *not* whether they happen to be raised by the appellees or PVCA.

In short, subject to the Board's discretion based upon the facts of individual cases, 25 Pa. Code § 1021.62(f), an intervenor in Board proceedings is not automatically limited as a result of its status as an intervenor on what arguments it can make. Arguments might be precluded for evidentiary reasons, because the intervenor lacks standing on a particular issue,[5] because the issue was already decided prior to its intervention, because an issue is not identified in a petition to intervene, or for a slew of other reasons, but not simply because it is an intervenor who wants to raise issues that are different than those raised by the existing parties.

This conclusion is in accordance with the Pennsylvania Supreme Court's holding in *Penn Hills*, 546 A.2d 50 (Pa. 1988). In that case, a municipality and school district (hereinafter "Penn

[5] Standing is issue specific. A party can only present facts and legal arguments that relate to the issues concerning which the party has standing. *Estate of Charles Peters v. DER*, 1992 EHB 358.

Hills") challenged a property assessment, saying it was too low. The owner of the property did not file its own timely challenge, but sought to intervene in Penn Hills's case and argue that the assessment was too high. The owner was allowed to intervene. Penn Hills then decided to withdraw its appeal, but the owner pressed on and was eventually successful in convincing the Allegheny County Board of Property Assessment to reduce the assessment. Penn Hills, obviously piqued, appealed to the court of common pleas, arguing that the Board should not have proceeded after Penn Hills withdrew its appeal. The court of common pleas agreed but the Commonwealth Court reversed. The Supreme Court accepted review to decide whether the intervenor's ability to participate was dependent upon the status of the original party.

In a six-to-one decision, the Court held that the intervenor's participation was not limited by the original party's status. *Id.*, 546 A.2d at 52. Of particular moment here, the Court rejected Penn Hills's argument that the property owner could not argue for a lower assessment because it had not filed its own appeal. The court rejected the argument because proceedings before the Board were *de novo,* with the Board having the latitude to revise the assessment upwards or downwards based upon its own discretion. *Id.*, 546 A.2d at 53. The court acknowledged that its decision effectively gave a second chance to a party that failed to exercise its original appeal right, but believed that the broad language in the Board's rules regarding intervention as well as the *de novo* nature of the review compelled that side effect. *Id.,* 546 A.2d at 54 n. 8.

Similarly, the Environmental Hearing Board is required to allow all concerned persons to intervene by its enabling statute as interpreted by the Commonwealth Court. Similarly, this Board's

review is *de novo*. Similarly, this Board can substitute its discretion for that of the Department. Accordingly, *Penn Hills* supports our conclusion that an intervenor in our appeals is not limited as a matter of law to the arguments presented by the original parties. *Accord, Fontaine v. DEP*, 1996 EHB 1333, 1347. To the extent some prior Board cases held to the contrary (*e.g. Patterson v. DER*, 1995 EHB 385, *Rand Am, Inc. v. DER*, 1995 EHB 998), we decline to follow them here.

Applying these principles to the case at hand, PVCA may present arguments that are otherwise appropriate in opposition to Conners's plan, whether or not they served as a basis for the appellees' action. This Board will then decide, considering all of the evidence and all legitimate legal arguments before it, whether the plan should have been disapproved.

The qualification that the arguments must be "otherwise appropriate" is an important one. We will address which arguments are appropriate as the case progresses. Relevance is likely to be the key limiting factor. An intervenor will also be limited to those specific issues identified in its petition to intervene. 25 Pa. Code § 1021.62(b)(4). What has already transpired in the appeal may limit an intervenor's rights. 25 Pa. Code § 1021.62(f).

Conners will not be limited to the issues raised in his notice of appeal to the extent that that filing did not address issues raised for the first time by the intervenors. The allowance of broad intervention constitutes the "good cause shown" that justifies raising related additional objections if necessary pursuant to 25 Pa. Code § 1021.51(e). The point is probably academic given Conners's broadly worded notice of appeal.

