Enviromental Hearing Board

Adjudications and Opinions

1997

Volume I

COMMONWEALTH OF PENNSYLVANIA

George J. Miller, Chairman

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

1997

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City by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 1997 EHB 1

ISBN No. 0-8182-0229-7

FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1997.

The Environmental Hearing Board was originally created as a departmental administrative board within the Department of Environmental Resources 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 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, however, is unchanged by the Environmental Hearing Board Act; it still is empowered "to hold hearings and issue adjudications. . . on orders, permits, licenses or decisions" of the Department of Environmental Resources.

ADJUDICATIONS

OPINIONS

1997 DECISIONS

UNITED STATES CONSTITUTION

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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M. DIANE SMITH
SECRETARY TO THE BOARD

PHILLIP and ELEANOR ZICCARDI	:	
	:	
v.	:	**EHB Docket No. 96-161-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and INSURANCE COMPANY OF NORTH AMERICA, Intervenor	:	**Issued:** January 6, 1997

OPINION AND ORDER ON
MOTION TO QUASH AND
MOTION FOR APPEAL NUNC PRO TUNC

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Before the Board is a motion to quash the appeal of appellants for untimeliness by an intervenor in an appeal from a decision by the Department to waive forfeiture of certain bonds posted by intervenor for mining operations conducted on appellants' property. Appellants have filed a motion to appeal *nunc pro tunc*. The Board grants intervenor's motion because the appeal was untimely filed, and denies the motion of appellants because they have failed in their burden of proving that they had good cause for the late filing of their appeal.

BACKGROUND

Phillip and Eleanor Ziccardi (Appellants) have appealed a letter dated January 19, 1996, by the Department of Environmental Protection which waives collection of bonds on mining permits which were held by Glacial Minerals, Inc. Portions of the property covered by certain bonds is

currently owned by Appellants. Insurance Company of North America (Intervenor) posted these bonds as a surety on behalf of Glacial Minerals.

The property now owned by Appellants, known as the Gerwick Farm, was mined by Glacial Minerals pursuant to two permits: Permit No. 10880102, known as the Torris permit, and Permit No. 10813016, known as the Gerwick permit. By letter dated January 13, 1995, the Department informed Appellants that it had entered into an agreement to complete the reclamation of areas affected by mining as a settlement of ten appeals of bond forfeitures pending before the Board which included, among others, the Torris permit bonds and the Gerwick permit bonds. The letter also stated that as owners of land which was mined by Glacial Minerals they may have a right to appeal the agreement within twenty days of filing of the notice of consent order and adjudication in the *Pennsylvania Bulletin.* (Appellants Ex. C) The affected areas were identified by mine, permit number, surety, bond number and amount. (Appellants Ex. B)[1]

In a memorandum dated November 8, 1995, the compliance manager for the Department, Philip Newell informed the chief of the Department's compliance section for mining that the reclamation work had been satisfactorily completed by Intervenor and recommended waiver of the bond amounts on the affected sites. This document identified the sites by site name, permit number, township and county, bonding company, and bond numbers. Both the Gerwick and Torris permit bonds were identified on this memorandum. (Intervenor Ex. A) By letter dated January 19, 1996, the Department informed Glacial Minerals that the collection of the amounts of these bonds was

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[1] The Department alleges that the notice of settlement also included a table that identified the affected sites by mine site, permit number, township and county. (Department Reply to Appellants' Response to Motion to Quash ¶ 17) However, this table was not included as an exhibit to any of the motions or replies.

being waived pursuant to the January 1995 consent order and adjudication. The affected sites were identified by permit number, bond company, bond number and amount waived. Both the Gerwick and the Torris permit bonds were identified on this letter. (Intervenor Ex. B)

On May 28, 1996, Appellants filed a notice of appeal with this Board appealing the waiver of the bond for the Gerwick permit, based upon the November 8, 1995 memorandum. In their notice of appeal they state that they discovered the memorandum on May 15, 1996, when their attorney discovered the memorandum during his review of the Department's files on the mine site. *See Ziccardi v. DEP,* EHB Docket No. 96-115-R; Intervenor Ex. C. However, their appeal of the waiver of the bond on the Torris permit, which is presently before us, was filed on August 14, 1996, and was based upon the January 19, 1996 letter. Appellants state that they did not become aware that their property was also mined under the Torris permit until a meeting with representatives of the Department on July 25, 1996.

Intervenor argues that the appeal of the Torris permit bond waiver should have been filed within 30 days of May 15, 1996, when their attorney discovered the November 8, 1995 memorandum.[2] We agree.

This Board has no jurisdiction to hear appeals from actions of the Department which are received after the thirty day appeal period. *Rostosky v. Department of Environmental Resources*, 364

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[2] The Department, while agreeing that the appeal is untimely, argues that the appeal should have been filed during the appeal period of the January 1995 consent order and adjudication. However, it is not the Department's decision to settle the bond forfeitures that Appellants appear to be dissatisfied with, but whether the reclamation that the consent order required was in fact satisfactorily completed. It seems unlikely that this contention would have been ripe for review in January 1995. Accordingly, our analysis is predicated upon the issue of whether or not Appellants received notice of the Department's decision that the reclamation was complete on May 15, 1996.

A.2d 761 (Pa. Cmwlth. 1976). For third parties, where the Department does not publish notice of its action in the *Pennsylvania Bulletin* the appeal period begins to run from the date of actual notice of the Department's action, or the date of constructive notice of the Department's action. *Paradise Township Citizens Committee, Inc. v. DER*, 1992 EHB 668.

Appellants stated in their notice of appeal of the Gerwick permit bond waiver that they discovered the Department's action when their attorney reviewed the Department's file for the Glacial Minerals' mining activity on May 15, 1996. Both the Gerwick permit bonds and the Torris permit bonds were identified in the same way in the November 1995 memorandum.

We find the information provided by the Department in the November memorandum adequate notice to Appellants that the Department had decided to waive collection of the bonds for both permits. Although the memorandum did not identify the landowners of the mining sites, the sites were sufficiently identified so that Appellants could have discovered that the Torris permit authorized mining on their land. The Commonwealth Court's decision in *Sewickley Valley Hospital v. Department of Public Welfare*, 550 A.2d 1351 (Pa. Cmwlth. 1988), *petition for allowance of appeal denied*, 569 A.2d 1372 (Pa. 1989), is instructive. In that case the hospital argued that DPW was negligent in failing to provide it with specific notice of a disallowance decision in an audit report. The Court held that the revised amended audits which had been submitted to the hospital by DPW included notations which would have put the hospital on notice regarding DPW's disallowance decision had the hospital thoroughly reviewed the documents. Accordingly, the hospital's failure to file a timely appeal was not due to fraud or negligence on behalf of DPW. This Board faced an analogous situation in *Paradise Township Citizens Committee, Inc. v. DER*, 1992 EHB 668, wherein the appellants argued that they should have been entitled to appeal the approval of a Sewage

Facilities Act plan *nunc pro tunc* because they discovered that the contents of the proposed plan had been misrepresented to the county planning commission. The Board held that this fact did not provide grounds for an untimely appeal because, among other things, the appellants could have ascertained the information by reviewing the commission's files and the information concerning the plan was not hidden. Similarly, there is nothing to suggest that, in this case, a thorough review of the Department's files would not have revealed that Appellants' property was mined under the Torris permit.

In sum, since we have held that notice to an attorney is imputed to the client, *Paradise Township Citizens Committee, Inc. v. DER*, 1992 EHB 668, Appellants had notice of the Department's decision on May 15, 1996. Therefore their appeal of the Torris permit bond waiver is untimely.

However, Appellants argue that this information was not adequate to provide them with notice, since they did not know that their property was mined under both the Gerwick permit and the Torris permit. They contend that the appeal period should not begin to run until July 25, 1996, when the Department told them that their property was also mined under the Torris permit. They contend that both the Department and Intervenor had a duty to inform them that their property was mined under more than one permit. This argument is unpersuasive.

First, Appellants have cited no legal authority in support of their proposition that the Department and the Intervenor had any duty to inform Appellants which permits applied to their property. *Cf. Falcon Oil Co., Inc. v. Department of Environmental Resources*, 609 A.2d 876 (Pa. Cmwlth. 1992)(Department had no obligation to ascertain whether the appellants had appropriately filed a notice of appeal with the Board); *Recklitis v. DER*, 1991 EHB 365 (the Department was not

obligated or required to include specific information concerning specific permit conditions in the *Pennsylvania Bulletin* notice). Appellants were provided with sufficient information by the Department as early as January 1995 that if they were unsure which permits applied, they could have investigated. Appellants admit in their brief that they did not look at maps contained in the Department's files before July 1996. Their attorney clearly examined the file in May. It is simply not the Department's responsibility to make sure that Appellants know what permits apply to mining on their own property. *Cf. Polakovic v. Unemployment Compensation Board of Review*, 531 A.2d 852 (Pa. Cmwlth. 1987)(where an appellant failed to read the notice of her right to file an appeal, her failure to timely file was due to her own negligence and not because she was misinformed regarding the appeal period because the notice did not include a pink card which detailed her appeal rights). Rather, the responsibility lies with Appellants to be aware of activities occurring within the boundaries of their property. *See Fidelity Trust Co., Executor v. Lehigh Valley Coal Co.*, 143 A. 474 (Pa. 1928).[3]

Appellants argue that they are entitled to file their appeal *nunc pro tunc* because the Department and Intervenor deliberately failed to inform Appellants that their property was subject to both the Gerwick and the Torris permits. This claim is also baseless.

The Board will grant a petition to appeal *nunc pro tunc* "only where there is a showing of fraud, breakdown in the administrative process, or unique and compelling factual circumstances

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[3] We fail to understand the relevance of Appellants' allegation that it was difficult to determine the extent of the mining on the property when they inspected it prior to purchasing the property in 1992. If they were not sure what was involved, or were not confident that the seller had provided them with accurate information, they could have reviewed the Department's files at that time. If anyone had a duty to inform Appellants that the property was mined under more than one permit certainly the seller was in the best position to provide this information.

establishing a non-negligent failure to file a timely appeal." *Falcon Oil Co., Inc. v. Department of Environmental Resources*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992). It is the heavy burden of Appellants to establish that they are entitled to such extraordinary relief.

Appellants first argue that they are entitled to appeal *nunc pro tunc* because fraud on behalf of the Department and Intervenor induced Appellants to fail to adequately investigate the mining activity on their property. As we stated before, the Department and Intervenor had no obligation to make sure Appellants knew which permits applied to their property.

Further, appellants are only entitled to *nunc pro tunc* relief when there is some irregularity concerning the filing of their appeal, not their awareness of a possible cause of action. *See Paradise Township Citizens Committee, Inc. v. DER*, 1992 EHB 668. For example, in *Marcon v. DER*, 1990 EHB 476, an appellant argued that the Department unintentionally provided him with the wrong information about how close a proposed landfill would be to his property. Relying on this information he decided not to appeal. The Board held that the appellant was not entitled to *nunc pro tunc* relief because he was not misled about appeal procedures. *Marcon* is virtually indistinguishable from the facts before us here, except that Appellants do not charge that the Department provided them with incorrect information. Rather, they argue that the Department by its silence induced inaction on the part of Appellants. If misinformation concerning a permit does not provide grounds for an untimely appeal, silence is not a basis for *nunc pro tunc* relief. *See Fisher v. DER*, 1993 EHB 425, 428 (the courts generally have little sympathy for litigants who disavow knowledge of the applicable statutory requirements or expect the Department to advise them of their appeal rights).

Appellants also argue that their confusion concerning the permits establish unique and compelling circumstances which amount to a non-negligent happenstance. We disagree. Appellants

have not presented circumstances where they were not negligent in pursuing their appeal rights, but have provided an excuse for their failure to file a timely appeal. Negligence or mistake by an appellant does not excuse a failure to file a timely appeal. *Rostosky v. Department of Environmental Resources*, 364 A.2d 761 (Pa. Cmwlth. 1976)(failure to file an appeal with the Board rather than the Department because the appeal instructions did not provide a correct address for the Board does not provide grounds for appeal *nunc pro tunc*); *Taylor v. DER*, 1992 EHB 257; *Kirilia v. Contractors, Inc. v. DER*, 1991 EHB 13 (confusion of appellant concerning the effect of a settlement agreement did not provide grounds for appeal *nunc pro tunc*).

The Board's decision in *Fisher v. DER*, 1993 EHB 425, relied on by Appellants, is distinguishable. In that case, the appellant was misled by the language of a mine subsidence insurance agreement which led her to believe that she had two years to appeal the denial of her claim. The Board held that the language of the contract was misleading *and that appellant herself had not been negligent in any way.* Therefore, she was entitled to appeal *nunc pro tunc.*

Finally, Appellants argue that they are entitled to *nunc pro tunc* relief on the principle of equitable estoppel. The Supreme Court has specifically stated that since failure to file a timely appeal is a jurisdictional defect, courts can not extend the appeal period "as a matter of grace or mere indulgence." *Bass v. Commonwealth*, 401 A.2d 1133, 1135 (Pa. 1979). Recognizing this principal the Board has stated that potential injustice or hardship which may result from dismissal of an untimely appeal does not provide adequate grounds to allow the appeal *nunc pro tunc*. *Recklitis v. DER*, 1991 EHB 365.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

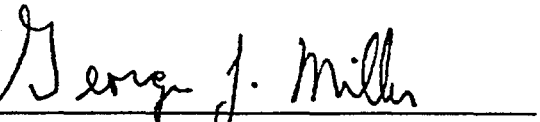
PHILLIP and ELEANOR ZICCARDI	:	
	:	
v.	:	**EHB Docket No. 96-161-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and INSURANCE COMPANY OF NORTH AMERICA, Intervenor	:	

ORDER

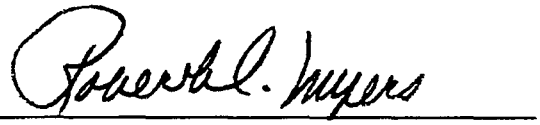
AND NOW, this 6th day of January, 1997, the motion of the Insurance Company of North America to quash the appeal in the above-captioned matter is hereby **GRANTED.**

The motion of Phillip and Eleanor Ziccardi to appeal *nunc pro tunc* is **DENIED.**

ENVIRONMENTAL HEARING BOARD

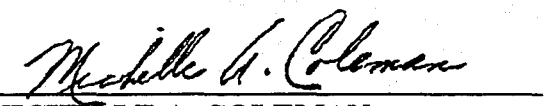


GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: January 6, 1997

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

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M. DIANE SMITH
SECRETARY TO THE BOARD

DR. JEFFREY YABLON	:	
	:	
v.	:	**EHB Docket No. 94-344-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 9, 1997**

ADJUDICATION

By Robert D. Myers, Administrative Law Judge

Synopsis:

Under its statutory authority, the Department was justified in issuing the Appellant an order directing removal of an unpermitted berm and restoration of the area where the evidence establishes the berm is a nuisance and is located mostly on Appellant's property.

PROCEDURAL HISTORY

Dr. Jeffrey S. Yablon (Appellant) commenced this matter on December 16, 1994, with the filing of a Notice of Appeal seeking review of an order issued by the Department of Environmental Protection (Department). The order, issued pursuant to the Dam Safety and Encroachments Act (Dam Safety Act or Act), Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1-693.27, and the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17, directed Appellant and First Falcon Corporation (First Falcon) to take corrective measures for the removal of an earthen berm, the majority of which is situated on Appellant's property in Haverford Township, Delaware County (Site), and the restoration of the Site.

At the parties' request, the hearing[1] scheduled for September 10, 11 and 12, 1996, was waived upon the filing of a Stipulation (Stip.) with ten exhibits and affidavits from each party. Post-hearing briefs were timely filed by the Department and Appellant on October 24, 1996, and November 8, 1996, respectively.

After a full and complete review of this record, we make the following:

FINDINGS OF FACT

1. Appellant is an individual who owns and resides at 1030 Sproul Road, Bryn Mawr, PA 19010 in Haverford Township, Delaware County. (Notice of Appeal; Stip.)

2. The Department is an administrative department of the Commonwealth of Pennsylvania charged with the duty and the authority to administer and enforce the provisions of the Dam Safety Act; the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 (Clean Streams Law); and the rules and regulations promulgated thereunder.

3. First Falcon is a Pennsylvania corporation with a place of business in Concord Township, Delaware County, and a mailing address of P.O. Box 467, Concordville, PA 19331. (Stip.)

4. In 1993, T.V. Spano Development Corporation (Spano) was engaged in the development of the real estate adjacent to Appellant's property, owned by First Falcon and known as Brittany Ridge. (Notice of Appeal; Exhibit 8)

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[1] Pre-hearing memoranda were submitted in the Spring of 1995 for a hearing set previously for October 17, 18 and 19, 1995. That hearing had been canceled because settlement of the matter had seemed likely. When that did not occur another hearing was scheduled for September 10, 11 and 12, 1996, by a Board order dated August 8, 1996.

5. As a result of the development, Appellant noticed in May of 1993 increased water run-off onto his property where it borders lot 16 of Brittany Ridge. When this was brought to Spano's attention, Spano through First Falcon, prior to August 1993, constructed an earthen berm perpendicular to Darby Creek. The berm is approximately 75 feet long, 18 feet wide and 9 feet high; about one-half of it is within the 100-year floodway and a portion is in the associated wetlands of Darby Creek.

6. Although it was first disputed, a later Site survey (conducted by Regester Associates, Inc. and dated June 28, 1995) revealed that the majority of the berm is positioned on Appellant's property with only its southern tip extending onto Brittany Ridge. (Notice of Appeal; Stip.; Exhibits 4, 8 and 9)

7. The Department did not receive a permit application nor issue a permit for the construction, operation or maintenance of the berm. (Stip.)

8. After being contacted by officials of Haverford Township about the berm, Appellant informed First Falcon by letter dated August 23, 1993, that he did not authorize the construction or placement of the berm, and assumed the appropriate permits had been obtained. (Stip.; Exhibit 2)

9. By a September 7, 1993, letter First Falcon replied to Appellant that it had constructed the berm along their property line to satisfy Appellant's request, and that he, as property owner, carried the responsibility for obtaining permits. (Stip.; Exhibit 3)

10. On April 13, 1994, the Department issued a Notice of Violation to First Falcon. The notice considered the berm "a threat to life and property" and stated it had filled wetlands. (Stip.; Exhibit 4)

11. By letter dated April 28, 1994, First Falcon informed the Department it was not involved in the placing of the berm but had constructed it at the request of Appellant, for which he was billed $5,422.22. (Stip.; Exhibit 5)

12. On November 16, 1994, the Department issued to Appellant and First Falcon the administrative order forming the basis of this appeal. The order directed them to

a. submit a Site plan showing the surveyed location of the berm;

b. submit plans to the Department Bureau of Dams and Waterways for the removal of the berm and restoration of the Site; and

c. begin implementation of the plan within ten days of its approval.

(Stip.; Exhibit 7)

13. On December 14, 1994, Appellant appealed the order with the filing of a Notice of Appeal. First Falcon did not appeal the order.

14. Current conditions of the berm are adversely affecting the environment and have threatened to cause substantial flood damage to the stream ecology and neighboring landowners. The Department also asked us to take judicial notice of the large amount of rainfall during the past year. We find this irrelevant to our decision. (Stip.)

DISCUSSION

In an appeal from an administrative order, the Department bears the burden of proof. 25 Pa. Code § 1021.101(b)(3). It must prove by a preponderance of the evidence that its issuance of the order was authorized by law and constituted an appropriate exercise of discretion.

Most of the facts and legal contentions are not in dispute. In 1993, Spano was engaged in the development of Brittany Ridge on the real estate adjacent to Appellant's property. As a result

of the development, Appellant in May noticed an increased amount of water run-off on his property where it borders lot 16 of Brittany Ridge and apprised Spano of the drainage problem. Shortly thereafter at Spano's request, First Falcon constructed an earthen berm that is approximately 75 feet long, 18 feet wide and 9 feet high. The berm sits perpendicular to Darby Creek; about one-half of the berm is within the 100-year floodway and a portion is in the associated wetlands of Darby Creek. Although it was first disputed, later survey revealed that the majority of the berm is positioned on Appellant's property with only its southern tip extending onto Brittany Ridge.

The parties stipulate the berm constitutes an "encroachment" as defined by the Dam Safety Act. Appellant's continued unpermitted maintenance of the berm, they agree, violates section 6 of the Dam Safety Act (32 P.S. § 693.6) and section 105.11 of the regulations (25 Pa. Code § 105.11) which sections require permits for encroachments. They further stipulate that the berm's unpermitted maintenance constitutes unlawful conduct pursuant to section 18 of the Dam Safety Act (32 P.S. § 693.18) and section 611 of the Clean Streams Law (35 P.S. 691.611). We, too, agree with these stipulations.

Appellant's only concern here, as conceded in his post-hearing brief,[2] is that he not be attributed the same responsibility as First Falcon. The exhibits make clear that Appellant and First Falcon ardently dispute responsibility for the berm. Appellant argues that the responsibility arising from his ownership of the property is a mere "technicality" and the Department abused its discretion

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[2] In his Notice of Appeal, Appellant disclaimed any responsibility for the berm. He asserted he did not construct nor authorize its construction, but believed at the time the berm was constructed it was located on First Falcon's property and trusted Spano was lawfully correcting the drainage problems. He did not raise this issue in his post-hearing brief, however, and it is therefore waived. *Lucky Strike Coal Co. v. Department of Environmental Resources*, 546 A.2d 447 (Pa. Cmwlth. 1988).

in assessing him "on the same basis as it assessed the actual wrongdoer." (Appellant's post-hearing brief) He avers First Falcon carried the responsibility to obtain the appropriate permit and Appellant assumed he had done so. First Falcon, in its correspondence, asserts it had constructed the berm along the property line only to satisfy Appellant's request, and that as property owner, Appellant carried the responsibility for obtaining the permit. Additionally, while we have received no evidence of it, Appellant contends he presented a berm Removal Plan to the Department. This, Appellant insists, should comprise the full extent of his responsibility.

It is not for the Board to allocate responsibility in a quantifiable manner between two alleged wrongdoers. Our role is solely to determine whether the Department was justified in ordering Appellant to remove the berm and restore the area.

The Department issued the order to Appellant and First Falcon,[3] first requesting the submission of two plans: one showing the surveyed location of the berm, and another providing for the removal of the berm and restoration of the Site; and second, requiring the implementation of the plan within ten days of its approval. Since the survey indicating the berm's location has been submitted and Appellant claims to have submitted a removal plan, we look only to the order's remaining requirements -- implementation of the plan.

Although Appellant disclaims responsibility for the remaining requirements, we cannot conclude Appellant is blameless or without liability. He was certainly involved in bringing about the construction of the berm by his complaint to Spano and his acquiescence in the placement of a

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[3] The Department, in its post-hearing brief, indicates it had attempted to ascertain who was the responsible party but, being unable to definitively make that determination, directed both to correct the unlawful condition. Since First Falcon did not appeal the order, it remains liable.

berm. Although he contends that he thought the berm was on First Falcon's property, we have our doubts. A property owner vigilant enough to protect his land against run-off from neighboring land is likely to object to the construction of a berm that does not meet with his approval. First Falcon claims to have billed Appellant $5,422.22 for the work, a claim that Appellant does not address.

Notwithstanding Appellant's argument, we find nothing in the Dam Safety Act that requires a prerequisite finding of responsibility. Neither the language of the Act nor its regulations express concern for the source of the prohibited activity; the mere maintenance of an encroachment constitutes a violation. Pennsylvania courts have oft said the "validity of an exercise of police power over land depends little upon the owner or occupier's responsibility for causing the condition giving rise to the regulation." *Bonzer v. Department of Environmental Resources*, 452 A.2d 280, 284 (Pa. Cmwlth. 1982) (citation omitted); *See Quehanna-Covington-Karthaus Area Authority v. Sandy Creek Forest, Inc.*, 606 A.2d 968 (Pa. Cmwlth. 1992) (responsibility for creating an unpermitted gravel road encroachment across a creek was immaterial to the issuance of an order pursuant to the Dam Safety Act).

The Department based its order here on the Dam Safety Act and the Administrative Code. The Dam Safety Act authorizes the Department to issue orders that are necessary for its enforcement, including cessation of any activity violative of its provisions. 32 P.S. § 693.20(a). Orders may also require "compliance with such terms and conditions as are necessary to effect" the Act's purposes. *Id.* One of the purposes served by regulating encroachments is to protect the "health, safety and welfare of the people and property" and to preserve the natural resources and environmental rights of Pennsylvanians. 32 P.S. § 693.2(1) and (3). Section 19 of the Dam Safety Act further requires that conduct declared unlawful under its provisions be treated as public nuisances and abated.

The unpermitted maintenance of the berm on Appellant's property constitutes unlawful conduct requiring abatement as a nuisance. The berm is adversely affecting the environment and threatens to cause substantial flood damage to the stream ecology and neighboring landowners. Half of the berm itself is located within the 100-year floodway and a portion of it is filling wetlands associated with Darby Creek. Considering these circumstances, removal of the berm is necessary to effect the purposes of the Dam Safety Act. To abate the nuisance, we agree with the Department that requiring restoration of the Site is a reasonably necessary means for accomplishing the purposes of the Act. *See Ramagosa v. DER*, 1990 EHB 1128 and 1461; *Conneaut Condominium Group, Inc. v. DER*, 1990 EHB 171.

Accordingly, we conclude the Department lawfully and appropriately exercised its discretion in issuing Appellant the order.

CONCLUSIONS OF LAW

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

2. The Department has the burden of proving by a preponderance of the evidence that the order was legally authorized and an appropriate exercise of its discretion.

3. The Dam Safety Act authorizes the Department to order the removal and abatement of unpermitted encroachments.

4. The Department lawfully and reasonably exercised its discretion in issuing the order directing Appellant to remove the unpermitted berm and restore the Site.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DR. JEFFREY YABLON	:	
	:	
v.	:	**EHB Docket No. 94-344-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 9th day of January, 1997, the appeal in the above-captioned matter is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: January 9, 1997

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

For the Commonwealth, DEP:
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M. DIANE SMITH
SECRETARY TO THE BOARD

MR. & MRS. CARL MILLER	:	
	:	
v.	:	**EHB Docket No. 95-234-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DAVID LIBERTI, Permittee	:	**Issued: January 9, 1997**

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A Department of Environmental Protection's (Department) motion to dismiss an appeal of the reissuance of a NPDES permit for sewage discharge into a water of the Commonwealth on the grounds that it had not abused its discretion is denied. The reissuance of a NPDES permit for a sewage discharge is an appealable action when the discharge has resulted in adverse effects on appellant's property. Under the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 - 691.1001(Clean Streams Law) and the accompanying regulations, the Department's enforcement of compliance of permit conditions is not discretionary. In addition, the Department abused its discretion by reissuing the permit to permittee after he failed to comply with the effluent limitations of the original NPDES permit.

OPINION

The Department's motion to dismiss currently before the Board arises from Mr. & Mrs. Carl

Miller's (Appellants) October 26, 1995 appeal of the Department's reissuance of a National Pollutant Discharge Elimination System (NPDES) - Sewage Permit No. PA0110124, under the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 - 691.1001, for a discharge from David Liberti's (Permittee) privately owned sewage facilities into an unnamed tributary of Pine Run Creek in Woodward Township, Lycoming County. The permit sets forth, *inter alia*, effluent limitations, monitoring requirements, management requirements including but not limited to matters on right of entry and property rights, and other requirements.

In their notice of appeal, Appellants contend that the grant was an abuse of discretion for the following reasons:

> - the discharge was contrary to the common law in that it permits an owner of land to discharge water on Appellants' land that is not natural drainage water from the Permittee's land causing Appellants substantial loss of use of their land (Notice of Appeal, ¶ 3.I);
>
> - the discharge of water by permittee in the past has increased the wetlands of Appellants causing loss of value to Appellants' land (Notice of Appeal, ¶ 3.II);
>
> - the grant had and will result in the continuing inverse condemnation of Appellants' land by the Commonwealth (Notice of Appeal, ¶ 3.III); and
>
> - the permit has and will cause continuing and increasing pollution to Appellants' land contrary to the duties of the Department (Notice of Appeal, ¶ 3.IV).

BACKGROUND

Appellants own a parcel of land located at the intersection of Route 220 and South Pine Run Road, Linden, Woodward Township, Lycoming County, Pennsylvania. The property is situated west of property owned by David Liberti (Permittee). Permittee's property is utilized as a trailer

court, known as Harvest Moon Mobile Home Park (Harvest Moon), with 170 trailers on site.

On December 3, 1990, the Department issued Permittee a National Pollution Discharge Elimination System Permit (NPDES), which authorized the discharge from a sewage treatment facility serving the trailer court into an unnamed tributary of Pine Run. On September 28, 1995, the Department reissued the permit. The reissuance is the subject of this appeal.

The unnamed tributary of Pine Run travels west across Appellants' property and into preexisting wetlands located on that property. The unnamed tributary is dry above or east of the point of discharge. The sole source of water in the unnamed tributary below the point of discharge is the discharge from the Permittee's sewage plant. As a result of the discharge, the wetlands on Appellants' property have steadily increased in size causing Appellants to be increasingly deprived of the beneficial use and enjoyment of their property. As a result of the increase in wetlands, Appellants have been unable to commercially develop the property as they had planned. Tests performed on water taken from the property indicate that the fecal coliform content of the water was in excess of that permitted under the Department's permit.

Appellants claim that Permittee has not acquired an easement over the Appellants' property despite a clause in the permit requiring him to do so and the increased flow of polluted water onto Appellants' property without the easement constitutes a trespass and has resulted in an increase in the size of the wetlands.

DISCUSSION

The Department asserts it did not abuse its authority because the permit was within its scope of authority. The Department argues that it properly reissued the NPDES permit, that the grant of discharge does not convey any property rights nor authorize injury to Appellants' property, that

revocation of the permit on the basis that Permittee did not acquire property rights is improper because resolution of property rights is not within the Department's jurisdiction and is not an appealable action.

In their response, Appellants argue that it appeals the Department action because the Department had abused its discretion in reissuing the permit since the Department knew that the Permittee had violated the terms of the permit in that the Permittee has not acquired an easement for the discharge and the permit should be revoked.

On April 19, 1996, the Department filed its reply in which it refuted Appellants' arguments.

We will dismiss an appeal only where there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law. *City of Scranton, et al v. DER, et al*, 1995 EHB 104.

The undisputed facts are set forth above under the title of "Background." On September 28, 1995, the Department reissued an NPDES permit to Permittee pursuant to its authority under the Clean Streams Law allowing Permittee to discharge into the unnamed tributary. The major issue is whether Permittee's noncompliance with the conditions of the permit and the Department's failure to prosecute the noncompliance is an appealable action.

Is the Department's action is an appealable action ?

The Department's reissuance of an NPDES permit permitting a sewage discharge is an appealable action. To be appealable to the Board, a Department decision must constitute an "action" which affects the appellant's "personal or property rights, immunities, duties, liabilities or obligations." 25 Pa. Code § 1021.2

Here, the reissuance has affected Appellants' property rights. The parties have agreed that

the source of the discharge is Permittee's sewage plant, that the discharge flows into an unnamed tributary of Pine Run which empties into preexisting wetlands located on Appellants' property, that the wetlands on Appellants' property have steadily increased in size causing Appellants to be increasingly deprived of the beneficial use and enjoyment of their property, and that as a result of the increase in wetlands Appellants have been unable to develop the property as they planned. Based on these facts it is clear that Appellants' property rights to use and enjoy the property have been adversely affected. Consequently, the Department's reissuance of the permit allowing the discharge is an appealable action.

Did the Department abuse its discretion ?

Under the Clean Streams Law, " ..., any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this act or any rule, regulation, order or permit issued pursuant to this act against the department where there is alleged a failure of the department to perform any act which is not discretionary with the department...." 35 P.S. § 691.601(c). The Department's enforcement of compliance of permit conditions is not discretionary. Section 92.13, Reissuance of permits, of the regulations regarding permits under the National Pollutant Discharge Elimination System states:

> Upon completing review of the new application, the Director may reissue the permit if, based on up-to-date information on the permittee's waste treatment practices and the nature, contents, and frequency of the permittee's discharge, the Director determines:
>
> (1) That the permittee is in compliance with all existing NPDES permit terms, conditions, requirements, and schedules of compliance.
>
> (2) That the discharge is consistent with the applicable water quality standards, effluent standards and limitations, and other legally applicable requirements, including any revisions or modifications of such standards, limitations and requirements

> which may have occurred during the term of the existing permit.

Here, Appellants argue that the Department has failed to enforce the permit conditions to abate pollution by requiring Permittee to comply with the stated effluent limitations set forth in the original permit issued December 3, 1990.[1] The Department did not address this issue. The Department in the permit set the effluent limit for fecal coliform at "200#/100 ml as a geometric mean." Appellants presented copies of printouts from tests performed on the surface water and from their well. These tests were performed on at least four different dates. The test reports showed that the water samples contained coliform or exceeded the permitted levels for coliform:

> July 21, 1995 - results were "positive MPN[2]/100ML[3] (Appellants' Ex. C);
>
> August 8, 1995 - "...everything passed except the Iron and Bacteria samples. These were the only ones that needed to be addressed. The iron did pass after the system was installed, but the bacteria sample did not (Appellants' Ex. C);
>
> September 27, 1995 - Total coliform ranged from 240 MPN/ 100 ML to 160,000 MPN/ 100 ML. Fecal coliform ranged from 240MPN/ 100 ML to 24,000 MPN/100 ML. (Appellants' Ex. C); and
>
> October 3, 1995 - Total coliform ranged from 2400 MPN/ 100 ML to 500,000 MPN/ 100 ML. Fecal coliform ranged from 900 MPN/ 100 ML to 240,000 MPN/ 100 ML. (Appellants' Ex. C).

The laboratories noted on the reports that the water samples "did not meet DER/EPA standards for potability at the time of sampling." Clearly, the fecal coliform limits were not met for several

---

[1] The permit expired at midnight on December 31, 1995.

[2] MPN stands for most probable number.

[3] ML is the abbreviation for milliliter.

months prior to expiration of the original permit. Consequently, the Department abused its discretion when it failed to adhere to the regulations, which specifically provide that prior to reissuance the Director reviewing the application should determine that the permittee is in compliance with all existing NPDES permit terms, conditions, requirements and schedules of compliance by reissuing the permit.

The parties focused on the permit condition which required Permittee to acquire an easement for the discharge. The discharge is to a "water of the Commonwealth" and not onto Appellants' property. Although we agree with the Department on the property rights issues, we cannot grant the Department's motion to dismiss because it failed to provide sufficient evidence that it is entitled to judgment on the issue of pollution of the waters of the Commonwealth which was the last objection raised by Appellants in their notice of appeal. The Department has the power and the duty to control and police pollution to the waters of the Commonwealth. Under the Clean Streams Law, the Department "... in issuing orders or permits, ... shall, in the exercise of sound judgment and discretion, ... consider, where applicable, the following: (1) Water quality management and pollution control in the watershed as a whole; ...." 35 P.S. § 691.5. Here, the Department has failed to appropriately exercise its statutory powers and, thus, it has abused is its discretion.

Consequently, we deny the Department's motion to dismiss because there is a material factual issue in dispute and the Department is not entitled to judgment as a matter of law since the Department abused its discretion by failing to prosecute Permittee. Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. & MRS. CARL MILLER	:	
	:	
v.	:	**EHB Docket No. 95-234-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DAVID LIBERTI, Permittee	:	

ORDER

AND NOW, this 9th day of January, 1997, the Department's motion to dismiss is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: January 9, 1997

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M. DIANE SMITH
SECRETARY TO THE BOARD

COUNTY OF DAUPHIN, UPPER PAXTON TOWNSHIP, AND WASHINGTON TOWNSHIP	:	
v.	:	**EHB Docket No. 96-184-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and USA WASTE, Permittee	:	**Issued: January 9, 1997**

OPINION AND ORDER ON MOTION TO DISMISS

By Robert D. Myers, Administrative Law Judge

Synopsis:

The Board dismisses an appeal for lack of jurisdiction when it seeks Board review of a DEP decision to suspend an application for the expansion of a landfill until substantive changes are made pursuant to Section 512 (b) of Act 101. The Board has no jurisdiction over non-final actions of DEP and has no authority to grant this type of equitable relief.

OPINION

On September 6, 1996, the County of Dauphin, Upper Paxton Township and Washington Township (Appellants) filed a Notice of Appeal seeking Board review of an August 7, 1996 letter of the Department of Environmental Protection (DEP) addressed to USA Waste (Permittee). The letter was a favorable response to a June 28, 1996 letter from Permittee which requested DEP to

suspend its review of an application to expand the Dauphin Meadows Landfill located in Upper Paxton and Washington Townships in Dauphin County.

DEP filed a Motion to Dismiss the appeal on October 18, 1996, claiming that the Board lacks jurisdiction to proceed with it. The Motion was accompanied by a supporting brief. Permittee joined in DEP's Motion on October 28, 1996. Appellants filed a joint Answer and Memorandum of Law on November 12, 1996. DEP filed a reply brief on November 21, 1996; Permittee filed one on December 2, 1996.

The issue raised by the Motion is whether DEP's August 7, 1996 letter is a final appealable action of DEP.

Permittee's June 28, 1996 letter read as follows:

> USA Waste Services, Inc. recently acquired Chambers Development Company, Inc., the owner of the Dauphin Meadows landfill. We have committed ourselves to understanding and addressing the concerns expressed by elected officials, community leaders and residents about the permit modification filed on November 15, 1995.
>
> Our initial review has demonstrated the need for significant amendment of the permit application. Further expenditure of time and effort by the Department pursuant to the review period requirements of 25 Pa. Code 271.203 seem to be unnecessary.
>
> We request, therefore, that the Department suspend any further action with respect to our permit application. This request is also intended to suspend any entitlement under the "Money-Back Guarantee Permit Review Program." After we have had the opportunity to appropriately address the issues involved in this matter we will communicate with you to establish a mutually acceptable time line for further review.
>
> Our request for suspension of the review process, rather than withdrawal of the permit application, is occasioned because of legal issues related to land use entitlement. Please be assured that our

> suspension request is intended to bring all department activity with respect to this permit application to a complete stop.
>
> DEP's August 7, 1996 response read as follows:
>
> This letter is in response to your letter dated June 28, 1996. The Department concurs with the statement made in your letter that the application for the proposed expansion requires substantive changes. Pursuant to ACT 1988-100 [sic] Section 512(b) (2) and 25 Pa. Code § 271.203(b), this letter constitutes the Department's formal notification that the permit modification application requires substantive corrections, and that the Department review period for the proposed expansion will begin when USA Waste submits its corrections or changes to the Department's satisfaction.
>
> Should you have any questions about this matter, please feel free to call me.

This correspondence is not unusual, in our experience, but typical of the give-and-take that goes on during DEP's processing of applications, especially those like landfills that involve complicated engineering and hydrogeological questions. It might differ somewhat from that typical of earlier years by the parties' recognition of DEP time limits in the Municipal Waste Planning, Recycling and Waste Reduction Act (Act 101), Act of July 28, 1988, P.L. 556, *as amended*, 53 P.S. §§ 4000.101-4000.1904; the regulations as 25 PA. Code § 271.203; and DEP's "Money-Back Guarantee Permit Review Program."[1] Otherwise, the correspondence is unexceptional.

Appellants contend, however, that it amounts to a final appealable action within the Board's jurisdiction. They allege in their Notice of Appeal that DEP determined on March 8, 1996 that Permittee's expansion application was administratively complete. This triggered the nine months review period in Act 101 (53 P.S. § 4000.512(b) (1)(i)) and in 25 Pa. Code § 271.203(a)(1), which

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[1] 4 Pa. Code § 7.651 *et seq.* This program, effective on July 1, 1995, calls for a refund of filing fees if DEP fails to act on an application within a specified period of time.

could be suspended only for a "period beginning with the date that [DEP] in writing has requested the applicant to make substantive corrections or changes to the application and ending with the date that the applicant submits the corrections or changes to [DEP's] satisfaction." 53 P.S. § 4000.512(b)(2); 25 Pa. Code § 271.203(b). Since DEP never sent such a letter to Permittee, the argument goes, DEP had no legal basis on which to suspend its review.

In addition, the Notice of Appeal asserts, Permittee withdrew its related Chapter 105 application on July 16, 1996. Without this Chapter 105 permit (for a stream relocation), the expansion permit cannot be issued on the basis of the present design. Consequently, it was an abuse of discretion for DEP to suspend its review of the expansion application instead of proceeding with it or mandating its withdrawal.

While the Appellants claim to be aggrieved by DEP's alleged action, they fail to aver either in the Notice of Appeal or their Answer to the Motion how they are affected. In a footnote to their Memorandum of Law, however, they explain that the Appellant Townships recently enacted zoning changes applicable to the proposed expansion area. They claim that Permittee's request for a suspension of its application rather than a withdrawal is an attempt by Permittee to establish some pre-existing use of the land that might override the change in zoning. DEP should not be a party to such an attempt, Appellants assert.

We have held that statements of fact contained in a legal memorandum will not be considered when dealing with a motion like the present one. *County of Schuylkill, et al. v. DER et al*, 1990 EHB 1370. Accordingly, we will disregard the footnote. That leaves us with nothing more on this point than Permittee's statement in the June 28, 1996 letter that its request for a suspension rather than a withdrawal is related to land use entitlements.

Board precedents have established that we cannot review claims of DEP inaction because we lack the power to grant equitable relief. *Westinghouse Electric Corporation v. DER*, 1990 EHB 515; *S.A. Kele Associates v. DER et al,* 1991 EHB 854. These decisions follow the ruling of Commonwealth Court in *Marinari v. Commonwealth, Department of Environmental Resources,* 566 A. 2d 385(Pa. Cmwlth.1989).[2] We have also held that we cannot review the many provisional, interlocutory decisions made by DEP during the processing of an application, not because they can have no impact, but because they are not final. *Phoenix Resources, Inc. v. DER,* 1991 EHB 1681. We said there at page 1684:

> Board review of these matters would open the door to a proliferation of appeals challenging every step of [DEP's] permit process before final action has been taken. Such appeals would bring inevitable delay to the system and involve the Board in piecemeal adjudication of complex, integrated issues.

The relief Appellants seek in this appeal is to force DEP (a) either to proceed with its review of the application until a final decision is made on it, (b) or to compel Permittee to withdraw it. Both requests sound in equity and appear to be beyond our powers to grant. *Marinari.* Moreover, they seem to involve a non-final decision of DEP -- a suspension of the application review process until Permittee revises it. This is the very type of DEP decision we declined to review in *Phoenix*.

Appellants make several arguments to convince us that we do have jurisdiction. Taken as a whole, they seem to challenge the whole concept of suspensions. They point out that the suspension here is open-ended and the expansion application could hang in suspense indefinitely.

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[2] Prior to *Marinari* there were Board decisions holding that we did have jurisdiction over DEP's inaction. *See, e.g., B & D Coal Company v. DER,* 1986 EHB 615; and *Duquesne Light Company v. DER,* 1984 EHB 423. These and others like them were overruled by the Board in *Westinghouse*, 1990 EHB 515 at 518. To the extent Appellants' Memorandum of Law relies on these overruled cases, it is unpersuasive.

They also claim that the amount of time left for DEP to review the substantive changes after they are made will not be adequate for careful consideration. These arguments should more properly be directed toward the Legislature. The provisions of Section 512(b) of Act 101, 53 P.S. § 4000.512(b), reflect lawmaker awareness of the fact that landfill applications go through a process of change while undergoing DEP review. When the application must be changed in a substantive way, the Legislature decided, the nine months review period would stop and would not stand again until the changes were made to DEP's satisfaction.

It is apparent that the Legislature contemplated suspensions of the review period. It could have gone ahead and legislated time limits and other details applicable to suspensions but did not choose to do so, obviously leaving those things to DEP discretion. It also could have provided that, after substantive changes are made, a whole new nine months review period would begin, or at the least, a certain minimal part of it to assure adequate time for careful review. It chose, however, to stick with the original nine months period, stopping the clock only while the changes are being made.

We agree with Appellants that the suspension is open-ended and that the four months remaining in the review period after the substantive changes are made might not be adequate for careful consideration.[3] But we have no power to override the Legislature and no authority to dictate to DEP the terms of a suspension. The latter requires equity powers that we do not possess. For this

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[3] We do not agree with the dire consequences Appellants predict. The suspension has been in effect only for about four months at this writing. We have confidence that, at some point, DEP will require Permittee to take some affirmative action. If the four months of review time are not adequate, DEP can request Permittee to waive the time limits. If Permittee refuses and DEP is not prepared to issue a permit, it can deny the application.

Board to interject itself into DEP's administrative process, policing minute aspects of its handling of permit applications, would not only constitute a usurpation of authority, it would also create the very problems discussed in *Phoenix*. We have an important role to play in environmental regulation but it begins only after DEP has taken a *final* action.

Appellants assert, however, that the provisions of Section 512(b) of Act 101, 53 P.S. § 4000.512(b), did not come into effect because the suspension for substantive changes was initiated by Permittee rather than DEP. According to this argument, a suspension can occur only when DEP "...in writing has requested the applicant to make substantive ... changes...." Here, Permittee recognized the need for such changes and requested the suspension. DEP merely acquiesced in it.

Besides being legalistic in the extreme, this argument is wrong. While Permittee clearly initiated the request, DEP in its August 7, 1996 letter affirmatively stated that it agreed that the application required substantive changes. It then went on to cite Section 512(b) and to proclaim that the letter constituted DEP's formal notification that the application needed substantive changes and that the review period would not begin again until the changes are made. How could DEP have acted that would have been in closer compliance with Section 512(b)? If we were to accept Appellants' contention, DEP could never suspend its review in a situation where the applicant has been the first to recognize the need for substantive changes. That would be an absurd result.

Appellants' final argument relates to Permittee's withdrawal of its Chapter 105 application. According to the allegations, a Chapter 105 permit is necessary to the design of the landfill expansion that was pending before DEP. The withdrawal of that application, Appellants argue, renders the expansion application moot. Accordingly, DEP could not suspend a moot application. We are not persuaded that this argument affords a basis for us to assume jurisdiction over the

suspension decision. Again, it is a non-final action and Appellants are seeking equitable relief we cannot grant. Aside from that, the argument lacks merit. The expansion application and Chapter 105 application are separate documents seeking specific approvals under separate statutes. While they may relate to the same proposed project, they are nonetheless distinct. Besides, it is conceivable that the design changes contemplated by Permittee eliminate the need for the Chapter 105 permit. Whatever motives prompted Permittee to withdraw the Chapter 105 application, the expansion application remains legally unaffected.