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOSEPH CONNERS	:	
	:	
v.	:	**EHB Docket No. 99-138-L**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
STATE CONSERVATION COMMISSION	:	
and DAUPHIN COUNTY CONSERVATION	:	
DISTRICT	:	

ORDER

AND NOW, this 20th day of August 1999, the Powell's Valley Conservation Association, Inc.'s petition for supersedeas is GRANTED. The caption is amended to read as follows:

JOSEPH CONNERS	:	
	:	
v.	:	**EHB Docket No. 99-138-L**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
STATE CONSERVATION COMMISSION	:	
and DAUPHIN COUNTY CONSERVATION	:	
DISTRICT, and POWELL'S VALLEY	:	
CONSERVATION ASSOCIATION, INC.,	:	
Intervenor	:	

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: August 20, 1999

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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THOMAS F. WAGNER,	:	
THOMAS F. WAGNER, INC., d/b/a	:	
BLUE BELL GULF and	:	**EHB Docket No. 98-184-MG**
BLUE BELL GULF	:	**(consolidated with 98-133-MG,**
	:	**98-164-MG, 98-213-MG and**
v.	:	**99-016-MG)**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	**Issued: August 23, 1999**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and SETH GRANT,	:	
Intervenor	:	

OPINION AND ORDER
ON
MOTION FOR PARTIAL SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

The Board grants in part and denies in part a motion for partial summary judgment in an appeal of a retail gasoline station owner from a series of orders issued by the Department of Environmental Protection in response to a release of petroleum products. The Board grants judgment in the appellant's favor on the section of the order which provides for an automatic assessment of a civil penalty and a letter which provides a statement of accrued penalty because the Board has held that such an automatic penalty provision is an abuse of discretion as being beyond the Department's authority as a matter of law. The appellant's motion for judgment is denied as it relates to the requirements of the order for a site characterization and remedial action and to the Department's order

which suspends the permits for the underground tanks and orders the appellant to cease operating his facility.

OPINION

Before the Board is the motion of Thomas F. Wagner and Thomas F. Wagner, Inc. d/b/a Blue Bell Gulf (collectively, Appellant) for partial summary judgment in his appeal of various administrative orders issued by the Department of Environmental Protection relating to the underground storage tanks located at the Blue Bell Gulf, a retail gasoline station located in Blue Bell, Whitpain Township, Montgomery County.

Much of the factual background in this matter was detailed by the Board in our opinions granting the Appellant's petitions for supersedeas of an order of the Department suspending his permits for operation of the underground storage tanks at the Blue Bell facility. *Wagner v. DEP*, EHB Docket No. 98-184-MG (consolidated)(Opinion issued February 11, 1999); *Wagner v. DEP*, 1998 EHB 1056 (superseding paragraph of an order of the Department which required the Appellant to close the gas station). To briefly summarize, as a result of a leak of petroleum products claimed to be in excess of 10,000 gallons from the Appellant's underground storage tanks the Department issued a series of orders requiring, among other things, site characterization and remedial action, imposing an automatic civil penalty for violation of any of the orders, and finally, suspending the Appellant's permits and ordering cessation of the Appellant's operation. The appeal of each of these orders has been consolidated by the Board.[1] The Appellant seeks summary

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[1]On June 29, 1999, Seth Grant (Intervenor), a neighboring landowner, was permitted to intervene in the case.

judgment on certain paragraphs of these orders. We will address each claim for relief in turn.

Summary judgment is only appropriate where the depositions, answers to interrogatories, admissions of record and 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. No. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997). The Board will only enter judgment in favor of a moving party in those cases where the right to judgment is clear and free from doubt. *Martin v. Sun Pipe Line Company*, 666 A.2d 637 (Pa. 1995).