Despite Appellants' efforts to convince us that the August 7, 1996 letter of DEP constitutes a final, appealable action, we are satisfied that the suspension is a non-final decision of DEP over which this Board has no jurisdiction. We are also satisfied that the relief sought by Appellants in the appeal is the type of equitable relef that is beyond our powers to grant. Accordingly, the appeal will be dismissed.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COUNTY OF DAUPHIN, UPPER PAXTON TOWNSHIP, and WASHINGTON TOWNSHIP	:	
v.	:	**EBB Docket No. 96-184-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and USA WASTE, Permittee	:	

ORDER

AND NOW, this 9th day of January 1997, it is ordered as follows:

1. The Motion to Dismiss is **granted.**

2. The appeal is **dismissed.**

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: January 9, 1997

c: **DEP Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

HAROLD WEISS, et al.	:	
	:	
v.	:	**EHB Docket No. 94-283-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARTIN STONE QUARRIES, INC., Permittee	:	**Issued: January 10, 1997**

OPINION AND ORDER

By George J. Miller, Administrative Law Judge

Synopsis:

The Board will not compel the testimony of expert witnesses originally retained by another party if those witnesses choose not to testify.

OPINION

The appeal arises from the issuance by the Department for the operation of the Gabel quarry under the Non-Coal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3301 et seq., which is located in Washington Township, Berks County. A hearing on the merits is scheduled to commence on February 3, 1997. By letter dated December 30, 1996, appellants in this case have asked the Board to issue subpoenas to compel attendance at the hearing for Ramesh Venkatkrishnan, Ph.D. and Steven Wheeler. These individuals are identified in appellants' pre-hearing memorandum filed on December 30, 1996 as expert witnesses who are to offer testimony with respect to hydrologic characteristics in the area of the proposed quarry.

The Department and the permittee, Martin Stone Quarries, Inc., object to the issuance of these subpoenas on the ground that the testimony of expert witnesses cannot be compelled by order of the Board. These witnesses were originally employed by Washington Township which also had appealed the issuance of the permit but has since withdrawn its appeal.

Whether these individuals are willing to testify on behalf of the appellants appears to be a disputed issue. At a conference call with counsel for the parties on January 8, 1997, appellants' counsel asserted that these individuals were now willing to testify on behalf of the appellants needing only a subpoena from the Board so as to enable Dr. Venkatkrishnan to obtain time off from his employer and to facilitate Mr. Wheeler's testimony in view of his original employment by Washington Township. By contrast, counsel for permittee asserted that these individuals have told him that they would be willing to testify on behalf of the appellants only if they were ordered to do so by the Board. At the time of their depositions in this case, both of these individuals said that they were reluctant to testify on behalf of the appellants unless they were called to testify by the Board's subpoena.

Under Pennsylvania law, it is quite clear that a party has no right to subpoena an expert retained by an opposing party so that a failure of the Board to issue such a subpoena is a proper exercise of discretion. *Spino v. John S. Tilley Ladder Co.*, 671 A.2d 726 (Pa. Super. 1996).[1] It is equally clear under Pennsylvania law that a court has no power to compel expert testimony because a private litigant has no right to compel a citizen to give up the product of his brain anymore than

[1] The rule in federal courts appears to be quite different. In *Fitzpatrick v. Holiday Inns, Inc.*, 507 F. Supp. 979 (E.D. Pa. 1981), the court said that it has the power to subpoena an expert witness and can require him to state whatever opinions he may have previously formed.

he has a right to compel the giving up of material things. *Columbia Gas Transmission Corp. v. Piper,* 615 A.2d 979 (Pa. Cmwlth. 1992).

In this case, however, the question as to whether a subpoena should issue is clouded not only by the dispute as to whether or not these experts are willing to testify for the appellants, but also by a letter sent by the presiding administrative law judge to Michael Thrasher, the spokesman for these then unrepresented appellants, in response to his request in March, 1996 for the issuance of subpoenas for witnesses for the hearing on the merits which had not yet been scheduled. In that letter dated March 22, 1996, I focused on the timing of the request rather than the nature of the witnesses and advised that spokesman that the Board would issue subpoenas for the appellants' expert attendance at the hearing when the hearing date is scheduled. While appellants might have been led to believe that expert testimony could be compelled by that letter, any doubts on that issue should have been resolved by a subsequent letter dated April 5, 1996 which I sent to Mr. Steven Wheeler, one of appellants' proposed experts, who sought the Board's advice as to whether or not he could be required to testify at a deposition. In that letter, a copy of which was sent to Mr. Thrasher, the then spokesman for the appellants, I advised Mr.Wheeler as follows:

> You may not be required to testify with respect to your expert opinions without your consent. Whether you would properly give your expert opinion in testimony on behalf of the Concerned Citizens group regarding relevant wetland issues may depend on what arrangement, if any, you may have with any other person with respect to your report and testimony. I can give you no advice on that issue.

Throughout this case, counsel for the Department and the permittee have made it quite clear to the appellants and their counsel that it is their belief that the experts formally employed by Washington Township cannot be compelled to testifiy in this matter by the Board. Indeed, in the

Board's December 12th opinion on motions to dismiss and for summary judgment, the Board made it quite clear that expert witnesses cannot be compelled to testify without their consent and that it would be unlikely that the Board will issue subpoenas for the purpose of summoning witnesses to provide expert testimony. *Weiss v. DER*, EHB Docket No. 94-283-MG, Issued December 12, 1996.

Under ordinary circumstances, the Board will not issue subpoenas for expert witnesses. In this case, however, to avoid any possibility that the appellants were misled by the Board's letter of March 22, 1996, the Board will issue the subpoenas as requested subject to the following requirements:

1. The subpoenas must be served with a copy of this Opinion and Order advising the witnesses that the Board will not require them over their objection to offer expert testimony for the appellants at the hearings now scheduled to commence on February 3, 1997;

2. The witnesses served with the subpoena may advise this Board that they choose not to attend the hearing and give expert testimony on behalf of the appellants by sending a letter to the Board stating that intention. If they so advise the Board, they need not appear in response to the subpoena; and

3. Counsel are requested to secure a written statement from each proposed witness addressed to the Board of their intent to testify or not as promptly as possible.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HAROLD WEISS, et al.	:	
	:	
v.	:	**EHB Docket No. 94-283-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARTIN STONE QUARRIES, INC., Permittee	:	

ORDER

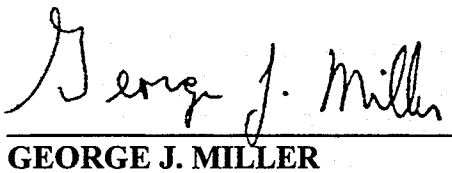
AND NOW, this 10th day of January, 1997, the Board will issue subpoenas for the attendance of Ramesh Venkatkrishnan, Ph.D. and Steven Wheeler at the hearing commencing on February 3, 1997, subject to the following conditions:

1. The subpoenas must be served with a copy of this Opinion and Order advising the witnesses that the Board will not require them over their objection to offer expert testimony for the appellants at the hearings now scheduled to commence on February 3, 1997;

2. The witnesses served with the subpoena may advise this Board that they choose not to attend the hearing and give expert testimony on behalf of the appellants by sending a letter to the Board stating that intention. If they so advise the Board, they need not appear in response to the subpoena; and

3. Counsel are requested to secure a written statement from each proposed witness addressed to the Board of their intent to testify or not as promptly as possible.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: **January 10, 1997**

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

For the Commonwealth, DEP:
Marc A. Ross, Esquire
Central Region

For Appellants:
Wendy Carr, Esquire
Philadelphia, PA

For Permittee:
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rk

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M. DIANE SMITH
SECRETARY TO THE BOAR

CHESTNUT RIDGE CONSERVANCY	:	
	:	
v.	:	**EHB Docket No. 96-022-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TASMAN RESOURCES, LTD., Permittee	:	
HILLSIDE COMMUNITY ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 96-024-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TASMAN RESOURCES LTD., Permittee	:	**Issued: January 15, 1997**

OPINION AND ORDER ON TASMAN RESOURCES' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST CHESTNUT RIDGE CONSERVANCY

By Thomas W. Renwand, Administrative Law Judge

Synopsis

Summary judgment is granted to the permittee on the issue of whether the Chestnut Ridge Conservancy has standing to challenge the impact of mining on Copperhead Cave. The Conservancy failed to demonstrate that it has a direct, immediate, and substantial interest in this issue. To the extent that a motion for partial summary judgment is inconsistent with supporting memoranda, the motion controls. Summary judgment is inappropriate where material issues of fact remain unresolved.

OPINION

This matter was initiated with the January 23, 1996, filing of a notice of appeal by Chestnut Ridge Conservancy ("the Conservancy") challenging the Department of Environmental Protection's ("Department") issuance of a noncoal surface mining permit to Tasman Resources, Ltd. ("Tasman"). The permit authorizes Tasman to mine Chestnut Ridge Quarry, a limestone quarry in Derry and Fairfield Townships, Westmoreland County. The Conservancy was formed in 1995. It is a not-for-profit organization with approximately 870 members, many of whom live in the vicinity of the proposed operation.

On June 20, 1996, Tasman filed a motion for partial summary judgment and a supporting memorandum of law. The Conservancy filed a response and memorandum in opposition on July 19, 1996. Tasman filed a reply memorandum on August 7, 1996, and later, on September 16, 1996, filed a "supplemental brief" in support of its motion. The Conservancy filed no response to the supplemental brief.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file--together with the affidavits, if any--show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Snyder v. Department of Environmental Resources*, 588 A.2d 1001 (Pa. Cmwlth. 1991), *appeal dismissed as improvidently granted*, 632 A.2d 308 (Pa. 1993). All doubts as to the existence of material facts are resolved against the moving party. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995).

We shall examine each aspect of Tasman's motion for summary judgment separately below.

A. Whether the notice for the December 20, 1994, public hearing was sufficient.

In its motion, Tasman asserts that it is entitled to summary judgment on the issue of whether

the notice for the December 20, 1994, public hearing was sufficient because "founding members" of the Conservancy attended the hearing. In support of its position, Tasman points to *Paradise Township Citizens Committee, Inc., v. DER*, 1992 EHB 668, which Tasman contends stands for the proposition that notice to representatives of a citizen's group constitutes notice to the entire group--even if the representatives received notice before the group existed. The Conservancy counters that summary judgment would be inappropriate because no founding members of the Conservancy attended the hearing and because notice to a member of a citizens group is not necessarily imputed to the entire group.

There is no question that some individuals who attended the December 1994 hearing later became members of the Conservancy during its formation in 1995. There is no evidence to establish, however, that any of those present were founding members of the Conservancy. In support of its contention that founding members were present, Tasman points to deposition testimony from Mark Samios, a member of the Conservancy, and a copy of a sign-in sheet alleged to be from the hearing. However, Samios' testimony simply identifies certain individuals who became members of the Conservancy and notes that two of them--Tom Metzgar and Kim Opatka Metzgar--attended the hearing. There was no testimony suggesting that either was a founding member of the Conservancy. Nor did the sign-in sheet indicate that any of the individuals at the hearing were founding members of the Conservancy. In addition, along with its response to the motion, the Conservancy submitted an affidavit from Mark Samios expressly stating that the individuals he identified as present at the hearing were *not* founding members of the Conservancy. (Exhibit 1 in opposition to the motion, paragraphs 3-5.)

Nor does the Board's decision in *Paradise Township,* 1992 EHB 668, support Tasman's

position. In *Paradise Township*, we held that we would impute notice received by officers of a citizens group to the group itself, even though the officers received the notice before the group was formed. We explained that knowledge possessed by an agent can be imputed to the principal--even if received prior to the agency--and that we would impute notice from the officers to the citizens group because the officers were agents of the citizens group and, therefore, had a duty to pass the notice on to the organization. According to the affidavit of Mark Samois, no officers of the Conservancy attended the December 1994 public hearing. (Exhibit 1 in opposition to the motion, paragraph 5.)

B. Whether the Conservancy has standing to raise certain issues.

The remaining grounds on which Tasman seeks summary judgment go to the issue of standing. It is Tasman's contention that the Conservancy lacks standing to raise certain issues contained in the notice of appeal.

A party has standing if it has a direct, immediate, and substantial interest which is impacted by the action taken. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). This interest must surpass the common interest of all citizens in procuring obedience to the law. *South Whitehall Township Police Service v. South Whitehall Township*, 655 A.2d 793, 795 (Pa. 1989). In the case of a citizens group, the group will be deemed to have standing so long as one of its members has standing. *RESCUE Wyoming v. DER*, 1993 EHB 839.

We examine below each of Tasman's arguments with regard to standing.

1. Whether the Conservancy has standing to argue that the Department violated the History Code, Act of May 26, 1988, P.L. 414, *as amended*, 37 Pa.C.S.A. § 101-906 (the History Code), by issuing Tasman a noncoal surface mining permit.

In its "supplemental" brief in support of its motion for summary judgment, Tasman argues that the Conservancy does not have standing to argue that the Department failed to comply with the History Code because none of the Conservancy's members have a direct, substantial, and immediate interest in the outcome of that issue. As noted above, the Conservancy did not respond to the supplemental brief.

The History Code was enacted in 1988 for the purpose of preserving and protecting Pennsylvania's historic resources. 37 Pa. C.S.A. §102. Pursuant to certain provisions of the Code, Commonwealth agencies must notify or consult with the Pennsylvania Historical and Museum Commission ("Commission") prior to taking certain actions. In addition, the Commission is given certain powers and duties, including the power to advise public officials regarding the planning and implementation of undertakings affecting historic resources.

In the motion for summary judgment itself, Tasman failed to address the issue of the Conservancy's standing to argue that the Department violated the History Code. By raising the issue in its supplemental brief, Tasman is attempting to expand the scope of its motion for summary judgment beyond that set forth in the motion itself. One cannot expand the scope of a motion in this manner. To the extent that a motion for partial summary judgment is inconsistent with the supporting memoranda, the motion controls. *See, e.g., Barkman v. DER*, 1993 EHB 738. This is particularly important here where we do not have the benefit of a response by the Conservancy to the supplemental brief. Therefore, having failed to contest the Conservancy's standing to raise the issue of compliance with the History Code in its motion for partial summary judgment, Tasman cannot raise that issue in its supplemental brief.

2. Whether the Conservancy has standing to raise objections concerning harmful

consequences on wildlife in the vicinity.

Tasman maintains that the Conservancy lacks standing to raise objections concerning harm to wildlife because the Conservancy must identify a member with a direct, immediate, and substantial interest in that issue, and "the interest in protecting and preserving the values common to the general public is not a direct, immediate, and substantial interest. . . ." (Tasman's motion, paragraph 12.) Specifically, Tasman argues: (1) that the Conservancy identified member Mark Samios as its representative for issues relating to standing; (2) that Samios named Dr. Joseph Merritt, William Allen, and Jennie Gourley as Conservancy members having standing to raise issues pertaining to wildlife, in particular the Allegheny woodrat and timber rattlesnake; (3) that neither Merritt, Allen, nor Gourley have a direct, substantial, and immediate interest in the issue; and, (4) that, therefore, the Conservancy does not have standing to raise the issue.

Attached to Tasman's supplemental brief are relevant portions of the deposition testimony of Merritt, Allen, and Gourley. While we agree with Tasman's assessment that the testimony of these three individuals provides very limited information about wildlife in the area of the mining, nonetheless, it does establish that Merritt at least has a sufficient interest in this issue so as to provide the Conservancy with standing to challenge the effect of Tasman's mining on area wildlife.

Merritt is identified by the Conservancy as "one of the foremost small mammalogists in the world." (Exhibit 2 in opposition to the motion, page 28) Samios identified Merritt as having a specific interest in the effect of mining and, in particular, silica dust on the Allegheny woodrat in the vicinity of the mining operation. In his deposition, Merritt testified as to the effect a modification of habitat would have on the woodrat. Merritt also discussed the effect of silica dust on small mammal distribution and abundance. We find that Merritt's testimony, in conjunction with

the testimony of Samios, establishes a sufficient interest in this matter as to confer standing on the Conservancy to raise this issue.

In contrast, the testimony of Allen and Gourley was vague and general and did not demonstrate a direct interest in wildlife in the area of the quarry. When asked which plants and animals would be destroyed by the quarry, Gourley testified that she could not recall. (Exhibit C to supplemental brief, page 21) When asked if she had ever seen a woodrat, Gourley could recall only one occasion, on her farm, when she had seen one. (Exhibit C to supplemental brief, page 23) When asked about Samios' deposition, in which he identified Gourley as a member of the Conservancy having an interest n the woodrat, Gourley responded, "I was a worker bee. Let me just put it that way. I gathered information and did what I was told." (Exhibit C to supplemental brief, page 26) In summary, Gourley's testimony indicated that she knew very little about the subject in which she was designated as having an interest.

Allen's testimony demonstrated that he had some knowledge about timber rattlesnakes, but did not establish how he would be directly impacted by the effect of mining on the rattlesnake. Allen testified that the last time he was in the affected area of Chestnut Ridge was two years ago. (Exhibit D to supplemental brief, page 36) In its brief in opposition to the motion, the Conservancy made no mention of Allen's alleged interest in the timber rattlesnake or other area wildlife.

The interest expressed by Allen is no more than an "abstract interest" which does not rise to the level of a direct, immediate, and substantial interest necessary to confer standing. *Tessitor v. Department of Environmental Resources,* 682 A.2d 434 (Pa. Cmwlth. 1996).

In addition to testifying as to Merritt, Allen, and Gourley's interest in the wildlife in the area, Samios also testified that there were other Conservancy members who had a particular interest in

the wildlife in the area. Attached to the Conservancy's response are affidavits signed by Samios and other members of the Conservancy stating that they enjoy hiking in the subject area and engage in the observation and identification of area wildlife. (Exhibits 1, 3, 4 in opposition to the motion.)

As noted earlier, an organization has standing to challenge a Department action so long as one of its members has standing. *RESCUE Wyoming v. DER*, 1993 EHB 839. Based on the testimony of Merritt and the affidavits of Samios and other members of the Conservancy, we cannot conclude that the Conservancy lacks a direct, immediate, and substantial interest in the impact of mining on area wildlife.

3. Whether the Conservancy has standing to argue that the Department should have considered adverse consequences to Copperhead Cave.

Tasman argues that the Conservancy lacks standing to raise the issue of the impact of the Department's action on environmental conditions at Copperhead Cave because no Conservancy members have a direct, substantial, and immediate interest in the issue.

In response, the Conservancy asserts it has standing to raise this issue because two of its members, Thomas and Kim Metzgar, are spelunkers, who have visited, explored, and mapped numerous caves in the vicinity of the permit area, including Copperhead Cave, and it is their intention "to continue, to the extent possible, to visit and explore" these caves. (Exhibit 3 in opposition to the motion, paragraphs 3 and 4)

However, in his deposition testimony, Mark Samios admitted that members of the Conservancy probably no longer have access to Copperhead Cave because it is on private property. When asked about the members' *current* interest in Copperhead Cave, Samios responded that "they respect nature and they have explored that cave and maintained that cave over the years and the

other caves..." (Exhibit C to motion, page 113) This interest is not the sort of direct, immediate, and substantial interest required by *William Penn*. Rather, this is the type of general interest in protecting the environment which *William Penn* held is not sufficient to convey standing.

The Conservancy argues that it also has standing to raise this issue on the basis that any impact of mining on Copperhead Cave also impacts bats which live in the cave. The Conservancy asserts it has already demonstrated that it has standing to raise issues concerning the impact of mining on bats in Copperhead Cave because of its standing to raise issues concerning wildlife in the vicinity of the mine. However, the Conservancy members who testified as to the effect of mining on wildlife testified only regarding their interest in the Eastern Woodrat and the timber rattlesnake. The Conservancy expressed no more than a general interest in the effect of mining on bats. This is insufficient to confer standing on the Conservancy to raise this issue.

Finally, the Conservancy asserts that it has standing to challenge the impact of mining on Copperhead Cave because any such impact may affect other caves in the area. Other than expressing a general concern about the effect on other caves in its response, the Conservancy failed to demonstrate that a question of material fact exists with respect to this issue.

For the reasons set forth above, we find that Tasman has demonstrated that the Conservancy lacks standing to challenge the effects of Tasman's mining on Copperhead Cave. Therefore, Tasman's motion for partial summary judgment is granted with respect to this issue.

4. Whether the Conservancy has standing to argue that the Department abused its discretion by failing to require Tasman to submit a revised blasting plan.

Tasman argues that the Conservancy lacks standing to argue that the Department should have required Tasman to file a revised blasting plan because none of the members of the Conservancy

have a direct, immediate, and substantial interest affected by the failure to submit the plan. According to Tasman, the Conservancy lacks such an interest because: (1) Samios identified Taylor as the only member with a direct, substantial and immediate interest in the revisions; (2) Taylor has a well in the vicinity of the blasting area; and, (3) Taylor will not be harmed because, under the revisions, blasting will be no closer to his spring.

However, even assuming Tasman has established that the blasting operations moved no closer to Taylor's spring under the revised blasting plan, we cannot necessarily conclude from that the revision could not affect the spring. Since all doubts as to the existence of material facts are resolved against the moving party, summary judgment on this issue would be inappropriate.

5. Whether the Conservancy has standing to raise issues concerning the Shapiras' property.

Tasman argues that the Conservancy lacks standing to raise issues concerning property owned by the Shapira family because the Conservancy is not an agent of the Shapiras, and an agency relationship is necessary for an association to have standing to bring an action on behalf of an individual in the association. Tasman avers that the Conservancy denied it was an agent of the Shapiras. In support of this assertion, Tasman points to language in a letter sent by counsel for the Conservancy in response to a request by Tasman to enter the Shapiras' property pursuant to Pa.R.C.P. 4009(a)(2).[1] There, the Conservancy's counsel wrote, "While the Shapiras are members of [the Conservancy], the Shapiras themselves are *not* parties to this appeal. Moreover, [the Conservancy] has no control over the Shapira property and thus cannot unilaterally authorize or allow the requested inspection." (Exhibit G in support of Tasman's motion, at attachment 1

[1] Pa.R.C.P. 4009(a)(2) pertains to requests to enter land made by one party to another.

(emphasis in original).)

However, contrary to Tasman's position, the Conservancy can be an agent of the Shapiras even if the Shapiras are not themselves parties to the appeal and even if the Conservancy did not have the power to authorize Tasman's entry onto the property. We know of no authority, nor does Tasman cite any, which stands for the proposition that individuals in an association must be parties to an action for the association to have standing to pursue the action on their behalf. If there were such a requirement, it would effectively eviscerate the long-standing practice of citizens' groups filing appeals as associations, as opposed to filing actions as individuals. Nor do we know of any authority for the proposition that an association must have the authority to grant entry onto its members' property if it is to represent their interests with respect to the property.

Moreover, the Conservancy submitted an affidavit in opposition to the motion in which David Shapira states that the Conservancy is authorized to represent his interests in the appeal. (Exhibit 4 in opposition, paragraph 2.)

For the reasons set forth above, we find that summary judgment on this issue would be inappropriate.

6. Whether the Conservancy has standing to argue that the Department violated the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. 3301-3326 (Noncoal Surface Mining Act), by failing to require Tasman to prove the existence of an alternative water supply.

Tasman argues that the Conservancy lacks standing to raise the issues in paragraphs 19 through 21 of the notice of appeal because (1) the Conservancy asserts that it has standing to raise these issues because the Department's action could harm the Blairsville Municipal Authority's (the municipal authority) water supply; (2) the municipal authority is not a member of the Conservancy;

and, (3) the interest of the municipal authority in its water supply cannot be imputed to the Conservancy if the municipal authority is not a member of the Conservancy.

In its response to the motion, the Conservancy stated that it had standing because some of its members are served by the municipal authority. In support of its response, the Conservancy submitted affidavits from two of its members who are served by the municipal authority and who expressed an interest in preserving the quality and quantity of their water.

Based on the interest of its members who are served by the municipal water authority and who are concerned about the preservation of their water supply, we find that the Conservancy has demonstrated sufficient standing to raise this issue.

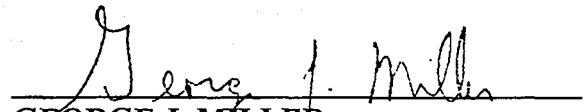
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHESTNUT RIDGE CONSERVANCY	:	
	:	
v.	:	**EHB Docket No. 96-022-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TASMAN RESOURCES, LTD., Permittee	:	
	:	
HILLSIDE COMMUNITY ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 96-24-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TASMAN RESOURCES LTD., Permittee	:	

ORDER

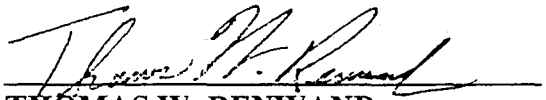
AND NOW, this 15th day of January, 1997, it is ordered that Tasman's motion for partial summary judgment is **granted** with respect to the issue of whether the Conservancy has standing to raise the issue of the impact of mining on Copperhead Cave. Tasman's motion is **denied** with respect to the remaining issues.

ENVIRONMENTAL HEARING BOARD

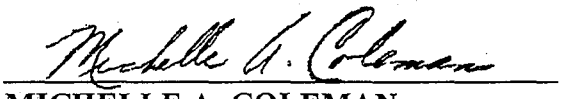


GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: January 15, 1997

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M. DIANE SMITH
SECRETARY TO THE BOARD

CAERNARVON TOWNSHIP SUPERVISORS	:	
	:	
v.	:	**EHB Docket No. 96-180-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and CHESTER COUNTY	:	**Issued: January 15, 1997**
SOLID WASTE AUTHORITY, Permittee	:	

OPINION AND ORDER ON MOTION FOR LEAVE TO AMEND APPEAL

By Robert D. Myers, Administrative Law Judge

Synopsis:

The right to amend an appeal "within 20 days after the filing thereof" extends from the date that an appeal is filed and docketed with the Board. This includes a skeleton appeal. Where the Board misled an appellant into believing that the 20 days did not begin to run until after its skeleton appeal had been completed by the filing of the required information, the amendment is allowed.

OPINION

On September 5, 1996, Caernarvon Township Supervisors (Appellant) filed a letter of appeal stating its interest in seeking review of a major permit modification for the Municipal Site Landfill Overfill at the Lanchester Landfill facility (Permit No. 100944) located in both Caernarvon Township, Lancaster County and Honeybrook Township, Chester County. The Department of Environmental Protection (Department) issued the modification to the Chester County Solid Waste

Authority (Permittee) on August 1, 1996, pursuant to the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101 - 6018.1003.

Because Appellant's letter did not contain all of the information required by the Board's procedural rules, at 25 Pa. Code § 1021.51, the Board treated it as a "skeleton appeal" under 25 Pa. Code § 1021.52(c) and issued an order requiring Appellant to submit the additional information on or before September 24, 1996. Appellant, responding to this order, filed an Amended Notice of Appeal (Amended Appeal) on September 16, 1996, which provided the information. The Board's standard Pre-Hearing Order No. 1 was issued the following day.

On October 7, 1996, Appellant filed a Restated Notice of Appeal (Restated Appeal) raising two additional issues. Appellant asserts, *inter alia*, that it submitted the Restated Appeal pursuant to paragraph 5 of Pre-Hearing Order No. 1 (which refers to section 1021.53), and also requests leave to submit the Restated Appeal as a supplement to the appeal (for which it cites section 1021.51(e) for authority). Because the Restated Appeal was filed without first obtaining Board authorization under section 1021.53(b), Appellant by Board rule was directed to show cause why it should not be rejected. On November 8, 1996, Appellant responded to the rule by filing a reply. Since the reply seeks leave to supplement the Amended Appeal, we will treat it as a motion for leave to amend the appeal under section 1021.53(b) (Motion).

On November 15, 1996, Permittee filed a Response in Opposition to Appellant's Reply accompanied with supporting memorandum. Appellant filed a brief in reply on November 26, 1996. The Department has neither joined nor opposed the Motion.

In the meantime, Permittee filed on November 8, 1996, a motion to dismiss the appeal, or alternatively, to limit the issues raised. This motion is addressed in a separate opinion.

The issue now presented is one of first impression, calling upon us to consider the effect of the Board's recently enacted rule regarding the procedure for amending an appeal as set forth in 25 Pa. Code § 1021.53. Section 1021.53(a) provides "[a]n appeal may be amended as of right within 20 days after the filing thereof." Beyond that period, amendments may be obtained only upon a motion for leave to amend which satisfies one of the three criteria enumerated in section 1021.53(b).

Appellant, in its Motion, urges us to calculate the 20-day period for amending appeals as of right from the date on which its appeal was perfected. In support of its position, Appellant argues, in part, that it relied on language in Pre-Hearing Order No. 1 as granting it the right to amend the appeal. Specifically, Appellant cites the portion of paragraph 5 that reads "[a]ny party may amend its appeal as of right within 20 days of filing the appeal by filing a restated notice of appeal with the Board." Because the Order was dated and issued September 17, 1996, -- the day after the filing of the Amended Appeal -- presumably, Appellant interpreted the Order's reference to "appeal" as referencing Appellant's Amended Appeal.

Permittee, in its response, argues that because the Restated Appeal was filed beyond 20 days from the date the appeal was first filed (September 5, 1996), Appellant's amendment can not be permitted as of right. Rather, Appellant had to follow the procedure set forth in section 1021.53(b) requiring parties to obtain leave of the Board to amend the appeal.

We agree with Permittee's interpretation of the meaning of the rule. "[W]ithin 20 days after the filing thereof" in section 1021.53(a) was meant to refer back to the date the Board's jurisdiction was invoked. That is the date specified in section 1021.52(a) when the appellant files an appeal in writing with the Board within the appropriate 30-day appeal period. Because this time period is as short as it is, the rule on amendments was adopted to provide appellants "ample time to formulate

the grounds for appeal based on adequate information which may not be available to them at the time the appeal is originally filed." 25 Pa.Bull. 5981.

A certain leeway had historically been given in the "skeleton appeal" provisions of the Board's rules. Under this practice (now found at section 1021.52(c)) an appeal which met the perfection requirements of section 1021.52 but did not satisfy the form and contents requirements of section 1021.51 was nonetheless docketed. The appellant was then advised by Board order what additional information was needed and the amount of time given to supply it. If the information was not filed by the stated deadline, the appeal was dismissed. This practice was not to be affected by the addition of the rule on amendments. 25 Pa.Bull. 5981.

Reading the two rules together, it is clear that the 20 days for amendments as of right were not intended to be added onto the additional time allowed for skeleton appeals. The critical date in both rules is the date of filing and the additional time allowed in both rules runs from that date. In skeleton appeals, therefore, the times run concurrently (but not necessarily for the same length).

While we have no doubt about the proper interpretation of these rules, we are convinced that our communications to Appellant created some confusion. After the amendment rule became effective, we revised our standard Pre-Hearing Order No. 1 to add a paragraph notifying appellants of their amendment rights. This Order normally is issued immediately after the appeal is docketed. Where a skeleton appeal is involved, however, the Order is not issued until the appellant has supplied all the necessary information. Typically, this occurs fifteen or more days after the appeal is docketed. By the time the appellant receives the Order, the full twenty days may have expired.

In the present-case, the skeleton appeal was docketed on September 5, 1996. The order requesting filing of additional information was issued on September 9, 1996, and Appellant was

given until September 24 to comply. Appellant complied on September 16 and Pre-Hearing Order No. 1 was issued on September 17. Paragraph 5 of that Order announced the right to amend within 20 days. Appellant took advantage of this on October 7 -- the 20th day after September 17.

The timing of issuance and the language of our Pre-Hearing Order No. 1, we believe, led Appellant to conclude that it had until October 7 to amend as of right, when that right expired on September 25. Where the Board misleads a litigant, its action must be reconsidered. *Hawbaker, Inc. v. DEP,* EHB Docket No. 95-014-MR (Opinion issued March 5, 1996). Accordingly, we must allow the proposed amendment[1] pursuant to section 1021.53(a) despite the fact that the 20-day period for amendments as of right has already expired.

[1] Initially, Appellant sought to amend its appeal with the addition of two issues, (n) and (o), but in its Motion, waived one of them.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

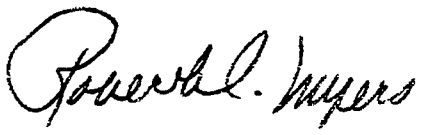
CAERNARVON TOWNSHIP SUPERVISORS	:	
	:	
v.	:	**EHB Docket No. 96-180-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CHESTER COUNTY SOLID WASTE AUTHORITY, Permittee	:	

ORDER

AND NOW, this 15th day of January, 1997, it is hereby ordered that Appellant's Motion is granted.

The appeal is amended to add paragraph 8(n).

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: January 15, 1997

See next page for a service list.

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

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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

STANLEY GRAZIS	:	
	:	
v.	:	**EHB Docket No. 95-181-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 17, 1997**

OPINION AND ORDER ON PETITION FOR RECONSIDERATION

By Michelle A. Coleman, Administrative Law Judge

Synopsis

A petition for reconsideration of an interlocutory order is denied where it was not submitted within the 10 days of the Board's order as required by § 1021.123(a) of the Board's rules of practice and procedure, 25 Pa. Code § 1021.123(a).

OPINION

This matter was initiated with the August 23, 1995, filing of a notice of appeal by Stanley Grazis (Grazis) who operates wells on state lands in Abbot and Eulalia Townships, Potter County. Grazis appealed the Department's July 21, 1995, decision to revoke the inactive status of nine wells on two tracts of land owned by the Commonwealth of Pennsylvania: wells 1 and 2 on tract 364, and wells 1, 2, 3, 4, 6, 10, and 11 on tract 365. According to Grazis, the Department abused its discretion and acted contrary to law by revoking the inactive status. He requested, among other things, that the Board order the Department to post replacement security for the wells and release his bond covering

those wells.

The Board has issued one previous opinion in this appeal. On September 25, 1996, we issued an opinion and order denying cross-motions for summary judgment because a material issue of fact remained concerning whether Grazis' lease for the wells had expired. On December 18, 1996, Grazis filed a petition requesting that the Board reconsider its decision on his motion for summary judgment. The Department filed its response on December 27, 1997, and Grazis filed a reply to the Department's response on January 13, 1997.[1]

Grazis contends that reconsideration is appropriate in light of a November 22, 1996, letter from the Department to him which reinstates the inactive status of the wells. According to Grazis, the letter establishes that no factual issues remain for a hearing and constitutes an admission of wrongdoing by the Department. The Department, meanwhile, contends that the Board should not grant Grazis motion because he failed to file it within 10 days of our decision on his motion for summary judgment, as required by the Board's rules of practice and procedure.

We agree with the Department.

Section 1021.123(a) of the Board's rules, 25 Pa. Code § 1021.123(a), provides that petitions for reconsideration must be filed within 10 days of the order or ruling. Grazis filed his petition 84 days after we issued our opinion and order, well beyond the 10-day limit. We will not, therefore, grant his petition.

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[1] We will not consider Grazis' reply for purposes of this petition. Section 1021.70(g) of the Board's rules of practice and procedure, 25 Pa. Code § 1021.70(g), provides that moving parties may not file a reply to a response except in the case of dispositive motions or where the Board orders otherwise. A petition for reconsideration is not dispositive, nor did the Board authorize Grazis to file a reply. (Indeed, Grazis never sought the Board's permission to file a reply.)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STANLEY GRAZIS	:	
	:	
v.	:	**EHB Docket No. 95-181-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 17th day of January, 1997, IT IS ORDERED that Grazis' petition for reconsideration is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: January 17, 1997

c: **DEP, Bureau of Litigation:**
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Harrisburg, PA

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jb/bl

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M. DIANE SMITH
SECRETARY TO THE BOARI

JOHN and LISA FORCE and WANDA and BARRY YEAGER	:	
v.	:	**EHB Docket No. 96-054-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 21, 1997**

OPINION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

By George J. Miller, Chairman

Synopsis

Cross-motions for summary judgment are denied where material issues of fact remain unresolved. The Board will not consider exhibits attached to legal memoranda but not referred to in the motion or otherwise made a part of the record.

OPINION

This matter was initiated with the March 6, 1996, filing of a notice of appeal by John and Lisa Force and Wanda and Barry Yeager (collectively, Appellants), who own residences on Sunrise Lane, Pottstown, PA. The appeal challenges the Department of Environmental Protection's (Department) February 6, 1996, denial of Appellants' request that the Department order Lower Pottsgrove Township (the township) to revise or implement its official sewage facilities plan to allow Appellants to connect to the township's sewer system "without prohibitive costs." According to

Appellants--whose Sunrise Lane homes use on-lot sewage disposal systems--the Department erred by denying their request because: (1) the Department has the authority to abate nuisances, to protect the public, and to order the township to contribute to the cost of extending the sewer lines; (2) Appellants' current on-lot systems pose a health hazard to the community; (3) Appellants are not permitted to install new on-lot systems; (4) the township has refused to extend the sewer lines closer to Appellants' homes and to require other nearby homeowners with on-lot systems to share in the costs of extending the lines; and, (5) it is unfair and unrealistic to expect Appellants to shoulder the cost of extending the sewer lines without financial assistance from the township or other homeowners.

Appellants filed a motion for summary judgment and a memorandum in support on October 10, 1996. The Department filed a cross-motion for summary judgment and a memorandum in support on October 11, 1996. Both parties filed legal memoranda opposing the other's motion: Appellants on October 25, 1996, and the Department on November 5, 1996.[1] Both parties also filed reply memoranda in response to the memoranda in opposition. The Department filed its reply memorandum on November 12, 1996. Appellants filed theirs on November 11, 1996.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file--together with 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. *Snyder v. DER*, 588 A.2d 1001 (Pa. Cmwlth. 1991), *appeal dismissed as improvidently granted*, 632

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[1] The Department referred to its document as a "response," but the document is actually a memorandum. It does not conform to section 1021.70(e) of the Board's rules, 25 Pa. Code § 1021.70(e), which provides that responses to motions must "set forth in correspondingly-numbered paragraphs all factual disputes and the reason the opposing party objects to the motion."

A.2d 308 (Pa. 1993). All doubts regarding the existence of material facts are resolved against the moving party. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995).

I. Appellants' motion for summary judgment

Appellants maintain that they are entitled to summary judgement because: (1) on-lot systems at their residences and a neighboring residence on Sunrise Lane pose a health hazard to the community, constituting a nuisance under the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1 *et seq.* (Sewage Facilities Act); (2) the Department has a duty, under the Sewage Facilities Act, to abate nuisances; (3) the on-lot systems creating the nuisance cannot be repaired or replaced, except by extending the township's sewer lines to Sunrise Lane and connecting the affected residences to them; (4) the township has refused to contribute to the cost of extending its sewer lines closer to the affected residences, or to use its powers of eminent domain to extend those lines; and, (5) it is unfair and unrealistic to expect Appellants to shoulder the cost of extending the sewer lines without financial assistance from the township or other homeowners. Appellants ask that we direct the Department to require the township to extend the sewer lines to include Sunrise Lane, assess the homeowners a connection charge based on each residence's foot frontage on Sunrise Lane, and assess all other costs for the sewers on the same terms provided to other residences connected to the township's sewer system.

The Department argues that Appellants are not entitled to summary judgment because they failed to support the allegations in their motion with references to evidence in the record, including supporting affidavits, and failed to prove that the official plan was inadequate or that the Township was implementing it improperly. The Department also maintains that it has no duty to abate nuisance conditions created by the on-lot systems on Sunrise Lane, and that, even if it did, it only

has the power to order the *individuals* causing the nuisance to abate it--not the power to order *local agencies* to eliminate the nuisance. The Department also argues that Appellants cannot raise the issue of whether the Department should have ordered the township to exercise its eminent domain power because Appellants failed to raise that issue in their notice of appeal.

We need not address the substantive issues raised by Appellants' motion because we agree with the Department that Appellants' motion is fatally flawed. Although Appellants make numerous factual allegations in their motion, the motion fails to identify any support for them.[2] For instance, there is no support for Appellants' assertions that the on-lot systems on Sunrise Lane are malfunctioning or that, under the existing laws and regulations, it would be necessary to replace the on-lot systems with a connection to a public sewer to prevent them from malfunctioning.

Since Appellants' motion relies at least in part on factual allegations and Appellants failed to identify any support for these allegations in the motion, it should come as no surprise that there are outstanding issues of material fact precluding summary judgment. Even assuming Appellants' arguments on the legal issues were correct, they cannot prevail having failed to establish the factual premises of those arguments in their motion.

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[2] Appellants did provide support for factual allegations made in their memorandum in support, and attached exhibits to that memorandum, but that cannot cure the defect in the motion itself. The purpose of a supporting memorandum is to *explain* the motion, not to augment it. *Barkman v. DER*, 1993 EHB 738, 745. The motion for summary judgment itself must show, with adequate particularity, the reasons the moving party is entitled to summary judgment. *See County of Schuylkill v. DER*, 1990 EHB 1370. The same reasoning extends to the exhibits offered in support of a motion for summary judgment. The Board will not consider exhibits placed in the record only by attachment to legal memoranda. *County of Schuylkill*. They must be attached to the motion itself or--if they are already on file and part of the record--may be incorporated by reference into the motion. *Id.* This facilitates the Board's consideration of the motion because the opposing party must respond to the motion by setting forth in correspondingly-numbered paragraphs all factual disputes and the reasons the opposing party objects to the motion. 25 Pa. Code § 1021.70(e).

II. The Department's motion for summary judgment

In its own motion for summary judgment, the Department maintains that Appellants request was not really a request for a plan revision--since Appellants are allowed to connect to township sewers under the official plan--but rather a request that the township help finance the extension of the sewers. The Department notes that issues concerning the financing of sewers are delegated to the township under the Municipalities Planning Code, Act of December 21, 1988, P.L. 1329, 53 P.S. §§ 10101 *et seq.* (Municipalities Planning Code), and argues that the fact that the financing of the sewer may relate to the official plan is--without more--insufficient to bring the matter within the Department's authority.

Appellants oppose the Department's motion and insist that their appeal is not simply a dispute over financing the sewer extension. Appellants do not dispute the Department's contention that their request is consistent with the current official plan. Instead, they maintain that, even if their request is consistent with the official plan, the Department has the authority to order the township to implement their request because: (1) the Sewage Facilities Act provides that local agencies must abate discharges of partially-treated sewage, and the Department must ensure that local agencies administer the Act and implement official plans; and (2) the Cleans Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.1 *et seq.*, prohibits municipalities from permitting the discharge of sewage into waters of the Commonwealth, declares that such discharges may be abated as public nuisances, and provides that individuals may sue the Department if it fails to perform a non-discretionary duty under the Clean Streams Law.

The Department is not entitled to summary judgment. The criteria for requests to revise or implement an official plan are set forth at section 5(b) of the Sewage Facilities Act, 35 P.S. §

750.5(b). Section 5(b) provides that residents or property owners can request that the Department order a municipality revise or implement its official plan if they can show that "the official plan is not being implemented or is inadequate to meet [their] sewage disposal needs." Therefore, the Department is incorrect when it assumes that Appellants must show that the official plan is inconsistent with their proposed course of action if they are to prevail under section 5(b). Appellants might also prevail under section 5(b) if they show that the official plan expressly provides for Appellants' proposed course of action and that the township was failing to implement that part of the plan and that the Department's refusal to order the township to implement the official plan was an abuse of discretion reviewable by this Board.[3]

Here material issues of fact remain with respect to whether the official plan expressly provides for, or precludes, Appellants' proposed course of action and whether or not the Department's decision not to implement the plan was an abuse of discretion. The Department did not attach the official plan to its motion, nor did it aver that the official plan provided for, or precluded, Appellants' proposed course of action.[4] Since the Department failed to establish the

---

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

We are also concerned over whether the Board has jurisdiction where the Department refuses to act. We have previously held that we do not have jurisdiction over actions filed by individuals seeking to compel the Department to utilize its authority under the Sewage Facilities Act or the Clean Streams Law because they are not appeals of Department "actions." *See, e.g., Boling v. DER*, 1995 EHB 599.

[4] While the Department did aver in its motion that the official plan "provides for public sewers for Sunrise Lane," (The Department's motion for summary judgment, paragraph 15), the

terms of the official plan in its motion, the Department has not shown that it is clearly entitled to judgment as a matter of law, and summary judgment is inappropriate for that reason alone.

Department did not address whether the plan provided for, or precluded, the financing Appellants proposed. Furthermore, the exhibits the Department relies on in support of the proposition that the plan provides for public sewers on Sunrise Lane are problematic. The Department cites a letter from Gregory Prowant, Manager of Lower Pottsgrove Township, and an affidavit from Glenn Stinson, a water quality specialist supervisor with the Department. The letter from Prowant states that *the township believes* that the connection of Appellants' residences to public sewers is consistent with the official plan. (The Department's motion for summary judgment, Ex. F) Whether the township believes the two are consistent is irrelevant; that is a legal question and the Board must make that determination itself. Similarly, in his affidavit Stinson states that he reviewed the official plan and that it was consistent with connecting Appellants to public sewers. As in the case of Prowant's letter, Stinson's opinion of whether Appellants' request and the official plan are consistent is irrelevant; that is a legal question and the Board must make that determination itself.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

ORDER

AND NOW, this 21st day of January, 1997, it is ordered that:

1) Appellants' motion for summary judgment is denied; and

2) the Department's motion for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: January 21, 1997

cc: **DEP, Bureau of Litigation:**
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Southeastern Region
For Appellants:
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Pottstown, PA

jb/bl

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MIDDLEPORT MATERIALS, INC.	:	
	:	
v.	:	**EHB Docket No. 96-004-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and W & W CONSTRUCTION COMPANY, Permittee	:	**Issued: January 22, 1997**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Robert D. Myers, Administrative Law Judge

Synopsis:

Where a third party appeals the issuance of a coal surface mining permit issued pursuant to the Surface Mining Conservation and Reclamation Act (SMCRA), the appeal is timely if filed within thirty days after issuance of the permit is published in the *Pennsylvania Bulletin.* The date when Appellant received notice of the permit issuance is immaterial.