Once a motion for summary judgment is made and properly supported, the opposing party may not rest upon the mere allegations or denials of his pleading. Rather, his response, by affidavit or as otherwise provided in Pa. R.C.P. No. 1035.3, must set forth specific facts arising from evidence in the record showing that there is a genuine issue for hearing. *O.S.C. Co. v. Lackawanna River Basin Sewer Authority,* 551 A.2d 376 (Pa. Cmwlth. 1988).

The Department does not contest many of the facts as averred by the Appellant in his motion. The Intervenor, on the other hand, does take issue with many of the Appellant's allegations in his response to the motion for summary judgment, but has failed to support his denials with any exhibits, affidavits or other reference to evidence in the record. Therefore, to the extent that he contests factual matters which have been properly supported by the Appellant and uncontested by the Department, we may not consider factual statements which are not supported by evidence in the record. *See* Pa. R.C.P. No. 1035.3(a).

Paragraph 10 of the July, 1998 Order

On July 2, 1998, the Department issued an order to Wagner in response to the release of gasoline. Paragraph 10 of the order also provided for an automatic civil penalty of $1,500 per day per violation of any provision of the order issued under the Storage Tank Act.[2]

The Appellant argues that the Board should grant partial summary judgment on the issue of an automatic civil penalty based on its decision in *202 Island Car Wash, L.P. v. DEP*, 1998 EHB 1325. The Department is aware of this decision and takes no position with respect to this issue in the appeal. The Intervenor argues that the Board should affirm the automatic penalty because of the gasoline leak at Blue Bell Gulf that led to the July 1998 Order.

Similarly to the matter before us, in *202 Island Car Wash*, the Department assessed a penalty of $1,500 per day per violation for any failure of the Appellant to comply with its order. The Board held that section 1307 of the Storage Tank Act, 35 P.S. § 6021.1307, provides that the Department shall consider the willfulness of the violation; damage to air, water, land or other natural resources of this Commonwealth or their uses; cost of restoration or abatement; savings resulting to the person in the consequence of the violation; deterrence of future violations, and other relevant factors. *See id.* (citing 35 P.S. § 6021.1307(a)). Accordingly, the Board held that as a matter of law, the Department must consider the facts surrounding the violation itself, not just the facts underlying its order

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[2] 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).

which gave rise to a violation, in order to calculate a reasonable penalty. Penalties assessed before a violation are made without adequate information about the specific violation.

Based on our decision in *202 Island Car Wash* and the specific facts of this case, we find that *202 Island Car Wash* is controlling. The Department's automatic assessment of a $1,500 civil penalty for any violation of the July 1998 Order is arbitrary as a matter of law and therefore an abuse of the Department's discretion. The Department must look at the specific facts of a violation to calculate a reasonable civil penalty and not just the facts of the underlying order.

The Intervenor argues that the automatic penalty would be a "much-needed deterrent to those renegade owners of underground storage tanks, who feel they do not need to be bothered with regulation." (Intervenor's Mem. at 2.) Yet, the Intervenor has not provided us with any legal authority supporting his position.

Therefore, we grant the Appellant's motion based on the Department's issuance of an automatic civil penalty.

Accrual of Penalty Letter

On August 19, 1998, the Department issued a letter to the Appellant advising him that he was in violation of the Department's July 2, 1998 order because he had not ceased operation of his facility. The letter went on to inform him that based upon Paragraph 10 of the order, assessing a civil penalty for each day of violation of the order, as of the date of the letter, he had accrued a penalty in the amount of $3,000. The Appellant seeks summary judgment on this assessment claiming that it is moot in light of our decision that the automatic assessment of penalties is arbitrary as a matter of law.

We are constrained to grant the Appellant's motion for summary judgment on the assessment of the civil penalty. The Department has taken no position on whether our decision concerning the automatic penalty provision is dispositive or whether the $3,000 penalty is appropriate for the Appellant's alleged violation of the July 1998 order. It has also not presented any evidence that it took into consideration any of the factors for assessing penalties as required by Section 1307 of the Storage Tank Act, 35 P.S. § 6021.1307.[3] The Intervenor has also failed to provide any evidence in opposition to the Appellant's motion. Therefore, the motion is granted to the extent that it pertains to the accrual of an automatic civil penalty predicated on the July order.