Where the permit applicant filed a signed consent of landowner to enter and surface mine and also filed a copy of a signed agreement granting and reserving to the applicant the right to enter and surface mine, DEP was justified in issuing the permit even though the landowner (Appellant) qualified its consent on the execution of a coal lease. The signed agreement expressly established the Applicant's rights without any reference to a coal lease.

Issues concerning alleged post-permit issuance violations and DEP's prosecutorial discretion cannot be raised in this appeal.

OPINION

Appellant, Middleport Materials, Inc., filed a Notice of Appeal on January 10, 1996 seeking Board review of the December 7, 1995 issuance by the Department of Environmental Protection (DEP) of Coal Surface Mining Permit No. 54950102 to W & W Construction Company (Permittee). The Permit, issued under the provisions of the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §§ 1396.1-1396.19a, authorized Permittee to surface mine anthracite coal on a tract in Schuylkill and Walker Townships, Schuylkill County (Site).

In its Notice of Appeal, Appellant claims to be the owner of the Site pursuant to an October 1993 deed and gave its consent to Permittee's coal mining operation only on condition that Permittee execute an appropriate lease, which Permittee refused to do. This refusal was brought to DEP's attention prior to Permit issuance but disregarded. As a result, Appellant contends that its signed consent was ineffective and DEP's issuance of the Permit was a violation of SMCRA and the regulations.

Appellant also claimed in its Notice of Appeal that White Pine Coal Co. began coal mining operations on the Site on December 29, 1995, as a contractor for Permittee, contrary to the provisions of the Permit. Appellant requested the Board (1) to "revoke" the Permit because of the absence of an effective consent, (2) to find that Permittee violated the Permit by allowing a contractor to operate under it, and (3) to take appropriate action against White Pine Coal Co. for mining without a permit.

On May 22, 1996 Permittee filed a Motion for Summary Judgment with exhibits and supporting Brief. Appellant filed a Response, Affidavit with exhibits and Brief on June 28, 1996. Permittee contends that it is entitled to summary judgment because (1) a properly executed and irrevocable consent of Appellant was filed with the application, (2) the Board has no power to revoke or take appropriate action to enforce the Permit, and (3) the appeal was not timely filed. Attached to the Motion are documents allegedly supporting the averments of the Motion.

In its Response, Appellant argues that genuine issues of material fact exist with respect to Permittee's right to enter and mine, issues that were raised with DEP before Permit issuance. Issues of material fact also surround the timeliness of the filing of the Notice of Appeal; but, on that issue, Appellant also argues that it could not be raised in a motion for summary judgment. With respect to the Board's power to revoke and take enforcement action, Appellant's Response is muddled but appears to concede that Permittee may have a point as far as enforcement actions are concerned.

We must deal first with the timeliness issue, because it controls whether we have jurisdiction to consider the other two issues. In our Opinion and Order dated August 12, 1996 we concluded that genuine issues of material fact exist with respect to this issue and released an Order deferring action on the Motion for Summary Judgment and scheduling a hearing for the limited purpose of receiving evidence on the timeliness issue. That hearing was held on September 30, 1996. Five days prior thereto, DEP filed a letter with the Board, joining in Permittee's Motion on the first two grounds but not on the timeliness issue.

Appellant filed a post-hearing brief on November 15, 1996 and Permittee filed its memorandum on December 3, 1996. DEP advised the Board on November 21, 1996 that it would

not be filing a brief but reiterated the position it took on the timeliness issue in its September 25, 1996 letter.

The evidence at the hearing focused on when Appellant's legal counsel actually received notice of DEP's issuance of the Permit. Permittee contends that it was actually received on December 8, 1995 and not December 11, 1995 as stated in the Notice of Appeal. As such, the thirty day appeal period expired on Monday, January 8, 1996, two days before the appeal was filed. The evidence was conflicting, to say the least, and raised serious implications about the truthfulness of the witnesses. Nonetheless, we agree with Appellant's "belated"[1] position that it is of no consequence when the notice was actually received because, under the holding in *Lower Allen Citizens Action Group, Inc. v. Commonwealth, Department of Environmental Resources*, 546 A.2d 1330 (Pa. Cmwlth. 1988), Appellant had thirty days to appeal after issuance of the Permit was published in the *Pennsylvania Bulletin.* That occurred on December 23, 1995 (Vol. 25, page 6028) and the appeal period did not close until January 22, 1996. Appellant's filing of its Notice of Appeal on January 10, 1996 was, therefore, well within this period and Permittee's Motion is denied on this issue.

Having disposed of the jurisdictional question, we will proceed to consider the other two grounds raised in Permittee's Motion. We can grant summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with supporting affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled

---

[1] We use the word "belated" because Appellant did not raise it until November 15, 1996 when it filed its post-hearing brief. DEP had raised the issue in its September 25, 1996 letter which Appellant sought to strike at the outset of the hearing. The request was denied. Appellant obviously discovered later that the point was beneficial to it.

to judgment as a matter of law. Pa. R.C.P. 1035[2]; *Snyder et al. v. DER*, 588 A.2d 1001 (Pa. Cmwlth. 1991). Once a motion for summary judgment has been properly supported, the burden is on the non-moving party to disclose evidence that is the basis for its argument resisting summary judgment. *Felton Enterprises, Inc. v. DER*, 1990 EHB 42, 45-46.

In order to obtain a surface mining permit, an applicant must satisfy the following requirement:

> Except for permit applications based upon leases in existence on January 1, 1964 for bituminous coal surface mines, or leases in existence on January 1, 1972 for anthracite coal surface mining operations and all noncoal surface mining operations, the application for a permit shall include, upon a form prepared and furnished by the department, the written consent of the landowner to entry upon any land to be affected by the operation by the operator and by the Commonwealth and any of its authorized agents prior to the initiation of surface mining operations, during surface mining operations and for a period of five years after the operation is completed or abandoned for the purpose of reclamation, planting, and inspection or for the construction of any pollution abatement facilities as may be deemed necessary by the department for the purposes of this act. SMCRA, 52 P.S. § 1396.4(a)(2)F.

The statutory provision goes on to state, *inter alia*, that the consent form is to be recorded in the appropriate county and is not to be construed as altering or constraining "the contractual agreements and rights of the parties thereto...." The regulations at 25 Pa. Code Section 86.64 implement the statutory provision. Subparagraph (a) requires the application to contain a description of the documents upon which the applicant bases his legal right to enter and commence coal mining activities, and whether that right is the subject of pending court litigation.

---

[2] The revisions to this rule, at Pa. R.C.P. 1035.1 - 1035.5, did not become effective until July 1, 1996, after the filing of the Motion.

Section 86.64(b) provides:

> (b) The application for a permit shall provide one of the following for lands within the permit area:
>
> (1) A copy of the written consent of the current surface owner to the extraction of coal by surface mining methods.
>
> (2) A copy of the document of conveyance that expressly grants or reserves the right to extract the coal by surface mining methods and an abstract of title relating the documents to the current surface land owner.

Attached to Module 5 in the permit application is Supplemental "C," Contractual Consent of Landowner (consent form), which is to be used to satisfy Section 86.64(b)(1).[3]

Section 86.64(c)[4] requires an application to provide "the written consent of the landowner to enter upon land to be affected by the activities by the operator and by the Commonwealth and of its authorized agents."

The consent form acknowledges the operator's right to use the landowner's land, but the operator's right to enter and mine the affected land must be established by other documents -- either an underlying agreement between the landowner and the operator: *Lucchino v. DER and Robinson Coal Co.*, 1994 EHB 380, or title documents establishing that right: *Empire Coal Mining &*

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[3] This is a form prepared and furnished by DEP which states in pertinent part:

> DO HEREBY ACKNOWLEDGE THAT THE MINING OPERATOR HAS THE RIGHT TO ENTER UPON AND USE THE LAND FOR THE PURPOSES OF CONDUCTING SURFACE MINING ACTIVITIES. Furthermore, (I) (We), the undersigned, do hereby irrevocably grant to the Mining Operator and the Commonwealth of Pennsylvania, the right to enter upon the aforesaid land before beginning the mining activity(ies), during the mining activity(ies) and for a period of five (5) years after the completion or abandonment of the mining activity(ies) for the purposes of inspecting, studying, backfilling, planting and reclaiming the land and abating pollution...

[4] Section 86.64(c) is virtually identical to Section 1396.4(a)(2)F of SMCRA.

Development, Inc. v. Department of Environmental Resources, 678 A.2d 1218 (Pa. Cmwlth. 1996).

The application involved here (Exhibit B to the Motion) was filed in June 1995 in the name of W & W Construction Company, identified as a sole proprietorship of Joseph Walacavage. In Module 5, the surface owner was stated to be Appellant and the mineral owner was listed as Walacavage Enterprises, Joseph Walacavage, owner (5.1(a)). In response to 5.1 (b), requesting the documents on which the applicant bases its right to enter and mine, Permittee referred to a September 30, 1993 sales agreement "conveying lands" to Appellant but "reserving coal rights." Some or all of an Agreement of Sale, dated September 29,[5] 1993, was attached. Paragraph 19 of that agreement reads as follows:

> 19. Coal Mining
>
> After closing the Parties agree that Sellers shall have the right to mine coal on the premises for a period not to exceed five years from the closing date. All expenses and costs related thereto including but not limited to permits and land reclamation shall be paid for solely by Sellers. Sellers shall be permitted to mine for coal on the premises so long as it does not interfere in any way with the Buyer's operations, which determination shall be made solely in Buyer's opinion and shall not be unreasonably made. Sellers shall be solely responsible for any environmental impact caused by his coal mining operations and all expenses and costs associated with it. The provisions of this section are personal to Sellers and may not be transferred or assigned by him unless approved in writing by the Buyer. Buyer's consent to any transfer may be unreasonably withheld by it. Sellers agree to indemnify, defend and hold harmless Buyers from and against all liabilities, costs, expenses, damages, including legal fees and suit costs that may arise as a result of Sellers coal mining operation.

[5] Even though Permittee referred to a September 30, 1993 agreement, it attached the September 29, 1993 agreement. We assume the attachment to be correct.

In response to 5.1(c), requesting a consent form, Permittee stated that a completed consent form would be submitted after recording. Prior to Permit issuance, a consent form, executed by Appellant and naming Permittee as the operator, was filed with DEP. In a blank space on the consent form, where additional provisions may be inserted, the following hand-printed words appeared: "As per lease for coal mining."

It is apparent that Permittee satisfied both prongs of Section 86.64(b), filing the consent form and the title documents on which it based its right to enter and mine. Before Permit issuance, however, Appellant informed DEP that, in Appellant's view, Permittee's right to enter and mine under paragraph 19 of the Agreement of Sale was not absolute but depended on the execution of an additional document -- "lease for coal mining" -- that had not yet been entered into. Appellant's execution of the consent form with the handwritten language added ("as per lease for coal mining") made the consent conditional on the execution of such a document; and, if Permittee refused to do so, the consent would be automatically rescinded.

We held in *Lucchino, supra,* that DEP's role in determining whether a permit applicant has the right to enter and mine is more than ministerial. If, prior to permit issuance, DEP is informed that a dispute exists on this subject, it must exercise its discretion (a) by requiring the applicant to demonstrate its right of entry by additional documents, (b) by examining the matter itself and making a determination that the dispute has no merit, or (c) by requiring the parties to resolve the matter in an appropriate forum.

Since *Lucchino,* we have been instructed by Commonwealth Court that we (and DEP by implication) do not have jurisdiction to resolve title disputes but do have "jurisdiction to determine whether a particular document expressly grants or reserves the right to surface mine." *Empire Coal*

Mining & Development, Inc., supra. We have also been instructed that, where the right to enter and mine is derived from documents severing the minerals from the surface estate, a consent form executed by the surface owner is unnecessary. *Sedat Inc., v. Department of Environmental Resources,* 645 A.2d 407 (Pa. Cmwlth. 1994).

DEP has not informed us of the reasoning that prompted it to issue the Permit. Our only insight into DEP's thinking is the statement in DEP's November 8, 1995 letter to Appellant (Exhibit F to the Motion) that the application was "deemed technically acceptable ...." We surmise from this that DEP found Appellant's objections to have no merit -- the second of the options set out in *Lucchino.*

Paragraph 19 of the Agreement of Sale, which makes no mention of a coal lease, certainly appears to *expressly* grant or reserve the right for Permittee to enter and surface mine the Site. The printed language of the consent form produces the same result. What effect, then, did Appellant's handwritten addition of the words "as per lease for coal mining" have on the clear language of these documents? None, in our opinion, because these words without more give no hint of a dispute. It is only paragraph 3 of Appellant's August 29, 1995 letter to DEP (Exhibit E to the Motion) that clarifies the intent of the handwritten words and notifies DEP that a dispute exists over the necessity for a coal lease.

Upon receipt of Appellant's August 29, 1995 letter, DEP could no longer view the consent form as *express* authorization for Permittee to enter and surface mine. Since it decided to issue the Permit anyway, DEP must have looked again at paragraph 19 of the Agreement of Sale and decided that it required no implementing coal lease but *expressly* authorized Permittee to enter and surface mine the Site.

Permittee's Motion for Summary Judgment asks us to reach the same conclusion -- in a circuitous way. Permittee's main thrust is that a consent form once executed is irrevocable. Appellant's attempt to revoke it, therefore, was ineffective. As an adjunct to this primary argument, Permittee contends that, in any event, paragraph 19 of the Agreement of Sale is clear on its face and requires no implementing coal lease. Appellant's attempt to qualify its consent by demanding a coal lease, therefore, was groundless. Appellant focuses its argument exclusively on the revocability issue and never informs us why it believes paragraph 19 requires a coal lease as a supplemental document.

It is our judgment that revocation of consent is not the issue here. The consent form, as executed, raised the coal lease issue in the handwritten words inserted by Appellant. Admittedly, their meaning was not obvious until the August 29, 1995 letter was sent to DEP. Nonetheless, the consent was not unqualified at the outset and later withdrawn.

The central issue, in our opinion, is the meaning to be given to paragraph 19 of the Agreement of Sale. Permittee contends that it does not call for a coal lease to implement its terms. Appellant does not argue the point. We find nothing in the language of paragraph 19 that would condition Permittee's mining rights on the signing of a coal lease. While coal leases, in our experience, are common documents in the mineral extraction industry, they are not absolutely necessary. This is especially true in situations like this where the right to surface mine is reserved in a document concerned with the conveyance of land.

Moreover, paragraph 19 already contains many provisions similar to those that would be found in a coal lease. The duration is stated; costs and expenses are placed on the miner, along with the risk of environmental impact; the right to mine cannot be transferred unilaterally; the mining

cannot interfere with other operations; the miner agrees to hold the new landowner harmless. Obviously, these provisions were negotiated by the parties before the Agreement of Sale was executed. It is reasonable to believe that, if these or other terms were to be agreed upon later as part of a coal lease, paragraph 19 would have mentioned it. The Agreement of Sale, as a whole, supports this belief. It is clearly an integrated agreement. No condition of closing requires a coal lease. No obligation of either party includes a coal lease.

"When the words of a contract are clear and unambiguous, the intent is to be found only in the express language of the agreement. [Citing Cases] Clear contractual terms that are capable of one reasonable interpretation must be given effect without reference to matters outside the contract." *Krizovensky v. Krizovensky,* 624 A.2d 638, 642 (Pa. Super. 1993). The clear language of paragraph 19 *expressly* gives and reserves to Permittee the right to enter and surface mine the Site. We conclude that DEP acted lawfully and within its discretion in issuing the Permit. Therefore, Permittee is entitled to judgment as a matter of law on this issue.

We will also grant summary judgment to Permittee on the post-Permit issuance contentions raised by Appellant. These deal with Permittee's alleged violations of the Permit terms by allowing White Pine Coal Co. to mine the Site as its contractor. Appellant requests that we find that this was a violation and take appropriate action against White Pine Coal Co. In an appeal challenging the issuance of a permit, alleged post-issuance violations are not relevant and will not be considered. *North Pocono Taxpayers Association v. DER,* 1994 EHB 449, 479. Nor do we have any power to take enforcement action against an alleged violator of SCMRA. Only DEP has that authority (52 P.S. § 1396.4c), and we cannot interfere with DEP's prosecutorial discretion. *Ridenour v. DEP*, EHB Docket No. 95-180-R (Opinion and Order issued July 24, 1996).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MIDDLEPORT MATERIALS, INC.	:	
	:	
v.	:	**EBB Docket No. 96-004-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and W & W CONSTRUCTION COMPANY, Permittee	:	

ORDER

AND NOW, this 22nd day of January, 1997, it is ordered as follows:

1. Permittee's Motion for Summary Judgment is granted except on the timeliness of the appeal.

2. The appeal is dismisssed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

See next page for service list

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: January 22, 1997

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

For the Commonwealth, DEP:
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Southcentral Region

For Appellant:
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BINGAMAN, HESS,
COBLENTZ & BELL
Reading, PA

For the Permittee:
Joseph H. Jones, Jr., Esquire
WILLIAMSON, FRIEDBERG & JONES
Pottsville, PA

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STANLEY GRAZIS	:	
	:	
v.	:	**EHB Docket No. 95-181-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** January 23, 1997

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis

A motion to dismiss for mootness is granted in an appeal of the Department's decision to revoke the inactive status of certain oil and gas wells where the Department has since reinstated the inactive status of those wells.

OPINION

This matter was initiated with the August 23, 1995, filing of a notice of appeal by Stanley Grazis (Grazis) who operates wells on state lands in Abbot and Eulalia Townships, Potter County. Grazis appealed the Department's July 21, 1995, decision to revoke the inactive status of nine wells on two tracts of land owned by the Commonwealth of Pennsylvania: wells 1 and 2 on tract 364, and wells 1, 2, 3, 4, 6, 10, and 11 on tract 365. According to Grazis, the Department abused its discretion and acted contrary to law by revoking the inactive status. He requested, among other things, that the Board order the Department to post replacement security for the wells and release his bond covering

those wells.

The Board has issued two previous opinions in this appeal. On September 25, 1996, we issued an opinion and order denying cross-motions for summary judgment because a material issue of fact remained concerning whether Grazis' lease for the wells had expired. On January 17, 1996, we denied a petition for reconsideration filed by Grazis asking us to reconsider his motion for summary judgment.

On December 9, 1996, the Department filed a motion to dismiss the appeal as moot. The Department avers that it has reinstated the inactive status of the wells, mooting out Grazis' challenge to the revocation of inactive status. Grazis filed a response to the motion to dismiss on December 18, 1996. Although he concedes that the Department has reinstated the inactive status of the wells, he maintains that his appeal is not moot because some of the underlying issues between him and the Department remain unresolved.

After a careful review of Grazis' notice of appeal, we agree with the Department that his appeal is moot.

When asked, in his notice of appeal, to identify the Department action he wished to appeal, Grazis listed only the revocation of the wells' inactive status. During the course of listing his objections to the Department's action, however, Grazis referred to other differences he had with the Department. The Department revoked the inactive status of Grazis' wells because he failed to submit required information on annual integrity testing and the future utility of his wells, required under the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, *as amended*, 58 P.S. § 601.101 *et seq.*. When Grazis listed his objections to the revocation, he asserted that the Department had denied him access to the wells because it wrongly believed that his lease for the wells expired on

June 23, 1993. Grazis maintained that his lease for the wells had not expired and that, even if it had, the Department lacked the authority to deny him access without instituting an action in ejectment beforehand. Grazis also argued that, in the event his lease had expired, the Department acted contrary to law by failing to transfer his permits to itself and failing to replace his bonds with its own.

In his response to the Department's motion to dismiss, Grazis argues that his appeal is not moot--despite the Department's reinstatement of the wells' inactive status--because outstanding issues remain unresolved: namely, (1) whether the lease for the wells expired; (2) whether the Department had the authority to deny his representatives access to the wells; and, (3) whether the Department acted contrary to law by failing to transfer Grazis' permits to itself and failing to replace his bonds with its own.

We disagree. A matter before the Board becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or deprives the appellant of a stake in the outcome. *In re Gross*, 476 Pa. 203, 382 A.2d 1000 (1980); *New Hanover Corporation v. DER*, 1991 EHB 1127. By reinstating the inactive status of Grazis' wells, the Department deprived the Board of the ability to grant meaningful relief with respect to the one action Grazis appealed: the revocation of inactive status. To the extent Grazis seeks to raise other issues because they relate to the revocation of inactive status, those issues are moot. To the extent that he seeks to raise those issues on their own merits, they are outside the scope of his appeal. The objections Grazis made in his notice of appeal were made within the context of his challenge to the revocation of inactive status. If Grazis wanted the Board to review other Department conduct independent of the revocation, he should have filed a notice of appeal with respect to the relevant action, specified which action he meant to

challenge, and done so within 30 days of receiving notice of the action. He did not do so here.[1] Having failed to do so, he cannot collaterally attack those actions within the context of an appeal of the revocation of inactive status. *See DER v. Wheeling-Pittsburgh Steel Corporation*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*, 473 Pa. 432, 375 A.2d 320 (1977), *cert. denied*, 434 U.S. 969 (1977); *Lower Paxton Township Authority v. DER*, 1994 EHB 1826.

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[1] Even had Grazis listed the other Department conduct he now wishes to challenge in the "action . . . for which review is sought" portion of his notice of appeal, he would not have filed his notice of appeal within 30 days of the relevant Department action. The Department informed Grazis as early as May 25, 1995, that his lease for the wells had expired on June 23, 1993, and that the Department would deny him access to the site. (Notice of appeal.) More than thirty days elapsed between that notice and August 23, 1995, when Grazis filed his notice of appeal.

(When Grazis referred to his differences with the Department in the notice of appeal, he referred to the conduct of the Bureau of Oil and Gas and the Bureau of Forestry, both of which he identified as organs of the Department of Environmental Resources (DER). These bureaus were, in fact, both components of DER prior to July 1, 1995, the effective date of the Conservation and Natural Resources Act, Act 18 of 1995, P.L. 89, June 28, 1995. On July 1, 1995, however, DER was split into the Department of Environmental Protection (Department) and the Department of Conservation and Natural Resources (DCNR). As part of the restructuring process, the Bureau of Forestry was moved to DCNR, and the Bureau of Oil and Gas was moved to the Department.

None of the conduct Grazis complains of was taken by DCNR. The alleged conduct which occurred prior to May 25, 1995, was done prior to the DER split, and, therefore, was all done by DER. The only conduct Grazis complains of after May 25, 1995, was the revocation of inactive status which was performed by the Department.)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STANLEY GRAZIS	:	
	:	
v.	:	**EHB Docket No. 95-181-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 23rd day of January, 1997, it is ordered that the Department's motion to dismiss is granted and Grazis's appeal is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: January 23, 1997

c: **DEP, Bureau of Litigation:**
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Harrisburg, PA

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Northwestern Region

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M. DIANE SMITH
SECRETARY TO THE BOARD

FREDERICK DUCKLOE	:	
	:	
v.	:	**EHB Docket No. 96-060-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, STROUD TOWNSHIP, Permittee, R&D DEVELOPMENT CO. INC. Appellee, and MARVIN PAPILLON, Intervenor	:	**Issued:** January 29, 1997

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

A motion for summary judgment by a developer and an intervenor in an appeal from the approval of a sewage facilities planning module for a commercial office building project is granted. The developer has sustained its burden of demonstrating that there are no issues of material fact in dispute as to any of the objections raised in appellant's notice of appeal. Appellant has not identified any evidence in the record in response to the motion which would support the objections set forth in his notice of appeal.

OPINION

Before the Board is a joint motion for summary judgment filed by R&D Development Co. (Developer) and Marvin Papillon (Intervenor) in an appeal filed by Frederick R. Duckloe (Appellant) challenging the Department of Environmental Protection's approval of a sewage facilities planning

module for a commercial office building project.

The proposed commercial office building project involves a two-storey building which is to be constructed in Stroud Township, Monroe County. Appellant owns property which is adjacent to the proposed project. Intervenor owns the property which Developer is developing. Developer received approval of the Preliminary Land Development Plan from the Stroud Township Board of Supervisors in April 1995. On March 1, 1996, the Department approved a Sewage Facilities Planning Module and revision to the Stroud Township Official Sewage Facilities Plan[1] for the proposed project. Appellant filed a timely appeal.

Discovery in this matter closed on August 16, 1996. Developer's motion now seeks summary judgment on each of the ten specific objections raised by Appellant in his notice of appeal, arguing that Appellant has failed to adduce sufficient evidence to support his claims or is not entitled to judgment as a matter of law. Appellant has not specifically responded to the arguments raised by Developer's motion, but argues generally that the Department's action in approving the planning module was in error because the proposed project will not connect to the public sewer system.

Where discovery has been completed this Board may grant summary judgment where the moving party adequately demonstrates that the adverse party bearing the burden of proof has failed to produce "evidence of facts essential to the cause of action." Pa. R.C.P. No. 1035.2(2). To defeat a motion for judgment, the non-moving party must identify either (1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion, or (2) evidence in the record establishing the facts essential to the cause of action or defense which the

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

motion cites as not having been produced. Pa. R.C.P. No. 1035.3. Examining Developer's motion and exhibits, we find that it has established that there are no issues of material fact in dispute. Appellant has failed to dispute any of Developer's allegations of fact by evidence in the record and has not identified any evidence in the record supporting the objections in his notice of appeal in his response to Developer's motion.[2]

DISCUSSION

The first objection of Appellant's notice of appeal states that the Department's approval was in error because an adjoining landowner has a sewer system within fifty feet of the well for the proposed development which is in violation of a condition of the land development approval.

Developer contends that the following facts are not in dispute. The land development plan for the proposed project was revised on February 5, 1996, to relocate the well as required by Stroud Township in conditionally approving the land development plan. (Developer Ex. RD-5; Developer Ex. RD-14) As depicted on the revised land development plan map, the nearest adjoining property is that belonging to Appellant. (Developer Ex. RD-5) Appellant's property line is fifty feet from the well. (Developer Ex. J, Deposition of Frederick B. Duckloe[3] at 92). The revised well location is also more than fifty feet from the sewage bed and from the closest sewer line. (Developer Ex. RD-5; Developer Ex. J at 91-92). The Department approved the plan as revised. Appellant has not brought to the Board's attention any evidence in the record which would contradict this evidence. Therefore

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[2] In a third-party appeal from the approval of a revision to an official sewage facilities plan, Appellant bears the burden of proof. *E.g., Andrews v. DER*, 1993 EHB 548, *affirmed*, 1142 C.D. 1993 (Pa. Cmwlth. filed May 13, 1994).

[3] Frederick B. Duckloe, Appellant's son, offered deposition testimony by agreement of the parties in lieu of his father who is in ill health. (Developer Ex. RD-2; Developer Ex. J at 5)

we will grant Developer's motion as to the first objection of Appellant's notice of appeal, Paragraph II.A.

Appellant's next allegation is that the approval is erroneous because it "does not address how water pollution and water run-off *generated by the land development* will be controlled, and how the general environment will be protected." (Notice of Appeal ¶ II.B; Developer Ex. A ¶ II.B)(*emphasis added*). The motion for summary judgment specifies evidence as to how storm water is to be controlled pursuant to the land development plan approved by the township. (Developer Motion ¶¶ 34-37) Further, Developer cites to Appellant's answers to interrogatories and deposition testimony which indicate that Appellant's concerns regarding water pollution and run-off relate to the building and parking lot of the proposed development, not the proposed method of sewage disposal. (Developer Ex. RD-16 Interrogatory Nos. 18, 19, 21; Developer Ex. J at 123, 137, 143) Appellant has not explained otherwise in his response to Developer's motion. Further, Appellant has not produced any expert testimony which supports an allegation that the proposed method of sewage disposal is likely to cause water pollution.

This Board has repeatedly held that the Department's focus in reviewing plan revisions under the Sewage Facilities Act is the method of sewage disposal; impacts from the proposed project which are not related to the method of sewage disposal are beyond the scope of the Department's review. *Kise v. DER*, 1992 EHB 1580. As Appellant has not argued that he is concerned about water pollution related to the method of sewage disposal, nor produced any evidence to support such a claim, this objection of his notice of appeal can not be sustained. Accordingly, Developer's motion for summary judgment as to Paragraph II.B. of Appellant's notice of appeal is granted.

Similarly, Paragraphs II.C, II.G. and II.J. of Appellants notice of appeal deal with matters

beyond the scope of the Department's review of a sewage plan revision. These objections allege that the Department erred in approving the plan revision because it failed to assure that there would be no violation of the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended,* 35 P.S. §§ 4001- 4106, or the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-.1003. Compliance with these statutes is clearly beyond the Department's purview in reviewing revisions to official sewage plans. Approval of the sewage plan revision does not relieve Developer of the responsibility for securing any other permits which may be necessary for the construction and operation of the proposed development, and the Department's actions in granting or denying those additional permits will at that time be reviewable. *E.g., Andrews v. DER*, 1993 EHB 548, 547, *affirmed*, 1142 C.D. 1993 (Pa. Cmwlth. filed May 13, 1994); *cf. Jefferson County Commissioners v. DEP*, EHB Docket No. 95-097-C (Opinion filed August 21, 1996)(a permittee need not secure all permits necessary for a project at the same time; specifically, there is nothing in the Solid Waste Management Act which requires simultaneous approval of a permit required under the Air Pollution Control Act); *County Commissioners v. DEP,* EHB Docket No. 95-031-MG (Adjudication issued March 6, 1996). Moreover, Appellant has failed to produce any evidence which specifies how these statutes will be violated by the proposed project.[4]

Appellant in Paragraph II. J also contends that the Department's approval of the plan revision is contrary to the Clean Streams Law and the Federal Water Pollution Control Act. The Department

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[4] In his depostion and answers to interrogatories the only concern he expressed was related to air pollution related to the air conditioning in the building for the proposed project. (Developer Ex. RD-16; Developer Ex. J at 146-51) Even if such a claim were cognizeable in a challenge to the revision of a sewage plan, ordinary air conditioning systems which are not designed to remove pollutants from other sources are specifically exempted from the Air Pollution Control Act. 25 Pa. Code §§ 127.14 and 127.443. (See Developer Motion ¶¶ 57-66)

does have some responsibilities in reviewing the consistency of plan revisions with the Clean Streams Law and whether the municipality adequately considered the regulatory and statutory provisions listed in 25 Pa. Code § 71.21(i) - (iii), which include provisions of Federal Water Pollution Control Act. 25 Pa. Code § 71.32(d). However, as we stated before, the Department's review responsibilities concerning these other statutes are limited to impacts of the proposed method of sewage disposal. Appellant has not cited any evidence in the record which would support an allegation that the proposed method of sewage disposal violates any of these provisions. Developer is not required to negate Appellant's case. *Ertel v. Patriot-News Co.*, 674 A.2d 1038 (Pa. 1996). It is Appellant's burden to specify evidence in the record supporting his claim in the appeal. Developer's motion therefore is granted on Paragraphs II.C, II.G. and II.J. of Appellant's notice of appeal.

Paragraph II.D of Appellant's notice of appeal charges that the Department erred in approving the sewage plan revision without "first determining that the Deed agreement between Robert and Donald Erwin and R & D Development Co. which was signed on February 15, 1996 addressed the well location restriction and condition [of the Stroud Township Board of Supervisors's conditional approval of the land development plan], and . . . by not first determining that the Agreement addressed a well location within the dispersion plume area of a neighboring property owner's lot." (Notice of Appeal ¶ II.D; Developer Ex. A at ¶ II.D)

Developer states that the following facts are not in dispute. In deposition testimony Appellant admitted that the agreement referenced in Paragraph II.D is the agreement between Developer and Marvin Papillon dated February 14, 1996 and contained in Developer Ex. RD-6A. (Developer Ex. J, Duckloe Deposition at 158) The "neighboring property owner's lot" is Lot No. 2

which is currently owned by Marvin Papillon. (Developer Ex. J at 158; Developer Ex. C, Papillon Affidavit at ¶ 3) Appellant admits that the February 14, 1996 agreement was in response to a condition in Stroud Township's conditional approval of the preliminary land development plan which required an easement agreement precluding the installation of a well on Lot No. 2 within the dispersion plume area as depicted in the Preliminary Hydrological Report prepared by Brian Oram, P.G. (Developer Ex. J at 158; see also Developer Ex. 6-A) Appellant admits that there are no wells located within the dispersion plume area identified by the Preliminary Hydrological Report and incorporated in Developer Ex. 6-A. (Developer Ex. J at 160)

In his response to Developer's motion Appellant does not dispute any of these facts or produce any evidence which would contradict any of Developer's allegations. Since there are no issues of material fact in dispute, and the well location restriction has been addressed, Developer's motion for summary judgment on Paragraph II.D is granted.

Finally, Appellant objects to the Department's approval of the plan revision on the basis that it did not have authority to grant such an approval "while litigation is pending relative to the permittee's obligation to hook-up, or provide connections to, the municipal community sewer system of Stroud Township." (Notice of Appeal ¶ II.E; Developer Ex. A at ¶ II.E) Specifically Appellant contends that until all legal rights are resolved by way of that action, the Department has no legal authority to approve the plan revision and that its action is therefore a legal nullity. (Notice of Appeal ¶ II.F; Developer Ex. A at ¶ II.F)

The legal action referenced in Paragraphs II.E and F of the notice of appeal is a declaratory judgment action filed in the Court of Common Pleas of Monroe County which seeks review of Stroud Township's Ordinance No. 180. (Notice of Appeal Ex. C) Ordinance No. 180 provides, in

relevant part, that subdivisions within connecting distance to public sewers can not be approved; the township engineer is responsible for determining whether or not a subdivision is within connecting distance to the public sewer. (Developer Ex. RD-37)[5]

Although the Department must consider municipal zoning requirements in its review of sewage plan revisions, and must respect any judicial resolution regarding zoning and land use rights, *Oley Township v. DER*, EHB Docket No. 96-198-MG (Opinion issued November 6, 1996), there is nothing in the Sewage Facilities Act or its regulations which precludes the Department from acting upon a sewage plan revision simply because litigation involving zoning is *pending* before a court of common pleas. In fact, the Department is required to act upon a plan revision within 120 days of its submission with supporting documentation and may not be free to wait for the outcome of what may be extensive litigation. 25 Pa. Code § 71.32(b).[6] Therefore we grant summary judgment on Paragraphs II.E and F of the notice of appeal.

The only argument which Appellant makes in his response to the motion is that the plan revision for the proposed development does not provide adequate justification for not requiring connection to the public sewer system which, Appellant alleges, is not consistent with the official sewage plan. This argument is not fairly encompassed within any of the objections Appellant raised in his notice of appeal. The only objections related to the connection of the project to the public sewer relate solely to the issue of the Department's approval during the pendency of litigation

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[5] The township engineer in fact determined that the proposed development was not within connecting distance to the public sewer. (Developer Ex. RD-11)

[6] There has been no discovery in Appellant's litigation in the court of common pleas, and the case has been dormant since June 1995. (Developer Ex. E)

regarding the township zoning ordinance, not whether or not public sewer connection is mandated by the township's official plan. Although Appellant reserved a right to amend his notice of appeal he has never sought leave to add additional grounds of appeal. *See* 25 Pa. Code § 1021.51(e).[7] Therefore we can not review this issue.[8]

Accordingly, we enter the following:

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[7] The Board's rules were amended to allow an amendment as of right within 20 days after an appeal is filed. 25 Pa. Code § 1021.53(a). However, this rule is only applied to appeals filed after September 2, 1996.

[8] Even if the issue were properly raised, Appellant has not demonstrated that there is sufficient evidence to support his prima facie case at hearing.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FREDERICK DUCKLOE	:	
	:	
v.	:	**EHB Docket No. 96-060-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION, STROUD TOWNSHIP,	:	
Permittee, R&D DEVELOPMENT CO. INC.	:	
Appellee, and MARVIN PAPILLON,	:	
Intervenor	:	

ORDER

AND NOW, this 29th day of January, 1997, the motion for summary judgment of R&D Development Co., Inc. and Marvin Papillon in the above-captioned matter is hereby GRANTED. The appeal of Frederick Duckloe is dismissed.

ENVIRONMENTAL HEARING BOARD

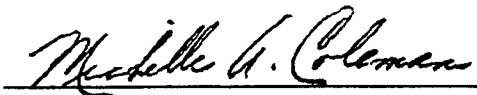
George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: January 29, 1997

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Attention: Brenda Houck, Library

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M. DIANE SMITH
SECRETARY TO THE BOARD

ALICE WATER PROTECTION ASSOCIATION	:	
v.	:	**EHB Docket No. 95-112-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERIKOHL MINING, INC., Permittee	:	**Issued: January 31, 1997**

ADJUDICATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

In this appeal of a transfer of a mining permit, the Appellants have not met their burden of demonstrating that the Department of Environmental Protection abused its discretion in approving the permit transfer. Although the Appellants demonstrated that water supplies in their community are, in some instances, plagued by water quality problems, there is insufficient evidence to link the water quality problems to mining activity at the site in question.

PROCEDURAL BACKGROUND

This appeal was brought by the Alice Water Protection Association ("the Association"), challenging the Department of Environmental Protection's ("Department") approval of a permit transfer for the surface mining of a site in Mount Pleasant Township, Westmoreland County, known as the "Leon site." The Leon site had been previously mined by Purco Coal, Inc. ("Purco") pursuant

to Surface Mining Permit Number 65773019 ("the permit"). On May 23, 1995, the permit was transferred to Amerikohl Mining, Inc. ("Amerikohl"), which, during 1991 and 1992, had mined a site south of the Leon mine, known as the "Schott site." On June 22, 1995, the Association filed the present appeal.

A hearing on this matter was held on December 14 and 15, 1995. The Association appeared *pro se*, with its case presented by one of its members. At the hearing, the Association presented the testimony of individuals living in the vicinity of the Leon and Schott sites, who testified that their water supplies had been degraded by mining in the area. At the conclusion of the Association's case, the Department and Amerikohl moved for a directed verdict. Because our decision in this matter relies on testimony presented by both the Association and Amerikohl, we deny the motion for a directed verdict.

The Association filed its post-hearing brief on February 12, 1996. The Department and Amerikohl filed their post-hearing briefs on February 20, 1996. On March 11, 1996, the Association filed a reply brief, attaching several documents which had not been admitted at the hearing. In response thereto, on March 26, 1996, Amerikohl filed a Motion to Strike Matters Outside the Record, in which the Department concurred. We hereby grant Amerikohl's Motion to Strike since, in adjudicating this appeal, we may consider only those matters which are a part of the record.

Based on our review of the record, we make the following findings of fact:

FINDINGS OF FACT

1. The appellant is Alice Water Protection Association, an unincorporated association with a mailing address of R.D. 5, Box 111-A, Mount Pleasant, PA 15666.

2. The permittee is Amerikohl Mining, Inc., with an address of 202 Sunset Drive, Butler,

PA 16001.

3. The Department of Environmental Protection is the agency of the Commonwealth of Pennsylvania with the duty and authority to enforce the Surface Mining Conservation and Reclamation Act ("Surface Mining Act"), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. § 1396.1 *et seq.*, and the rules and regulations promulgated thereunder.

4. The Leon mine site is located in Mount Pleasant Township, Westmoreland County. (Ex. A-3)

5. The direction of groundwater flow in the area of the mine is to the northwest. (T. 373, 377)

6. Phase I of the Leon site, which is the eastern portion of the site, was mined by Purco. (T. 106-07)

7. Purco began mining the site sometime between July 14, 1980 and August 24, 1981. (T. 183)

8. On July 21, 1980, prior to Purco's mining on the Leon site, the Department surveyed area residents about the quality of their water. (T. 298-99) Some of the surveys indicated that their water caused staining, had an odor, and, in some cases, was cloudy or muddy. (T. 301-06)

9. In February or March 1992, the Department received a petition from a number of residents of the community of Alice stating that they felt mining activities by Purco at the Leon mine had adversely affected the quality of their water supplies. (T. 281)

10. Richard Beam, a hydrogeologist with the Department, was assigned the task of investigating the petition. He conducted his investigation in the spring of 1992. (T. 281-82)

11. Mr. Beam reviewed the following information in connection with his investigation:

regional geologic information for the Alice area obtained from the Pennsylvania Geologic Survey, site-specific information submitted with Purco's 1977 application for the Leon mine, information pertaining to the adjacent Schott mine site being operated by Amerikohl, and information obtained from a mining application submitted by Holiday Constructors for a permit which was never activated. (T. 282-83)

12. In addition, Mr. Beam and a team of Department personnel sampled the water of the eight residents who had signed the petition, a ninth resident who had submitted a separate complaint, and three additional water supplies in the area. (T. 284-85)

13. The majority of the water supplies sampled by Mr. Beam were concentrated in a location downslope of the Leon mine. (T. 285)

14. For the majority of the water supplies sampled by Mr. Beam, the Department had pre-mining water quality data available. (T. 286, 287)

15. Although a number of the water supplies sampled by Mr. Beam had elevated levels of iron, there was no definitive increase in the level of iron over time. (T. 291)

16. Of the water supplies sampled by Mr. Beam, there was no increase in the parameters associated with mining. (T. 291-92)

17. A number of the water supplies sampled by Mr. Beam contained hydrogen sulfide, which is characterized by a foul odor. (T. 291, 292)

18. Based upon his experience, Mr. Beam is aware of no incident in which the Department determined there to be a link between mining and the presence of hydrogen sulfide in a water supply. (T. 293)

19. Based upon his experience, Mr. Beam is aware of water supplies containing hydrogen

sulfide where there has been no mining in the area. (T. 293)

20. Hydrogen sulfide can occur naturally in an aquifer. (T. 159)

21. A report prepared in October 1992 by Department hydrogeologist Keith Brady found no conclusive evidence to link the presence of hydrogen sulfide in the wells in Alice with mining in the area. (Ex. A-6)

22. The presence of hydrogen sulfide in water supplies is common in the area of Alice. (T. 160, 296)

23. Mr. Beam found no hydrogeologic connection to exist between Phase I of the Leon site and the water supplies of the Alice area. The two locations are removed spatially and are separated by a significant amount of strata. (T. 338)

24. Based on his investigation, Mr. Beam concluded that mining had not degraded the water quality of the water supplies he had reviewed. (T. 288)

25. Adjacent to the Leon mine is the Schott mine. (T. 282-83)

26. The Schott mine was activated in July 1991 by Amerikohl. (T. 366)

27. In or about September 1991, the Department received a complaint from Richard Ashmun regarding the quality of his water. (T. 366)

28. Mr. Ashmun lives northwest of the Schott site. (T. 9) His water supply is a well. (T. 15)

29. At the time of the hearing, Mr. Ashmun had owned the property for seventeen years. At the time he purchased the property, he required a water softener to treat his water. (T. 9)

30. In 1980, Mr. Ashmun installed a chlorinating system. (T. 17)

31. In 1989 or 1990, Mr. Ashmun installed a "Rainsoft system" with an iron filter. (T.

9-10, 18) This system was effective in treating his water until approximately one year prior to the hearing. (T. 10)

32. Michael Gardner, a hydrogeologist with the Department, investigated Mr. Ashmun's complaint. (T. 366) Mr. Gardner prepared a report of his findings in December 1991. (T. 366)

33. Mr. Gardner reviewed pre-mining information for the Ashmun well, current water samples, and hydrogeologic information relating to the Schott site. (T. 367)

34. Water samples showed that there was no change in water quality from the pre-mining condition of the Ashmun well. (T. 369)

35. Based on his investigation, Mr. Gardner concluded that the mining activities at the Schott mine had not impacted the Ashmun well. (T. 367)

36. The active area of the Leon mine is located further from the Ashmun well than is the Schott mine. (T. 368)

37. Mr. Ashmun's property is separated from the Leon and Schott mines by the Pennsylvania Turnpike. (T. 19)

38. Gloria Williams lives northeast of the Leon mine. (T. 24) She had resided at this location for thirty-three years prior to the hearing. (T. 24)

39. Her water has always had an odor of sulfur. (T. 26-27) She has never been able to use her water without a filter. (T. 25)

40. Approximately eight to nine months prior to the hearing, she noticed a "sewage smell." (T. 34-35)

41. Ms. Williams has a septic tank on her property. (T. 34)

42. Adeline Leichliter lives in the vicinity of the Leon mine. (T. 37) She has lived at this

location since 1974. (T. 38)

43. Mrs. Leichliter draws her water from a well on her property. (T. 38)

44. When Mrs. Leichliter first moved to her present location, the quality of her water was "good." (T. 38) She drank the water and did laundry with it without using a treatment system. (T. 38-39)

45. In or about 1991, Mrs. Leichliter began to experience sand, iron, and mud in her water. She could not use it for drinking or cooking. (T. 38-39)

46. Testing of her water showed the presence of coliform. (T. 42, 50)

47. During a field investigation, Richard Beam observed a gap between the casing of Mrs. Leichliter's well and the surrounding earthen material, which would allow surface water into the well. (T. 295)

48. Mrs. Leichliter has a septic system on her property. (T. 46)

49. Brenda Miller lives adjacent to the Leon mine. (T. 53) She has lived at this location since 1976. (T. 53)

50. Ms. Miller draws her water from springs on her property. (T. 54)

51. When Ms. Miller moved to her present location, she experienced no problems with her water. (T. 54) She now experiences problems with the taste of the water. (T. 54-55)

52. Emma Geiger lives approximately 1/8 mile from the mined area of both the Leon and Schott sites. (T. 80-81) She has lived at this location since 1972. (T. 88)

53. Ms. Geiger has spring water, which she describes as "pure" with only a very small amount of iron. (T. 81) Ms. Geiger uses the spring water without having to treat it. (T. 81)

54. Ms. Geiger's spring is located somewhat downgradient of the Leon mine. (T. 372)

Sampling of the spring showed no increase in the level of sulfates or metals, but did indicate the presence of coliform and fecal bacteria. (T. 371-72)

55. Ms. Geiger also has a man-dug well on her property. She does not use the water from the well and describes its quality as "terrible." (T. 89)

56. Scott Bradley is a hydrogeologist with the Department. (T. 349) Mr. Bradley was the lead permit reviewer for the transfer of the Leon permit from Purco to Amerikohl. (T. 112, 353)

57. Mr. Bradley performed a cumulative hydrologic impact assessment of the Leon site. (T. 93, 94; Ex. A-3) As part of this assessment, Mr. Bradley reviewed the potential hydrologic impact of continued mining under the transferred permit. This included the continued impact on Laurel Run and on private water supplies. (T. 353-54)

58. Laurel Run is located directly downslope of both the Leon and Schott sites. (Ex. A-3) Mr. Bradley's assessment showed a slow but definite increase in the level of sulfate at SP-15, a downstream sampling point on Laurel Run. (T. 136) The increase in sulfate levels in Laurel Run downstream of the mine sites is modest and is not likely to impact the quality of the stream. (T. 154; Ex. A-3)

59. With respect to private water supplies, Mr. Bradley expressed concern in his report that the mining of the lower coal seam by Amerikohl might affect three private water supplies designated as SP-11, 13, and 14. (Ex. A-3) His report concluded, "I have not completed my review, but I will not recommend any mining on the lower seam, which may affect the above supplies, until Amerikohl meets all Dept. requirements regarding private water supply protection or replacement." (Ex. A-3)

60. Mr. Bradley found no increase in sulfate levels in the private water supplies of the

Alice area. (T. 143)

61. In reviewing the impact of mining on private water supplies, Mr. Bradley included in his analysis the investigation conducted by Mr. Beam. (T. 354)

62. Based on his complete review, Mr. Bradley determined that continued mining would not have an adverse impact on water supplies in the area. (T. 354-55)

63. The mined area of the Leon site is producing sulfate, high iron levels, and manganese. Elevated levels of these parameters are not present in the water supplies of the residents of Alice. (T. 118)

64. A report prepared by Department hydrogeologist Keith Brady in October 1992 examined water quality data for water supplies in the Alice area from pre-mining to 1992. The report indicated that sulfate levels had not increased in the sampling locations, with two exceptions: SP-14 and the Alan Miller spring. (Ex. A-6; T. 160-61)

65. Mr. Brady's report showed a temporary increase in sulfate levels for SP-14 in 1986 to 1987, sulfate levels subsequently returned to 1980 to 1982 levels. (Ex. A-6)

66. Sulfate levels for the Alan Miller spring rose from pre-mining levels of 14 milligrams per liter ("mg/l") and 23 mg/l to a level of 121 mg/l in 1992. (Ex. A-6)

67. The Miller spring has a different recharge area than the wells in the Alice area. (T. 161)

68. All of the water supplies examined in Mr. Brady's report were below 250 mg/l, the acceptable drinking water level for sulfate. (Ex. A-6)

DISCUSSION

The issue presented here is whether the Department abused its discretion in approving the

transfer to Amerikohl of Purco's permit to mine the Leon site. As the party objecting to the permit transfer, the Association has the burden of proof. 25 Pa. Code § 1021.101 (c) (2). It is the Association's contention that past mining in the area has degraded the quality of the water supplies of the residents of Alice and that further mining will continue to degrade the water quality of the area.[1] For the reasons which follow, we conclude that the Department did not err in approving the permit transfer.