Site Characterization Report and Remedial Action Plan

The Appellant also moves for summary judgment on Paragraphs 3 and 4 of the Department's July 1998 order, as amended,[4] which required the Appellant to submit a complete site characterization study by January 15, 1999 and remedial action plan by March 1, 1999. The Appellant argues that he is entitled to judgment in his favor because the Department assumed responsibility for completing these tasks and because the deadlines imposed were impossible to meet. For the reasons that follow, we do not believe that the Appellant has met his burden of showing he is entitled to judgment because he has not demonstrated that the Department abused its discretion as a matter of law.

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[3] For the purposes of this motion we are treating this letter as if it were an action of the Department which can be appealed rather than merely an informational letter. The Board reserves judgment on whether the August 19, 1998 letter is an appealable action of the Department.

[4] The July order was amended by the Department by letter dated October 2, 1998. (Appellant's Ex. D) The deadlines were incorporated by reference into an order issued by the Department on January 19, 1999. (Appellant's Ex. E) All of these orders are on appeal.

The Appellant sets forth the following facts. The July 1998 order initially required the Appellant to submit a complete site characterization report to the Department by October 2, 1998 and a complete remedial action plan by November 27, 1998. (Appellant Ex. A) The Appellant hired consultants, using funds available from the Underground Storage Tank Indemnification Fund (USTIF), who provided the Department with an interim site characterization report. The Department responded by letter dated October 2, 1998, wherein it acknowledged that the work to date had been "pursued vigorously" but that further work needed to be done. Accordingly, it extended the deadline for the site characterization report until January 15, 1999, and the remedial action plan until March 1, 1999. (Appellant Ex. D)

In December 1998, the Appellant no longer had USTIF funds available, so the Department authorized another consultant, Foster Wheeler Environmental Corp., to complete the site characterization and remedial action plan. Foster Wheeler is currently authorized to implement all cleanup activities associated with the release from Blue Bell Gulf, including interim remediation, site characterization and remedial action. (Appellant's Ex. F; Board Ex. 1, February 9, 1999 Supersedeas Hearing). To date, Foster Wheeler has not completed either the site characterization or remedial action plan.

The Appellant first argues that he is entitled to summary judgment because Foster Wheeler "assumed responsibility" for the work required by the July order of the Department. The Department counters that although Foster Wheeler has taken responsibility for completing the work in the place of the consultant originally retained by the Appellant, the Appellant remains legally responsible for complying with the terms of the Department's order.

We fail to see how the substitution of consultants is relevant to the question of the propriety of the Department's order. The substitution of the Appellant's consultant, paid for by the Appellant using USTIF funds, for the Department's consultant, paid for with Commonwealth funds, does not relieve the Appellant of the legal responsibility for complying with the terms of the July order, as amended. Foster Wheeler took over the work required by the order because the Appellant was financially unable to do so and it was in the interests of the Commonwealth for the spill to be remediated. While the Appellant's financial inability to comply with an order of the Department may become relevant in an the assessment of an appropriate civil penalty, it has no bearing on the validity of the order at the time it was issued by the Department. *See Ramey Borough v. Department of Environmental Resources*, 351 A.2d 613 (Pa. 1976)(whether one can comply with an order of the Department is irrelevant to an appeal of the order); *Wasson v. DEP*, 1998 EHB 1148 (lack of funds to comply with a Department order is not a defense to a subsequent bond forfeiture).

The Appellant also argues that the deadlines set forth in the amended order were an abuse of discretion because they were impossible to meet. The only evidence the Appellant presents to support this argument is that Foster Wheeler has not yet completed the work. The mere fact that a contractor fails to complete a task on time does not support the conclusion that the deadlines were impossible to meet.