The community of Alice is located to the approximate northwest of the Leon mine. The Association is comprised of two residents of Alice, Patricia A. Paul and Adeline Leichliter. The Leon mine was permitted by Purco in 1977. Mining activity did not commence at the site until sometime between July 1980 and August 1981. Purco mined the eastern portion of the site designated as "Phase I." This portion of the mine has been reclaimed since 1990 or 1991.

In February or March 1992, eight residents of Alice submitted a petition to the Department stating that they believed that mining activities on the Leon strip had adversely affected the quality of their water. In the spring of 1992, the Department investigated the residents' complaint. Heading the investigation was Department hydrogeologist, Richard Beam, who looked into the potential impact of surface mining operations on private water supplies in the Alice area. As part of the

---

[1] In its notice of appeal, the Association raised allegations that Amerikohl's advertising of the permit transfer was faulty. (Notice of Appeal Objections 1 and 2) However, the Association presented no evidence on this issue at the hearing and did not include this issue in its post-hearing brief. Therefore, it is deemed to have waived this objection. *Lucky Strike Coal Co. v. Department of Environmental Resources*, 546 A.2d 447 (Pa. Cmwlth. 1988). In addition, by Order of December 11, 1995, the Board precluded the Association from presenting evidence with regard to the following issues, as being outside the scope of this appeal: blasting, Amerikohl's authorization to mine the Schott site, the hydrologic survey conducted by the Department in connection with Amerikohl's application to mine the Schott site, and the hydrologic survey conducted by the Department in connection with Purco's application to mine the Leon site.

investigation, Mr. Beam reviewed information obtained from the Pennsylvania Geologic Survey on the regional geology of the Alice area, site-specific information submitted by Purco with its 1977 permit application to mine the Leon site, information submitted by Amerikohl with its application to mine the Schott site, and information obtained from a permit application submitted by another mining company which had sought to mine in the area. In addition, Mr. Beam and his team took water samples of the residents' water supplies and compared them to pre-mining data which he compiled. Also included in Mr. Beam's sampling were two wells used as quarterly monitoring points which were located near the mine sites. Although a number of the wells sampled had elevated levels of iron, there had been no definitive increase in iron from pre-mining samples. (F.F. 15) Nor was there an increase in any of the parameters normally associated with mine drainage, such as sulfate and metals. (F.F. 16) Mr. Beam's investigation produced no evidence that the water quality of any of the wells in question had been degraded by mining. (F.F. 24)

Mr. Beam's investigation also revealed the presence of hydrogen sulfide in the water supplies of some of the residents of Alice. Hygrogen sulfide is characterized by a foul odor. In his experience with the Department, Mr. Beam is aware of no cases where a link was found between mining and the presence of hydrogen sulfide in water. (F.F. 18) He is aware, however, of cases where hydrogen sulfide has been found in water supplies in areas where there has been no mining. (F.F. 19)

The presence of hydrogen sulfide in the water supplies of the residents of Alice was investigated by Department hydrogeologist Keith Brady. Mr. Brady prepared a report of his findings in October 1992. In conducting his investigation. Mr. Brady relied on water sampling data from 1980 through 1992. Based on his investigation. Mr. Brady found no evidence linking the presence

of hydrogen sulfide with either Purco's or Amerikohl's mining activities. (F.F. 21)

At the hearing, residents of the Alice community testified as to the problems they are experiencing with the quality of their water. The residents are unable to drink or wash clothes with the water without it first being treated. According to the testimony of the residents, in many cases the water problems either began or became worse in or about 1991, when blasting was taking place in connection with mining activity in the area.

At least some of the residents who testified, however, had experienced problems with the quality of their water even prior to mining on the Leon and Schott sites. Richard Ashmun, who lives northwest of the Schott site, testified that he had used a water softener with his well since moving into his home seventeen years prior to the hearing. (F.F. 29) Gloria Williams, who had resided northeast of the Leon site for thirty-three years prior to the hearing, testified that her water has always had a sulfur smell and has always required treatment. (F.F. 39) In addition, a survey conducted by the Department on July 21, 1980, prior to mining on the Leon site revealed that some residents at that time had problems with their water, including staining, odor, and cloudiness. (F.F. 8)

It is clear from the evidence presented at the hearing that a number of residents of Alice do indeed experience problems with the quality of their water. However, in order to meet its burden of proof, the Association must prove by a *preponderance of the evidence* that the water quality problems are the result of mining and that continued mining of the area will further degrade their water supplies. This means that the evidence on which the Association relies must so preponderate in favor of its proposition as to exclude any equally well-supported belief in an inconsistent proposition. *Midway Sewage Authority v. DER*, 1991 EHB 1445, 1476 (citing *Henderson v.*

National Drug Co., 23 A.2d 743, 748 (Pa. 1942)).

Although the Association presented a strong case showing that the area's water supply suffers from a number of water quality problems, we cannot find that the evidence preponderates in favor of the proposition that the water quality problems are the result of mining or that the problems will be worsened by further mining at the Leon site by Amerikohl. It is at least as likely that the water quality problems, in particular the presence of hydrogen sulfide, are naturally occurring. There is simply insufficient evidence to conclude that the Department abused its discretion in approving the permit transfer. Therefore, we must dismiss the Association's appeal.[2]

CONCLUSIONS OF LAW

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

2. An argument which is not included in a party's post-hearing brief is deemed to be waived. *Lucky Strike, supra.*

3. The Association has the burden of proving by a preponderance of the evidence that the issuance of the permit was an abuse of the Department's discretion.

4. The Association did not demonstrate by a preponderance of the evidence that the Department abused its discretion in issuing the permit.

---

[2] As a final note, we commend all of the parties on their presentation at the hearing and their conduct throughout this proceeding. The Board appreciates the thorough preparation and courtesy demonstrated by each of the parties during the course of this appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ALICE WATER PROTECTION ASSOCIATION	:	
v.	:	EHB Docket No. 95-112-R
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERIKOHL MINING, INC., Permittee	:	

ORDER

AND NOW, this 31st day of January, 1997, the appeal of Alice Water Protection Association is dismissed and the action of the Department of Environmental Protection is sustained.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: January 31, 1997

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

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Southwestern Region

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Adeline Leichliter, *pro se*
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For Permittee:
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GEORGE M. LUCCHINO	:	
	:	
v.	:	**EHB Docket No. 96-114-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LUZERNE LAND CORPORATION	:	**Issued: January 31, 1997**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The permittee's motion to dismiss for lack of standing is granted. In order to have standing to appeal, an appellant must establish that his interest in the appeal surpasses the common interest of all citizens in procuring compliance with the law.

OPINION

This appeal was filed by George M. Lucchino on May 28, 1996. In his appeal, Mr. Lucchino objects to the Department of Environmental Protection's ("Department") approval of an application by Luzerne Land Corporation ("Luzerne") to remove coal incidental to construction activities at a site in Robinson Township, Westmoreland County. Mr. Lucchino resides approximately two miles from the site of coal removal. (Lucchino Deposition, page 19)

On October 18, 1996, Luzerne filed a motion to dismiss the appeal for lack of standing. It

is Luzerne's contention that Mr. Lucchino has not demonstrated an interest in this matter sufficient to rise to the level of standing to bring this appeal. Luzerne bases its motion on, *inter alia*, the deposition testimony of Mr. Lucchino, submitted with its motion. Mr. Lucchino did not respond to the motion to dismiss. Nor did the Department file a response to the motion. For the reasons set forth in this Opinion, we find that Mr. Lucchino lacks standing to bring this appeal and that Luzerne's motion should be granted.

One seeking to challenge a government action must demonstrate a direct, substantial, and immediate interest in the action being challenged. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975) It is not sufficient for the person claiming to be aggrieved by the action in question to assert the "common interest of all citizens in procuring obedience to the law." *Id.* at 281. Rather, the appellant's interest must have "substance," that is, there must be "some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law." *Id.* at 282.

At his deposition, when asked by counsel for Luzerne how the permit issuance would affect him, Mr. Lucchino testified as follows:

> A. We have people within the department who are making law in [sic] which the legislators are supposed to do.
>
> Q. Right. So, you, personally, that's how you're impacted by this permit?
>
> A. Right.
>
> Q. You're not affected by noise from the operation, or dust?
>
> A. No, sir.

Q. Noise?

A. No.

Q. Dust?

A. No, sir.

(Lucchino Deposition, page 31)

Mr. Lucchino further testified that "there's nothing to say that there's any pollution that I could be affected by." (Lucchino Deposition, page 32) When asked how the mining operation would personally impact him, Mr. Lucchino answered as follows:

> I'm impacted because the department issued a permit that by state law that [sic] the department officials who are empowered to enforce the law that the legislators set down, and that the department has come into the township -- and Saddam Hussein has come down through Iraq and Kuwait -- has done the same thing in Robinson Township. They've broken all these regulations I have outlined. They have just allowed them with no public participation.

(Lucchino Deposition, page 20)

Mr. Lucchino further testified that the purpose of his appeal was *not* to stop the incidental removal of coal by Luzerne, but that he filed this appeal because he believed his constitutional rights had been violated by Department officials who had "decided to write their own legislation." (Lucchino Deposition, pages 31 and 43)

In *Sierra Club v. Hartman*, 605 A.2d 309 (Pa. 1992), the Pennsylvania Supreme Court held that the petitioners' claim of deprivation of their "constitutional rights to clean air and a proper functioning state government" was "general in nature and arguably common to all Commonwealth citizens" and, therefore, was insufficient to confer standing to challenge a governmental action.

By his own admission, Mr. Lucchino is not directly impacted by the proposed coal removal operation. The purpose of Mr. Lucchino's appeal is to insure that the Department follows its regulations. As noted in both *William Penn* and *Sierra Club*, *supra*, it is not sufficient for the person claiming to be "aggrieved" to simply assert the common interest of all citizens in seeing that the law is obeyed. This interest fails to rise to the level of standing necessary to bring an appeal from an action taken by the Department. *See also, Tessitor v. Department of Environmental Resources*, 682 A.2d 434 (Pa. Cmwlth. 1996) (Petitioner lacked standing to challenge the Department's issuance of a water obstruction and encroachment permit where he failed to demonstrate how he would be directly impacted by the activity covered by the permit.)

Because we have found that Mr. Lucchino lacks standing to challenge the Department's action, his appeal must be dismissed.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GEORGE M. LUCCHINO	:	
	:	
v.	:	**EHB Docket No. 96-114-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LUZERNE LAND CORPORATION, Permittee	:	

ORDER

AND NOW, this 31st day of January, 1997, the appeal of George M. Lucchino at Docket No. 96-114-R is **dismissed** and the action of the Department of Environmental Protection is sustained.

ENVIRONMENTAL HEARING BOARD

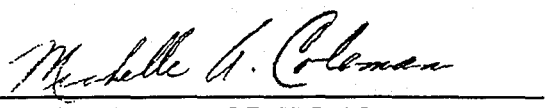
George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: January 31, 1997

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

For the Commonwealth, DEP:
Patience Nelson, Esq.
Southwest Region

For Appellant:
George M. Lucchino, *pro se*
McDonald, PA

For Permittee:
Stanley R. Geary, Esq.
Buchanan Ingersoll, P.C.
Pittsburgh, PA

maw

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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

WILLIAM DANIEL KUTSEY	:	
	:	
v.	:	**EHB Docket No. 96-026-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** February 6, 1996

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Department of Environmental Protection's (Department) motion to dismiss as moot an appeal of an explosives permit for mining as moot is granted because the Board is unable to grant any relief on this matter as the permit expired by its own terms and by operation of law.

OPINION

The motion to dismiss[1] currently before the Board arises from *pro se* appellant William

[1] On October 28, 1996 the Board received an unlabeled document from Appellant which the Board decided to treat as a motion. By letter dated November 1, 1996 the Board advised the Department that its response was due no later than November 18, 1996. In its response the Department stated that it was opposed to any consolidation with another appeal from this Appellant, EHB Docket No. 96-057-C (Opinion and Order issued December 12, 1996), and denied any allegation concerning fraud. The Department requested that the Board dismiss the current appeal as moot. By letter dated November 27, 1996 the Board stated that it concurred with the Department and would not consolidate the appeal, and reminded the Department that requests for dismissal must be by formal motion. On December 5, 1996 the Department sent a reply in which it reminded the Board that it previously had filed a motion to dismiss and since that motion was still pending wished

Kutsey's (Appellant) January 24, 1996 notice of appeal[2] of the Department's revocation by letter dated December 28, 1995 of a permit to purchase explosives for coal mining at a deep mine operated by Hickory Coal Company in Molleystown, Schuylkill County.[3]

Appellant objects to the revocation claiming it was inappropriate because (1) the Department does not have lawful jurisdiction, (2) dealers will not sell him explosives without the permit, (3) the revocation involves "unclean hands" since there have been misrepresentations by the Department, and (4) no action in a court of law has been pursued or succeeded.

On July 22, 1996 the Department filed a motion to dismiss with a supporting memorandum of law. The Department argues that the appeal should be dismissed on the grounds that the issue of the revocation of the explosives is moot because the Board cannot provide Appellant with any effective relief.

On August 20, 1996 Appellant filed its response. Appellant contends the matter is not moot. Appellant argues that the motion should not be dismissed because there has been fraud, that he stipulated to the agreement "under protest" and entered into the agreement due to harassment, and that the Department had no jurisdiction since there was no signature on the document.

We will dismiss an appeal only where there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law. *Miller v. DEP, et al*, EHB Docket No. 95-

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that motion to be considered as a filing for this issue also.

[2] The appeal was perfected on February 13, 1996.

[3] Appellant has filed a motion for sanctions on this matter. In light of the order set forth in this opinion we believe it unnecessary to address that motion and consider that motion dismissed as well.

234-C (Opinion issued January 9, 1997).

Initially we will determine if there are any material factual disputes. We hold that there are no factual disputes. Board Rule 1021.70(f) states, "Except in the case of motions for summary judgment or partial summary judgment, for purposes of the relief sought by a motion, the Board will deem a party's failure to respond to a motion to be an admission of all properly-pleaded facts contained in the motion." 25 Pa. Code § 1021.70(f) In this case, Appellant did not deny or admit specifically the allegations raised by the Department in its motion. Therefore, pursuant to this Rule all of the allegations are deemed admitted by Appellant.[4]

The facts which are deemed admitted are as follows. Appellant operated an underground anthracite coal mine in Tremont Township, Schuylkill County known as Slope #1 Operation (the Site). Appellant purchased explosives for use at the Site pursuant to Explosives Permit No. 312. The Permit specified that the explosives were to be used to "blast coal" at the Site in accordance with 25 Pa. Code 211.42(d)[5] (Records of disposition of explosives). Section 211.42(g) of the regulations states, "[Explosive] Permits expire on April 30, and are renewable on May 1 of each year." 25 Pa. Code § 211.42(g). Prior to December 1, 1994, Appellant operated the Site pursuant to Surface

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[4] Although we recognize that the Appellant herein is appearing *pro se*, the Board has noted on a number of occasions that individuals who represent their own interests without legal counsel assume the risk that their lack of knowledge may lead to an adverse ruling. *Palmer v. DER, et al.*, 1993 EHB 499.

[5] Section 211.42(d) requires the purchaser of explosives to have a permit issued by the Department in order to purchase explosives from a seller. The permit shall show the name, address, type of business engaged in by the purchaser, the location at which the explosives are to be used, the purpose for which they are to used, the location of the explosives storage magazines of the purchaser and the current storage magazine license numbers as well as the names and license numbers of all licensed blasters employed by the purchaser. 25 Pa. Code § 211.42(d).

Mining Permit (SMP) No. 54861311. The Department suspended the SMP No. 54861311. Appellant did not appeal the December 1, 1994 permit suspension letter. In December of 1995, the Department determined that Appellant was continuing to mine coal at the Site despite the suspension of the SMP. On December 15, 1995, the Department issued Compliance Order No. 95-5-066-U to Appellant. The December 15, 1995 Order required that Appellant immediately cease mining at the Site and seal the mine in accordance with the mine closure and reclamation plan approved as part of the SMP. Appellant did not appeal the December 15, 1995 Compliance Order. By letter dated December 28, 1995, the Department revoked Explosives Permit No. 312 because the December 15, 1995 Compliance Order prohibited mining and coal removal at the Site. On January 24, 1996, Appellant filed this appeal challenging the Department's revocation. On February 23, 1996 the Department filed a Petition for Enforcement of Administrative Order with the Commonwealth Court at Docket No. 232 M.D. 1996. In its petition, the Department requested that the Commonwealth Court issue an order which required Appellant to comply with the December 15, 1995 Compliance Order. On April 29, 1996, Appellant appeared in front of the Commonwealth Court and stipulated to the entry of an order, which the Court issued on April 30, 1996. In that Order, the Court required Appellant, among other things, to immediately cease mining at the Site and to seal the Site within 45 days in accordance with the closure and reclamation plan incorporated into SMP No. 54861311. These being the admitted facts, there are no material factual disputes.

Next we will determine whether the Department is entitled to judgment as a matter of law. On April 30, 1996, in accordance with a permit condition that the explosives being used to blast coal at the site, Explosives Permit No. 312 expired since no more mining was to be done at the Site. This expiration occurred by operation of law through the Commonwealth Court order. Appellant has

sealed the mine in partial satisfaction of the other part of the Commonwealth Court's order. Appellant's appeal of the revocation of Explosives Permit No. 312 is moot as there is no relief that the Board may grant because Appellant no longer is physically able or legally authorized to mine coal at the Site. Explosives Permit No. 312 has expired by its own terms and by operation of law. Therefore, the Board is unable to grant him any effective relief.

The Department is clearly entitled to judgment as a matter of law. The Board cannot grant any relief on this matter because the permit expired on April 30, 1996 by the provision of Section 211.42(g) of the regulations, by the terms of the permit (Department's Ex. A) and by operation of law through the Commonwealth Court order. Appellant did not apply for a subsequent permit when his expired. Thus, the Department is entitled to judgment as a matter of law. We will grant the motion to dismiss. Accordingly, we enter the following order.

sealed the mine in partial satisfaction of the other part of the Commonwealth Court's order. Appellant's appeal of the revocation of Explosives Permit No. 312 is moot as there is no relief that the Board may grant because Appellant no longer is physically able or legally authorized to mine coal at the Site. Explosives Permit No. 312 has expired by its own terms and by operation of law. Therefore, the Board is unable to grant him any effective relief.

The Department is clearly entitled to judgment as a matter of law. The Board cannot grant any relief on this matter because the permit expired on April 30, 1996 by the provision of Section 211.42(g) of the regulations, by the terms of the permit (Department's Ex. A) and by operation of law through the Commonwealth Court order. Appellant did not apply for a subsequent permit when his expired. Thus, the Department is entitled to judgment as a matter of law. We will grant the motion to dismiss. Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILLIAM DANIEL KUTSEY	:	
	:	
v.	:	**EHB Docket No. 96-026-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 6th day of February, 1997, the Department's motion to dismiss is granted and William Daniel Kutsey's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: February 6, 1997

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

For the Commonwealth, DEP:
Joseph Cigan, Esq.
Northeast Region
and
Patrick Zaepfel, Esq.
Central Region

For Appellant:
William Daniel Kutsey
R. D. 1, Box 479
Pine Grove, PA 17963

kh/bl

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717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

FRANK DEPAULO and MARTIN DESOUSA	:	
	:	
v.	:	**EHB Docket No. 96-100-MG**
	:	**(Consolidated with 96-101-MG)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION, and CAMPTON FUNERAL	:	**Issued:** February 7, 1997
HOME, Permittee	:	

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

Before the Board are motions for summary judgment filed by both the appellants and the permittee in an appeal from the Department's issuance of an air quality plan approval and an air quality operating permit to the permittee. After consideration of the motions and exhibits, the Board finds that neither party's right to summary judgment is clear. In some instances they have both failed to demonstrate that there are no issues of material fact in dispute. In others, the facts are not disputed, but the parties differ on the inferences to be drawn from the facts, which also makes summary judgment inappropriate. Both motions for summary judgment are denied.

OPINION

Campton Funeral Home, Inc. (Permittee) submitted an application to the Department of Environmental Protection requesting the issuance of an air quality plan approval to construct and temporarily operate a crematory at 525 Delaware Avenue in Palmerton, Carbon County,

Pennsylvania. The Department issued air quality plan approval no. 13-301-012 in December 1994. Construction of the crematory was completed in June 1995, but the actual location of the facility was at 517-519 (Rear) Delaware Avenue, which the Permittee says is a contiguous property in an adjacent building. The Department required the Permittee to submit a revised face page for the application reflecting the proper address for the location of the crematory, and on April 8, 1996, issued revised air quality plan approval no. 13-301-012A and air quality operating permit approval no. 13-301-012A. The Appellants, owners of property in proximity to the crematory, filed timely appeals from both the plan approval and the operating permit. These two appeals were consolidated for our consideration on June 4, 1996.

Discovery in these appeals was completed on September 16, 1996. Both the Permittee and the Appellants have filed motions for summary judgment. The Department has filed a response in opposition to the Appellants' motion[1] and informed the Board that it concurs with the motion of the Permittee.

The Board is empowered to grant summary judgment where the pleadings, depositions answers to interrogatories and admissions on file, together with the affidavits and expert reports, 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. In passing on a motion for summary judgment, the Board's job is only to determine whether or not there are triable issues of fact, not to decide issues of fact. *County of Schuylkill v. DER,* 1990 EHB 1370. Judgment may only be entered in those cases where the right to judgment in the movant's favor is clear and free from doubt.

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[1] The Department's response to the Appellants' motion was not accompanied by a memorandum of law.

Township of Florence v. DEP, EHB Docket No. 96-045-MG (Opinion issued November 25, 1996). With these principles in mind, we turn our consideration to the arguments properly raised by the parties' motions.

PLAN APPROVAL ISSUES

The Appellants first state that the Department's issuance of the modified plan approval was an abuse of discretion because the Department did not require the Permittee to submit a complete application for the proper location. Instead, the Department allowed the Permittee to simply submit a revised face page for the original application which reflected the proper address for the location of the crematory.

The following facts are not in dispute. The original permit application authorized construction of the crematory at 525 Delaware Avenue. The crematory was actually constructed at 517-519 (Rear) Delaware Avenue. The Department requested that the Permittee submit a revised face page to supplement the application for the air quality plan application, but did not request a completely new application.

We conclude that these facts are not sufficient for the Board to conclude that as a matter of law the Department abused its discretion. It is true, as the Appellants contend, that the Department's regulations provide that a plan approval is only valid for the specific location for the source noted in the application. 25 Pa. Code § 127.32(c). It is also true that the Department must comply with its own regulations. *Oley Township v. DEP*, EHB Docket No. 95-101-MG (Adjudication issued October 24, 1996). However, there are no facts indicating whether the information supplied in the plan approval application should have been different for the second location, or whether the original source address for the plan approval application was merely a typographical error which did not

affect the Department's consideration of the application. There is no supported statement in either the motion or the responses which indicates the distance between 525 Delaware Avenue and 517-519 (Rear) Delaware Avenue or the significance of the distance between the two locations to the Department's review of the applications. It is also unclear what other qualitative differences there may be between the two locations. The Board is unable to conclude that the Department abused its discretion; the Appellants have not demonstrated that they are clearly entitled to judgment in their favor on this issue.

The Appellants next state that the Department abused its discretion in issuing the plan approval because the application contained no information concerning the height of the stack associated with the crematory, incorrect information concerning visible emissions associated with the operation of the crematory, and inconsistent information concerning the capacity of the crematory. The Permittee and the Department admit that the application contained no information concerning stack height, but the Department contends that stack information is not necessary because the Department controls air emissions from crematories by requiring controls on combustion units. (Department Ex. 1, Affidavit of Thomas A. DiLazaro at ¶ 7)

The Appellants rely upon Section 4004(14) of the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. § 4004(14), in support of their argument. That section requires the Department to consider "specifications of air pollution control equipment, devices or process changes . . . ." The Department's regulations further require that plan approval applications demonstrate that a source and air cleaning devices can be operated in accordance with "good air pollution control practices." Neither of these statutory mandates require the Department to insist upon stack information where an applicant will use an alternative type of air pollution

control equipment which would make stack information unnecessary. Moreover, the Appellants have not cited any facts from the record which indicate whether or not the application to this facility of the Department's policy concerning stack information for crematories is an abuse of discretion. Accordingly, the Appellants' motion is denied.[2]

The Appellants have also failed to demonstrate that they are clearly entitled to judgment in their favor because the application contained inadequate information about visible emissions and the capacity of the crematory. In support this part of the motion, the Appellants cite deposition testimony of Thomas DiLazaro and Norman Frederick of the Department. The Department, in response, cites to the same testimony of Norman Frederick to support its contention that the application *did* contain sufficient information concerning visible emissions and capacity. Mr. DiLazaro notes that the original plan approval included a condition that emissions from the crematory unit would be zero percent opacity. He believed that this condition was included by Mr. Frederick because of representations that were made in a sales brochure.[3] He also noted that the condition was changed in the modified plan approval to include an emissions rate of ten percent opacity for three minutes to conform to the Department's guidance document on the subject. (Appellants' Ex. G, Deposition of Thomas A. DiLazaro at 62- 64) The Appellants strenuously argue that this change in the permitted emissions rate was an abuse of discretion. However, they do not

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[2] The Appellants note in their brief that the stack for the crematory is close to an apartment building, and that minimum stack heights are recommended for this particular crematory unit. These facts alone do not prove an abuse of discretion. In addition, these facts were not cited in their motion for summary judgment and are therefore beyond our consideration. *See County of Dauphin v. DEP*, EHB Docket 96-184-MR (Opinion issued January 9, 1997)(statements of fact only found in legal memoranda will not be considered by the Board); *County of Schuylkill v. DER*, 1990 EHB 1370.

[3] The sales brochure is not currently part of the record before the Board in this matter.

explain *why* the Department's modification of the plan approval to conform to the Department's guidance document is an abuse of discretion. The Department admits that the condition in the modified plan approval is a more relaxed standard, but the standard does not violate the visible emissions standards of the Department's regulations at 25 Pa. Code § 123.41. The Appellants have not provided any facts which would support a finding that a more stringent standard for this particular crematory was necessary. Thus, although it seems the facts are not in dispute concerning the change in the permit condition, the inferences to be drawn from those facts are clearly disputed; therefore, summary judgment is inappropriate. *See County of Schuylkill v. DER*, 1990 EHB 1370.

Further, Mr. Frederick testified in his deposition concerning various measurements of capacity for the crematory. (Appellants' Ex. D, Deposition of Norman Frederick at 32-42) While it does appear that there was some inconsistency in the available information concerning the capacity of the unit as reported in various sections of the plan application, the significance of this information is not adequately supported by any of the parties. The Appellants have presented no expert report that would demonstrate that the Department's final analysis was improper in any way. Accordingly, the Appellants have failed to demonstrate that their right to judgment in their favor is clear and their motion must be denied. *See Barkman v. DER*, 1993 EHB 738 (in a motion for summary judgment it is the movant's responsibility to sift through the documents used in support and to frame the motion so as to present the best case).

The Appellants' next contention is that the plan application did not contain an adequate demonstration and verification of compliance in violation of 25 Pa. Code § 127.13b(a)(2). That regulation provides that the Department will deny an application for plan approval if "provision has not been made for adequate demonstration and verification of compliance . . . ." 25 Pa. Code §

127.13b(a)(2). The only supported factual contention made by the Appellants in their motion is a statement by Mr. DiLazaro in his deposition that a plan approval must provide for adequate demonstration and verification of compliance. (Appellants' Ex. D, Deposition of Thomas DiLazaro at 124) He does not state that the Permittee's application did not include appropriate information. The Department cites other testimony of Mr. DiLazaro wherein he discussed stack test information that was submitted by the Permittee although the significance of this testimony is less than obvious. (Permittee Ex. A at 49-52)[4] Since there is clearly a material fact in dispute, the Appellants' motion is denied.

The Appellants next contend that the plan approval application was fatally flawed because it did not provide municipal notifications concerning the construction and operation of the crematory at the 517-519 (Rear) Delaware Avenue address.[5] In support of this claim the Appellants cite a letter from the Department written to the Permittee advising them to provide these notifications. (Appellants' Ex. L) This fact alone does not support the contention that the Permittee never notified the relevant municipalities where the crematory is constructed and operated.[6]

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[4] This exhibit was incorporated by reference in the Department's response to the motion of the Appellants.

[5] The Permittee argues that this objection was not properly preserved in the Appellants' notice of appeal. We have reviewed the notice of appeal which alleges in Paragraph 5 that issuance of the plan approval was in error because it was not in accordance with applicable law. Under the Commonwealth Court's decision in *Croner, Inc. v. Department of Environmental Resources*, 589 A.2d 1183 (Pa. Cmwlth. 1991), a general allegation of unlawfulness is sufficient to preserve an objection based upon a specific statutory or regulatory provision.

[6] The Department in response includes as an exhibit letters from the County of Carbon Office of Planning and Development and from the Borough of Palmerton which state that the municipalities were informed of the air quality application for the location at 517 Delaware Avenue in September 1994. (Department Ex. 3) However, neither of these items are properly before the Board for

The Appellants next state that the Permittee failed to submit a complete and accurate compliance history form with the amended plan approval application. They therefore claim that the Department erred in issuing the plan approval and it should be revoked. Both the Permittee and the Department admit that the compliance form was not submitted with the amended plan approval application. (Appellants' Ex. C at Interrogatory No. 12(a)) However, the Department evidently was aware of the Permittee's compliance history. For example, the updated compliance form which was submitted in September 1996 notes past violations which were resolved by the Department through a consent order and civil penalty in March 1996.[7] (See Permittee Ex. K at 5; Department Ex. 2, Affidavit of Ronald Mordosky at ¶¶ 5, 6; Appellants' Ex. D, Deposition of Thomas DiLazaro at 113) Since there appear to be other circumstances which may or may not affect the conclusion the Board must draw from the fact that the compliance history form was not included with the amended plan approval application, on this record it is not possible to conclude that the omission rises to the level of such an abuse of discretion by the Department and that the plan approval must be revoked. The Appellants' motion is denied on this issue.

The Appellants next seek revocation of the plan approval because they claim that the Department failed to perform an adequate technical review of the amended plan approval application for the source at its actual location. The Appellants note, and the Department agrees, that the

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consideration because there is no indication that they are authentic and properly part of the record as defined by Pa. R.C.P. No. 1035.1 (the record includes pleadings, depositions, answers to interrogatories, admissions, affidavits and certain reports signed by experts).

[7] The Department references this agreement in its response to the Appellants' motion, but does not include the agreement or reference it as an exhibit. (See also Department's Ex. 1, Affidavit of Thomas DiLazaro at ¶ 8) However, the Appellants have included it as an exhibit to their motion. (Appellants' Ex. H)

location of a source is a factor in compliance with the malodor regulation at 25 Pa. Code § 123.31. (See Appellants' Ex. D , Deposition of Thomas DiLazaro at 113)

The Department contends that it reviewed only the elements of the plan approval application that actually changed and that this review constituted a complete and meaningful review of the application. Mr. Frederick in his deposition testimony states that the modification application involved a change of address, therefore his review consisted of verifying the location at 517-519 (Rear) Delaware Avenue. (Appellants' Ex. G, Deposition of Norman Frederick at 79-80) In the context of the Department's involvement with the Permittee throughout the permitting process, there remain facts in dispute concerning the Department's review of the source, and the effect, if any, of the modified application upon its review of the original plan approval. In these circumstances summary judgment would be inappropriate.

Since a principle concern of the Appellants is a violation of the malodor standard, we would direct their attention to the Board's recent decision in *DER v. Franklin Plastics Corp.*, EHB Docket No. 90-316-CP-E (Adjudication issued June 19, 1996).[8] There we held that the quantum of proof necessary to establish a violation of 25 Pa. Code § 123.31(b), is proof of an odor which (1) causes annoyance or discomfort to the public and (2) the Department determines is objectionable to the public. Proof of public annoyance is not merely a complaint from a few individuals, but must rise to a level of proof of a public nuisance. The record currently before us is devoid of proof of either element required to establish a violation of the Department's malodor regulation.

Finally, the Appellants contend that the plan approval must be revoked because it is not

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[8] This adjudication is currently on appeal to the Commonwealth Court at docket 2046 C.D. 1996.

designed to prevent further operations of the source if there were future violations. In support of this argument, the Appellants provide evidence that violations of the Air Pollution Control Act were documented by the Department, and were the subject of a consent order between the Permittee and the Department. (Appellants' Ex. H) The Permittee and the Department met, and the Permittee proposed changes in their operating practices to remediate some of the violations. (Appellants' Ex. N, Deposition of Ronald Mordosky at 13-14) The Appellants also contend that the Department received additional complaints concerning the crematory. The Department admits that violations by the Permittee were documented and addressed by the consent order. The Department admits that it received six complaints from the public concerning the crematory, but only documented violations on January 4, 1996. (Department Ex. 2)

The substance of the Appellants' argument is that the Department knew that violations had occurred in the past; that it had received complaints; and that the Permittee proposed operating changes to address the past violations. Yet the Department issued the plan approval without imposing conditions which would prevent subsequent violations. The Appellants state that the Department imposed a less stringent opacity standard in the amended plan approval than that imposed in the original plan approval. While these facts are not in dispute, they do not provide a sufficient basis for the Board to conclude that the Department abused its discretion in issuing the plan approval. For example, as explained earlier, the Department contends that the less stringent opacity standard was put in the amended plan approval so that it would conform to departmental guidance documents. The Appellants have not provided any basis for us to conclude that this was improper or that a more stringent standard was required for this particular crematory than for other crematories regulated by the Department. Further, a failure to prohibit operation of a source in the

event of any future violation is not a violation of any provision of law and is not likely to be an abuse of discretion. Therefore we can not conclude that the plan approval is so fatally flawed that it must be revoked. The Appellants' motion must be denied.

OPERATING PERMIT

The Appellants argue that since the Department erred in issuing the plan approval, it necessarily erred in issuing the operating permit. Further, they charge that the operating permit suffers from the same deficiencies as the plan approval. Specifically, the Permittee failed to comply with the Department's air quality regulations, failed to provide sufficient information regarding stack information and the capability of the crematory to be operated in accordance with good air pollution control practices, and failed to provide an updated compliance review form. In their motion the Appellants cite no new facts to support these statements of fact. Accordingly, for the same reasons we denied the Appellants' motion on these issues in the context of the plan approval, we also deny their motion regarding the operating permit.

The Appellants next contend that the Permittee failed to perform a source test or an evaluation demonstrating that it will not discharge air emissions in excess of that authorized. In support of this contention, the Appellants cite the Department's answer to interrogatories which states that no source test was performed because a source test was not necessary. (Appellants' Ex. E at Interrogatory No. 33) In response the Department refers to the review it performed in the context of the plan approval where it evaluated the Permittee's ability to control emissions. (Permittee Ex. A, Deposition of Thomas DiLazaro at 49-52) Moreover, the Department relied upon the operating experience of the crematory during its shakedown period in concluding that the issuance of an operating permit was appropriate. It is unclear at this juncture that such reliance was an abuse of

discretion. In sum, as with many of the issues in this case, it is not the facts which are disputed, but the conclusions which must be drawn from them which are. We must therefore deny the Appellants' motion.

Finally, the Appellants argue that they are entitled to summary judgment because the Department abused its discretion by issuing the amended plan approval and the operating permit simultaneously. In the context of the facts which have been provided in this motion, this circumstance alone does not support the conclusion that the Department abused its discretion and so that the operating permit must be revoked.

PERMITTEE'S MOTION FOR SUMMARY JUDGMENT

The Permittee has also filed a motion for summary judgment. It maintains that it is entitled to judgment because "contrary to the allegations in the Appellants' notice of appeal" (1) the crematory complies with the Department's malodor and fugitive emission regulations; (2) the operation of the crematory at 517-519 Delaware Avenue was not a violation of the Air Pollution Control Act under the circumstances; (3) the modified plan approval was not an abuse of discretion because it did not include an obligation to modify the design or operation of the crematory to prevent future violations; (4) the plan application contained sufficient information regarding the stack or flue; (5) the crematory is adequately equipped to monitor emissions and will operate in accordance with good air pollution control practices; (6) the plan approval and operating permit adequately prohibit violation of the Department's opacity requirements; and (7) the plan approval and operating permit applications adequately demonstrated that the crematory will comply with all relevant provisions of the Air Pollution Control Act and federal air pollution requirements. The motion concludes with a bald statement that there are no material facts in dispute.

The Board can not address these issues raised by the Permittee. Its motion is fatally flawed inasmuch as none of the statements in its motion are supported with citations to exhibits or reference to facts in the record. The Permittee did support the factual allegations made in its accompanying memorandum of law; however, the purpose of the memorandum is to explain the motion, not to augment it. *Barkman v. DER*, 1993 EHB 738. Accordingly, the citations of exhibits and allegations of fact made in a memorandum of law can not cure a defective motion. *Force v. DEP*, EHB Docket No. 96-054-MG (Opinion issued January 21, 1997); *see also County of Schuylkill v. DER*, 1990 EHB 1370. Even if the Board were to consider the Permittee's memorandum of law as a motion for summary judgment, we would conclude that the Permittee has failed to demonstrate that it is clearly entitled to judgment in its favor.

We enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

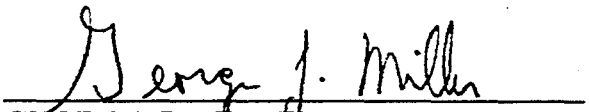
FRANK DEPAULO and MARTIN DESOUSA	:	
	:	
v.	:	**EHB Docket No. 96-100-MG**
	:	**(Consolidated with 96-101-MG)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION, and CAMPTON FUNERAL	:	
HOME, Permittee	:	

ORDER

AND NOW, this 7th day of February, 1997, the motion for summary judgment of Frank DePaulo and Martin DeSousa in the above-captioned matter is hereby DENIED.

The motion for summary judgment of Campton Funeral Home in the above-captioned matter is hereby DENIED.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: February 7, 1997

See following page for service list.

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

For the Commonwealth, DEP:
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Northeastern Region

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MANKO GO.D & KATCHER
Bala Cynwyd, PA

For Permittee:
Howard J. Wein, Esq.
Paul A. Supowitz, Esq.
KLETT LIEBER ROONEY & SCHORLING
Pittsburgh, PA
and
Alfred S. Pierce, Esq.
TEEL, STEETZ, SHIMER & DiGIACOMO
Nazaareth, PA

ml/bl

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M. DIANE SMITH
SECRETARY TO THE BOARD

ANTHONY R. POPPLE	:	
	:	
v.	:	**EHB Docket No. 96-044-C**
	:	**(Consolidated with 96-158-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** February 13, 1997

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Department of Environmental Protection's (Department) motion to dismiss is granted where there are no material facts in dispute and the Department is entitled to judgment as a matter of law because the Board lacks jurisdiction to hear cases where the Department action does not pertain directly to an environmental issue which affects appellant's property or personal rights, privileges, immunities, duties, liabilities or obligations.

OPINION

The Department's motion to dismiss currently before the Board arises from Anthony R. Popple's (Appellant) February 20, 1996 and August 9, 1996 notices of appeal concerning the Department's rejection of his bids on four contracts for the Department's Office of Surface Mining. Two of the contracts were Contract No. OSM 54 (3625) 102.1 for backfilling strip pits at Coal Castle North, Cass Township, Schuylkill County and Contract No. OSM 54(4238) 101.1 for

backfilling a shaft at Arlington Yards Southwest, Tamaqua Borough, Schuylkill County (EHB Docket No. 96-044-C). The other two contracts were Contract No. OSM 40(2235)101.1 for backfilling a shaft on Pennsylvania Avenue in the City of Wilkes-Barre, Luzerne County and Contract No. OSM 54(3629)103.1 for backfilling strip pits in Heckscherville, Cass Township, Schuylkill Township (96-158- C).

On January 8, 1997 the Department filed a motion for consolidation of the two appeals since they raise the same objections. By the Board's January 10, 1997 order the appeals were consolidated at EHB Docket No. 96-044-C.

Appellant contends that the Department's rejection of his low bids for the contracts was arbitrary, capricious and in violation of a management directive, specifically Section VII (Procedures) of Management Directive 215.9, Contractor Responsibility Program. He alleges that the Department violated the provisions of that directive when the Department rejected his bid on the basis of past conduct of A.R. Popple Construction, Inc., including its alleged failure to pay sub-contractors on previous Department contracts in a timely manner and violation of a previous Department contract by removal of equipment from the job site without Department approval. All the allegations concern contracts.

On May 17, 1996 the Department filed a motion to dismiss with an accompanying memorandum of law. On June 10, 1996 Appellant filed a response.

The Department argues that the appeal should be dismissed because the Board lacks jurisdiction to rule on contractual matters.

Appellant contends the Board has jurisdiction. Appellant argues that the Board's jurisdiction arises from the Department's rejection of his bid, and that rejection is a Department action which

involves Appellant's right or privilege to perform services for a commonwealth agency.

The Board will dismiss an appeal only where there are no material factual disputes and the moving party is clearly entitled to judgment as a latter of law. *City of Scranton, et al. V. DER, et al.*, 1995 EHB 104.

We agree with the Department. Under the rules of civil procedure, "[A]verments in a pleading to which a responsive pleading is required are admitted when not denied specifically or by necessary implications." Pa. R.C.P. 1029(b) The facts set forth in the Department's motion are deemed admitted by Appellant because he failed to file a response in which he specifically denied the Department's averments. Consequently, there are no disputes of material facts. Next, we must consider whether the Department as the moving party is entitled to judgment as a matter of law.

We hold that the Department is entitled to judgment. Section 7514 of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511- 7516, provides that the Board has the power and duty to hold hearings and issue adjudications under 2 Pa. C.S. Ch 5 Subch. A (relating to practice and procedure of the Commonwealth agencies) on orders, permits, licenses or decisions of the Department. 35 P.S. § 7514(a) By implication and practice the Board has limited its rulings to those orders, permits, licenses or decisions of the Department on matters directly concerning the environment. In *DER v. New Enterprise Stone & Lime Co., Inc.*, 359 A.2d 845, 847 (Pa. Cmwlth. 1976) the issue was whether or not the Board had jurisdiction to review a refusal by the Department to modify an agreement with New Enterprise. The agreement in question was an agreement to extend the time for compliance with a Department order for New Enterprise to install air pollution control devices on its equipment at a quarry. The Commonwealth Court affirmed the Board's ruling that it did not have jurisdiction to review this dispute arising out of this

Department decision because the Department's decision not to modify the agreement is not the type of Department decision that resulted in any action being taken against a party and which does not affect property rights, privileges, liabilities and other obligations which would render it an appealable "decision." Special note is taken of the word "decision" as the Commonwealth Court states,

> that "... administrative agency laws generally refer to the term 'decision', as including a determination which can be classified as quasi-judicial in nature and which affects rights or duties. 1 Am Jur 2d Administrative Law, 138. Here, the refusal by the DER to modify the outstanding agreement with New Enterprise lacks the elements which would suggest that a 'decision' had been made in the technical sense of the word because the rights and obligations of New Enterprise have not been altered."

DER v. New Enterprise Stone & Lime Co., Inc., 359 A.2d 845 (Pa. Cmwlth. 1976) Footnote 5.

In the instant case, the Department's rejection of the low bids is not a Department action or decision that affects Mr. Popple's property or personal rights, privileges, immunities, duties, liabilities or obligations, nor does it directly involve environmental issues. Furthermore, we have consistently stated that the Board is not authorized to rule on contract questions. *See, Approved Coal Corporation v. DER*, 1992 EHB 107; *Montgomery County v. DER, et al*, 1991 EHB 1874. In this case, Appellant's notice of appeal raises only those questions pertaining to contractual bids which he submitted to the Department and the Department's rejection of those bids. For the reasons stated herein, the Board lacks jurisdiction to hear this appeal. Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ANTHONY R. POPPLE	:	
	:	
v.	:	**EHB Docket No. 96-044-C**
	:	**(Consolidated with 96-158-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

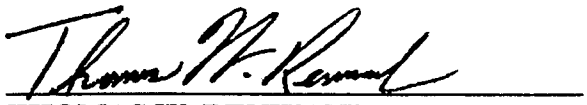
AND NOW, this 13th day of February, 1997, the Department's motion to dismiss is granted and Anthony R. Popple's appeals are dismissed.

ENVIRONMENTAL HEARING BOARD

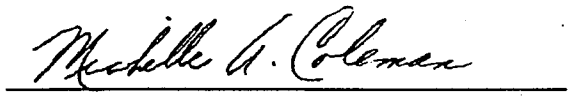
GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 96-044-C
(Consolidated with 96-158-C)



THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: February 13, 1997

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

For the Commonwealth, DEP:
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Northeast Region

For Appellant:
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kh/bl

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M. DIANE SMITH
SECRETARY TO THE BOARD

C. WILLIAM MARTIN, et al., CHESAPEAKE ESTATES OF GRANTVILLE MOBILE HOME PARK	:	
v.	:	**EHB Docket No. 95-190-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EAST HANOVER TOWNSHIP	:	**Issued:** February 14, 1997

OPINION AND ORDER ON PRAECIPE TO WITHDRAW APPEAL

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

Appellants' request for withdrawal is denied. The Board denies Appellants' request for a withdrawal with prejudice of that portion of an appeal which concerns a matter which the Board considered and decided in a prior opinion and order. The Board denies Appellants' request for withdrawal without prejudice for the remaining allegations. The appeal is dismissed for failure to prosecute.

OPINION

The current praecipe to withdraw an appeal arises from a notice of appeal filed by C. William Martin, owner of the Chesapeake Estates of Grantville Mobile Home Park (Chesapeake Estates), and residential tenants of Chesapeake Estates (collectively, Appellants) challenging the Department of

Environmental Protection's (Department) approval of a township's supplement to its official Act 537 Plan for sewage services. The facts of this case were set forth in detail in the Board's September 24, 1996 opinion and order and will not be repeated here. In that opinion the Board granted in part and denied in part the Department's motion for summary judgment. The motion was granted regarding Appellants' challenge of the inclusion of a private sewage system in the supplement of a township's official Act 537 Plan. The challenges concerning the inclusion were precluded by the doctrine of administrative finality because the claims could have been raised in prior permit issuances. The motion was denied regarding Appellants' objections which were not addressed by the Department's motion.

On January 15, 1997 Appellants filed a Praecipe to Withdraw an Appeal. In the praecipe Appellants requested:

> 1. the Board withdraw their appeal filed at Docket No. 95-190-C with prejudice as to the matter which was previously determined by the Board in its September 24, 1996 opinion and order.
>
> 2. the withdrawal be without prejudice for all other matters which had not been previously determined by the Board in accordance with Board Rule 1021.120(e).

We deny the withdrawal with prejudice on the issues which were previously determined by our earlier opinion and order. It is impossible for the Board to grant Appellant's request regarding the previously determined matter since we disposed of it in our earlier opinion and order when we granted the Department's motion for summary judgment on the issue. Consequently, the issue is no longer available to be withdrawn.

We deny Appellants' request for withdrawal without prejudice and dismiss the appeal for

the reasons which follow. The dates for filing pre-hearing memoranda were set at the parties' request and only after several conference calls between the parties and the presiding Administrative Law Judge. Later, the parties requested extensions, which the Board granted. Nevertheless, Appellants failed to file their pre-hearing memorandum by December 23, 1996, as required by the Board's October 2, 1996 order. Although a hearing was scheduled for January 21-23, 1997, Appellants failed to properly prepare for hearing and failed to inform the Board of their reasons for not complying with the Board's order.

In response to Appellants' failure to file a pre-hearing memorandum, the Department filed a motion for sanctions on January 14, 1997. On January 15, 1997, Permittee, East Hanover Township, filed a pre-hearing memorandum which reserved the right to call certain witnesses and requested that the Board dismiss Appellants' appeal for Appellants' failure to comply with a Board order. Four hours after Permittee's filing on January 15, 1997, Appellants filed their praecipe to withdraw the appeal.

The Board's standard procedure when a motion for sanctions is filed by a party is to issue a rule to show cause. In that order the Board informs the party that he has 20 days to file his pre-hearing memordum and failure to do so will result in dismissal of the case as a sanction for failing to file as directed by the order. We will not follow that procedure in this case since we have a unique set of circumstances. At the request of the parties, the dates for filing pre-hearing memoranda were set within 30 days of the hearing. Had the Appellant filed a timely memorandum, the Department and Permittee would have been required to file their memoranda within 15 days, leaving less than two weeks before the hearing. On January 14, 1997, one week prior to the hearing, the Department filed its motion for sanctions. This was the first filing from any party since the letter dated December

23, 1996, and received December 27, 1996, from counsel for the Permittee in which he objected to the possible change of hearing dates because he believed that Appellant would request another extension. No request was made. Appellants did not file their praecipe to withdraw until January 15, 1997. Under these circumstances the Board sees no basis to adhere to its usual procedures. To do so would result only in an unnecessary protraction of the case.

To grant the praecipe to withdraw without prejudice would be inappropriate in light of the numerous extensions which have been granted in this appeal, the fact that a hearing was scheduled to begin less than a week after the praecipe was received and the incovenience caused to the other parties by Appellants' failure to proceed so close to hearing. Therefore, we deny Appellants' praecipe because it requests withdrawal without prejudice, but since Appellants have failed to prosecute their appeal as directed by Board orders we will dismiss the appeal. Since we have addresssed the problems with the request to withdraw the appeal, we find it unnecessary to addresss the motion for sanctions. Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

C. WILLIAM MARTIN, et al., CHESAPEAKE ESTATES of GRANTVILLE MOBILE HOME PARK	:	
v.	:	**EHB Docket No. 95-190-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EAST HANOVER TOWNSHIP	:	

ORDER

AND NOW, this 14th day of February, 1997, we deny C. William Martin, et al., Chespeake Estates of Grantville Mobile Home Park's praecipe to withdraw their appeal without prejudice, and dismiss the appeal.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: February 14, 1997

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

For the Commonwealth, DEP:
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Southcentral Region

For the Appellant:
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For the Township:
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WIX, WENGER & WEIDNER
Harrisburg, PA

kh/bl

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M. DIANE SMITH
SECRETARY TO THE BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION III, Appellant	:	
	:	**EHB Docket No. 97-029-MG**
v.	:	
DEPARTMENT OF ENVIRONMENTAL PROTECTION and UPPER MORELAND-HATBORO JOINT SEWER AUTHORITY, Permittee	:	**Issued:** February 19, 1997

OPINION AND ORDER

By George J. Miller, Administrative Law Judge

Synopsis:

An appeal by the Environmental Protection Agency, Region III ("EPA") from the Board's approval of an agreement between the appellant and the Department of Environmental Protection ("DEP") for the issuance of an NPDES permit is dismissed on the Board's own motion as being untimely.

OPINION

Background:

The Upper Moreland-Hatboro Joint Sewer Authority ("Authority") owns and operates a sewage treatment plant located in Upper Moreland Township, Montgomery County, Pennsylvania. On January 4, 1996, the Department issued a National Pollutant Discharge Elimination System Permit ("NPDES") to the Authority authorizing the discharge of treated effluent to Pennypack Creek

and an unnamed tributary to Pennypack Creek in accordance with the limitations and requirements of the permit. The Authority filed a timely appeal with the Board at Docket No. 96-034-MG.

On November 27, 1996, the Board received a request from the parties that the Board publish a notice of the settlement of the appeal in the Pennsylvania Bulletin pursuant to the Environmental Hearing Board's Rules of Practice and Procedure at 25 Pa. Code § 1021.120.

By order dated December 5, 1996, the Board approved the Consent Adjudication in settlement of the appeal and saw to it that the notice of the settlement was published in the Pennsylvania Bulletin on December 21, 1996. That notice stated that the settlement would be final absent objections which had to be filed within 20 days of publication or by January 10, 1997.

On January 17, 1997, the Board received a letter from EPA which requested the Board to reconsider acceptance of the Consent Adjudication as an acceptable settlement of this matter. The letter correctly states that as part of the Consent Adjudication, the Department agreed to draft a permit amendment concerning the sanitary sewer overflow outfall at the headworks of the Authority's treatment plant. The letter goes on to state that on December 11, 1996, the EPA submitted to the Director of the Department's Southeast Regional Office a specific objection to the draft permit stating that the outfall is prohibited pursuant to 40 C.F.R. § 122. 41 (m)(4). The letter from EPA requested that the Board reconsider its acceptance of the Consent Adjudication at EHB Docket No. 96-034-MG as an acceptable settlement of the matter.

Discussion:

We have treated the letter from the EPA as an appeal and have docketed it as such at EHB Docket No. 97-029-MG. However, the Board on its own motion, hereby dismisses the appeal because it has no authority to grant the relief requested because the request from EPA was not

timely. Under the applicable Board Rule of Practice and Procedure at 25 Pa. Code § 1021.120 any objection to the Board's action had to be taken within 20 days of the publication of the notice in the Pennsylvania Bulletin on December 21, 1996. Because EPA's letter was not received until January 17, 1997, the Board is without authority under its rules to now reconsider its approval of the settlement. EPA recognized that there was a problem on December 11, 1996 by sending a letter of objection to the Department, but did not make any objection to the Board in order to forestall any approval of the settlement agreement.

While we dismiss the EPA appeal, it is clear that EPA is not without an appropriate remedy in dealing with the Department based on its objection.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION III, Appellant	:	
	:	**EHB Docket No. 97-029-MG**
v.	:	
DEPARTMENT OF ENVIRONMENTAL PROTECTION and UPPER MORELAND-HATBORO JOINT SEWER AUTHORITY, Permittee	:	

ORDER

AND NOW, this 19th day of February, 1997, the appeal of the Environmental Protection Agency, Region III is **DISMISSED** on the Board's own motion because the appeal was not timely filed under the Board's Rules of Practice and Procedure.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: February 19, 1997

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

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

For Upper Moreland-Hatboro Joint Sewer Authority:
R. Rex Herder, Jr., Esquire
ACTON HERDER AND BRESNAN
Willow Grove, PA

For EPA:
Lorraine H. Reynolds
NPDES Branch
Philadelphia, PA

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M. DIANE SMITH
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Plaintiff	:	
v.	:	**EHB Docket No. 92-429-CP-MG**
CROWN RECYCLING AND RECOVERY, INC., JOSEPHINE BAUSCH CARDINALE, Executrix for the Estate of Phillip Cardinale, NANCY CARDINALE, Executrix for the Estate of Anthony Cardinale, UNIVERSAL MANUFACTURING CORP., MAGNETEK, INC., SCHILBERG INTEGRATED METALS, CORP. and WIRE RECYCLING, INC., Defendants	:	**Issued:** February 20, 1997

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

Summary judgment as to liability for interim response costs is entered against the owners and operators of a waste incineration facility, now a contaminated site, where they failed to respond to the Department's motion for summary judgment and the available evidence indicates that they are responsible parties under the Pennsylvania Hazardous Sites Cleanup Act ("HSCA"), Act of October 18, 1988, P.L. 756, *as amended*, 35 P.S. § 6020.101- § 6020.1305. One generator defendant is found to be a responsible person under this act for the release of hazardous substances at the site where

there was an arrangement between it and the owner/operators for the treatment of this generator's scrap copper wire at this treatment facility because copper is a hazardous substance and copper was found at the site. However, the motion for summary judgment as to the liability of this defendant is denied because there is a dispute of material fact as to whether or not this generator is exempt under an exemption provided for scrap metal in HSCA and as to whether or not this was an arrangement for disposal. While HSCA imposes strict, joint and several liability on the responsible persons defined by it, this defendant will be given an opportunity at the hearing on the merits as to its liability, if any, to prove that its liability is only several by proving that the harm caused by its copper wire is divisible from the harm caused by other hazardous materials treated or disposed of at the site.

A second generator's motion for summary judgment is denied as to its liability under HSCA because there is a dispute of material fact as to whether or not there was an arrangement for treatment or disposal of this defendant's scrap copper wire. This generator's motion for summary judgment is also denied with respect to the claimed absence of personal jurisdiction over it as a New Jersey business without the required "minimum contacts" with Pennsylvania because there is a dispute of material fact as to whether or not this defendant knew that its scrap copper wire was being sent to the owner/operator's facility in Pennsylvania for treatment or disposal.

OPINION

Background:

The Department of Environmental Protection ("Department") seeks a summary judgment that the Cardinale defendants and Schilberg Integrated Metals Corp. ("SIMCO") are strictly, jointly and severally liable, pursuant to sections 507(a), 701(a) and 702(a)(1) of the Pennsylvania Hazardous

Sites Cleanup Act ("HSCA"), Act of October 18, 1988, P.L. 756, *as amended*, 35 P.S. §§ 6020.507(a), 6020.701(a) and 6020.702(a)(1), for interim response costs incurred by the Department in response to the claimed release or threatened release of hazardous substances into the environment at the so-called Crown Industries site. The Crown Industries site is located off Rheingold Boulevard, in Lackawaxen Township, Pike County, Pennsylvania. According to the report of NUS Corporation of its investigation of this site for the Environmental Protection Agency ("EPA"), operations at the site, consisting of approximately eight acres, primarily involved the open burning of electrical paraphernalia to recover salvageable materials, mostly copper. The burn materials include fluorescent light ballast, transformers, strippings consisting of oil-paper and copper strips, electrical wire and other scrap materials. (Department's Motion, Exhibit 7). The site had been owned by defendant Phillip Cardinale since April 20, 1968. (Department's Motion, Exhibit 3). According to the Department's motion, Phillip and Anthony Cardinale operated, maintained and otherwise controlled activities related to this unpermitted scrap metal processing, salvage, reclamation and waste disposal facility. Both Anthony Cardinale and Phillip Cardinale died prior to the institution of this action. Defendant Josephine Bausch Cardinale is Executrix for the Estate of Phillip Cardinale. Defendant Nancy Cardinale is Executrix for the Estate of Anthony Cardinale. These defendants are referred to below as the "owner/operator defendants."

The Department's motion is aimed to secure a summary judgment against the owner/operator defendants and against SIMCO. The amount of interim response costs which the Department seeks to recover from all defendants is $3,381,084.76.

SIMCO has filed a cross motion for summary judgment in which it claims that it is not liable either because it made no "arrangement" for treatment or disposal or because it is exempted from

liability under a "scrap metal" exemption contained in HSCA. Its motion also says that SIMCO could only be severally liable in any event, that certain response costs are not recoverable and that the Board has no personal jurisdiction over SIMCO as a foreign corporation with no significant contacts with Pennsylvania. Wire Recycling, Inc. ("Wire Recycling"), a second generator defendant, has also filed a motion for summary judgment in which it contends that it is not liable because it made no "arrangement" for treatment or disposal with the owner/operator defendants and because it only sold scrap wire to them. In addition, Wire Recycling claims that the Board has no personal jurisdiction over it as a foreign corporation without significant contacts with Pennsylvania.

A hearing on the merits is scheduled to commence on May 12, 1997.[1]

DISCUSSION

Under Rule 1035.1-1035.5 of the Pennsylvania Rules of Civil Procedure, we are empowered to enter a summary judgment precluding the need for a hearing on the merits (1) whenever there is no genuine issue of any material fact necessary to establishing the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of fact necessary to the cause of action or defense which in a jury trial would require the issue to be submitted to a jury. Pa.R.C.P. No. 1035.2. Under Rule 1035.3, a party may avoid the entry of a summary judgment only if he responds to the motion and identifies either (1) one or more issues of fact arising from evidence in

[1] The defendants, Universal Manufacturing Corp. and MagneTek, Inc., entered into a consent order and agreement with the Department in November, 1996 which settled the Department's claims against them.

the record controverting the evidence cited in support of the motion, or (2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced. Under Rule 1035.3(d), summary judgment may be entered against a party who does not respond to the motion. The Board will grant a motion for summary judgment only where the right of the applicant to summary judgment is clear and free from doubt. *Township of Florence v. DEP*, EHB Docket No. 96-045-MG (Opinion issued November 25, 1996).

HSCA

Pennsylvania's Hazardous Sites Cleanup Act, Act of October 18, 1988, P.L. 756, No. 108, *as amended*, 35 P.S. §§ 6020.101 to 6020.1305, as its name implies, provides the Department with authority to develop a program for the clean up of sites containing hazardous wastes. HSCA is modeled in many ways after the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C.A. §§ 9601 to 9675. HSCA authorizes the Department to conduct site investigations and assessments, to cleanup sites at which there are releases or threatened releases of hazardous substances, to require the provision of alternate water supplies, to take other appropriate response actions and recover from responsible persons its costs for conducting the response. 35 P.S. § 6020.301. HSCA also establishes a fund to provide financial resources needed to plan and implement these responses. These funds are to be provided for from HSCA's imposition of hazardous management and transportation fees. 35 P.S. § 6020.901.

Section 507 of HSCA provides that the responsible persons specified in section 701 of the Act shall be liable for the response costs and for damages to natural resources. 35 P.S. § 6020.507. The liability provisions of sections 701 and 702 of HSCA are similar in many ways to the liability provisions contained in section 107 of CERCLA. Section 701(a) of HSCA states, in relevant part,

that the following persons "shall be responsible for a release or threatened release of a hazardous substance from a site" under the following circumstances:

(1) The person owns or operates the site:

(i) when a hazardous substance is placed or comes to be located in or on a site;
(ii) when a hazardous substance is located in or on the site, but before it is released; or
(iii) during the time of the release or threatened release.

(2) The person generates, owns or possesses a hazardous substance and arranges by contract, agreement or otherwise for the disposal, treatment or transport for disposal or treatment of the hazardous substance.

35 P.S. § 6020.701(a). Section 701 also specifies certain transporters of hazardous substances as responsible parties. Exceptions to liability are provided in section 701(b) for certain innocent purchasers of real estate, generators of household wastes, employees of a responsible party and certain generators of scrap metal and lead-acid batteries who transfer these materials to another facility for purposes of reclamation or reuse through melting, smelting or refining. 35 P.S. § 6020.701(b).

Section 702 of HSCA states that a person who is responsible for a release or threatened release of a hazardous substance from a site under section 701 "is strictly liable" for specified response costs and natural resource damages. These include:

(1) Costs of interim response which are reasonable in light of the information available to the Department at the time the interim response action was taken.

(2) Reasonable and necessary or appropriate costs of remedial response incurred by the United States, the Commonwealth, or a political subdivision.

35 P.S. § 6020.702. Section 703 of HSCA provides for the same limited defenses which exist under CERCLA, including an act of God, an act of war and certain limited acts of third persons. 35 P.S. §6020.703.

The Owner/Operator Defendants

We will enter a summary judgment as to liability against the owner/operator defendants based on the Department's motion and their failure to respond. Exhibit 4 to the Department's motion shows that Phillip J. Cardinale was the owner of the site since April 20, 1968. The motion also alleges that both Phillip and Anthony Cardinale operated, maintained and otherwise controlled activities related to the unpermitted scrap metal processing, salvage and reclamation of the waste at the treatment and disposal facility located on the site. The report of the investigation of NUS Corporation submitted to EPA on November 29, 1988 showed that the on-site soil and sediment samples revealed significant levels of a number of inorganic chemicals, including copper which is a hazardous substance under HSCA. (Department's Motion, Exhibit 8). This is sufficient proof of a release of these substances at the site.

The motion also alleges that the Department undertook interim response action to clean up the site and that it has incurred costs of approximately $3,381,084.76 in interim response costs. (Department's Motion, ¶¶16-22).

Accordingly, we will enter a partial summary judgment against these defendants as to their liability for the Department's provable response costs. The amount of those response costs will be determined following the hearing on the merits. As indicated above, under HSCA the owner/operator of a site where a hazardous substance is located or during the time of the release or a threatened release is strictly liable for the costs of interim response. Section 701(a) of HSCA, 35 P.S. § 6020.701(a), and Section 702(a) of HSCA, 35 P.S. § 6020.702(a). In addition to the claim that the Cardinales owned and operated the site, it is clear from the Department's motion that the processing of scrap metals at the site resulted in the depositing of hazardous substances or

contaminants onto the ground at the site in a manner which constitutes a release of hazardous substances. Counsel for the parties have agreed, however, that the judgment be entered only against these defendants in their fiduciary capacity so that it is clear that they have no personal liability for these response costs. Our order so provides.

Liability of SIMCO

Defendant Schilberg Integrated Metals Corp. ("SIMCO") is a Connecticut metals merchant specializing in the processing of copper scrap. SIMCO also deals with aluminum, nickel and tin. SIMCO acquired its scrap materials from wire mills (i.e., manufacturers of electrical cable) or scrap dealers. SIMCO contests the Department's motion for summary judgment and, as indicated above, has also filed a motion for summary judgment. Both motions are dealt with in this opinion.

The claims set forth in paragraphs 39, 40 and 43 of the Department's motion relating to SIMCO and its business are not disputed by SIMCO. It is also undisputed that insulated scrap copper wire was shipped from SIMCO's facility pursuant to shipping orders issued by SIMCO to the Cardinales' facility in Pennsylvania. The agreement was that Cardinale would pick up and "process" the insulated wire and return the metal to SIMCO for a fee beginning in December, 1981 (undisputed allegations of Department's Motion, ¶¶46-53). It also is undisputed that the main product that was recovered following Cardinale's processing of the wire for SIMCO was copper wire that was about 96-97% copper. The ash residue which remained after treatment of SIMCO's wire was sent at SIMCO's direction to Franklin Smelting in Pennsylvania for that company to further recover any remaining copper. Franklin Smelting paid SIMCO for the recovered copper. Approximately 1.6 million pounds of insulated scrap wire was so processed by the Cardinales for SIMCO. (Undisputed allegations in ¶¶59-64 and Exhibit 13 of the Department's Motion).

SIMCO does dispute the legal significance of these undisputed facts. It denies that the shipping of scrap wire from it to the Cardinale facility was an "arrangement" for the "treatment" and/or "disposal" of a hazardous material. It disputes that the processing of the scrap wire changed the physical characteristics of the scrap wire so as to amount to a treatment. In addition, SIMCO contends that the exception to liability for generators of scrap materials contained in section 701(b)(5) of HSCA, 35 P.S. § 6020.705(b)(5), exempts SIMCO from liability because all of the scrap materials which were delivered to the Cardinale treatment facility met all of the requirements of that exception. SIMCO also says that even if it is liable for response costs under HSCA, the total amount of recoverable response costs is no more than $450,000 and that it could be responsible for only a small portion of that amount because any damage done by its copper wire is divisible from that caused by by the other wastes disposed of or treated at the site.

We turn first to whether or not there was an arrangement for disposal or treatment of the copper wire by SIMCO.

The Nature of the Arrangement

The deposition testimony of Bernard Schilberg makes clear that there was an agreement between him and Phillip Cardinale of Crown Recycling under which the Cardinales would pick up insulated copper scrap wire from SIMCO and that they would return the insulated scrap copper wire to their facility in Pennsylvania for burning which would leave a copper ash residue. The main reason for this processing was to recover the copper conductor. Under the agreement, the copper ash residue was to be transported to Franklin Smelting in Philadelphia, Pennsylvania for further attempts to reclaim any metallic content. (Undisputed allegations of Department's Motion, ¶¶43-45, Exhibit 13) About 1.6 million pounds of the insulated scrap copper wire was dealt with by the Cardinales

under this arrangement. (Schilberg Deposition, p. 54; Schilberg Letter attached to Department's Motion, Exhibit 12).

Was the Arrangement for Treatment or Disposal?

The foregoing agreement can hardly be described as anything other than an arrangement. Where the parties divide sharply is whether or not this was an arrangement for either treatment or disposal within the meaning of HSCA.

Section 103 of HSCA, 35 P.S. § 6020.103, defines "treatment" as a method, technique or process designed to change the physical, chemical or biological character or composition of a hazardous substance so as to, among other things, render the hazardous substance suitable for recovery. The Department says that the arrangement between Phillip Cardinale and Bernard Schilberg was an arrangement for treatment of the insulated scrap copper wire relying on the decision of the United States District Court for the Western District of Pennsylvania in *United States v. Pesses*, 794 F. Supp. 151 (W.D. Pa. 1992), under CERCLA. In that case, the defendant sent materials to the site which contained, among other things, copper. The scrap material was processed at the site by burning it inside furnaces. The district court held that the site owner's burning of these scrap materials which it received constituted "treatment" under CERCLA.

SIMCO's answer to the motion for summary judgment disputes whether or not this was for treatment and contends that there was no arrangement for treatment because there was no chemical change in the copper wire as a result of the incineration process. (Schilberg's Response to Motion for Summary Judgment, ¶56; Forrester Affidavit; SIMCO Response, Exhibit D).

We believe that the admitted agreement between SIMCO and Phillip Cardinale amounts to an arrangement for treatment. Even though the affidavit of Keith E. Forrester submitted by SIMCO

states that the copper that may be located in the residual ash does not result from incineration so that the burning of the wire did not change the composition of the copper wire, the removal of the insulation by burning which does contain copper, according to the Forrester affidavit, is a treatment of the insulated wire which makes possible the reclamation of the copper and the contamination of the site with some copper. This process clearly changed the physical character of the hazardous substance from insulated copper wire to copper wire and residual ash containing copper.

In addition, there is sufficient evidence of a release from this treatment facility. The evidence from NUS Corporation that copper was found in the soils at the site is sufficient evidence of a release. The Department, under the existing CERCLA decisions, need not prove that it was SIMCO's copper that was contained in the release or caused the incurrence of clean-up costs. See, *e.g., B. F. Goodrich v. Betkowski,* 99 F.3d 505, 514 (2d Cir. 1996); *Amoco Oil v. Borden, Inc.,* 889 F.2d 664, 670 (5th Cir. 1989); *United States v. Marisol, Inc.,* 725 F. Supp. 833, 840 (M.D. Pa. 1989); *United States v. Wade*, 577 F. Supp. 1326, 1332-33 (E.D. Pa. 1983). We also hold that SIMCO would be liable under HSCA based on this evidence in absence of a relevant exemption from liability.

A different question is presented as to whether or not there was an arrangement for disposal. Section 103 of HSCA defines "disposal" as the incineration of a hazardous substance in a manner which allows it to enter the environment. 35 P.S. § 6020.103. The Department again relies on the decision in *United States v. Pesses*, 794 F. Supp. 151 (W.D. Pa. 1992), in which the court found that there was also an arrangement for disposal. In that case, however, the court relied on the creation of wastes as a result of incineration which were "disposed" of upon land. The Department points to no evidence in the record that would demonstrate that the ash residue was disposed of on land.

Instead, at least some of the ash residue was sent to another processor to recover whatever copper might remain in the ash residue. A likelihood exists, however, that some of the residual ash may have been spilled on land and that the incineration process resulted in air emissions containing copper. Accordingly, we believe that there is an issue of material fact to be resolved at a hearing on the merits as to whether or not SIMCO is also liable because the arrangement was for disposal of a hazardous substance.

SIMCO also argues that it cannot be liable as arranging for disposal of the copper because it did not intend that the Cardinales dispose of anything. Under the agreement, the reclaimed copper was to be sent back to SIMCO and the residual ash was to be sent to Franklin Smelting for further reclamation. SIMCO points out that in *United States v. Cello-Foil Products, Inc.,* U.S. App. LEXIS 30129 (6th Cir. Nov. 22, 1996), the Court of Appeals for the Sixth Circuit granted the defendant's motion for summary judgment on the issue of arranger liability under CERCLA where the evidence conclusively showed that defendants lacked the intent to dispose of residual hazardous substances. SIMCO also points to other court decisions holding that arranger liability turns on whether there was an intent to dispose of the hazardous waste. *See Amcast Industrial Corp. v. Detrek Corp.,* 2 F.3d 746, 751 (7th Cir. 1993), *cert. denied,* __U.S. __, 114 S.Ct. 691 (1994) (shipper who arranged for transport of material by common carrier not liable for carrier's spill of material under Superfund). However, in *State of California v. Summer Del Caribe,* 821 F. Supp. 574, 581 (N.D. Cal. 1993), also relied upon by SIMCO, the court found an intent to dispose of the material where its only options were to dispose of the hazardous substance, treat it and dispose of the residue or sell it to a third party.

We agree that the issue of SIMCO's intent to permit copper to enter the environment presents

an issue of material fact for hearing. It may well be that SIMCO believed that all residue would be sent to Franklin Smelting for reclamation and that there would be no emissions of copper to the atmosphere as a result of the burning process. Whether that was a good faith belief which was reasonable under the circumstances is an issue of fact which may be addressed at the hearing on the merits.

The Waste Metal Exception

Whether SIMCO can be found liable at all depends on the interpretation which is to be given to the scrap metal exception contained in section 701(b)(5) of HSCA, 35 P.S. § 6020.701(b)(5). This provision provides as follows:

> (5) A person who generates scrap materials that are transferred to a facility owned or operated by another person for the purpose of reclamation or reuse of the metallic content thereof through melting, smelting or refining shall not be considered to have arranged for the disposal, treatment or transport for disposal or treatment at the facility of a hazardous substance present in the scrap materials, provided that the generator demonstrates that all of the following are true:
>
> (i) The scrap materials consisted of:
>
> (A) obsolete metallic items, such as automobiles or appliances;
> (B) new solid metallic by-products, such as trimmings, turnings, cuttings or punchings;
> (C) prepared grades of scrap metal produced in accordance with recognized industry specifications by processing obsolete items or metallic by-products through shredding, cutting, compressing or other mechanical means; or
> (D) intact, nonleaking spent lead-acid storage batteries.
>
> (ii) The generator did not introduce the hazardous substance into the scrap materials.
> (iii) The generator handled and transported the scrap materials in accordance with all applicable laws and regulations.
> (iv) The generator transferred the scrap materials for valuable consideration.
> (v) If the generator selected the facility, the generator reasonably believed that the facility was then in substantial compliance with all applicable laws and regulations pertaining to receipt, management and reclamation or reuse of the scrap materials.

The Department contends that this exception cannot apply because SIMCO's scrap material

did not consist of "obsolete metallic items, such as automobiles or appliances." It also contends that SIMCO's scrap material did not consist of "new solid metallic by-products, such as trimmings, turnings, cuttings or punchings." Finally, it claims that SIMCO's scrap wire did not consist of "prepared grades of scrap metal produced in accordance with recognized industry specifications." SIMCO, by contrast, contends that all of these requirements have been met so that it is entitled to summary judgment against the Department.

We conclude that the application of this exemption is too factually specific to permit summary judgment for either side on the application of this exemption. To begin with, it is not entirely clear that SIMCO's scrap wire was delivered to the Cardinales for the purpose of reclamation or reuse of the metallic content through "melting, smelting or refining." The Forrester affidavit submitted by SIMCO (SIMCO Response to Department Motion, Exhibit D) concludes that the copper in SIMCO's copper wire was not melted in the Cardinale's burning process. A process designed only to burn the insulation off the wire without melting the copper may not fit into the categories required by the exception. The scrap materials did not consist only of metallic items, whether obsolete or not. The scrap wire produced by SIMCO consisted of insulated wire which by reason of the combination of insulation and wire may not be deemed to be new metallic by-products. Thirdly, we are uncertain as to what is meant by "prepared grades of scrap metal produced in accordance with recognized industry specifications." Expert testimony as to practices and recognized specifications in the scrap metal industry may be helpful on this issue. Finally, the processing of the insulated wire was by burning rather than by shredding, cutting, compressing or other mechanical means.

This exception to HSCA has not yet been the subject of a judicial interpretation and many

conflicting interpretations can be made of its meaning as applied to this case. Accordingly, since the right of neither party to summary judgment on the issue of this exception is clear, summary judgment on this issue will be denied to both the Department and to SIMCO.

Joint or Several Liability

The Department's motion for summary judgment against SIMCO is based in part on its contention that SIMCO is jointly and severally liable for all response costs relating to the release alleged in the complaint and in the motion for summary judgment. The Department relies on decisions under CERCLA which hold under most circumstances that the generators have joint and several responsibility for response costs resulting from a release. In addition, the Department cites legislative history materials from HSCA indicating that the General Assembly intended joint and several liability.

SIMCO's cross motion for summary judgment seeks a judgment that there is no joint and several liability under HSCA and claims that joint and several liability cannot be imposed on it because the damage caused by any of its copper at the site is divisible from the damage caused by hazardous materials sent to the site by others. With respect to the divisibility of harm as a defense against joint and several liability, SIMCO properly points to a developing body of law under CERCLA which enables a generator to show by a preponderance of the evidence that the harm caused by the defendant is divisible from harm caused by others at the site. *See, e.g., B. F. Goodrich v. Betkowski,* 99 F.3d 505, 514 (2d Cir. 1996); *United States v. Alcan Aluminum Corp.,* 990 F.2d 711, 721-22 (2d Cir. 1993); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1992). SIMCO says that a portion of the Department's alleged response costs includes the cost of providing bottled water to adjacent landowners to protect them from tetrachloroethylene in the drinking water.

SIMCO points to the affidavit of Keith Forrester (Exhibit D to SIMCO's response to the Department's motion) stating that there is no evidence that there is any tetrachloroethylene in the wells resulting from SIMCO's insulated wire. The Forrester affidavit also states that elemental copper has little or no toxicity and little or no mobility.

Our analysis of HSCA leads us to the conclusion that HSCA was intended to, and does impose joint and several liablilty in all circumstances other than those in which a party can bear his burden of proof that the damage done by his actions is clearly divisible from the harm done by other responsible parties. Section 702 of HSCA clearly imposes strict liability on responsible parties for response costs which result from *the* release. It does not say, as SIMCO argues in its motion for summary judgment, that a responsible party is liable only for a release which is attributable to that responsible person. The fact that HSCA does not expressly use language "joint and several liability" is not significant. HSCA does impose liability for that release on responsible persons who contributed to the release in their different roles as owner/operators, generators and transporters. The same responsible parties are made liable under CERCLA for the release under very similar language. Yet the federal courts have been unanimous in finding that the general rule of liability under CERCLA is joint and severable liability. *United States v. Alcan Aluminum Corp.*, 990 F.2d 711 (2d Cir. 1993); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3d Cir. 1992); *United States v. Aceto Agricultural Chemical Co.*, 872 F.2d 1373 (8th Cir. 1989); *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988).

The legislative history of HSCA leaves no doubt but that the General Assembly intended joint and several liability to be the general rule of liability. HSCA resulted from the Report of the Committee of Conference on House Bill 1852. It was submitted to the House for a vote with a

statement from Representative George which said that it was the intent of the General Assembly that the provisions of HB 1852 uphold and preserve the doctrine of joint and several liability. At the same time, Representative George said that the Bill provides opportunities for individual responsible persons to reach settlement agreements with the Department whereby their financial obligation could be limited through the use of mediation and other tools referred to in his statement. The House adopted the Report of the Committee of Conference by a vote of 193 to 0. On the same day, the clerk of the Senate informed the House that the Senate had also adopted the Report of the Committee of Conference on the subject of the differences existing between the two Houses on SB 1437 and PN2446. Legislative Journal-House, October 13, 1988 at pp. 1717-1720.

The floor debates prior to the Conference Committee Report contain numerous references to the intent to impose joint and several liability. In the remarks before the Senate on June 29, 1988, Senator Fisher said that an amendment to the Bill providing for proportionate liability in connection with *de minimis* or voluntary settlements "does not extinguish the concept of joint and separate liability in any other portion of the bill." Legislative Journal-Senate, June 29, 1996, p. 2554. In remarks before the House on June 7, 1988, Representative Hayden asked the House to defeat a proposed amendment because it would be contrary to the notion of strict, joint and several liability. The amendment was defeated. Legislative Journal-House, June 7, 1988, p.1005. SIMCO argues that the General Assembly did not intend to impose joint and several liability because a vote in the Senate on the extensive "Lincoln" amendments, including an express provision for joint and several liability, defeated those proposed amendments. We reject that argument, because that vote was well before the adoption of the report of the Conference Committee which was intended to generally adopt the rule of joint and several liability, but provide for only severable or proportionate liability

through settlement reached by mediation or otherwise. In addition, the Lincoln amendments proposed many changes to the House Bill, any one of which may have been the reason for the defeat of those proposed amendments.

However, liability under HSCA is not joint and several where the harm or damages are divisible and reasonably capable of apportionment. *Bethlehem Iron Works, Inc. v. Lewis Industries, Inc.*, 1996 U.S. Dist. LEXIS 14446, 204 (E.D. Pa. 1996). Accordingly, SIMCO will be given an opportunity to bear its burden of proof, if it can, that the harm caused by its copper is divisible from the harm caused by other substances at the site so that the harm caused at the site is capable of reasonable apportionment. This may include, for example, proof disclosing the relative toxicity, migratory potential, degree of migration and the synergistic capabilities of the hazardous substances at the site. *See United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 722 (2d Cir. 1993). The affidavit of Keith Forrester submitted by SIMCO at least raises the possibility that SIMCO's responsibility may be divisible as to at least one element of the Department's claim for response costs.

Response Costs

SIMCO contends that the claimed response costs of $3,381,084.76 cannot be recovered as "interim response costs" because they exceed the amount of $2,000,000 and were incurred beyond a 12 month time period. These limitations are part of the definition of "interim response costs" with specified exceptions, two of which the Department says apply here. The exceptions are:

> (1) Continued response actions are immediately required to prevent, limit or mitigate an emergency.
> (2) There is an immediate risk to public health, safety or welfare or the environment.
> (3) Assistance will not otherwise be provided on a timely basis.

(4) Continued response action is otherwise appropriate and consistent with future remedial response to be taken.

35 P.S. § 6020.103.

The Department's response to SIMCO that these limitations do not apply to this case may be correct. The Department says it properly undertook the interim response action before the development of an administrative record pursuant to section 505 (b) of HSCA, 35 P.S. § 6020.505(b) because there was reason to believe that prompt action was required to protect the public health or safety or the environment. The Department points out in response to SIMCO that its continued response thereafter was appropriate and consistent with any future remedial response to be taken. The Department also says that costs in excess of $2,000,000 were believed by the Department to be appropriate given the need for future remedial action to complete the cleanup.

Because SIMCO has not presented any evidence indicating that these exceptions do not apply, there are issues of material fact on which the Department may well prevail at the hearing on the merits.

Personal Jurisdiction

SIMCO claims in its motion for summary judgment that the Board has no personal jurisdiction over it because it is now a Connecticut corporation and, at the time in question, was a New Jersey corporation located in Montague, New Jersey, with no significant contacts with Pennsylvania. It points to the affidavit of Nathan Schilberg to show that it has never had any property in Pennsylvania. Mr. Schilberg also testified on deposition that he did not initiate discussions with the operators of the Crown site, that they never visited the site in Pennsylvania and that the arrangements for transportation were made by the Cardinales rather than by them. (SIMCO

Motion, ¶¶14-18).

This does not provide a sufficient basis for the entry of summary judgment based on the claimed absence of personal jurisdiction. Mr. Schilberg acknowledged in his deposition that he knew that Cardinale was going to burn SIMCO's copper wire at the Cardinale's facility in Pennsylvania. The copper which SIMCO was having reclaimed was clearly property owned in Pennsylvania for which it was paid. In addition, some of SIMCO's shipping documents indicate that some of the wire was shipped to Pennsylvania by SIMCO's truck. Finally, a part of the arrangement was that the residual ash be sent to Franklin Smelting in Philadelphia where copper was to be reclaimed from the residual ash. SIMCO was paid by this Pennsylvania company for the value of the copper so reclaimed. Accordingly, there are disputes of material fact which preclude summary judgment on the issue of personal jurisdiction.

Under Pennsylvania's long arm statute, a tribunal of this Commonwealth may exercise personal jurisdiction over a person as to a cause of action from such person or agent transacting business in the Commonwealth, shipping merchandise into the Commonwealth or doing a series of similar acts for the purpose of thereby realizing pecuniary benefit. Jurisdiction may also arise from such a person's causing harm or tortious injury in this Commonwealth by an act or omission in or outside this Commonwealth. 42 Pa. C.S. § 5322. We believe that SIMCO's participation in the arrangement under which the wire was shipped into Pennsylvania to be burned so that copper could be reclaimed may be sufficient contacts with Pennsylvania to meet the requirements of this statute and the constitutional requirement of due process based on meeting the "minimum contacts" requirement of state and federal court decisions. See *Kubik v. Letteri,* 614 A.2d 1110 (Pa. 1992); *King v. Detroit Tool Company,* 682 A.2d 313 (Pa. Super. 1996); *Colt Plumbing Co., Inc., v.*

Boisseau, 645 A.2d 1350 (Pa. Super. 1994).

Liability of Wire Recycling

Defendant Wire Recycling, Inc. ("Wire Recycling") has filed a motion for summary judgment contending that it only sold scrap wire and did not make any arrangement for treatment or disposal. In addition, it claims that the Board has no personal jurisdiction over it. The facts set forth below are drawn from its motion as supported by evidence from the record.

Wire Recycling is a corporate New Jersey scrap metal dealer which is organized and existing under the laws of New Jersey. The affidavit and deposition of Angelo Armenti show that its only place of business is located in Newark, New Jersey, and that it owns no property and has no employees in Pennsylvania. Wire Recycling reclaims copper and aluminum wire in New Jersey and also acts as a scrap metal broker by buying scrap wire and reselling it, "as is" and unprocessed for a profit. Its method of reclamation is by chopping the wire into small pieces and using a gravity separator to separate the metal content from the plastic insulation. The copper is sent to mills for reclaiming; the plastic scrap is sent to a transfer station located in and regulated by the state of New Jersey for disposal.

HSCA Liability

The facts established by Angelo Armenti's deposition and affidavit are that in the time period of August, 1986 to August 1988 Wire Recycling sold scrap copper wire to Basco Salvage & Recovery and sent bills to that company at a post office box in New Jersey. During 1989 and 1990, Wire Recycling also sold scrap copper wire to Tony Cardinale, Phillip Cardinale, ABC Recycling, Basco Salvage & Recovery and Crown Sanitation & Recovery. These sales were made as a result of conversations between Mr. Armenti and one of the Cardinales in New Jersey. Both the

Department and Wire Recycling rely on the contents of the deposition of Angelo Armenti in support of their positions as to liability. Mr. Armenti is President of Wire Recycling and has been the principal manager of that business at all material times. Wire Recycling points out the following testimony by Mr. Armenti:

- He did not know that any wire he sold to Basco or Crown Sanitation would be transported to Pennsylvania.
- Neither Anthony or Phillip Cardinale explained to him how they intended to process the wire that was being sold to them.
- As far as he knew Basco intended to resell the scrap wire.
- Neither he nor any other representative of Wire Recycling ever visited the Crown Recycling site.
- He did not know whether the Cardinales operated Crown Industries out of a garage, their home or an open piece of land.
- Wire Recycling's motive in selling the scrap wire was to make a profit, not to arrange for the treatment or disposal of the wire at the Crown Recycling site.

In response, the Department points to Mr. Armenti's deposition testimony that indicates that he sold the scrap wire to Basco Salvage & Recovery and Crown Sanitation as a result of his dealings with the Cardinales, all of whom were customers of Wire Recycling. Mr. Armenti had known Phillip Cardinale for 30 years and he had done business with the Cardinales when Wire Recycling was under its previous ownership. The Department draws particular attention to the testimony that:

- There came a time in the 1970's when Crown Recycling was doing business with the Cardinales that Mr. Armenti became aware that Phillip and Anthony Cardinale were

operating a business in Pennsylvania known as Crown Industries.

- Mr. Armenti made checks out to Crown Industries whenever the Cardinales requested.
- Mr. Armenti was aware that the scrap metal that the Cardinales purchased was going to Pennsylvania.

The Department also points to Mr. Armenti's testimony that the wire that he sold to the Cardinales was wire that he could not "run" because of the limited capacity of his reclamation facilities and that the name of Basco *Salvage and Recovery* indicated that Mr. Armenti knew that the Cardinales would treat the wire in order to reclaim it.

We deny both motions for summary judgment as to Wire Recycling's liability under HSCA because conflicting inferences can be drawn by the Board based on this testimony. We might conclude that in the real world of waste commerce Mr. Armenti had only two courses of action available to him for the wire that he could not process. He could sell it to someone else who would process it or he could dispose of it without realizing any profit. Because the scrap wire had no value for use, but only for the value of reclaimed copper, we might conclude after hearing all the evidence that the "sale" of this scrap wire was really an arrangement for treatment or disposal of a hazardous substance. On the other hand, Wire Recycling may be able to show that there was a realistic market for resale for purposes other than for treatment. In this circumstance, we might conclude that the "sale" of the scrap wire was a real sale, not an arrangement for treatment.

The precedent in the federal courts under the analogous CERCLA legislation indicate that the inference that this was an arrangement for treatment or disposal is permissible. In *California v. Summer del Caribe, Inc.*, 821 F. Supp. 574, 581-82 (N.D. Cal. 1993), the court found that a

defendant who sold solder dross (a by-product of the defendant's manufacturing process) to a metals reclaimer had "arranged for disposal" where the defendant sold the solder dross either to get rid of it or to treat it. Similarly, in *United States v. Pesses,* 794 F. Supp. 151 (W.D. Pa. 1992), the court found that companies that sold scrap materials to a scrap dealer who processed the scrap to make alloys "arranged for disposal and treatment of a hazardous substance" within the meaning of CERCLA where the scrap materials necessarily required processing in order to be productively used. The fact that Mr. Armenti asked no questions as to what was to be done with the wire and never visited the site may be of no relevance under these circumstances. *See United States v. Summit Equipment & Supplies,* 805 F. Supp. 1422, 1431-32 (N.D. Ohio 1992).