Accordingly, we will deny the Appellant's motion for summary judgment on Paragraphs 3 and 4 of the July 1998 order, as amended. The Appellant has failed to demonstrate that he is entitled to judgment in his favor.

Cessation of Operations

The Appellant next seeks judgment on Paragraphs 1, 2 and 3 of the January 1999 order which suspended the Appellant's permits for the underground storage tanks, and required him to cease operation of the tanks and surrender the facility registration certificate of Blue Bell Gulf. The Appellant relies on our February 1999 opinion and order superseding the order as a basis for summary judgment in his favor. *See Wagner v. DEP*, EHB Docket No. 98-184-MG (consolidated)(Opinion issued February 11, 1999). The Department asks us to revisit our opinion as well and deny the Appellant's motion, arguing that we took too narrow a view of the facts of this case.

We reviewed the January 1999 order in the context of a petition for supersedeas of that order. The Department predicated the order on facts which have been discussed above, namely that there had been a significant release of gasoline from the Appellant's facility which contaminated groundwater, drinking water wells and surface water in the vicinity. Additionally, vapors from the release forced the evacuation of two homes and infiltrated at least one commercial building. The Appellant was no longer able to fund the remediation required by earlier orders necessitating the authorization of Foster Wheeler to take over the work. Therefore the Department suspended the operating permits for the tanks and ordered the Appellant to cease operation.

At hearing on the petition for supersedeas the Appellant claimed that the order was an abuse of the Department's discretion because he had cooperated fully with the Department in effecting the remediation, and there was no further danger to the public since the Department took over the remediation work.

In determining whether the Appellant was "likely to succeed on the merits," a requirement for the issuance of a supersedeas, we analyzed Section 1309 of the Storage Tank Act. That section authorizes the Department to "issue such orders as are necessary to aid in the enforcement provisions of this act." 35 P.S. § 6021.1309. Based on the case that was presented to us, we believed that the Department failed to show that ordering the cessation of operation of the facility was *necessary* to enforce the Storage Tank Act inasmuch as the Appellant had complied with the orders of the Department to the best of his ability and there did not seem to be an ongoing release from the tanks. In its response to the Appellant's motion for summary judgment, the Department contends that suspending the Appellant's permits was necessary under Section 1309 because of the Appellant's lack of vigilance by not noting the loss of petroleum inventory sooner, financial instability and uncertain status of piping which contributed to the release, which all contributed to the Department's decision to issue the January order. In reply, the Appellant asserts that all of these concerns have been addressed. Specifically, he contends that his response to the release was prompt; financial stability is not a regulatory requirement and he has been making the required contributions to USTIF; and finally, none of the tightness testing and leak detection performed to date provides any indication of a problem with the tank lines.

We believe that the issue of whether the Department's January order was necessary to aid in the enforcement of the Act as required by Section 1309 of the Storage Tank Act is a question of fact which must be resolved following a hearing on the merits. The Department may be able to show that the particular circumstances of this case mandated its action based on evidence now in the record or to be admitted at the hearing. Therefore we will deny the Appellant's motion for summary judgment.

Accordingly we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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THOMAS F. WAGNER, INC., d/b/a	:	
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	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and SETH GRANT,	:	
Intervenor	:	

ORDER

AND NOW, this 23rd day of August, 1999, it is ordered that motion for summary judgment filed by the Appellant in the above-captioned matter is **GRANTED** as to Paragraph 10 of the July 2, 1998 order issued by the Department of Environmental Protection, requiring an automatic civil penalty. The Appellant's motion is further granted as to the accrual of civil penalty in the Department's letter dated August 19, 1998, as provided by the foregoing opinion. The Appellant's motion is **DENIED** in all other respects.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

EHB Docket No. 98-184-MG
(consolidated with 98-133-MG,
98-164-MG, 98-213-MG and
99-016-MG)

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: August 23, 1999

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