Personal Jurisdiction

Wire Recycling also moves for summary judgment based on its contention that the Board has no jurisdiction over it because Wire Recycling does no business in Pennsylvania. The evidence of record shows that the "sales" were made in New Jersey and that the bills were sent to an address in New Jersey to the extent that they were addressed. Wire Recycling also relies on Mr. Armenti's testimony that he did not know that the wire that it sold was going to Pennsylvania for treatment or disposal at the site. (Motion, ¶¶34-37).

While part of Mr. Armenti's testimony and affidavit would support this contention, the Department points out that Mr. Armenti also testified that he knew as far back as the 1970's that the Cardinales had a business in Pennsylvania known as Crown Industries and that the scrap metal that they purchased was going into Pennsylvania. (Armenti Deposition, p. 36). The Department also points to Mr. Armenti's testimony that the purpose of the sales was for Wire Recycling to make a profit when he had more wire than his plant capacity permitted him to process (Armenti Deposition,

pp. 33-34).

Pennsylvania's long arm statute, 42 Pa. C.S. § 5322, provides that a tribunal of this Commonwealth may exercise personal jurisdiction over a person as to a cause of action arising from such person or his agent transacting business in this Commonwealth or who causes harm or tortious injury by an act or omission in or outside of this Commonwealth, among other things. Another portion of this statute, 42 Pa. C.S. § 5308, properly limits this power by providing that this exercise of jurisdiction may be exercised only where the defendant's contact with this Commonwealth is sufficient under the Constitution of the United States under the "minimum contacts" rule. Accordingly, the Pennsylvania Supreme Court has held that a single sale to an unrelated party in Pennsylvania is not a sufficient contact to justify the exercise of jurisdiction. *Kenny v. Alexon Equipment Co.*, 432 A.2d 974 (Pa. 1981). It has also held that Arizona residents who sold their home when they were residents of Pennsylvania to Pennsylvanians could be subjected to the jurisdiction of the Pennsylvania courts based on a claim of misrepresentations made in connection with the sale. *Kubik v. Letteri,* 614 A.2d 1110 (Pa.1992). By contrast, the Pennsylvania Supreme Court has held that the Pennsylvania courts have no jurisdiction in a case involving an accident with a Yugo automobile in Pennsylvania over a New York purchasing agent for a Yugoslavia car manufacturer where the purchasing agent had no contact with Pennsylvania other than being part of a manufacturing distributive chain for the Yugo automobile. *Kachur v. Yugo America, Inc.*, 632 A.2d (Pa. 1993).

The touchstone of the decisions of the Pennsylvania courts and of the decisions of the United States Supreme Court has been whether the defendant has purposefully directed an action toward the forum state so that it is reasonable to expect that he might be haled into court there. In *Burger*

King Corporation v. Rudzewicz, 471 U.S. 462 (1985), the Supreme Court upheld jurisdiction of the Florida courts over a Michigan resident and franchisee of a Florida corporation because the franchisee had accepted a contract with the franchisee which tied the Michigan operation to the franchisor's headquarters in Florida. The court said that the required minimum contacts with the forum state cannot be satisfied by the unilateral activity of third parties who have had some relationship with the non-resident defendant. In each case there must be some act by the defendant purposefully availing itself of the privilege of conducting activities within the forum state, thus invoking the benefits of the protection of its laws. In *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County,* 480 U.S. 102 (1987), the court held that a Japanese manufacturer who sold its tire valve assemblies and sold them for use in finished tire tubes to independent manufacturers could not be subjected to the jurisdiction of a California court from an accident which occurred in California merely because its product had found its way into California. The majority reasoned that the defendant's sale of its product with knowledge that the product might be sold in California was not enough and stated that the substantial connection must come about by an action of the defendant purposefully directed toward the forum state.

In *World Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980), the court also held that a New York automobile dealer could not be made subject to the Oklahoma Courts merely because an accident involving an automobile it had sold in New York had been involved in an accident in Oklahoma. In that case the court said that the foreseeability that the car might find its way to Oklahoma was not alone a sufficient basis for the assertion of jurisdiction. Rather, it is whether the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there. The court recognized that forseability might be enough had

the accident occurred in the defendant's market area because its activities were directed to states within that market area. In both *Asahi* and *World Wide Volkswagen,* the court stressed the difficulty the defendant would have in defending in a distant forum.

The Department's motion for summary judgment shows that an injury to Pennsylvania has occurred by a release in Pennsylvania which included a release of copper some of which may have included treatment residue of the copper wire sold by Wire Recycling to the Cardinales knowing, according to the Department's version of Mr. Armenti's testimony, that it was being sent to Pennsylvania for treatment. Accordingly, the statutory criteria of an act of the Defendant outside the Commonwealth causing injury inside the Commonwealth has been met.

We hold that the due process clause does not preclude the assertion of jurisdiction over Wire Recycling if the Department bears its burden of proof that Wire Recycling knew that the scrap wire was being sent to Pennsylvania for treatment or disposal. Wire Recycling knew from its own operations in New Jersey that the reclamation of copper from scrap wire resulted in waste that had to be disposed of at an authorized disposal site to prevent environmental damage in New Jersey. If it knew or had reason to know that the Cardinales were reclaiming the copper from the scrap wire in Pennsylvania, it had to be on notice that damage might be done through this operation in Pennsylvania. Its failure to even investigate what was being done with the scrap wire in Pennsylvania is not a failure that the Due Process Clause was designed to protect. Further, there is no significantly greater burden for the defendant to defend itself in nearby Pennsylvania than would exist if it were required to defend itself in many parts of New Jersey.

The realities of the waste disposal business are that waste disposal is not confined to a single state. Disposal of New Jersey waste in Pennsylvania has been as common as has the disposal of

Philadelphia waste in New Jersey. To hold that the courts of these states do not have jurisdiction over damage arising from the transportation and treatment of waste from one of these bordering states would mean that the Due Process Clause was designed to create an immunity from being haled into the courts of the other bordering jurisdiction. To the contrary, we think it is reasonable for waste disposers in either state to expect to be haled into court in the other bordering state.[2]

For the foregoing reasons, we issue the following order:

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[2] The Department also contends that we should be guided by the fact that there exists an interstate waste disposal market and that it is foreseeable that any generator of waste that places waste into the stream of that disposal market potentially subjects themselves to liability in any state where their wastes are unlawfully disposed. Unfortunately, substantially the same argument was made in *Asahi Metal Industry Co., Ltd. v. Superior Court of California,* 480 U.S. 102 (1987), with respect to the vehicle parts market and in *World Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980) with respect to the automobile market. Those arguments were rejected where the cause of action arose in a remote forum. In this appeal, the damage occurred in an adjoining state. A different result probably would be reached if the waste ended up, *e.g.,* in California without the defendants knowing that the waste was being sent to California for treatment.

Finally, the Department argues that we should be guided by district court decisions under CERCLA which have found it reasonable to subject out-of-state defendants to the jurisdiction of the location of the disposal site based on the overall policy of Congress in enacting CERCLA. As much as we would like to adopt that argument, this case is brought under HSCA. The statutes enacted by the Pennsylvania General Assembly, unlike the Acts of Congress enacted under its power to regulate interstate commerce, cannot be given effect outside of Pennsylvania in violation of otherwise applicable constitutional requirements.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION,	:	
Plaintiff	:	
v.	:	**EHB Docket No. 92-429-CP-MG**
CROWN RECYCLING AND RECOVERY, INC., JOSEPHINE BAUSCH CARDINALE, Executrix for the Estate of Phillip Cardinale, NANCY CARDINALE, Executrix for the Estate of Anthony Cardinale, UNIVERSAL MANUFACTURING CORP., MAGNETEK, INC., SCHILBERG INTEGRATED METALS, CORP. and WIRE RECYCLING, INC.,	:	
Defendants	:	

ORDER

AND NOW, this 20th day of February, 1997, upon consideration of cross-motions for summary judgment, IT IS HEREBY ORDERED:

1. The Department's motion for summary judgment as to liability against Josephine Bausch Cardinale as Executrix for the Estate of Phillip Cardinale and against Nancy Cardinale as Executrix for the Estate of Anthony Cardinale is hereby **GRANTED** to the extent that these defendants are found to be responsible parties in their fiduciary capacity only under the Pennsylvania Hazardous Sites Cleanup Act, Act of October 18, 1988, P.L. 756, *as amended*, 35 P.S. § 6020.101 - § 6020.1305 The amount of their liability is to be established at the hearing on the merits.

2. The motion of the Department for summary judgment as to the liability of Schilberg Integrated Metals Corp. is **GRANTED** to the extent that this defendant is found to be a responsible party under the Pennsylvania Hazardous Sites Cleanup Act based upon the Board's finding that it arranged for the treatment of scrap wire at the site. The motion of Schilberg Integrated Metals Corp. relating to this issue is **DENIED**.

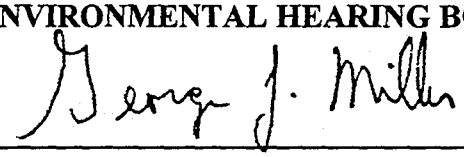
3. The motion of the Department with respect to Schilberg Integrated Metals Corp. and that Defendant's motion for summary judgment with respect to this defendant's alleged liability for having made an arrangement for the disposal of the hazardous substance at this site are **DENIED**.

4. The motion of the Department for summary judgment with respect to the liability of Wire Recycling, Inc. is **DENIED.**

5. The motion of Wire Recycling, Inc. for summary judgment is **DENIED**.

6. The amount of the response costs for which defendants may be found liable is to be established at the hearing on the merits at which defendants will be given an opportunity to prove that the harm that its copper caused at the site is divisible from the harm caused by the hazardous materials of others at the site.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: February 20, 1997

See following page for service list.

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Nancy Cardinale
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M. DIANE SMITH
SECRETARY TO THE BOARD

MICHAEL C. TRANGUCH	:	
	:	
v.	:	**EHB Docket No. 95-255-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** February 25, 1997

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis

A motion for summary judgment is granted. The Board will dismiss an appeal of a Department of Environmental Protection (Department) compliance order directing a landowner to implement reasonable interim remedial measures in response to gasoline contamination resulting from leaking underground storage tanks on his property. A landowner is strictly liable under section 316 of the Clean Streams Law, 35 P.S. § 691.316, for conditions on his property which threaten to pollute waters of the Commonwealth. Holding landowners strictly liable for such conditions does not violate the due process clause.

OPINION

This matter was initiated with the December 4, 1995, filing of a notice of appeal by Michael C. Tranguch (Appellant). The notice of appeal challenged a November 2, 1995, compliance order issued by the Department directing Appellant to submit a site characterization report and remedial

action reports, and to initiate certain remedial measures with respect to real property Appellant owns at 987-1017 North Church Street, Hazleton, PA. The compliance order was issued pursuant to the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101-6021.2104 (Storage Tank Act), the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001 (Clean Streams Law) and section 1917-A of the Administrative Code, 71 P.S. § 510-17. In the compliance order, the Department asserted that gasoline had escaped from underground storage tanks on Appellant's Church Street property into the soil and groundwater, and that Appellant was liable for the release because he was an owner and operator of the tanks, and a landowner and occupier of the property on which the tanks were located.

On October 4, 1996, the Department filed a motion for summary judgment and supporting memorandum. Appellant filed his response to the Department's motion and a memorandum in opposition on November 1, 1996. On November 21, 1996, the Department filed a reply to Appellant's response and a reply to his memorandum in opposition.

The Department contends that it is entitled to summary judgment because the compliance order pertains to contamination resulting from leaks from underground gasoline storage tanks which Appellant operated and which were located on property he owns. According to the Department, Appellant's activities and degree of control at the site where the tanks were located make him an "operator" of the tanks within the meaning of section 103 of the Storage Tank Act, 35 P.S. § 6021.103, and, therefore, subject him to liability for releases under sections 502(c) and 1311 of the Storage Tank Act, 35 P.S. §§ 6021.502(c) and 6021.1311. With respect to Appellant's liability as a landowner, the Department argues that, because Appellant owns the land on which the tanks were located, he is liable for releases from the tanks under sections 301, 307, 316, and 401 of the Clean

Streams Law, 35 P.S. §§ 691.301, 691.307, 691.316, and 691.401; sections 101.2 and 101.3 of the Department's special water pollution regulations, 25 Pa. Code §§ 101.2 and 101.3; section 1302(a) of the Storage Tank Act, 35 P.S. § 6021.1302(a); and sections 245.306 and 245.309-245.313 of the Department's storage tank and spill prevention regulations, 25 Pa. Code §§ 245.306 and 245.309-245.313. The Department also maintains that the corrective action required by the compliance order is appropriate given the nature of the spill.

Appellant disagrees. He argues that he was not the operator of the tanks at the time the releases occurred, that he did not take part in any tortious or wrongful acts, and that it would violate due process guarantees in the Federal and Pennsylvania Constitutions to hold him liable for pollution simply because he owned the land on which the release occurred. Appellant also argues that he is financially unable to implement the remedial measures required by the Department's order.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file--together with affidavits, if any--show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.1-1035.5; *Hilltown Township v. DEP*, EHB Docket No. 96-016-MG (Opinion issued December 4, 1996). All doubts as to the existence of material facts are resolved against the moving party. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995). We need not examine the other aspects of the Department's motion because it is clear here that Appellant is liable as a landowner under section 316 of the Clean Streams Law and that the Department's compliance order is reasonable given the nature of the release.

Section 316 of the Clean Streams Law provides:

Whenever the department finds that pollution or a danger of pollution is resulting

> from a condition which exists on land in the Commonwealth [sic] the department may order the landowner . . . to correct the condition in a manner satisfactory to the department. . . .

There is no question that Appellant's land has polluted, and continues to pose a pollution threat to, waters of the Commonwealth. Appellant concedes that he is the sole owner of the property at 987-1017 North Church Street. (The Department's motion and Appellant's response, para. 5) He admits that six underground gasoline storage tanks existed on the property. (The Department's motion and Appellant's response, para. 39 and 60) He admits that all of the tanks had numerous corrosion holes in them when the tanks were removed in February 1995, and he concedes that he does not have a permit to discharge gasoline. (The Department's motion and Appellant's response, para. 60 and 64) Appellant also admits that releases from the tanks produced a plume of gross gasoline contamination extending from the tanks to neighboring properties, that contamination persists in the soil and groundwater, and that gasoline emanating from the property poses a threat to the soil, groundwater and residences in the area, and to nearby Black Creek. (The Department's motion and Appellant's response, para. 61, 67 and 68).

The release of gasoline into the groundwater and Black Creek constitutes "pollution" within the meaning of section 316. Pollution is defined under section 1 of the Clean Streams Law as the "contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance or to render such waters harmful, detrimental, or injurious to public health, safety or welfare, or to domestic . . . or other legitimate beneficial uses. . . ." 35 P.S. § 691.1. The groundwater and Black Creek are both "waters of the Commonwealth." Section 1 defines "waters of the Commonwealth" as including "all rivers, streams, creeks . . . and . . . other bodies or channels of conveyance of surface and underground water . . . within . . . the boundaries of the

Commonwealth."

We also agree with the Department that the compliance order issued to Appellant is reasonable. The compliance order directs Appellant to immediately: (1) identify and mitigate all fire and health hazards posed by the presence of gasoline or its vapors; (2) recover free-phase gasoline present in the soil at his site and affected locations down-gradient from his property; (3) to excavate and dispose of grossly contaminated soil; and, (4) to restore or replace compromised water supplies. The compliance order also directed Appellant to submit a complete site characterization report within 30 days of the order, to submit a remedial action work plan within 30 days of approval of the characterization report; to implement the work plan within 14 days after the Department approves it; to submit quarterly remedial action progress reports as the work plan is being implemented, and, upon completion of the remedial action, to submit a remedial action completion report.

The contamination resulting from the releases from the gasoline storage tanks on Appellant's property is extensive. Gross petroleum contamination remains in the soil and groundwater at and around Appellant's property, and free-phase gasoline remains in the subsurface. (The Department's motion and Appellant's response, para. 67) Releases from the underground storage tanks on the property produced a plume of gross gasoline contamination extending from the site of the tanks on Appellant's property, into the subsurface beneath a neighboring residential area, and intercepting a nearby sanitary sewer main. (The Department's motion and Appellant's response, para. 61) As noted above, the gasoline emanating from Appellant's property poses a threat to the soil, groundwater and residences in the area, and to Black Creek, down-gradient from the contamination plume. (The Department's motion and Appellant's response, para. 68) Gasoline has migrated under a nearby school athletic field to within four feet of the playing surface. (The Department's motion

and Appellant's response, para. 68) Volatile organic vapors have impacted at least 23 residences and one commercial building within 2500 feet of Appellant's property. (The Department's motion and Appellant's response, para. 46) Gasoline contaminated groundwater has seeped into the basement of at least one nearby home, and, because of the dangerous levels of contamination present, the Hazleton Department of Public Safety condemned that residence. (The Department's motion and Appellant's response, para. 45 and 54) Although the Appellant admits that any releases from other potentially responsible parties are of minor significance to the contamination in the area, he has failed to take any investigative or remedial actions to alleviate the contamination.[1] (Motion and response, para. 66 and 77)

Given the extent of the contamination, the compliance order is reasonable. The activity the order requires that Appellant undertake immediately is reasonably tailored to eliminate the threat of further pollution to waters of the Commonwealth and to safeguard the welfare of those impacted by the gasoline releases. The other actions the order requires are also reasonable. The reports and remedial actions the Department requires provide the Department with a valuable tool in overseeing the remediation process and allow the Department to ensure that remediation proceeds expeditiously.

Appellant argues that the Department's compliance order is unreasonable given his limited resources. However, Appellant's finances are irrelevant. As we stated in *Fulkroad v. DER*:

> It is long-settled law in Pennsylvania that the financial ability of a violator to comply with a Department order is not relevant to whether the Department's order was an abuse of discretion. The appropriate time to raise this issue is when the Department

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[1] Although the Appellant denied this assertion, when made by the Department in its motion for summary judgment, Appellant failed to support its position with affidavits or other appropriate support. Since the Department's motion contained an affidavit supporting its position, Appellant cannot rest on a bare denial. *Atkinson v. Haug*, 622 A.2d 983 (Pa. Super. 1993).

seeks to enforce its order.

1993 EHB 1232, 1241 (citations omitted)

Finally, Appellant argues that holding him strictly liable for releases from the tanks solely on the basis of his ownership of the land on which they are located violates his right to due process under the U.S. and Pennsylvania Constitutions.[2] Appellant failed to develop this argument, however. His memorandum in opposition says only that "such liability, if imposed by the Board, violates due process." (Appellant's memorandum in opposition, p. 14) Nor does his notice of appeal shed any light on his due process theory: it states only that holding Appellant liable simply because he owns the land "violates the due process clauses of the United States Constitution and the Commonwealth of Pennsylvania Constitution." (Notice of Appeal, pp. 2-3)

We will not go into any great detail to refute an argument raised in such vague terms. Suffice

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[2] While Appellant argues that imposing liability under § 316 simply on the basis of land ownership is "unduly oppressive and transcends the parameters of reason"--quoting Justice Flaherty's concurring opinion in *National Wood Preservers, Inc. v. DER*, 414 A.2d 37, 47 (Pa. 1980)--the Board has previously rejected this argument and made it clear that Justice Flaherty's concurring opinion is not the law in Pennsylvania. *See Mckees Rocks Forging v. DER,* 1994 EHB 220, 260. Even after *National Wood Preservers*, "innocent" landowners and occupiers have been held strictly liable under section 316. *See, e.g., Western Pennsylvania Water Co. v. DER*, 560 A.2d 905, 908 (Pa. Cmwlth. 1989), *aff'd*, 586 A.2d 1372 (Pa. 1991) Although Appellant contends that liability should not extend to landowners for leaks from underground storage tanks if the landowners do not own the actual tanks themselves, we have previously held that landowners are liable under § 316 for releases whether or not they own the tanks on their land. *See, e.g., Gabig's Service v. DER,* 1991 EHB 1856.

The parties do not raise the issue of whether a landowner is liable under §316 for correcting contamination to property owned by others, but caused by a polluting condition on his property. Nor do the courts or the Board appear to have raised that issue previously. However, both the Commonwealth Court and the Board have dismissed appeals of other compliance orders issued under § 316 which directed landowners to take action with respect to pollution on property they did not own, but which resulted from a polluting condition on their property. *See, e.g., A.H. Grove & Sons, Inc. v. DER,* 452 A.2d 586 (Pa. Cmwlth. 1982); *Hrivnak Motor Company v. DER*, 1993 EHB 432.

it to say that the due process guarantees in neither the Federal nor the Pennsylvania Constitutions prohibit the imposition of liability without fault. *See, e.g., Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, 13-15 (1991) (company's due process rights under the U.S. Constitution not violated by imposing liability and exemplary damages under the doctrine of *respondeat superior* for fraud of company's employees); *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (imposing liability upon a nonprofit association for antitrust violations committed by its agents acting within the scope of their apparent authority does not violate due process under the U.S. Constitution); *TRM, Inc. v. United States,* 52 F.3d 941 (11th Cir. 1995) (innocent grocery store owner's due process rights under the U.S. Constitution not violated by permanent disqualification from federal food stamp program because of food stamp trafficking by store employees); *United States v. Coastal States Crude Gathering Co.*, 643 F.2d 1125 (5th Cir. Unit A April 1981) (imposition of liability on discharging facility for third party's actions, regardless of fault, under the Federal Water Pollution Control Act Amendments of 1972, does not violate due process under the U.S. Constitution) *cert. denied*, 454 U.S. 835 (1981); and, *Commonwealth v. CSX Transportation, Inc.*, 653 A.2d 1327 (Pa. Cmwlth 1995) (company's due process rights under the U.S. and Pennsylvania Constitutions not violated by imposing absolute liability on company for allowing substances harmful to fish to enter waters of the Commonwealth). Indeed, it has even been held that due process does not preclude the retroactive application of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 *et seq.*, to hold an innocent landowner strictly liable for substances placed on his property by others for whom the landowner had no responsibility. *See United States v. Tyson*, 25 ERC 1897, 1907 (E.D. Pa. 1986).

Courts have long recognized the concept of strict liability with regard to certain actions in the common law of torts--for instance, actions for damages caused by trespassing livestock. W. Page Keeton, *Prosser and Keeton on the Law of Torts,* § 75 (5th ed. 1984). We must accord at least that level of deference to strict liability where--as here--it is expressly provided for by the legislature.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MICHAEL C. TRANGUCH	:	
	:	
v.	:	**EHB Docket No. 95-255-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 25th day of February, 1997, it is ordered that the Department's motion for summary judgment is granted and Appellant's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

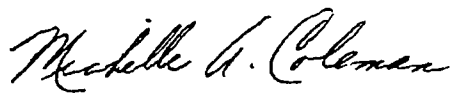
George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: February 25, 1997

c: **DEP Bureau of Litigation**
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GEORGE M. LUCCHINO	:	
	:	
v.	:	**EHB Docket No. 96-114-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LUZERNE LAND CORPORATION, Permittee	:	**Issued: February 25, 1997**

OPINION AND ORDER ON APPELLANT'S MOTION FOR RECONSIDERATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Following the Board's dismissal of this appeal, Appellant filed a Motion for Reconsideration pointing out that the Board mistakenly concluded that Appellant never filed a response to the Motion to Dismiss. The Board has now reviewed the Appellant's original response to the Motion to Dismiss. The response does not raise any legal grounds necessary to defeat the Motion to Dismiss.

OPINION

This appeal stems from the Department of Environmental Protection's ("Department") issuance of a permit to remove a small amount of coal incidental to a construction project. The removal of that coal was accomplished some time ago. In October, 1996 the Permittee filed a Motion to Dismiss alleging that the Appellant, George Lucchino, did not have sufficient standing to prosecute the appeal. On January 31, 1997 the Board issued an Opinion and Order granting the

Motion and dismissing the appeal because of Mr. Lucchino's lack of standing. In the Opinion, we made a passing reference to our mistaken belief that Mr. Lucchino had not filed a response to the Motion.

Following the issuance of the opinion, Mr. Lucchino contacted the Secretary to the Board and advised her that he had filed a response. The Board's docket confirms that Mr. Lucchino, who is not represented by counsel, filed a timely response in early November, 1996. Unfortunately, that response was never received by the Pittsburgh office of the Environmental Hearing Board. Therefore, we were not aware of the response when we wrote our opinion.

On February 10, 1997, Mr. Lucchino filed a Motion for Reconsideration asking us to review his earlier filed response. We have carefully reviewed his response and multiple exhibits. Such review leads us to affirm our original decision that Mr. Lucchino lacks the necessary legal standing to prosecute this appeal.

Mr. Lucchino cites some of the same passages of his deposition that were cited by the Permittee. Some of his deposition testimony, such as comparing Department officials to Sadam Hussein, were included in our opinion.[1] Additional passages cited by Mr. Lucchino, although adding no support to his standing argument, do reveal that he is a township supervisor who surprisingly voted to approve the same project he appealed to the Environmental Hearing Board. He also readily admits that he has no evidence that either he or his water or property were in any

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[1]Mr. Lucchino has made some very reckless accusations against Department officials. These allegations are not supported by any of the materials Mr. Lucchino has submitted to this Board. In fact, some of the very exhibits attached to Mr. Lucchino's response show that the Department treated him in a courteous and respectful manner. It is extremely unfortunate and disconcerting that he has chosen to compare hard working and conscientious Department officials with a ruthless dictator who is directly responsible for the loss of American lives.

way affected by the incidental coal mining.

Therefore, we see absolutely no need to reconsider our earlier opinion dismissing this appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GEORGE M. LUCCHINO	:	
	:	
v.	:	**EHB Docket No. 96-114-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LUZERNE LAND CORPORATION, Permittee	:	

ORDER

AND NOW, this 25th day of February, 1997, after a careful and detailed review of the response filed by Appellant on November 6, 1996, we affirm our Order of January 31, 1997 and deny Appellant's Motion for Reconsideration.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: February 25, 1997

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

For the Commonwealth, DEP:
Patience Robinson Nelson, Esq.
Western Region

For Appellant:
George M. Lucchino, *pro se*
McDonald, PA

For Permittee:
Stanley R. Geary, Esq.
BUCHANAN INGERSOLL, P.C.
Pittsburgh, PA

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ENVIRONMENTAL HEARING BOARD
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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

CAERNARVON TOWNSHIP SUPERVISORS	:	
	:	
v.	:	**EHB Docket No. 96-180-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and CHESTER COUNTY	:	**Issued: February 25, 1997**
SOLID WASTE AUTHORITY, Permittee	:	

OPINION AND ORDER ON MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO LIMIT ISSUES

By Robert D. Myers, Administrative Law Judge

Synopsis:

Permittee's Motion to Dismiss or, in the alternative, to Limit Issues (Motion) arising out of Appellant's appeal of an approved modification of a solid waste disposal facility is granted in part and denied in part.

The Motion is granted to dismiss Paragraphs 8(a), (b), (c), (f), (i), (k), (l) and (m) of the appeal. The condition requiring that the decommissioning of monitoring wells satisfy the cleanup standards of the applicable regulations in effect at the time when decommissioning is sought is appropriate when dealing with an event that may occur well into the future, when the "standards" that must be satisfied are presently unknown. Because the county plans provide for expansions, there is no additional legal requirement for demonstrating need. No legal basis requires an applicant to withdraw part of a pending application as a condition of an approved application. Neither the

Solid Waste Management Act nor Article I, Section 27 require the Department to ensure that the modification does not violate the local rules, regulations and ordinances. The Department's motivation in issuing the modification without considering an executive order that became effective after the modification's approval and applies prospectively is immaterial. There is no legal requirement for the Department to list in a modification the documents which it considered before issuance, and there is no abuse of discretion in not listing documents other than those passed between the Department and Permittee. Appellant's challenge that Condition 8 does not specify when a permit amendment as opposed to written approval will be necessary for future permit changes is dismissed because the condition simply restates the regulations. Since Appellant stipulated to Permittee's request to dismiss Paragraph 8(m), we see no reason to preserve it.

Appellant's challenge in Paragraph 8(e) that the modification authorizes an "overfill" is limited, and will not be considered to the extent it is based upon visual impact.

Motion is denied as to Paragraphs 8(d), (g), (h), (j) and (n) of the appeal. Although there is no legal requirement that the closure date be stated in the modification itself, there clearly is a requirement that it be part of the approved application, an issue we cannot foreclose Appellant from pursuing at this point. Moreover, because issues remain regarding the adequacy of the air quality monitoring information, the financial assurances provided for in Subchapter D of Chapter 271 (25 Pa. Code §§ 271.301-271.397), and the sufficiency of the health, safety and welfare of the modification, the Motion is denied with respect to Paragraphs 8(g), (h), (j). The Motion is also denied to the extent it seeks to dismiss Paragraph 8(n) for the procedural basis on which Permittee asserted that it was defective has since been resolved in a separate opinion.

OPINION

Caernarvon Township Supervisors (Appellant) filed this appeal to seek review of a permit modification, arguing that the Department of Environmental Protection (Department) committed errors of law and abused its discretion. The modification issued to the Chester County Solid Waste Authority (Permittee) on August 1, 1996, for the modification of an existing solid waste disposal and/or processing permit (Permit No. 100944) for the Lanchester Sanitary Landfill facility (Landfill). It approved the construction and operation of an expansion known as the Municipal Site Landfill Overfill located in both Caernarvon Township, Lancaster County, and Honeybrook Township, Chester County, pursuant to the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101 - 6018.1003.

On November 8, 1996, Permittee filed the present Motion to Dismiss or, in the alternative, a Motion to Limit Issues (Motion). The Motion was accompanied by a Memorandum of Law. Appellant filed a response and a supporting brief, respectively, on December 16, 1996 and December 13, 1996. On January 2, 1997, Permittee filed a reply. The Department has neither joined nor opposed the Motion.

In its Motion, Permittee contends the 14 objections raised by Appellant in its appeal are deficient as a matter of law and should be dismissed or, in the least, limited. In ruling on the Motion, we consider as pleadings the appeal, the Motion and the response.[1] If there are no disputed issues of material fact and the movant is clearly entitled to judgment as a matter of law, it can be granted.

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[1] As required by the Board's rules of practice and procedure a "response to a motion shall set forth in correspondingly-numbered paragraphs all factual disputes and the reason the opposing party objects to the motion." 25 Pa. Code § 1021.70(e).

We will deal with the objections *seriatim*.

(a) Decommissioning of Monitoring Wells 27 and 28

Permittee seeks to dismiss Paragraph 8(a) of the appeal which states:

> The permit modification can be read to allow the Authority to decommission monitoring wells 27 and 28 subject to "applicable cleanup standards set forth in the Regulations" (permit Condition 2). Allowing such a decommission at this time is without a sound technical or engineering basis. In addition, such a condition is overly vague with respect to which exact "Regulations" and water quality regulatory standards will apply.

Permittee argues this allegation is deficient because Conditions 2 and 3 of the modification are clear on their face.

Permittee first contends decommissioning is not, as Appellant infers, allowed immediately upon approval of the modification. Instead, Permittee must demonstrate that the groundwater quality conforms to the applicable regulatory standards before the monitoring wells may be decommissioned. Condition 2 simply provides that the demonstration will be accomplished in accordance with the assessment and abatement plans referenced in Condition 3 which, Permittee avers, are incorporated within the modification.

In response, Appellant denies Permittee's characterization of Conditions 2 and 3. It avers that whether the groundwater assessment and abatement plans are incorporated within the modification remains a factual issue for its investigation.

We agree with Permittee that Condition 2 does not effect a decommissioning of the two monitoring wells. Condition 2 specifically provides that "[p]rior to the decommissioning of groundwater monitoring wells MW-27 and MW-28, [Permittee] must demonstrate that the groundwater quality monitored by these two wells conforms to the applicable cleanup standards set

forth in the Regulations in effect at the time of the demonstration." Condition 3 requires Permittee to determine the "origin and extent" of the Volatile Organic Compound (VOC) contamination in MW-27 and MW-28 and to consult with the Department on a plan for cleaning up the contamination in order to meet the requirements of Condition 2.

We do not have the application for the modification before us and know little of the prior history of this Landfill. We suspect, however, that MW-27 and MW-28 are monitoring wells installed pursuant to an earlier permit requirement, covering a portion of the Landfill that now may be close to final elevation.[2] As areas of a landfill are completely filled, they often are closed even though waste is still being deposited in other areas.

Decommissioning of monitoring wells may occur when appropriate in accordance with the regulations, typically following the closure of all or part of a facility. Permit applicants are required to include in the Phase II application a water quality monitoring plan (25 Pa. Code § 273.152) as well as postclosure land use plan describing a schedule and measures for the facility's closure to ensure that water quality monitoring complies with the applicable regulations (25 Pa. Code § 273.192(a) and (b)(5)(i)). Both plans must conform to the applicable water quality monitoring regulations, currently set forth at Sections 273.281 to 273.288, which provide for the installation, operation and maintenance of a monitoring system and require approval of corresponding assessment and abatement plans. When an operator requests final closure of all or part of a facility, it must demonstrate to the Department that it has satisfied the approved closure plan, including the water quality monitoring regulations, which the Department must verify by inspecting the facility and

[2] Whether or not this so, in fact, is not essential to our ruling.

certifying closure. 25 Pa. Code § 271.342.

Conditions 2 and 3, read together, simply inform Permittee that MW-27 and MW-28 must satisfy the cleanup standards of the regulations in effect at the time when decommissioning is sought, and that the VOCs present in those wells now must be dealt with prior thereto. The requirement is "vague" only in the sense that the "time" of decommissioning is unknown and, therefore, the "standards" that must be satisfied are unknown. This vagueness is appropriate when dealing with an event that may occur well into the future. If standards governing that future event were set now, the Department could be criticized for not making allowance for technical advancement.

If and when the Department actually approves the decommissioning of these monitoring wells, anyone aggrieved by that action will have an opportunity to challenge it by appeal to this Board. *See Lankenau Hospital v. DER*, 1990 EHB 1264.

Accordingly, the Department's insertion of Condition 2 in this permit was not an abuse of discretion, and Paragraph 8(a) of the appeal is dismissed.

(b) Demonstration of Need for Overfill

Permittee contends there is no merit to Appellant's challenge in Paragraph 8(b) that the modification allows Permittee to overfill the landfill without first demonstrating a need to do so or explaining how existing areas are deficient.

Appellant, in its response, admits the permit modification complies with the Municipal Waste Planning, Recycling and Waste Reduction Act (Act 101), Act of July 28, 1988, P.L. 556, *as amended*, 53 P.S. §§ 4000.101- 4000.1904, and the corresponding regulations, but nonetheless argues that Section 507(a)(2)(iii) of the statute and Section 271.127(g) of the regulations require

waste management plans to specifically address the need for an expansion.[3] Because the plans which Permittee relies upon here fail to do so, Appellant argues the need for an expansion was not established.

Act 101 conditions the issuance of a permit modification resulting in additional capacity upon a needs assessment. A modification complies by demonstrating that the proposal is provided for in the county plan, 53 P.S. § 4000.507(a)(1), and involves reserved capacity for the waste needs of the host municipality and county, 53 P.S. § 4000.1111(a)(2). If the proposal is not provided for in the plan an applicant must, in alternative to Section 507(a)(1), meet the requirements set forth in Section 507(a)(2) to demonstrate need. The regulations at 25 Pa. Code § 271.127(g)(2) indicate the Department, in making the needs assessment, may additionally consider whether the "proposed facility will actually be used to implement an approved county plan based on implementing documents." Where a county plan provides for a proposed modification, there is no additional legal requirement that the proposal explain "why existing or proposed areas of the landfill are insufficient to fulfill the [proposed] need for additional landfill space," or demonstrate actual need. *See County Commissioners Somerset County v. DEP*, EHB Docket No. 95-013-MG (Adjudication issued April 4, 1996).

The Chester County Act 101 Waste Management Plan and the Lancaster County Municipal Waste Management Plan provide for the Landfill and recognize that county ordinances and disposal agreements provide a basis for acceptance of municipal waste at the Landfill. The Landfill,

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[3] Specifically, Appellant agrees that the modification satisfies Act 101 Sections 507 and 1111, and the regulations at 25 Pa. Code §§ 271.127(g), 271.201(a)(6), 271.201(b)(1), 273.138 and 273.139.

Permittee avers, is used to assist with the implementation of those plans. The Chester County Plan, in Section 3.1.4 entitled "Estimated Future Capacity with Reasonable Expansion," contemplates the permitted area will need to be replaced by additional expansion areas which would be constructed during the 1992-2002 period. Likewise, the Lancaster County Plan acknowledges, in Section 2.5, that periodic expansion will be necessary under the approved plan. Appellant has neither objected nor raised any factual issues to the contrary. The Department was well within its authority to rely on provisions of these plans and documents providing for the facility and subsequent modifications for satisfying the required demonstration of need.

Accordingly, Paragraph 8(b) of the appeal is dismissed.

(c) Withdrawal of Area A Application

Permittee contends Appellant has no legal basis to challenge the modification on the ground that it was not conditioned upon, as stated in Paragraph 8(c), the "withdrawal of [Permittee's] current application(s) to obtain regulatory approval for use of Area A of the [] Landfill." Although a Phase I application for Area A is pending, Permittee avers it has not submitted a Phase II application. No regulatory basis exists, it argues, to require the modification to be conditioned upon withdrawing the Area A application.

Appellant does not dispute these facts but argues, since the Department is required to issue or deny a permit application within 9 months of finding it administratively complete pursuant to 25 Pa. Code § 271.203, the Area A application, which should have been deemed complete months ago, must be denied. Appellant asserts that Area A was intended as an alternative to the overfill. Therefore, it argues the permit modification should be conditioned upon withdrawal of the Area A application.

Only a Phase I application has been submitted by Permittee for Area A. The Department is not required to make a determination upon it within 9 months, as Appellant alleges; rather, the Department must issue or deny an application only when the application is administratively complete.[4] 25 Pa. Code § 271.203(a). Moreover, approval of a Phase I application does not mandate approval of a Phase II application nor authorize operation of a landfill. 25 Pa. Code § 273.101. We are unaware of any legal basis requiring an applicant to withdraw part of a pending application as a condition of an approved application. Even if there were an agreement between the Department and Permittee that limited Area A for use only as an alternative to the Overfill, there is still no basis to require the Department to insert it as a condition in the modification, or to find that it erred in not doing so.

Accordingly, Paragraph 8(c) of the appeal is dismissed.

(d) Final Closure Date

Permittee contends Appellant has no regulatory basis to challenge the modification on the grounds that, as stated in Paragraph 8(d), it "was not conditioned upon and made no mention of the proposed final closure date for the [] Landfill (except, perhaps, by way of incorporation by reference of [Permittee's] documents)."

Without admitting or denying Permittee's Motion, Appellant asserts in its response that Paragraph 8(d) remains a meritorious ground for contesting the modification and it should be entitled to conduct discovery on the issue.

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[4] The regulations at 25 Pa. Code § 271.202(a) provide when "the Phase I and Phase II parts of the application for a landfill are submitted separately, the application will not be considered to be complete until both parts are determined to be administratively complete."

As part of the Phase II application for a permit, the regulations require submission of a post closure land use plan. Therein, applicants must include "[a]n estimate of the year in which final closure will occur, including an explanation of the basis for the estimate." 25 Pa. Code § 273.192(b)(2). As already noted, we do not have the application before us and, as a result, do not know if Permittee fulfilled this requirement. While we know of no legal requirement that the closure date be stated in the modification itself, there clearly is a requirement that it be part of the approved application. Because of our uncertainty on this point, we cannot foreclose Appellant from pursuing this issue.

Accordingly, the Motion is denied to the extent it seeks to dismiss Paragraph 8(d).

(e) Overfill Height

In its Motion, Permittee seeks to dismiss Paragraph 8(e) to the extent it contests the visual impact of the landfill expansion. It contends Appellant lacks regulatory basis to challenge the permit modification for this reason.

Paragraph 8(e) of the appeal seeks review of the modification on the grounds that it "authorizes an 'overfill' that is, for technical reasons, excessive in height, not justifiable on a scientific basis, and which constitutes an unjustifiable threat to the public health, safety and welfare of the citizens. . .." While this allegation sets forth a general challenge, it does not specifically mention visual impact. Appellant specifically denies that visual impact is a basis upon which it is proceeding in Paragraph 8(e), and avers it is irrelevant whether such a legal basis exists.

Accordingly, the Motion is granted to this extent, and visual impact will not be considered in review of the issues raised in Paragraph 8(e).

(f) Local Regulation of Landfill

Permittee seeks to dismiss Paragraph 8(f) that alleges the Department had an affirmative duty pursuant to the SWMA and the Pennsylvania Constitution, Article I, Section 27, "to ensure that the overfill allowed by the permit does not violate the rules, regulations and ordinances of Caernarvon Township, including without limitation the Caernarvon Township zoning ordinance and its height restrictions." Neither the SWMA nor Article I, Section 27, Permittee contends, require the Department to make such ensurances.

While refusing to admit or deny Permittee's averments, Appellant provides no additional legal basis in support of its position on this point.

Unlike the applicable requirements in sewage planning,[5] the SWMA does not require the Department to ensure that a proposed facility complies with the local zoning and land development ordinances. *Hanover Township v. DER*, 1992 EHB 119; *Hillton Township Board of Supervisors v. DER*, 1988 EHB 1009. Although a municipality may, via its zoning ordinances, regulate the location of a solid waste facility, the Department has the authority to regulate its design and operation. Issuance of a SWMA permit will not excuse a permittee's compliance with local ordinances but the Department is not "precluded from issuing a permit where a facility may not be in compliance with local zoning requirements." *Hillton Township* at 1012 (citation omitted).

As for Article I, Section 27 considerations, we agree with Permittee that they have been incorporated within the applicable statutes and regulations, and thus, compliance with the statutes

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[5] Local land use and zoning requirements must be evaluated along with other factors in the sewage planning process. *See South Huntington Township Board of Supervisors v.* DER, 1990 EHB 197.

and regulations satisfies those conditions. *Concerned Residents of the Yough, Inc. v. Department of Environmental Resources*, 639 A.2d 1265 (Pa. Cmwlth. 1994) (citations omitted).

Accordingly, the Motion is granted and Paragraph 8(f) is dismissed.

(g) Air Quality Issues

Permittee seeks to dismiss Appellant's challenge to permit Condition 1 in Paragraph 8(g) of its appeal. The objection states that the "condition concerning air quality monitoring. . . is insufficient to protect the health, safety and welfare of the general public," and complains that the phrase "Air Quality Plan Approval" is "vague, uncertain, and does not state with reasonable specificity what measures [Permittee] must take to satisfy" the condition. Specifically, Permittee asserts Condition 1 clearly requires Permittee to obtain an Air Quality Plan Approval prior to the deposition of waste. Besides, the condition is not deficient, Permittee asserts, because there is no authority in the SWMA requiring the Department to condition the issuance of a permit on the approval of air permits necessary pursuant to the Air Pollution Control Act (APCA), Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. §§ 4001 - 4106.

Appellant's response raises the Department's permit coordination policy and attaches a letter sent by Permittee's legal counsel to the Department while the application was pending. In the letter, counsel objects to delay in processing the air quality permit application, fearing that the Department's permit coordination policy will bring about further delay in issuance of the permit modification. We gather from Appellant's supporting brief that its real concern is the impact of this policy on the issuance of the modification.

We do not read Paragraph 8(g) as narrowly as Permittee, but find it has raised a general challenge to the air quality monitoring concerns. The SWMA requires applicants to "set forth the

manner in which the[y]. . . plan[] to comply with the requirements of the. . . 'Air Pollution Control Act.'" 35 P.S. § 6018.502(d). This language suggests that an application for a municipal waste landfill must include information sufficient to "allow the Department to conclude that the applicant has considered the provisions of APCA and has some reasonable likelihood of securing necessary air plan approvals." *Jefferson County Commissioners v. DEP*, EHB Docket No. 95-097-C (Opinion issued August 21, 1996) (slip op. at 4). Whether the application sufficiently addresses the issues and measures necessary to satisfy the regulatory air quality requirements cannot be concluded as a matter of law. Therefore, the Motion is denied to the extent material facts are in dispute regarding the adequacy of the air quality information.

Since there also appears to be some dispute over the Department's permit coordination policy, we will allow that aspect of Paragraph 8(g) to remain.

(h) Indemnification

Paragraph 8(h) of the appeal challenges the permit modification on the grounds that it is not conditioned upon an indemnification to "the Township and others for harms that operation of the landfill, as authorized by the permit modification or the underlying permit, may cause." Permittee's Motion argues there is no legal basis, as Appellant asserts, to require it to indemnify others from potential harms associated with the Landfill.

In response to the Motion, Appellant neither admits nor denies Permittee's averments nor does it provide legal authority for its position. Rather Appellant simply mentions an interest in raising related issues following discovery on the ground of indemnification and financial assurance. We are uncertain about Appellant's meaning. The regulations in Subchapter D of Chapter 271, 25 Pa. Code §§ 271.301-271.397, deal with Financial Assurance Requirements, covering bonds, trust

funds, public liability insurance and other financial assurances.

If Appellant is contending that there are financial assurance requirements beyond those in the regulations, it should have cited them because we are unaware of any. If Appellant is contending that the "underlying permit" did not satisfy the requirements of Chapter 271, Subchapter D, the doctrine of administrative finality precludes such an attack. *DER v. Wheeling-Pittsburgh Steel Foundation*, 375 A.2d 320 (Pa. Cmwlth. 1977).

Appellant seeks to hold open "its rights to later seek to raise issues related to indemnification and financial assurances as per 25 Pa. Code § 1053(b)"[6] after discovery. Despite our inclination to dismiss Paragraph 8(h), we will hold off until discovery is completed. Permittee may renew its motion at that time, if it thinks it appropriate to do so.

Accordingly, the Motion is denied with respect to Paragraph 8(h).

(i) The Executive Order

Permittee seeks to dismiss Appellant's objection requesting in Paragraph 8(i) of the appeal that the modification be reconsidered in light of the Governor's Executive Order 1996-5.[7] The Executive Order, Permittee argues, applies to municipal waste permit applications prospectively. Because it issued on August 29, 1996, 28 days after the modification issued, the Executive Order has no effect on the modification and therefore, Permittee avers, Paragraph 8(i) must be dismissed as irrelevant and lacking in legal foundation.

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[6] There is no such section in 25 Pa. Code. We presume Appellant meant Section 1021.53(b), a section of the Board's Rules of Practice and Procedure dealing with amendments to appeals with Board approval.

[7] The Executive Order was published in the *Pennsylvania Bulletin* on September 21, 1996. 26 Pa. Bull. 4515.

Appellant admits Permittee's assertion but, without identifying them, indicates there are other relevant portions of the Executive Order. Alleging that either Permittee personnel delayed the signing of the Order or the Department improperly "rushed" approval of the modification knowing issuance of the Executive Order was imminent, Appellant avers it will be denied due process and equal protection of the law if the Order is held not to apply here.

The Executive Order, a municipal waste facilities review program, provides for a cooperative agency and host municipality agreement intended to reflect new objectives for the State's policy on municipal waste management. It requires, among other things, the Department "shall review pending and future applications for municipal waste facility permits and permit modifications in accordance with the policy reforms required by this order." 26 Pa. Bull. 4515, 4517; 4 Pa. Code § 5.094(a). The Executive Order clearly has no intention of applying retrospectively and, consequently, has no relevance to the modification which was issued 28 days earlier. Nor is it relevant whether Permittee had the political influence to delay the signing of the Executive Order or to rush the Department into issuing the modification. We can overturn the Department's action only if the *modification* violates the law or constitutes an abuse of discretion. The motivation of Department personnel in issuing it when they did is immaterial. *Sechan Limestone Industries, Inc. v. DER*, 1986 EHB 134.

Accordingly, Paragraph 8(i) is dismissed.

(j) Public Health, Safety and Welfare

In paragraph 8(j) of the appeal, Appellant alleges the modification "allows expansion of the landfill in a manner detrimental to the health, safety, and welfare of the citizens of Pennsylvania and Caernarvon Township." Permittee seeks to dismiss the allegation on the basis that, as a general

allegation, it is deficient as a matter of law for not to specifying how the modification fails to satisfy requirements in either the SWMA or the regulations.

In its Response, Appellant asserts Paragraph 8(j) was intended to reference 25 Pa. Code § 271.127, and therefore, cannot be deficient.

Section 271.127(a) requires the permit application to provide a "detailed analysis of the potential impact of the proposed facility on the environment, public health and public safety." Upon receipt of that assessment the Department must then evaluate and determine "whether the proposed operation has the potential to cause environmental harm." 25 Pa. Code § 271.127(b). This objection is sufficient to withstand challenge at this stage of the proceedings. *Croner, Inc. v. Department of Environmental Resources*, 589 A.2d 1183 (Pa. Cmwlth. 1991)

Accordingly, the Motion to dismiss Paragraph 8(j) is denied.

(k) Document References

Permittee argues Appellant has no legal basis to challenge the modification on the ground, in paragraph 8(k), that documents other than those of the Department and Permittee should have been included in the list of submissions set forth in the modification approval. The fact that the Department includes a list of documents upon which it bases a permit is only a customary practice, Permittee asserts, and not required by statute or regulation.

Appellant responds in language similar to that used for Paragraph 8(h) -- including the nonexistent citation to the regulations -- seeking to conduct discovery on this issue. Although we allowed the objection to stand there until after discovery, we decline to do the same thing here.

Paragraph 8(h) dealt with financial assurances, a subject covered by the regulations and which discovery might develop into a genuine issue. That is not the case with Paragraph 8(k). First,

there is no legal or statutory requirement for the Department to list in a permit or a modification the documents which it considered before issuance. However, the Department is required by 25 Pa. Code § 271.201 to deny an application unless it meets specific criteria of completeness and accuracy. Section 273.201 requires the operator of a municipal waste landfill to comply with, *inter alia*, the terms of the permit and the plans and specifications of the permit. 25 Pa. Code § 273.201.

The permit application is almost invariably supplemented during its processing by responses to Department requests for more information, for design changes or other technical documents. When the Department issues the permit, it relies on these supplementary materials as well as the original filing. By listing them, it makes them part of the permit, demonstrating the approvability of the application and forewarning the permittee of what must be complied with in exercising the privileges granted by the permit.

The documents listed, therefore, are those that are passed between the Department and the permittee. Documents submitted to the Department by other interested parties are not relevant to the listing unless the Department imposed some requirement based on them. In those instances, there would be a Department document imposing the requirement that would be listed.

Accordingly, Paragraph 8(k) is dismissed.

(l) Future Permit Modifications

Permittee seeks to dismiss Paragraph 8(l) in which Appellant argues it "should have been granted a reasonable opportunity for review, comment and response with respect to *any* modification of the permit (as now modified) the [Permittee] may seek pursuant to permit Condition 8." (Emphasis added). To the extent Paragraph 8(l) challenges the approval of the modification containing Condition 8, Permittee asserts the Department, after providing public notice, conducted

a public hearing on March 21, 1996, allowing sufficient opportunity for comment. Permittee avers further that Appellant was represented at the hearing by its supervisors and employees as well as an expert, all or some of whom presented comments for the public record. The Department drafted a Comment and Response Document addressing all of Appellant's comments, Permittee asserts.

Appellant admits these facts in its response, noting that the Comment and Response Document was not issued until the day before issuance of the modification. This is not the focus of Appellant's objection in Paragraph 8(l), however. Rather, Appellant claims that Condition 8 does not specify when a permit amendment will be required and when written approval will suffice.

Condition 8 states:

> Any final operation, design or other plan developed subsequent to permit issuance which exhibits changes in the structures, locations, specifications, control measures or other changes of substance shall be submitted to the Department for subsequent permit action. Any deviation of plans herein approved shall not be implemented before first obtaining a permit amendment, or written approval from the Department.

Appellant's response indicates it is concerned that because Condition 8 does not specify when a permit amendment as opposed to written approval will be necessary, future changes can occur without Appellant being made aware of them.

Condition 8 reiterates, and perhaps even clarifies, what the regulations already mandate. If Permittee later submits an application to deviate from its plans requiring the reissuance, renewal or major modification of the permit, the application will be subjected to the notice and comment requirements set forth in the regulations at 25 Pa. Code §§ 271.141(d) and 271.142(d), and the SWMA at Section 504. The requirements provide the county and host municipality with an opportunity to submit recommendations relating to the proposed permit; and the Department must,

if it overrides their recommendations, publish justification for doing so in the *Pennsylvania Bulletin*. 35 P.S. § 6018.504. Even if a future modification is minor, the Department has discretion (pursuant to 25 Pa. Code §§ 271.143 and 271.144) to conduct public hearings for the purpose of gathering comments on an application of significant public interest. *See Plymouth Township v. DER*, 1990 EHB 1288. Since Condition 8 restates the regulations and since Appellant is not challenging the validity of the regulations, we find the Department did not abuse its discretion in implementing Condition 8.

Accordingly, Paragraph 8(l) of the appeal is dismissed.

(m) Additional Issues

In the Motion, Permittee seeks to dismiss Paragraph 8(m)'s request to later raise any additional issues that may be revealed through further document review and discovery. Permittee argues the general assertion is procedurally defective and without legal affect. Appellant should instead raise additional issues in accordance with the procedure for amending appeals set forth in 25 Pa. Code § 1021.53(b).

Since Appellant stipulates to Permittee's suggestion and offers us no reason to preserve or consider Paragraph 8(m), it is dismissed.

(n) Unresolved Notice of Appeal

Similarly, Permittee asks us to dismiss Paragraph 8(n) as procedurally defective because Appellant did not abide by 25 Pa. Code § 1021.53(b).

Since submission of the Motion, the issue has been resolved and Paragraph 8(n) was accepted despite the procedural defects in *Caernarvon Township Supervisors v. DEP*, EHB Docket No. 96-180-MR (Opinion issued January 15, 1997).

Therefore, the Motion is denied as to Paragraph 8(n).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CAERNARVON TOWNSHIP SUPERVISORS	:	
	:	
v.	:	**EHB Docket No. 96-180-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CHESTER COUNTY SOLID WASTE AUTHORITY, Permittee	:	

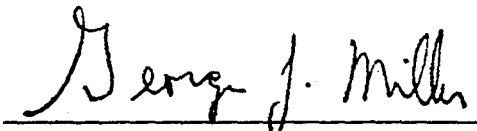
ORDER

AND NOW, this 25th day of February, 1997, the Motion to Dismiss or, in the alternative, to Limit Issues is hereby granted in part and denied in part, as follows

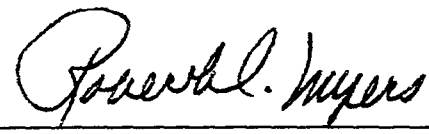
1. The Motion is granted to dismiss Paragraphs 8(a), (b), (c), (f), (i), (k), (l) and (m); and Paragraph 8(e) to the extent it is based upon visual impact; and

2. The Motion is denied as to Paragraphs 8(d), (g), (h), (j) and (n).

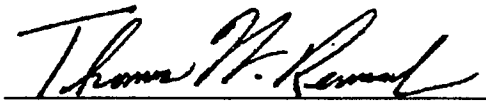
ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: February 25, 1997

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

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M. DIANE SMITH
SECRETARY TO THE BOARD

HABIB ZADEH and NED LAMBERT	:	
	:	
v.	:	**EHB Docket No. 96-275-C**
	:	**(Consolidated with 96-276-C)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	**Issued:** February 26, 1997

OPINION AND ORDER ON
MOTION FOR A HEARING ON ABILITY
TO PREPAY A CIVIL PENALTY

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board grants a motion for a hearing on appellant's ability to prepay a civil penalty assessed under Section 1307 of the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended*, Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. § 6021.101 - 6021.2104 (Storage Tank and Spill Prevention Act) where a matter of fact exists because appellant claims he is unable to prepay the civil penalty.

OPINION

The motion before the Board arises from the Department of Environmental Protection's (Department) November 20, 1996 issuance of an Assessment of Costs and Expenses for Corrective Actions Undertaken by the Department at a service station located in Friedens, Somerset County and

an assessment of a Civil Penalty and an Order[1] for violations of the Storage Tank and Spill Prevention Act at the same station.

Ned Lambert (Appellant) filed his notice of appeal on December 23, 1996. Appellant's appeal was assigned Docket No. 96-276-C. Habib Zadeh filed his notice of appeal on the same day and his appeal was assigned Docket No. 96-275-C. On January 24, 1997, the parties filed a joint motion to consolidate these appeals. By a January 29, 1997 order the Board granted the motion and consolidated the appeals at Docket No. 96-275-C. Although the service station is owned by both appellants, only Lambert filed an inability to pay statement.

One of Appellant Lambert's objections is that he is unable to afford to post bond or other security regarding the civil penalty assessment.

On January 22, 1997 the Department filed a motion requesting a hearing to determine Appellant Lambert's financial ability to provide security for appeal of the civil penalty assessment. In its motion the Department contends that the Board must hold a hearing and make a factual determination as to Appellant Lambert's ability to post security. The Department contends that the failure to provide security for an appeal of civil penalty assessment by prepaying the proposed penalty or posting an appeal bond deprives the Board of jurisdiction over the appeal. Therefore, the Department states, where the appellant fails to provide security for an appeal of civil penalty, but asserts in his notice of appeal that he is unable to prepay the civil penalty the Board must first make a factual determination of the appellant's financial ability to provide security before dismissing the appeal.

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[1] The Order requires Sampling, Mointoring and Restoration of Affected Water Supplies, site Characterization, Remedial Action Plan, Remedial Action completion Report, General Provisions.

On February 10, 1997, Appellant Lambert filed his response in which he reiterated his inability to post cash security due to his financial situation and asked the Board to accept documents, income tax returns from 1991- 1995, copies of his check vouchers, and an affidavit, in lieu of a hearing to determine waiving the requirement Appellant Lambert post security in the appeal.

We grant the Department's motion. Section 1307 of the Act provides:

> The person charged with the penalty shall then have 30 days to pay the proposed penalty in full or, if the person wishes to contest the amount of the penalty or the fact of the violation, forward the proposed amount of the penalty to the department within the 30-day period .... Failure to forward the money or the appeal bond shall result in a waiver of all legal rights to contest the violation or the amount of penalty.

35 P.S. § 6021.1307(b). Generally, if a party, who can pay, fails to pre-pay the proposed penalty that failure to pay deprives the Board of jurisdiction over the matter. *She-Nat, Inc. v. DEP*, EHB Docket No. 95-145-C (Opinion issued May 7, 1996).

Similar statutory language concerning failure to post security is contained in the Pennsylvania Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1 - 1396.31(SMCRA)[2] and the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301 - 3326

[2] Section 1396.18d provides: The person or municipality charged with the penalty shall then have 30 days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount of the penalty .... Failure to forward the money or the appeal bond to the secretary shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.... 52 P.S. § 1396.18d.

(Noncoal Surface Mining Act)[3]. Consequently, the Board has held it is deprived of jurisdiction over the matter if the party fails to post the penalty as stated in the statute. *See Kilmer v. DER,* 1994 EHB 1799 (failure to pre-pay a penalty assessment under a similar provision of the Noncoal Surface Mining Act deprives the Board of jurisdiction).

The cases before the Board concerning pre-payment of civil penalties have included issues under provisions in SMCRA and the Noncoal Surface Mining Act. The Board looked to those cases for guidance concerning with issues under similar provisions in the Storage Tank and Spill Prevention Act. *See She-Nat, Inc. v. DEP*, EHB Docket No. 95-145-C (Opinion issued May 7, 1996). Consequently, we will consider precedents under SMCRA and the Noncoal Surface Mining Act on the current issue before the Board.

Under those acts where a party claims an inability to pay the penalty the Board and Commonwealth Court have stated that prior to determining jurisdiction a hearing is required to determine the party's ability to post the amount of the penalty. In *Martin v. DER*, 1984 EHB 821, the Board dismissed an appeal of a civil penalty assessment issued under SMCRA for lack of jurisdiction because appellant failed to post the required appeal bond or to prepay the penalty as required by the statute. The Board noted that the case was distinguishable from *Boyle Land and Fuel Co. v. EHB*, 475 A.2d 928 (Pa. Cmwlth. 1984).[4] In *Martin* the appellant had alleged that his current

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[3] Section 3321(b)(1) provides: The person charged with the penalty shall then have 30 days to pay the proposed penalty in full or, if the the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount .... Failure to forward the money or the appeal bond to the secretary within 30 days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.... 52 P.S. § 3321(b)(1).

[4] The Commonwealth Court held that SMCRA's and the Clean Streams Law's bond requirements as a condition to the right to appeal a civil penalty assessment issued under the statutes

financial status precluded the posting of a bond or prepayment of the penalty. The Board provided him with an opportunity for oral argument on the issue of whether his allegation of lack of financial resources should operate to excuse him from the bonding/prepayment requirement. However, appellant failed to avail himself of that opportunity for oral argument and the Board had no alternative but to dismiss the appeal for lack of jurisdiction. *Id.*

The Commonwealth Court reached a similar conclusion in *Twelve Vein Coal Co. v. DER*, 561 A.2d 1317 (Pa. Cmwlth. 1989). In *Twelve Vein Coal Co.* the company filed an appeal with the Board from a civil penalty assessment under SMCRA. The company failed to perfect its appeal by either forwarding the amount of the penalty or posting an appeal bond. Subsequently, the Board granted the Department's motion to dismiss on the basis that the company's failure to perfect deprived the Board of jurisdiction and the company appealed the dismissal. The Commonwealth Court remanded the case for a hearing on the issue of whether or not the company was financially able to comply with the appeal. The court held that it was unable to assess the company's claims because no record had been made with respect to the alleged inability to pay since the Board merely dismissed the appeal without a finding on a matter of fact of whether or not the company was able to comply with the appeal procedure. *Id.* at 1319. The court noted that a serious issue is involved where a petitioner, because of alleged impecunity, may be denied access to the courts and due process of law. *Id.*

In the case currently before the Board, we are presented with the same issue. Appellant alleges that he is unable to comply with the appeal procedure of prepaying or posting a bond on a

---

was constitutional.

civil penalty assessed under the Storage Tank and Spill Prevention Act. Consequently, we have a matter of fact which must be determined by a hearing before any other action can be taken on this case. Therefore, we grant the Department's motion for a hearing. Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HABIB ZADEH and NED LAMBERT	:	
	:	
v.	:	**EHB Docket No. 96-275-C**
	:	**(Consolidated with 96-276-C)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 26th day of February, 1997, the Department of Environmental Protection's motion for a hearing on ability to prepay a civil penalty is granted.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: February 26, 1997

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library
For the Commonwealth, DEP:
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Southwestern Region
For Habib Zadeh:
Kim R. Gibson, Esq.
Somerset, PA
For Ned Lambert:
Carolann A. Young, Esq.
BOOSE AND YOUNG
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kh/bl

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M. DIANE SMITH
SECRETARY TO THE BOARD

EASTERN CONSOLIDATION AND DISTRIBUTION SERVICES, INC., HUGO'S SERVICES, INC., EASTERN REPAIR CENTER, INC. and BARON ENTERPRISES, et al.	:	**EHB Docket No. 94-200-C (Consolidated with 94-201 and 96-097)**
v.	:	
	:	**Issued:** February 28, 1997
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASTE MANAGEMENT of PENNSYLVANIA, INC., Permittee	:	

OPINION AND ORDER ON A MOTION FOR PARTIAL SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion for partial summary judgment on appellants' standing to appeal issues related to traffic impacts is denied where the permittee as the moving party fails to demonstrate that it is entitled to judgment as a matter of law. The motion is granted on the issue of whether the Department of Environmental Protection (Department) abused its discretion by failing to consider traffic impacts or to require a traffic survey prior to the issuance and subsequent reinstatement of a waste transfer facility permit since traffic surveys were submitted and reviewed by the appropriate agencies.

OPINION

Waste Management of Pennsylvania, Inc.'s (Permittee) motion to dismiss currently before the Board arises from appeals brought by Eastern Consolidation and Distribution Services, Inc., (ECD), Hugo's Services, Inc.(Hugo), Eastern Repair Center, Inc.(Eastern), Baron Enterprises (Baron), Arnold Industries, Inc. (Arnold), New Penn Motor Express, Inc.(New Penn) and Lebarnold, Inc. (Lebarnold) (collectively, Appellants) of the Department's issuance of a permit under the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended* 35 P.S. §§ 6018.101 - 6018.1003 for a waste transfer station to be constructed and operated on 1.94 acres of land in Hampden Township, Cumberland County. On July 19, 1994 Eastern Consolidation and Distribution Services Inc., Hugo's Services, Inc., Eastern Repair Center, Inc. and Baron Enterprises filed an appeal (Docket No. 94-200-MR) from the Department's issuance of Permit No. 101620 to Permittee for the waste transfer station. On July 20, 1994 Arnold Industries, Inc., New Penn Motor Express, Inc., and Lebarnold, Inc. filed their appeal (Docket No. 94-201-MR) on this Department action. On August 8, 1994 Eastern Consolidation and Distribution Services, Inc., Hugo's Services, Inc., Eastern Repair Center, Inc. and Baron Enterprises filed a motion to consolidate these appeals. By the Board's August 30, 1994 order these appeals were consolidated at Board Docket No. 94-200-C. A supplemental appeal, which is the basis for this motion, was filed on May 1, 1996.

BACKGROUND

Before addressing the legal issues and accompanying arguments raised by the parties in this appeal we will set forth general background information for all of the appellants and the history leading to the appeals.

Appellants

Appellants are seven businesses, some of whom are located in an industrial park adjacent to the proposed location of Permittee's transfer station. The seven businesses consist of the following:

> Eastern Consolidation and Distribution Services, Inc. (ECD) is a Pennsylvania corporation which operates facilities located at 405 Sterling Road, 460 Industrial Park Road, and 470 Terminal Road, Hampden Township, Cumberland County, Pennsylvania. ECD conducts trucking, warehousing, consolidation and related activities involving various products and commodities;
>
> Hugo Services, Inc. (Hugo), a Pennsylvania corporation, is the parent corporation of ECD;
>
> Baron Enterprises (Baron) is a partnership which owns property located at 460 Industrial Park Road, Hampden Township - the land upon which ECD maintains its trucking and warehousing operations;
>
> Eastern Repair Center, Inc. (Eastern) is a Pennsylvania corporation located at 460 Industrial Park Road, Hampden Township. Eastern repairs trucks;
>
> New Penn Motor Express, Inc. (New Penn) is a Pennsylvania corporation with business facilities located at 451 Freight Street, Camp Hill, Pennsylvania and 475 Terminal Road, Camp Hill, Pennsylvania. New Penn owns and operates a trucking business at these facilities;
>
> Lebarnold, Inc. (Lebarnold) is a Pennsylvania corporation with a business facility located at 4410 Industrial Park Road, Camp Hill, Pennsylvania. Lebarnold owns and operates a trucking and warehousing business at this location;
>
> Arnold Industries, Inc. (Arnold), a Pennsylvania corporation, is the parent corporation of both New Penn Motor Express and Lebarnold.

History

The permitted area consists of approximately 1.94 acres of a 16 acre parcel purchased on

December 17, 1991 by Permittee from Roadway Services, Inc. and is presently utilized by Permittee's hauling division. When Roadway Services occupied the property it performed, among other things, service and maintenance of its truck fleet. Tests performed prior to Permittee's purchase confirmed the presence of pre-existing soil and groundwater contamination on the property. On approximately March 2, 1992, Permittee submitted its application for a solid waste transfer facility to the Department. Around July 23, 1992, the Department determined that the permit application was administratively complete. By letter dated September 20, 1993 the Department sent Permittee a pre-denial letter that raised additional technical issues concerning its application. Permittee responded to the Department's correspondence by submitting additional information on November 5, 1993. Subsequently, on November 29, 1993 the Department sent a letter of inquiry to the Pennsylvania Department of Transportation (PennDOT) concerning possible traffic and safety problems. In a response dated December 8, 1993, PennDOT stated that it is the responsibility of the Permittee to obtain the services of an engineering firm to perform traffic studies. This response was misfiled by the Department and not uncovered until discovery in this matter had closed. By letter dated November 9, 1995, the Department informed the Board of this misfiling. Also on that day the Department sent Permittee a letter notifying it of the suspension of the waste transfer permit pending a resolution of the matters raised in PennDOT's December 8, 1993 letter. Subsequently, Permittee submitted traffic analysis reports from two engineering firms. On February 20, 1996, the Department sent PennDOT copies of a traffic impact analysis prepared by TriLine Associates, Inc. and Rettew Associates, Inc. submitted on behalf of Permittee, and a copy of a traffic impact analysis prepared by ACER Engineers and Consultants, Inc. submitted on behalf of Appellants. On March 11, 1996 PennDOT transmitted its response to a request for review to the Department. In that response

PennDOT stated that "both studies are consistent in concluding that existing levels of service are less than ideal" and that "[I]n this case, the developer would not be responsible for addressing the intersection." On April 2, 1996, the Department notified Permittee by letter that it had reinstated the waste transfer permit. In that letter, the Department noted that several changes were made to the permit - Condition No. 7 was amended, Conditions 15 and 16, new conditions, were added in the reinstated permit. Condition 16 provides "[a]ll vehicles waiting to be weighed at the facility must be staged on property owned or leased by Waste Management. No vehicles may be parked along Industrial Park Road." Subsequently, on May 1, 1996, Appellants filed the current supplemental appeal with the Board from the Department's reinstatement of the transfer permit. Appellants contend the Department abused its discretion because the Department failed to conduct or consider any environment assessment that met the minimum requirements of the regulations in its review and approval of the permit application.

DISCUSSION

On July 2, 1996, Permittee filed its current motion. Permittee contends that Appellants lack standing to raise traffic and traffic safety issues and that the Department did not abuse its discretion by reinstating the permit after reviewing the submitted traffic information.

Appellants filed a response in which they contend that all of the Appellants have standing. Furthermore, Appellants contend that the Department abused its discretion by reinstating the permit because it failed to adequately consider traffic impacts as required by law or to require an adequate traffic survey.

Permittee filed a reply brief on August 15, 1996 in which it reiterated its arguments.

When ruling upon a motion for summary judgment, the Board is authorized to render

summary judgment if the pleadings, depositions, answers to interrogatories, and the admissions on file, together with affidavits, if any, 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. 1035.1 - 1035.5[1] We grant such motions only in circumstances which are clear and free from doubt. *Hayward v. Medical Centre of Beaver County*, 608 A.2d 1040 (Pa. 1992). The Board must read the motion for summary judgment in the light most favorable to the non-moving party. *Hilltown Township v. DEP, et al*, EHB Docket No. 96-016-MG (Opinion issued December 4, 1996).

Standing

The first portion of Permittee's motion is based on its assertion that the Appellants lack standing to raise objections regarding the concerns of traffic and traffic safety. Permittee contends Appellants have failed to set forth how their businesses will be adversely affected by the purported increase in traffic resulting from operation of the transfer station. Furthermore, Permittee argues it is ludicrous for Appellants to contend they are adversely affected by the permit issuance when Appellants' businesses have substantially increased their own truck traffic in the industrial park.

Appellants contend that each of the Appellants has standing. Appellants argue they all have a substantial interest in the outcome of this case since they either operate businesses in the industrial park, own property in the industrial park or are parent corporations of the operating businesses in the industrial park where the transfer station is proposed to be located. Appellants argue their interest is substantial, direct, and immediate.

We deny Permittee's motion on this issue because Permittee is not entitled to judgment as

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[1] The motion was filed after July 1, 1996 so the new Pa. R.C.P. rule on summary judgment, which became effective on that date, is applicable.

a matter of law. The undisputed facts are as set forth in the Background. In order to have standing to challenge a Department action, the appellant must be "aggrieved" by that action, that is, a party must have a direct, immediate and substantial interest in the litigation challenging that action. *McCutcheon, et al v. DER, et al.*, 1995 EHB 6; *see also, William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). A "substantial" interest is "an interest in the outcome of the lititgation which surpasses the common interest of all citizens in procuring obedience to the law." *South Whitehall Twp. Police Service v. South Whitehall Twp.*, 655 A2d. 793 (Pa. 1989); *Press-Enterprise, Inc. v. Benton Area School District*, 604 A.2d 1221 (Pa. Cmwlth. 1992). For an interest to be "direct," it must have been adversely affected by the matter which is the subject of the complaint. *South Whitehall Twp. Police Service v. South Whitehall Twp.*, 655 A.2d 793 (Pa. 1989). An "immediate" interest means one with a sufficiently close causal connection to the challenged action, or one within the zone of interests protected by the statute at issue. *Empire Sanitary Landfill, Inc. DER, et al.*, 1994 EHB 1365.

We conclude Permittee has failed to carry its burden of demonstrating it is entitled to judgment as a matter of law regarding standing. Since neither party submitted a map showing business locations and truck routes as part of their exhibits, the Board can rely only on the verbal text of submitted interrogatories. We know Permittee's property is across the street from 475 Terminal Road in Hampden Township. Regarding some of the Appellants' trucking facilities' physical location in relation to the Permittee's site, we know the following:

> - New Penn's one facility is located at 475 Terminal Road, across the street from Waste Management and the other facility is located 3/4 of a mile from Waste Management;

- All of Arnold's facilities are located within a maximum of 3/4 of a mile of Waste Management;

- Lebarnold is located less than 3/4 of a mile from Waste Management;

- ECD's one location includes 470 Terminal Road which is close to 475 Terminal Road that is across from Waste Management;

- Eastern leases its 470 Terminal Road property from the owner, Baron.

The traffic studies performed by two different engineering firms both conclude that the projected development will generate a minimum of 100 truck trips in each direction (approximately 200 new truck trips) on an average weekday. Thus, it appears that all of the Appellants, as trucking facilities or owners of land on which the trucking facilities are located, have an interest in traffic and traffic safety issues by the proximity of their facilities to the proposed site and the projected increase in traffic with the development of the proposed waste transfer station. Consequently, we believe the parties have a substantial interest because their interest in the outcome of this matter surpasses the common interest of all citizens in procuring obedience to the law.

In order for an interest to be "direct," the aggrieved party must show causation of harm to his interest by the matter about which he complains. *Ferri Contracting Co., Inc. v. DER*, 1985 EHB 339. The prospective litigant should demonstrate that there is a "substantial probability" that the result he seeks would materialize. *Id.* Here Appellants are concerned that the waste transfer station will result in increased traffic and therefore increase safety concerns as a result of the increased traffic. The traffic analysis performed by two engineering firms concluded that there will be what the Board considers to be a significant increase of traffic in trash trucks for the proposed vicinity (estimated minimum of 100 truck trips in each direction on an average weekday). (Permittee's Exs.

F and G) Depositions of authorized management personnel for the Appellants indicate that they believe their truck hauling businesses could be affected because increased traffic could result in delays in unloading, loading and delivering goods to their customers. (Permittee's Exs. L and M; Appellants' Exs. A - D) This constitutes a harm to their business interests and consequently, Permittee has failed to establish Appellants do not have direct interests.

We also believe Appellants have an "immediate" interest because their trucking and hauling businesses in the industrial park, where the proposed transfer station is to be located, will be affected by the additional traffic and potential traffic safety problems which will commence with the operations of the transfer station.

With regard to Hugo and Eastern Repair Center specifically the evidence submitted to support Permittee's motion was insufficient to establish that they do not have a substantial interest in the matter. The only evidence regarding Hugo is a portion of a deposition which states that Hugo is a truck hauling operation, and an answer to an interrogatory which states that it leases 405 Sterling Road to Eastern Consolidation. Viewing the information in a light most favorable to the non-moving party, we cannot determine based on this evidence that Permittee is entitled to judgment as a matter of law. The evidence demonstrating Eastern Repair Center's standing is just as insufficient. Thus, again looking at the evidence in the light most favorable to the non-moving party, we hold that Permittee also is not entitled to judgment as a matter of law regarding Eastern Repair Center. Consequently, we must deny Permittee's motion for these parties.

For the foregoing reasons we deny Permittee's motion for summary judgment as set forth above.

Environmental Assessment

Appellants allege in their appeal that the Department abused its discretion by reinstating the permit because it failed to adequately consider traffic impacts as required by law or to require an adequate traffic survey.

In its motion Permittee contends that it is entitled to judgment on the merits because Permittee did submit a traffic study as part of an environmental assessment in accordance with the Department requirements. Permittee argues that the Department complied with the environmental assessment requirement by consulting the appropriate agencies before reinstating the permit, and therefore the Department did not abuse its discretion.

Appellants counter Permittee's argument by stating that Permittee misinterprets the regulations, specifically, 25 Pa. Code § 271.127. According to Appellants, adverse impacts from all of the issues set forth in the regulation should be analyzed as part of an "environmental assessment." The traffic studies in this case would be part of an environmental assessment, and therefore, would not address all issues which might constitute "environmental harm" as used in the regulation.

We grant Permittee's motion on the issue of submission of the traffic study. The facts are undisputed that traffic studies were completed and submitted for review as evidenced by Appellants' Exhibits F and G attached to its motion. However, Appellants' argument concerning 25 Pa. Code §271.127 goes beyond the submission of traffic studies to include a full environmental assessment. Section 271.127 provides:

> (a) Each environmental assessment in a permit application shall include at a minimum a detailed analysis of the potential impact of the proposed facility on the environment, public health and public

> safety, including traffic, aesthetics, air quality, water quality, stream flow, fish and wildlife, plants, aquatic habitat, threatened or endangered species, water uses and land use. ....
>
> (b) The Department, after consultation with appropriate governmental agencies and potentially affected persons, will evaluate the assessment provided under subsection (a) to determine whether the proposed operation has the potential to cause environmental harm. In determining whether the proposed operation has the potential to cause environmental harm, the Department will consider its experience with a variety of factors, including, but not limited to, engineering design, construction and operational deviances at comparable facilities; with inherent limitations and imperfections in similar designs and materials employed at comparable facilities; and with the limitations on future productive use of the land closure facility.

25 Pa. Code § 271.127. The Department received traffic studies submitted by Permittee as well as input from PennDOT prior to reinstating the permit. These studies were specific to the number of vehicles on and use of the adjacent road. The ACER traffic study stated that the scope of services undertaken for the analysis included:

> - Data collection including AM, Mid-Day and PM peak period manual turning traffic counts and automatic traffic counts along each approach of the subject intersection.
>
> - Evaluate the existing conditions including capacity/level of service analyses at the previously mentioned intersection.
>
> - Develop and determine the trip generation characteristics of the proposed waste transfer facility.
>
> - Conduct future conditions capacity analysis at the subject intersection with the consideration of the proposed waste transfer facility.
>
> - Evaluate the pavement section to determine the effects of the additional truck traffic.
>
> - Develop a list of conclusions resulting from the additional traffic expected to be generated by the proposed waste transfer facility.

TriLine Associates, Inc. had a similiar scope of work for its traffic impact analysis study. The study noted that the report documented the results of the following scope of services:

> - Identified study intersections and count locations for automatic traffic recorder (ATR) and manual traffic counts. (Actual roadway counts were performed for Waste Management by Rettew Associates.)
>
> - Projected the number and distribution of transfer trailers and collection trucks for the proposed facility from information provided by Waste Managment. Assigned those trips to the roadway network.
>
> - Analyzed the intersection level of service for existing and future conditions with and without the transfer station on the three study intersections.
>
> - Estimated the pavement service life for St. Johns Church Road, Trindle Road, and Industrial Park Road with and without the transfer station.

As a result of the Department's subsequent review of the environmental assessment portion of the permit application a condition was added to the reinstated permit which requires Permittee to show how vehicles will be staged or that they can be staged on property owned or leased by Permittee while waiting to be weighed at the facility. The traffic studies described herein were not designed to address any issues other than traffic and the Department's review does not include environmental impact issues other than traffic. Therefore, we will grant the motion solely on the issue of whether a traffic study was performed. In granting this part of the motion we are closing only the issue of whether the Department considered traffic impacts. Our decision, however, does not preclude Appellants from demonstrating at a hearing that the Department abused its discretion by not requesting a full environmental assessment as required by 25 Pa. Code §271.127. Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EASTERN CONSOLIDATION AND DISTRIBUTION SERVICES, INC., HUGO'S SERVICES, INC., EASTERN REPAIR CENTER, INC. and BARON ENTERPRISES, et al.	:	**EHB Docket No. 94-200-C (Consolidated with 94-201-C and 96-097-C)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASTE MANAGEMENT of PENNSYLVANIA, INC. Permittee	:	

ORDER

AND NOW, the 28th day of February, 1997, we

1) DENY Waste Management of Pennsylvania Inc.'s motion on the issue of standing regarding traffic and traffic safety issues for all the appellants;

2) GRANT Waste Management of Pennsylvania Inc.'s motion on the sole issue that the Department failed to consider traffic impact or to require an adequate traffic survey.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

EHB Docket No. 94-200-C
(Consolidated with 94-201-C
and 96-097-C)

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: February 28, 1997

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M. DIANE SMITH
SECRETARY TO THE BOARD

HORSEHEAD RESOURCE DEVELOPMENT COMPANY, INC.	:	
v.	:	**EHB Docket No. 97-002-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

HORSEHEAD RESOURCE DEVELOPMENT COMPANY, INC.	:	
v.	:	**EHB Docket No. 97-009-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 7, 1997**

OPINION AND ORDER ON MOTION OF APPELLANT TO CLOSE THE SUPERSEDEAS HEARING AND TO SEAL THE HEARING TRANSCRIPT AND EXHIBITS

By George J. Miller, Administrative Law Judge

Synopsis:

A motion to close hearings to the public is granted only to the extent that evidence may be offered at the hearing involving confidential business information in the matter of trade secrets, financial data and the identity of customers. The motion is otherwise denied. A ruling on the motion to seal the notes of testimony and the exhibits is deferred until after the hearing is completed.

DISCUSSION

These appeals arise from the issuance by the Department of orders to two customers of Horsehead Resource Development Company, Inc. (Appellant) of iron rich materials sold to them by Appellant. These orders initially required those customers to present a plan for the removal of the material which had been used for the construction of township roads and a ski resort parking lot. Those orders have since been suspended by the Department of Environmental Protection (Department) pending further discussion between the Department and Appellant's customers. Nevertheless, Appellant seeks an order from the Environmental Hearing Board (Board) superseding the orders as originally issued to its customers on the ground that these orders irreparably damage its business interest in the sale of its iron rich material to its existing and prospective customers.

The motion presently before the Board with respect to the hearing asserts that closure of the entire hearing is necessary to prevent disclosure of all testimony and argument relating to:

1. the irreparable harm being caused by the two Compliance Orders recently issued by the Department;
2. confidential business information concerning Appellant's iron rich material; and
3. the allegedly baseless threat of the iron rich material to human health and the environment.

In support of the motion, Appellant relies primarily on two decisions of the federal courts which permit the closure of a hearing or the sealing of a transcript based on a showing that disclosure will work a clearly defined and serious injury. *Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984); *In Re Iowa Freedom of Information Council*, 724 F.2d 658, 664 (8th

Cir. 1993). Neither the motion nor the supporting memorandum of law make any reference to what may be relevant Pennsylvania legal material such as the provision of Article 1, Section 11 of the Pennsylvania Constitution which provides that all courts shall be open or the Pennsylvania Right To Know Law, Act of June 21, 1957, P.L. 390, § 1, 65 P.S. § 66.1 *et seq.,* which provides that "every public record of an Agency shall, at all reasonable times, be open for examination and inspection by any citizen of the Commonwealth."

Whether or not the constitutional guarantee that court proceedings shall be open applies to administrative agencies, the Board adopts that provision as a matter of Board policy for purposes of this case. There is a strong presumption under the decided cases that the public is entitled to access to court proceedings other than discovery materials. *Hutchison v. Luddy*, 581 A.2d 578 (Pa. Super. 1990) (closure of proceedings arising out of sexual acts allegedly performed by a priest held to be improper); *In re Petition of the Daily Item*, 456 A.2d 580 (Pa. Super. 1983) (public given access to record of preliminary hearing on homicide charges). Nevertheless, this guarantee is subject to reasonable exceptions. For example, Rule 223 of the Pennsylvania Rules of Civil Procedure authorizes a court to exclude the public or persons not interested in the proceedings whenever the court deems such regulation or exclusion to be in the interest of the public good, order or morals. Accordingly, we believe that the exclusion of persons not directly interested in the proceedings from the hearings may be ordered to protect confidential business information such as the identity of customers, trade secret and financial information.

By contrast, the request of the motion to close the hearing for purposes of the evidence on whether or not the iron rich material is environmentally harmful is something that the Appellant is not entitled to because the environmental safety of this material is a matter of public interest.

In addition, the request that the hearing be closed entirely as a matter of administrative convenience to avoid the necessity of having to clear the hearing room and then reopen it on a number of occasions is not a basis for closing the hearing to the public.

The motion also requests that the transcript of the proceeding and all exhibits be taken under seal. This request is premature inasmuch as the Board cannot tell what portion of the total evidence to be offered is entitled to protection as confidential business information. Accordingly, that portion of the motion is denied without prejudice to its renewal after the evidence has been taken. The Board is concerned that the Pennsylvania Right To Know Act may prohibit the entry of such an order. If Appellant desires to pursue this request, it should submit appropriate memoranda of law to the Board detailing the basis for its request in face of this Act.

The Appellant's motion and supporting legal memorandum were filed as if the Appellant were entitled to file the motion as being confidential and submitted under seal. In the conference call with counsel yesterday, the Board ruled that these documents must be considered public documents notwithstanding the marking of the motion and related brief as being confidential and submitted under seal.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HORSEHEAD RESOURCE DEVELOPMENT COMPANY, INC.	:	
v.	:	**EHB Docket No. 97-002-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

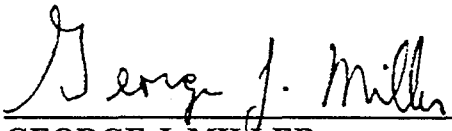
HORSEHEAD RESOURCE DEVELOPMENT COMPANY, INC.	:	
v.	:	**EHB Docket No. 97-009-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 7th day of March, 1997, the Appellant's motion to close the supersedeas hearing and to seal the transcript and exhibits is **GRANTED** only to the extent that the Board will be willing to close the hearing for the presentation of evidence which might reveal protected trade secrets, confidential customer information or confidential financial data. The motion to close the supersedeas hearing is otherwise **DENIED**. A ruling on the motion to seal the hearing transcript and

exhibits is **DENIED** at this time without prejudice to renewal of that motion after the hearing has been held.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: March 7, 1997

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M. DIANE SMITH
SECRETARY TO THE BOAR

EAGLE ENVIRONMENTAL, L.P.	:	
	:	
v.	:	**EHB Docket No. 96-215-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PENNSYLVANIA FISH AND BOAT COMMISSION, JEFFERSON COUNTY COMMISSIONERS, JEFFERSON COUNTY SOLID WASTE AUTHORITY and CLEARFIED-JEFFERSON COUNTIES REGIONAL AIRPORT AUTHORITY, Intervenors	:	**Issued: March 12, 1997**

OPINION AND ORDER ON MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis:

Before the Board is the Pennsylvania Fish and Boat Commission's (Commission) motion to dismiss an appeal from an order of the Department of Environmental Protection which revoked several permits which had been issued for the construction of a municipal waste landfill because of the proximity of the proposed landfill to a wild trout stream. Specifically, the Commission argues that the Board lacks subject matter jurisdiction, and the appellant has failed to state a claim upon which relief can be granted because the appeal requests review of an action of the Commission in classifying waterways as wild trout streams. In the alternative, the motion requests the Board to strike certain objections of the notice of appeal and/or limit the issues of the appeal. The Board

holds that the motion to dismiss is denied because it does have subject matter jurisdiction over the appeal to the extent that it seeks review of the Department's reliance upon the action of the Commission, but will strike certain objections of the notice of appeal which the Board has no authority to review.

OPINION

On September 25, 1996, the Department issued an order to Eagle Environmental, L.P. (Appellant) which suspended or revoked an encroachment permit for the filling of wetlands, a solid waste permit and an air quality permit (collectively, landfill permits) which had been issued to the Appellant for the construction and operation of a municipal waste landfill known as the Happy Landing Landfill located in Washington Township, Jefferson County. The order stated that the Department was revoking these permits because it had received correspondence from the Commission informing the Department that several water courses near the proposed landfill were wild trout streams. Pursuant to the Department's regulations the presence of the wild trout streams meant that the wetlands on or near the site were "exceptional value wetlands" and the operation of a landfill within 300 feet of such wetlands was prohibited.[1]

The Appellant filed a timely appeal from this order. The Commission filed a motion to intervene in the case because the Appellant's notice of appeal challenged the Commission's classification of the waterways as wild trout streams and the Department's reliance upon that classification. The Commission's intervention request was granted and it shortly thereafter filed this motion.

---

[1] *See* 25 Pa. Code § 273.202(a)(2).

The Department's regulations define exceptional value wetlands as, among other things, "[w]etlands that are located in or along the floodplain of the reach of a wild trout stream . . . ." 25 Pa. Code § 105.17. A wild trout stream is defined as "[a] stream classified as supporting naturally reproducing trout populations by the Fish Commission." 25 Pa. Code § 105.1. The Commission argues that the Appellant's notice of appeal must be dismissed because it is predicated upon the Commission's classification of the water courses as wild trout streams, that this Board has no authority to review actions taken by the Commission, and that the Department is bound by the Commission's classification. The Appellant argues that the Board has the authority to review the actions of the Commission in the context of its review of whether or not the Department abused its discretion in relying upon the correspondence from the Commission in revoking the landfill permits.

We agree that the Board does not have jurisdiction under the Environmental Hearing Board Act to directly review actions of the Commission. However, the Board is clearly authorized to review actions of the Department and determine whether or not those actions amount to an abuse of discretion or error of law. Section 4 of the Hearing Board Act, Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. § 7514.

The Board has often examined determinations made by agencies other than the Department to aid in its determination of whether or not the Department's reliance on those agency determinations was reasonable under the circumstances. *See, e.g., Heasley v. DER*, 1991 EHB 1758 (evaluation of traffic safety by the Department of Transportation); *County of Schuylkill v. DER*, 1989 EHB 1241 (evaluation of the historical value of bridge abutments by the Pennsylvania Historic and Museum Commission). Accordingly, to the extent that the Appellant's notice of appeal challenges

the propriety of the Department's reliance upon the Commission's classification of the wild trout streams, those objections to the Department's action are reviewable by the Board

The Commission argues that these decisions are inapposite because it is an independent commission with primary authority for the protection of fish in the waters of the Commonwealth and has been entrusted by the regulations of the Environmental Quality Board to determine what are wild trout streams for purposes of Pennsylvania's water quality regulations. See 25 Pa.Code § 105.1. Eagle contends in its Surreply brief, however, that this is an unlawful delegation of power from the EQB which has the sole authority to adopt water quality regulations. Eagle claims that this power cannot be delegated and, in any event, the Commission has no power to issue water quality regulations under its enabling statute. In addition, Eagle argues that any such designation would be a regulation under the Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, as amended, 45 P.S. §§ 1102-1205 & 45 Pa. C.S. §§ 501-907, and that this designation is unenforceable as to the Appellant because it was never published in accordance with that law in the Pennsylvania Bulletin. *See, DER v. Rushton Mining Co.*, 591 A.2d 1168, 1173 (Pa. Cmwlth. 1991). Finally, Eagle argues that there is a dispute of material fact as to whether or not the Commission, as distinguished from only its staff members, has made such a designation.

We cannot finally resolve this entire dispute at this time based only on the Commissions's motion. Whether the determination made by the Commission's staff is binding on the Department is a mixed issue of law and fact on which the Commission's right to dismissal of the appeal is not clear. However, it is clear that the Board has jurisdiction to resolve this dispute after a full hearing on the merits. Whether the Department properly relied on such a determination to affect the property rights of a permit holder without at least requiring compliance with the Commonwealth

Documents Law are issues over which this Board has jurisdiction. *See, Concerned Citizens v. DER*, 632 A.2d 1 (Pa. Cmwlth. 1993). Whether such an action comports with due process requirements is also within the Board's jurisdiction. *Middle Creek Bible Conference v. DER*, 632 A.2d 295, 301 (Pa. Cmwlth. 1994).

The Commission next argues that the Board can grant no relief because the Appellant failed to appeal the classification of the wild trout streams to the Commission. Whether the Appellant appealed the classification to the Commission is not directly relevant to our determination concerning the Department's reliance upon that classification in its decision to revoke or suspend the permits which had been issued to the Appellant, and the relief which we may ultimately fashion. In short, if the Board finds that the Department erred in relying upon the Commission's classification of the waterways as wild trout streams, the Board can grant relief by, for example, ordering the Department to reinstate the revoked and suspended permits.

Finally, the Commission argues that the objections in Paragraph 7 and Paragraphs 17-22 of the Appellant's notice of appeal should be stricken. We deny the motion to strike Paragraph 7 of the notice of appeal. This paragraph charges an abuse of discretion on the part of the Department because the streams identified in the Department's order were not classified by the *Commission* as wild trout streams within the meaning of the Department's regulations. As stated previously, it is a proper function of this Board to determine whether or not the Department properly relied upon any such findings of the Commission as being binding on the Department at least without publication as may have been required by the Commonwealth Documents Law.

However, we agree that Paragraphs 17-20 and Paragraph 22 of the notice of appeal must be stricken. These objections directly charge the Commission with abusing its discretion in classifying

the wild trout stream. This Board does not have jurisdiction to make that determination.

Paragraph 21 of the notice of appeal states that both the Department and the Commission acted arbitrarily in relying on data collected during the site visits which resulted in the classification of the waterways as wild trout streams because the visits violated the Appellant's constitutional rights. We will allow this objection to the extent that it challenges the actions of the Department, but caution the Appellant that the scope of our review is limited to determining whether or not the Department acted contrary to the law or abused its discretion. To the extent that the Commission violated the law or the Appellant's rights, the Appellant must seek relief elsewhere.

Accordingly, we enter the following:[2]

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[2] The Commission's motion also included a motion to suspend Joint Case Management Order No. 2 and suspend discovery. These motions have been resolved by the issuance of Joint Case Management Order No. 3 issued on January 28, 1997.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EAGLE ENVIRONMENTAL, L.P.	:	
	:	
v.	:	**EHB Docket No. 96-215-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PENNSYLVANIA FISH AND BOAT COMMISSION, JEFFERSON COUNTY COMMISSIONERS, JEFFERSON COUNTY SOLID WASTE AUTHORITY and CLEARFIED-JEFFERSON COUNTIES REGIONAL AIRPORT AUTHORITY, Intervenors	:	

ORDER

AND NOW, this 12th day of March, 1997, the motion of the Pennsylvania Fish and Boat Commission to dismiss the appeal in the above-captioned matter is hereby DENIED. The motion of the Pennsylvania Fish and Boat Commission to strike Paragraphs 17-20, and Paragraph 22 of the Notice of Appeal of Eagle Environmental, L.P. is GRANTED. The remainder of the motion of the Pennsylvania Fish and Boat Commission is otherwise denied.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 12, 1997

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Jefferson County Solid Waste Authority
Clearfield-Jefferson Counties Regional Airport Authority
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M. DIANE SMITH
SECRETARY TO THE BOARD

WESTVACO CORPORATION	:	
	:	
v.	:	**EHB Docket No. 96-119-MR**
	:	**(Consolidated with 96-127-MR**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW ENTERPRISE STONE AND LIME CO., INC., Permittee	:	**and 96-136-MR)**
	:	**Issued:** March 13, 1997

OPINION AND ORDER ON MOTION TO DISMISS

By Robert D. Myers, Administrative Law Judge

Synopsis:

The Board grants the Department's motion to dismiss an appeal, seeking review of the withdrawal of an application for a permit revision, for lack of jurisdiction. The Board has no jurisdiction over the Department's failure to act and lacks authority to compel it to do so.

OPINION

On June 3, 1996, Westvaco Corporation (Appellant) filed a Notice of Appeal seeking review of the Department of Environmental Protection (Department)'s decision to discontinue its consideration of New Enterprise Stone & Lime Company, Inc. (New Enterprise)'s application for a revision to the Narehood Mine Drainage Permit (MDP No. 4275SM14(T)) pertaining to operations in Snyder and Warriors Mark Townships, Blair and Huntingdon Counties. The proposed activity (operation of a relocatable asphalt plant), Appellant alleges, should be subject to a mine drainage permit pursuant to the Non-Coal Surface Mining Conservation and Reclamation Act (Non-Coal

Surface Mining Act), Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301- 3326. Without a permit, the activity will adversely affect the exceptional quality groundwater supply wells which provide Appellant's paper mill in Tyrone, PA with necessary process water.

On August 2, 1996, this appeal was consolidated at 96-113-MR with four other appeals (96-113-MR, 96-127-MR, 96-136-MR and 96-137-MR) relating to New Enterprise's asphalt and attendant mining operations. Two of those appeals, 96-113-MR and 96-137-MR, have since been withdrawn, and the remaining appeals were reconsolidated here.[1]

On December 30, 1996, the Department filed a Motion to Dismiss the appeal at 96-119-MR (Motion), claiming that the Board lacks jurisdiction or that the appeal is moot.[2] The Motion was accompanied by a supporting memorandum of law. Appellant filed a response and supporting memorandum of law on January 20, 1997, to which the Department replied by memorandum on February 10, 1997. New Enterprise filed a memorandum of law in support of the Department's Motion on January 30, 1997; Appellant replied to it on February 19, 1997.

The Motion raises, in part, the issue of whether the Department, in returning New Enterprise's application for a permit revision, took a final appealable action.

New Enterprise filed the application with the Department on or about January 29, 1996, seeking to add 20 acres to the area already permitted and to construct and operate an asphalt plant and related mine operations on part of the proposed addition. Subsequently, New Enterprise decided

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[1] In addition to the appeal at 96-119-MR, the other two remaining appeals deal with an air quality plan approval (96-127-MR) and a storm water discharge approval (96-136-MR) for a relocatable batch asphalt plant in Warriors Mark Township, Huntington County.

[2] Also submitted was a Motion for Rule to Show Cause why the Notice of Appeal should not be dismissed for lack of jurisdiction as having been untimely filed. Because of our disposition of the present Motion we need not consider the Motion for Rule to Show Cause.

not to pursue mining activities at the proposed facility. New Enterprise so informed the Department in an April 15, 1996, letter that stated it was withdrawing the application since it had decided to limit the operation to non-mining activities. In response, on April 19, 1996, the Department returned extra copies of the application to New Enterprise, and terminated its review of the application.

In its Notice of Appeal, Appellant challenges the Department's "return" of New Enterprise's application claiming that it was an abuse of discretion to allow the application to be withdrawn. Appellant urges us to consider this decision an appealable action because, it argues, once the application was submitted, the Department began reviewing it and could have stopped its withdrawal.[3]

While the denial or issuance of an application for a permit revision is a final appealable action, the Department's inaction on an application is not.[4] *Westinghouse Electric Corp. v. DER*, 1990 EHB 515. As the Department asserts, it neither denied New Enterprise's application nor issued the permit revision sought. Instead, the application was simply returned. Regardless of whether or not the Department "considered" the withdrawal before actually returning the application, no appealable "action" resulted because the Department did not make a "decision, determination or ruling. . . affecting personal or property rights, privileges, duties, liabilities or obligations of a

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[3] In its memorandum of law, Appellant cites a Department letter as evidence that the Department actively reviewed and deliberated the application before "allowing" it to be withdrawn. Even if the letter were relevant to the disposition of the Motion, we would not consider it here as we are precluded from considering factual allegations contained in legal memoranda. *County of Schuylkill v. DER*, 1990 EHB 1370.

[4] Appellant cites at least one decision in which the Board allowed an appeal from the Department's inaction. However, while a few older Board decisions held that our jurisdiction included consideration of Departmental inaction, following the Commonwealth Court's ruling in *Marinari v. Department of Environmental Resources*, 566 A.2d 385 (Pa. Cmwlth. 1989), they have been overruled by the Board in *Westinghouse Electric Corp. v. DER*, 1990 EHB 515.

person." 25 Pa. Code § 1021.2(a). *Westtown Sewer Co. v. DER*, 1992 EHB 979. We can only review Departmental actions after they have been taken.

Appellant's contention that the Department could have prohibited New Enterprise from withdrawing the application is preposterous. Nothing in our statutes, regulations or system of laws requires an applicant to continue with the application process to final action. Just as filing the application initially is a voluntary act, continuing with it is also voluntary. The applicant can change its mind at any time and withdraw.[5]

We recognize that the Department, as part of its enforcement policy, often directs (formally or informally) a violator to apply for a permit to bring an illegal operation into compliance. If the violator later withdraws the application, the Department may choose to take some other enforcement action. While Department intentions to take some other action may persuade the violator to continue with the application, the decision whether or not to declare such intentions is prosecutorial discretion over which this Board has no control.

The decision in *Dithridge House Assoc. v. Department of Environmental Resources*, 541 A.2d 827 (Pa. Cmwlth. 1988), is not to the contrary, as Appellant argues. There the Department was attempting to regulate condominium swimming pools despite a 1979 amendment to the Public Bathing Law. Because of Department pressure, the appellant had filed an application for a permit but later withdrew it. The Department refused to allow the withdrawal and, in fact, denied the permit. Since the appeal involved a final permit action by the Department, the Board's jurisdiction

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[5] We express no opinion on the appealability of the Department's returning an application over an appellant's objection.

over the withdrawal issue never arose.[6]

Appellant argues, in addition, that by allowing New Enterprise to withdraw its application for an MDP revision, the Department allowed New Enterprise to continue violating provisions of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001, the Non-Coal Surface Mining Act and other applicable statutes and regulations. It also contends a *de facto* amendment to the MDP permit was granted "by approving the location and operation of the asphalt plant through, *inter alia*, the issuance of permits or approvals - without requiring New Enterprise to complete the MDP revision application process." As a result, New Enterprise may be currently violating its MDP permit or laws of the Commonwealth.

As discussed above, the Department had enforcement powers to require certain activities to be permitted. The Department is legislatively authorized, and in fact carries a duty, to administer and enforce the various environmental acts. However, its decision to exercise prosecutorial enforcement is discretionary. The Board, as a tribunal with jurisdiction limited to that conferred by the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511 - 7516, lacks equitable power to review prosecutorial decisions of the Department. *Supra Westtown* at 996; *North Poccono Taxpayers' Assoc. v. DER*, 1994 EHB 449.

As we have no power to control the Department's decision to return an application or to compel it to exercise its enforcement authority, we are satisfied that the relief sought by Appellant in this appeal is beyond our jurisdiction. Accordingly, the appeal is dismissed.

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[6] The Board held that appellant's swimming pool was still covered by the Public Bathing Law and that the Department was justified in denying the permit because the swimming pool did not comply with the regulations (1989 EHB 513). Commonwealth Court reversed the Board and held that condominium swimming pools were not covered by the Law.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WESTVACO CORPORATION	:	
	:	
v.	:	**EHB Docket No. 96-119-MR**
	:	**(Consolidated with 96-127-MR**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 96-136-MR)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and NEW ENTERPRISE	:	
STONE AND LIME CO., INC. Permittee	:	

ORDER

AND NOW, this 13th day of March 1997, it is hereby ordered as follows:

1. The Motion to Dismiss is granted.

2. The appeals consolidated at 96-119-MR are unconsolidated.

3. The appeal originally docketed at 96-119-MR is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 96-119-MR
(Consolidated with 96-127-MR
and 96-136-MR)

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 13, 1997

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

For the Commonwealth, DEP:
Kurt J. Weist, Esquire
Southcentral Region

For Appellant:
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M. DIANE SMITH
SECRETARY TO THE BOAF

BETHENERGY MINES, INC.	:	
	:	
v.	:	**EHB Docket No. 90-050-MR**
	:	**(Consolidated with 90-058-MR,**
	:	**90-059-MR, 90-114-MR, 91-018-MR,**
	:	**91-050-MR, 91-426-MR)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: March 17, 1997**
PROTECTION	:	

OPINION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

By Robert D. Myers, Administrative Law Judge

Synopsis:

The Board denies the Department of Environmental Protection's (DEP) motion for summary judgment and grants in part the Petitioner's motion for summary judgment in connection with an application for legal fees and costs. The Board reaffirms its prior ruling that, because DEP relied (in part) on § 5(e) of the Bituminous Mine Subsidence and Land Conservation Act (BMSLCA) as the legal basis for its order, the underlying proceeding was a proceeding under § 5 of BMSLCA and Petitioner can recover legal fees and costs to the extent they relate to § 5(e) of BMSLCA. The Board examines the issues raised in Petitioner's post-hearing brief in the underlying proceeding and rules that all but four relate to § 5(e) of BMSCLA. The parties, who have stipulated to the total amount of Petitioner's claim, are to attempt to stipulate to the portion applicable to the arguments unrelated to § 5(e) of BMSLCA.

OPINION

Bethenergy Mines, Inc. (Petitioner) owns and operates an underground bituminous coal mine (Cambria Mine #33) under Coal Mining Activities Permit (CMAP) No. 11841301 issued by the Department of Environmental Resources, now known as the Department of Environmental Protection. On December 27, 1989, DEP issued an Order charging Petitioner with adversely affecting the Roaring Run watershed, the Howells Run watershed and the North Branch Little Conemaugh River watershed and directing Petitioner to take remedial action. Petitioner appealed this Order to this Board at Docket No. 90-050. Subsequent appeals from modifications to this Order were filed at Board Docket Nos. 90-058, 90-059, 90-114, 91-018, 91-150 and 91-426. The first three of these were consolidated at Docket No. 90-050 in March 1990. The last three were consolidated at Docket No. 91-018 and stayed pending disposition of the earlier appeals. On July 11, 1994, this Board (with one member dissenting) rendered an Adjudication (1994 EHB 925) sustaining the appeals consolidated at Docket No. 90-050.

On September 9, 1994, Petitioner filed a Petition for Payment of Costs and Attorney's Fees pursuant to Section 4(b) of the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.4(b), and § 5(g) of the Bituminous Mine Subsidence and Land Conservation Act (BMSLCA), Act of April 27, 1966, Sp. Sess., P.L. 31, *as amended*, 52 P.S. § 1406.5(g). DEP filed a Response on October 13, 1994.

DEP filed a Motion to Dismiss which this Board denied in an Opinion and Order issued December 7, 1995 (1995 EHB 1270). In that decision, this Board held that (1) Petitioner had not waived its right to petition for an award of legal fees and costs, that (2) the petition could not be entertained under Section 4(b) of SMCRA, but (3) could be entertained under § 5(g) of BMSLCA

despite the fact that the underlying proceeding was, by nature, an enforcement action.

Following the Board's December 7, 1995 decision, the parties engaged in discovery and, on March 8, 1996, filed with the Board a Joint Stipulation as to the amount and reasonableness of the legal fees and costs claimed by Petitioner, thereby eliminating the need for a hearing on that aspect of the case. Petitioner filed its pre-hearing memorandum on October 4, 1996 and DEP filed its pre-hearing memorandum a month later on November 4, 1996.

Petitioner filed a Motion for Summary Judgment together with exhibits and brief on December 30, 1996. DEP filed its own Motion for Summary Judgment with supporting legal memorandum on the same date. Each party responded to the other's motion on January 24, 1997 and Petitioner filed a reply brief on February 15, 1997. These motions raise issues this Board has struggled with over the past seven years, trying to delineate the circumstances under which legal fees and costs can be awarded under Pennsylvania's mining statutes.

We held in our December 7, 1995 Opinion and Order that the language in § 5(g) of BMSLCA, 52 P.S. § 1406.5(g), empowering the Board "in its discretion to order the payment of costs and attorney's fees it determines have been reasonably incurred...in proceedings pursuant to this section," should be interpreted to encompass proceedings arising under all of § 5 (1995 EHB 1270, 1276). This was based upon the interpretation of identical language in Section 4(b) of SMCRA, 52 P.S. § 1396.4(b), adopted in *Big B Mining Co. v. DER,* 1990 EHB 248, *reversed on other grounds,* 597 A.2d 202 (Pa. Cmwlth. 1991), *allocatur denied,* 602 A.2d 862 (Pa. 1992).

We observed that one of the components of § 5 is § 5(e) which reads as follows:

> An operator of a coal mine subject to the provisions of this 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 forseeable use of such surface land: Provided, however, That nothing in this subsection shall be construed to prohibit planned subsidence in a predictable and controlled manner or the standard method of room and pillar mining.

Because DEP in its December 27, 1989 Order charged Petitioner with violating § 5(e) and more critically, cited § 5(e) as one of the statutory provisions authorizing the Order, we concluded that Petitioner's appeal of the Order was, in part at least, a proceeding pursuant to § 5. To the extent that Petitioner's claim fell within the scope of § 5, it could be entertained.

We noted that the proceeding, by its nature, was an enforcement action that ordinarily would fall outside the scope of § 5 and, therefore, not be a proper basis for a claim for attorneys fees and costs, following the reasoning in *McDonald Land & Mining Company v. Department of Environmental Resources,* 664 A.2d 194 (Pa. Cmwlth. 1995). It was DEP's reliance on § 5(e) as support for its Order that convinced us that the proceeding was also under § 5.

DEP challenges this ruling in its Motion for Summary Judgment. Petitioner argues that our December 7, 1995 Opinion and Order is final on the point and no longer open to question. That Opinion and Order dealt with a Motion to Dismiss the Petition on the grounds that it could not be entertained either under SMCRA or under BMSLCA and because Petitioner had waived any rights to seek an award. Our decision denying the Motion to Dismiss was interlocutory, allowing the proceedings to continue toward final resolution. Neither party, therefore, is prohibited from challenging any portion of that ruling in the final dispositive motions now before us.

We may grant summary judgment (1) whenever the record shows that the material facts are undisputed, or (2) whenever the record contains insufficient evidence of facts to make out a *prima*

facie cause of action or defense. Pa. R.C.P. 1035.1-1035.5. We must view the motion in the light most favorable to the non-moving party. *Robert C. Penoyer v. DER,* 1987 EHB131.

It is intriguing that both DEP and Petitioner rely on the deposition of Marc A. Roda, Esquire, the DEP legal counsel involved in drafting the December 27, 1989 Order. We have carefully read Roda's deposition and considered the arguments of the parties on this point but find no reason to change our ruling that the underlying proceeding in this case was, in part, a proceeding under § 5 of BMSLCA. Among the relevant portions of Roda's testimony are the following:

> Q Does [5(e)] impose post permit issuance obligations on an operator?
> A Yes.
> Q I think you said you were involved in the development of the subsidence regulation, is that correct?
> A Uh-huh.
> Q Do you have any idea why post permit issuance obligations are contained within the permit application provisions of the subsidence act?
> A No. I was not a party to the crafting of the statute, so why it was exactly placed there I'm not sure. But the language was always very broader than just permit application requirements.
> Q Now, again - -
> A The rationale for that is you can approve a permit today, but the affirmative obligation is to mine so as not to cause damage. And the statute enumerates the types of damage you're concerned about.
> (Deposition, page 19, line 15 to page 20, line 7).

> Q Which I believe you characterized as section [5(e)] being one of the key pieces of statutory authority for the promulgation of those regulations?
> A Right. As I said, [5(e)] imposes on the operator performance obligations that are independent of the permit.
> (Deposition, page 34, line 33 to page 35, line 2).

> Q That's the regulations. What about the statutory authority?
> A The statutory authority is Section 9 in the act and to some extent also [5(e)] because it requires them to adopt measures to prevent subsidence from causing damage.

(Deposition, page 39, lines 1 to 5).

Q My question was whether in your opinion Section [5(e)] grants the Department authority to issue orders.

MS. WYMAN: His opinion now or his opinion at the time --

MR. JUGOVIC: At the time he issued the order.

THE WITNESS: At the time I issued the order the question never came up. With Section 9 being express language dealing with enforcement authority, that was the governing language for enforcement authority. We did not consider [5(e)] as an enforcement authority section. It's performance obligation.

BY MR. JUGOVIC:

Q I just want to make clear Section [5(e)] is listed in the therefore clause --

A Right.

Q -- in the order that was issued in 1989. Was it listed in there because you believed at that time that it granted the Department authority to issue orders?

A It's listed there because it requires individuals to adopt measures to prevent subsidence from causing damage, and that is the authority for the order. They're obligated to not cause damage. So in that sense it is authorize for the order.

Q Let me read Section [5(e)] to you.

A Okay.

Q [Section read] ...Does that language -- forgetting about Butler County Mushroom Farm and eliminating -- forgetting about Section 9, does that language in your opinion when you issued the order of September 1989 -- or in December 1989 was it your opinion that that language granted the Department the authority to issue orders in and of itself alone?

A I never asked that question whether [5(e)] by itself alone provided the authority in '89. That question wasn't considered.

(Deposition, page 86, line 1 to page 87, line 22).

A ...Can I go back to a question you asked earlier?

Q Yes. You could qualify your answer to any question now or after the deposition when you read it. So if you want to do it now, that's fine.

A Going back to the [5(e)] Section 9 question we always viewed section [5(e)] as imposing on operators an obligation to mine -- even after a permit is issued, the permit doesn't address the specific situation -- to mine so as not to cause damage as listed in that section. That's an independent obligation.

Because of the presence of Section 9 we never had to worry whether [5(e)] provided independent authority for the order. We didn't have to worry about that issue.

(Deposition, page 72, lines 7 to 20)

Roda's testimony supports the Board's conclusion in the December 7, 1995 Opinion and Order that "DEP interpreted the provision [§ 5(e)] as imposing on Petitioner a continuing obligation to adopt measures to prevent subsidence, to maximize mine stability, and to maintain the value and reasonable forseeable use of surface land." (1995 EHB 1270, 1277). Because of this interpretation by DEP, we concluded that the underlying proceeding constituted "proceedings pursuant to this section" as used in § 5(g). We reaffirm these conclusions now.

DEP argues, however, that the ruling disregards Commonwealth Court's holding in *McDonald Land & Mining Company, supra,* 664 A.2d 194 (Pa. Cmwlth. 1995). We agree with DEP's statement that under *McDonald* it is the nature of the DEP *action* and not the nature of the *violations* that determine whether a proceeding is under § 5 of BMSLCA (Section 4 of SMCRA in *McDonald*). That is the essence of the distinction between the two cases that prompted our conclusion in the December 7, 1995 Opinion and Order. The preamble to the ordering paragraphs in the December 27, 1989 Order states:

> Now therefore, pursuant to Sections 5(e) and 9 of the Mine Subsidence Act [BMSLCA] ... it is ordered that:

This is DEP's own statement for the authority to issue the Order. Section 5(e) was specifically cited, according to Roda, because DEP considered it to impose on Petitioner a continuing obligation rather than merely a permit application requirement. It was one of the statutory grounds for the Order, along with Section 9. Whether § 5(e) was, by itself, sufficient authority for the Order never came up because both it and Section 9 were used.

The DEP order involved in *McDonald,* by contrast, did not contain any citation to Section 4 of SMCRA (footnote 4, 1995 EHB 32, 34). DEP relied there solely on provisions of SMCRA

authorizing DEP to administer and enforce the statute. Had DEP followed that practice here (as we noted in our December 7, 1995 Opinion and Order), we would have dismissed Petitioner's request for fees and costs. Since DEP cited § 5(e) of BMSLCA, it made its action, in part, a proceeding under § 5. The nature of the *action* being the controlling factor under *McDonald,* we have no hesitancy in reaffirming this conclusion.

Accordingly, we will deny DEP's Motion for Summary Judgment on the issue and grant summary judgment to Petitioner.

Petitioner has to show that the costs and attorneys fees it is claiming fall within the scope of § 5(e) of BMSLCA. Petitioner argues that the primary focus of the underlying litigation was on § 5(e) of BMSLCA because DEP maintained that Petitioner's mining operations impacted the value and reasonable forseeable use of surface lands by adversely affecting three streams and their watersheds. To respond to DEP's contention, Petitioner also had to focus primarily on § 5(e).

Roda's deposition makes clear that Petitioner is correct on this point. DEP viewed § 5(e) as imposing a continuing obligation on the miner to prevent subsidence from causing surface damage (see deposition excerpts quoted above). If surface damage occurred, the miner had to modify the mining practices and repair the surface damage (Deposition, page 16, lines 12 to 14; page 27, lines 1 to 3; page 41, lines 17 to 21; page 52, lines 13 to 20; etc.). To sustain the December 27, 1989 Order, DEP (the Party with the burden of proof) had to show the following:

> A Okay. In the Department's opinion we had to, one, establish first and foremost that the streams were perennial prior to the mining activity. If they were not perennial streams prior to the mining activity, they were not entitled to protection under the law. So we had to demonstrate that these were perennial streams.
>
> And the testimony of Miss Earl with respect to aquatic life, a lot of her testimony went to showing that the upper reaches were perennial prior to mining or the upper reaches that were in effect were as a matter of fact still perennial.

> We needed to establish that the lower reaches were perennial; that they should have been perennial. A lot of testimony of Mr. Miller went to the hydrology of the area; that the upper area was perennial and the stream should continue to be perennial.
>
> Once establishing that the stream should be a perennial stream the next factual issue that has to be established is that subsidence is responsible for that stream not being perennial. The flow data went to both showing that the stream should have been perennial and that the loss of water is due to an unnatural cause.
>
> The testimony, the evidence introduced by both Mr. Motycki and Mr. Shueck went specifically to the issue of causation for the mining activity, and this was the bulk of the case.
>
> (Deposition, page 32, line 23 to page 33, line 23).

In order to respond to DEP's evidence, Petitioner had to have its own experts and present their testimony (along with other witnesses) to show that the streams were not perennial and that the mining activity had not affected them or their watersheds. Petitioner's efforts succeeded to the point that this Board ruled in its Adjudication (1994 EHB 925) that DEP had not sustained its burden of proof. Certainly, all legal fees and expenses related to this aspect of the case stem from the provisions of § 5(e) of BMSLCA and can be claimed under § 5(g).

Petitioner's post-hearing briefs in the underlying proceeding reveal that Petitioner challenged the December 27, 1989 Order by arguing that [1] (1) DEP had not proved that the streams were perennial and had been affected by Petitioner's mining operations; (2) 25 Pa. Code § 89.143(d) and § 89.145(a) are invalid to the extent they apply to nonpublic water supply perennial streams; (3) § 5(e) of BMSLCA cannot be construed to protect nonpublic water supply perennial streams; (4) 25 Pa. Code § 89.52(a) cannot be construed to apply to nonpublic water supply perennial streams; (5) 25 Pa. Code § 89.145(a), even if valid, cannot be applied retroactively; (6) the Clean Streams Law (CSL), Act of June 22, 1937, P.L.1987, *as amended*, 35 P.S. §§ 691.1 - 691.1001, provides no

[1] These are the Board's paraphrases of the arguments.

authority for DEP's December 27, 1989 Order; (7) Section 1917-A of the Administrative Code of 1929 (Adminstrative Code), Act of April 9, 1929, P. L. 177, *as amended*, 71 P.S. § 510-17, provides no authority for DEP's Order; (8) DEP's Order to repair the streams did not consider technical and economic feasibility required by 25 Pa. Code § 89.145(a); (9) DEP's Order constitutes an unconstitutional taking of Petitioner's property rights; (10) DEP is estopped by its prior approval of 6-month mining maps; (11) exhibit 32 should have been admitted.

In our opinion, all of these arguments except (6), (7), (10) and (11) pertain to the requirements of § 5(e) of BMSLCA or the regulatory sections stemming from it. Since (6) and (7) deal with the other statutory authority DEP cited to support issuance of its December 27, 1989 Order, Petitioner was put in the position of having to contest their applicability. Estoppel (10) was also an appropriate argument to raise under the circumstances. Exhibit 32 (11) concerned a statement by a DEP legal counsel questioning DEP's authority to issue the December 27, 1989 Order. It was also appropriate for Petitioner to raise this argument.

Because the Board held in its Adjudication that DEP had not sustained its burden of proof, it saw no reason to deal with Petitioner's other arguments, specifically mentioning (2), (5), (6), (7), (8), (9), (10) and (11).[2] All of the arguments were appropriate, in our opinion, but (6), (7), (10) and (11) either dealt with other statutory provisions or else dealt with issues remote from § 5(e) of BMSLCA.[3] Fees and costs related to them cannot be awarded.

Petitioner argues that all of the issues were intertwined and related to the same core of facts.

---

[2] 1994 EHB 925, 978.

[3] The 6-month mining maps approved by DEP and forming the basis for Petitioners's estoppel argument in (11) are required by Section 8 of BMSLCA, 52 P.S. §1406.8.

While that certainly is true to a great extent, we believe that (6), (7), (10) and (11) are separate issues that stand primarily on their own -- and apart from § 5(e) of BMSLCA.

Petitioner and DEP stipulate that $572,500 is the amount of fees and costs recoverable by Petitioner if successful in its application. We have no way of knowing how much of this figure pertains to the arguments -- (6), (7), (10) and (11) -- we have found to be unrelated to § 5(e) of BMSLCA. We will schedule a hearing for that purpose unless the parties can reach a further stipulation on the point.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BETHENERGY MINES INC.,	:	
	:	
v.	:	**EHB Docket No. 90-050-MR**
	:	**(Consolidated with 90-058-MR,**
	:	**90-059-MR, 90-114-MR, 91-108-MR,**
	:	**91-150-MR, 91-426-MR)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 17th day of March, 1997, it is ordered as follows:

1. DEP's Motion for Summary Judgment is denied.

2. Petitioner's Motion for Summary Judgment is granted to the extent set forth in the foregoing Opinion.

3. The parties will confer and advise the Board on or before April 7, 1997, whether they can stipulate to that portion of the $572,500 which relates to arguments (6), (7), (10) and (11).

ENVIRONMENTAL HEARING BOARD

George J. Miller

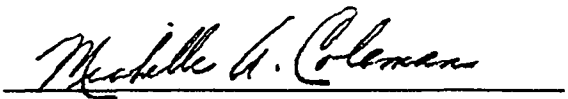
GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. Docket No. 90-050-MR
(Consolidated with 90-058-MR,
90-059-MR, 90-114-MR, 91-018-MR,
91-050-MR, 91-426-MR)

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 17, 1997

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

For the Commonwealth, DEP:
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George Jugovic, Jr., Esquire
Southwest Region

For Appellant:
Henry Ingram, Esquire
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WESTMARK DIVERSIFIED, INC.	:	
	:	
v.	:	**EHB Docket Nos. 96-089-C**
	:	**96-095-C**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued:** March 18, 1997
PROTECTION	:	

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A Department of Environmental Protection's (Department) motion to dismiss is granted. Corporations appearing before the Board must be represented by counsel. Dismissal of a corporation's appeal is appropriate where the corporation has failed to comply with Board orders requiring it to retain counsel and make itself available for settlement negotiations, and a Board rule requiring it to respond to discovery requests.

OPINION

This matter was initiated with the April 18, 1996, filing of a notice of appeal by Westmark Diversified, Inc. (Westmark) of North East, PA, appealing a March 19, 1996, compliance order (the March 19 compliance order) issued by the Department. The March 19 compliance order asserted that Westmark was violating the Noncoal Surface Mining and Reclamation Act, the Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. § 3301 *et seq.* (Noncoal Surface Mining Act),

because it was engaging in noncoal mining without required authorization or reclamation. The order directed Westmark to cease mining, to submit an application and a bond for their mining operation, and to reclaim certain areas affected by their mining operations. The Board docketed the appeal at EHB Docket No. 96-089-C.

On April 29, 1996, Westmark filed another appeal, this time to a March 28, 1996, compliance order (the March 28 compliance order) issued by the Department. That compliance order asserted that Westmark had failed to comply with the March 19 compliance order and directed the company to cease mining immediately. The Board docketed the appeal of the March 28 compliance order at EHB Docket No. 96-095-C.

On August 26, 1996, the Department filed a motion to dismiss Westmark's appeals of both orders, together with a supporting memorandum of law. Westmark failed to file any response to the Department's motion.

The Department requests dismissal of the appeals of both compliance orders as a sanction pursuant to section 1021.124 of the Board's rules of practice and procedure, 25 Pa. Code § 1021.124. According to the Department, dismissal is appropriate based on Westmark's failure to secure legal representation in accordance with a July 17, 1996, order of the Board; its failure to make itself available for settlement negotiations, as required by Pre-Hearing Order No. 1; and its failure to respond to the Department's discovery requests, as required by Rules 4006, 4009, and 4014 of the Pennsylvania Rules of Civil Procedure. In its motion, the Department avers that:

> (1) Westmark was operating a noncoal surface mine at the time the compliance orders were issued (motion to dismiss, para. 2);
>
> (2) Paul Kline represented Westmark from April 19, 1996, when the first appeal was filed, until July 2, 1996, when Kline filed a motion to withdraw (motion to

dismiss, para. 5, 11);

(3) Kline withdrew because Westmark would not respond to his attempts to communicate with them (motion to dismiss, para. 11);[1]

(4) On July 17, 1996, the Board ordered Westmark to retain another attorney (motion to dismiss, para. 6);

(5) Westmark has failed to retain another attorney (motion to dismiss, para. 13);

(6) Westmark has not made itself available to conduct settlement negotiations (motion to dismiss, para. 14); and,

(7) Westmark has not responded to the Department's first set of interrogatories, first request for production of documents, or first request for admissions and interrogatories, though its responses were due on July 14, 1996 (motion to dismiss, para. 15).

Since Westmark failed to respond to the Department's motion to dismiss and the Department properly pleaded the facts listed above, those facts are deemed admitted pursuant to section 1021.70(f) of the Board's rules of practice and procedure, 25 Pa. Code § 1021.70(f).[2]

At the time the Department filed its motion to dismiss, section 1021.124 of the Board's rules of practice and procedure, 25 Pa. Code § 1021.124, provided that the Board "may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure."[3]

---

[1] In his motion to withdraw, Kline states that he "attempted to communicate with Westmark via Federal Express®, first-class mail, telephone, beeper, fax and through its former attorney, but . . . received no response to the letters, messages, or faxes." (Kline's motion to withdraw, para. 5.)

[2] Section 1021.70(f) of the Board's rules provides:

> Except in the case of motions for summary judgment or partial summary judgment . . . the Board will deem a party's failure to respond to a motion to be an admission of all properly-pleaded facts contained in the motion.

[3] The Board's rules of practice and procedure have since been amended. Currently, the rule pertaining to sanctions appears at 25 Pa. Code § 1021.125. Although the language in the new section

Westmark has violated the Board's July 17, 1996 order by refusing to retain an attorney to represent it. In addition, Westmark violated Pre-Hearing Order No. 1 by failing to make itself available for settlement negotiations prior to June 28, 1996.[4] And Westmark violated section 1021.111(a) of the Board's rules by failing to respond to the Department's discovery requests. Although the Department averred in its motion that Westmark violated Pa.R.C.P. 4006, 4009, and 4014--as opposed to section 1021.111(a) of the Board's rules--the distinction here is academic: section 1021.111(a) provides that discovery proceedings before the Board shall be governed by the rules of civil procedure. Rules 4006, 4009, and 4014 of the Pa.R.C.P. provide, respectively, that parties must ordinarily respond to interrogatories, requests for production of documents, and requests for admissions within 30 days. Westmark failed to do so here.

Given Westmark's failure to comply with the Board orders requiring it to retain counsel and make itself available for settlement negotiations, and with section 1021.111(a) of the Board's rules, we agree with the Department that dismissal is appropriate under section 1021.124. The situation we confront here is similar to one we confronted in *Keystone Carbon and Oil v. DEP,* 1993 EHB 765, where we ruled on another Department motion to dismiss. There, in a case of first impression, we held that corporations must be represented by counsel in proceedings before the Board. Although we had previously ordered the corporation in *Keystone* to retain counsel, we did not dismiss the appeal immediately upon the Department's motion. Rather, we granted the motion and stated that

---

1021.125 differs slightly from that in the old section 1021.124, the difference is immaterial for purposes of this motion.

[4] Pre-Hearing Order No. 1 initially provided that the parties were to meet and discuss settlement within 45 days of the date of that order. On June 14, 1996, however, we issued an order amending Pre-Hearing Order No. 1 to extend the deadline to June 28, 1996.

dismissal would occur automatically within 30 days unless the corporation retained counsel and had him or her file an entry of appearance within that time frame. We expressly stated that we were giving the corporation one last opportunity to secure representation before dismissal only because the matter was a case of first impression. *See Keystone,* 1993 EHB 765, 770.

Westmark's violations are more egregious than those of the corporation in *Keystone*. First, the issue of whether corporations must be represented by counsel in Board proceedings is no longer one of first impression. Second, in addition to violating the Board's order that it retain counsel, Westmark has also violated section 1021.111(a) of the Board's rules by failing to respond to discovery requests and violated Pre-Hearing Order No. 1 by failing to make itself available for settlement negotiations.

In light of the foregoing, dismissal of Westmark's appeals is appropriate.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WESTMARK DIVERSIFIED, INC.	:	
	:	
v.	:	**EHB Docket Nos. 96-089-C**
	:	**96-095-C**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 18th day of March, 1997, the Department's motion to dismiss is granted, and Westmark's appeals at EHB Docket Nos. 96-089-C and 96-095-C are dismissed.

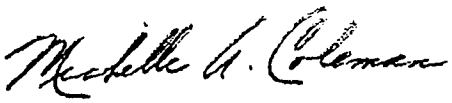
ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket Nos. 96-089-C
and 96-095-C

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 18, 1997

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

For the Commonwealth, DEP:
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Southwest Region

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Courtesy Copy:
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717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

BROWN'S GENERAL DUMP TRUCK SERVICE, INC.

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION

EHB Docket No. 96-263-C

Issued: March 18, 1997

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A Department of Environmental Protection's (Department) motion to dismiss is granted. Failure to pre-pay a civil penalty or post an appeal bond in an appeal of a civil penalty assessed under the Municipal Waste Planning, Recycling, and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, 53 P.S. §4000.101 *et seq.* (Act 101), deprives the Board of jurisdiction.

OPINION

This matter was initiated with the December 12, 1996, filing of a notice of appeal by Brown's General Dump Truck Service, Inc. (Brown) of Orchard Park, NY, to a $900 civil penalty assessed by the Department under Act 101. The Department assessed the penalty on November 12, 1996, based on violations it allegedly discovered during a September 24, 1996, inspection at Lake View Landfill. According to the civil penalty assessment, the inspection revealed that Brown transported solid waste to the landfill in at least three vehicles which violated section 1101(e) of Act 101, 53 P.S. § 4000.1101(e), because they did not bear the name and address of the vehicle owner, and the type

of solid waste transported, in lettering at least six inches high.

The Department filed a motion to dismiss and supporting memorandum of law on January 13, 1997. The Department contends that, under section 1704 of Act 101, 53 P.S. § 4000.1704, the Board lacks jurisdiction because Brown failed to pre-pay the civil penalty or post an appeal bond. Brown failed to file any response to the Department's motion or memorandum.

Since the Department's motion specifically avers that Brown failed to pre-pay the civil penalty or post an appeal bond (motion to dismiss, para. 5), and Brown failed to respond to that allegation, Brown is deemed to have admitted that fact for purposes of the motion to dismiss. 25 Pa. Code § 1021.70(f).[1]

Section 1704(b) of Act 101 provides, in pertinent part:

> When the Department assesses a civil penalty . . . [t]he person charged with the penalty shall have 30 days to pay the penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, either to forward the proposed amount to the Department for placement in an escrow account . . . or to post an appeal bond in the amount of the penalty. . . . Failure to forward the money or appeal bond to the department within 30 days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

The failure to comply with section 1704(b) in appeals of civil penalties assessed under Act 101 deprives the Board of jurisdiction over the appeal and is grounds for dismissal. *Grand Central Sanitation, Inc. v. DER*, 1990 EHB 695; *She-Nat, Inc. v. DEP*, EHB Docket No. 95-145-C (Opinion issued May 7, 1996).

Since Brown failed to pre-pay the civil penalty or post an appeal bond, it has not complied with section 1704(b) and dismissal of its appeal is appropriate.

---

[1] Section 1021.70(f) of the Board's rules provides:

> Except in the case of motions for summary judgment or partial summary judgment . . . the Board will deem a party's failure to respond to a motion to be an admission of all properly-pleaded facts contained in the motion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BROWN'S GENERAL DUMP TRUCK SERVICE, INC.	:	
	:	**EHB Docket No. 96-263-C**
v.	:	
	:	**Issued:**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 18th day of March, 1997, the Department's motion to dismiss is granted, and Brown's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 18, 1997

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

For the Commonwealth, DEP:
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Matthew L. Wolford, Esq.
Northwest Region

For Appellant:
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jb/bl

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TELECOPIER 717-783-4738

FRANKLIN TOWNSHIP MUNICIPAL SANITARY AUTHORITY	:	
v.	:	**EHB Docket No. 95-201-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 19, 1997**

ADJUDICATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Costs incurred by a municipal authority in the mitigation of a wetland impacted by the Authority's upgrading of its sewage treatment facility are not eligible for funding under Act 339.

HISTORY OF THE CASE

This matter involves an application by the Franklin Township Municipal Sanitary Authority ("the Authority") for funding under Act 339, Act of August 20, 1953, P.L. 1217, as amended, 35 P.S. § 701 *et seq.* (entitled "Contribution by Commonwealth to Cost of Abating Pollution") for the upgrading of its sewage treatment plant. The Department of Environmental Protection ("the Department") approved the Authority's application with the exception of certain costs associated with the mitigation of a wetland.

The history of this matter is as follows. In 1988, the Authority entered into a Consent Order and Agreement ("Agreement") with the Department in connection with the Authority's National

Pollution Discharge Elimination System ("NPDES") permit. Pursuant to the Agreement, the Authority was required to upgrade its sewage treatment facility. The Authority's upgrading plan involved impacting a wetland area located adjacent to the site of its sewage treatment facility. As a condition to impacting the wetland at the site of the sewage treatment facility, the Authority was required to provide a replacement wetland. The Authority selected a site one and one-half to two miles upstream of its sewage treatment plant as the location for the replacement wetland.

In its 1993 application for Act 339 funds, the Authority sought to recover, *inter alia*, the costs associated with constructing the replacement wetland. The Department determined that the wetland replacement costs were not eligible costs under Act 339 and denied that portion of the Authority's application.

A hearing on this matter was held on September 10, 1996 before Administrative Law Judge Thomas W. Renwand. After a thorough examination of the record, we make the following findings of fact.

FINDINGS OF FACT

1. The appellant is the Franklin Township Municipal Sanitary Authority, a municipal authority.

2. The appellee is the Department of Environmental Protection, the agency of the Commonwealth authorized to administer the provisions of Act 339, 35 P.S. § 701 *et seq.*

3. Pursuant to a Consent Order and Agreement entered into with the Department on September 23, 1988, the Authority was required either to construct new sewage treatment facilities or to upgrade its existing facilities to meet new effluent requirements. (T. 43-46)

4. The Authority determined that the only site available for expansion of the existing

sewage treatment facility was an area adjacent to the treatment facility containing a wetland. (T. 32-33)

5. In order to build on the adjacent wetland area, the Authority was required to mitigate the impacts to the wetland by creating a replacement wetland. (T. 36-37)

6. The Authority chose an upstream site one and one-half to two miles from its sewage treatment facility as the location of the replacement wetland. (T. 36)

7. The wetland mitigation site was approved by the Department and other agencies. (T. 36)

8. The wetland mitigation site contains no liquid waste disposal equipment or sewage treatment plant facilities or appurtenances. (T. 52-53)

9. The Department denied the Authority's request for Act 339 funding for the wetland mitigation because it determined that the work was not within the fenced area of the sewage treatment plant and was not part of the sewage treatment plant process. (T. 94, 132)

10. Even if the wetland mitigation had been done within the fenced area of the sewage treatment plant, the Department would not have considered it to be eligible for Act 339 funding. (T. 149-50)

11. By contrast, filling in the existing wetland adjacent to the sewage treatment facility was deemed by the Department to be an eligible expense under Act 339 because it was done in connection with preparing the site for construction. (T. 145)

12. Not all construction costs are eligible for funding under Act 339. The Department does not provide Act 339 funding for the following construction activities: collector sewers, interceptor sewers upstream of the first connection, and replacement capital projects at the treatment

plant or pump station. (T. 73)

DISCUSSION

As the moving party, the Authority has the burden of demonstrating by a preponderance of the evidence that it is entitled to Act 339 funding for the cost of the wetland replacement undertaken in connection with the expansion of its sewage treatment facilities. 25 Pa. Code § 1021.101 (a).

Act 339 was enacted in 1953 as a means by which the Commonwealth would assist municipalities in the cost of constructing and acquiring sewage treatment facilities. Preamble to Act 339, 35 P.S. § 701 *et seq.* Pursuant to Section 1 of the Act, the Commonwealth is authorized to pay an annual subsidy to public entities to assist them in the operation and maintenance of the sewage treatment facilities. 35 P.S. § 701. The subsidy shall equal two percent (2%) of the construction or acquisition cost of the sewage treatment facility. Although Act 339 provides that payments made to applicant municipalities shall be toward the cost of operating, maintaining, repairing, replacing and other expenses related to sewage treatment works, the basis for calculating the payments is 2% of the cost of acquisition and construction of the sewage treatment works. 25 Pa. Code § 103.24a. Expenditures not related to acquisition or construction of sewage treatment works are not eligible for payment. 25 Pa. Code § 103.26 (d).

It is the Department's contention that the cost to the Authority to construct a replacement wetland is not eligible for payment under Act 339 because it is not a construction cost *directly* related to the sewage treatment process. The Department bases its determination on its analysis of the definitions of "construction" and "sewage treatment works." The term "construction" is defined in Act 339 as follows:

> [T]he word "construction" shall include, in addition to

> the construction of new treatment works, pumping stations and intercepting sewers which are an integral part of the treatment facilities, *the altering, improving or adding to of existing treatment works*, pumping stations and intercepting sewers *which are essential to the sewage treatment plant system...*

35 P.S. § 702. (Emphasis added) The regulations, at 25 Pa. Code § 103.21, contain a similar definition of "construction."

The regulations define "sewage treatment works" (as well as "sewage treatment facilities" and "sewage treatment plant") as follows:

> An arrangement of devices and structures for treatment and disposal of sewage, all or part of which is required, or authorized, by a water quality management sewage permit issued under The Clean Streams Law. The term includes treatment and disposal devices and structures located inside the fence surrounding the treatment works site, outfalls to the receiving stream and their appurtenances, and liquid waste disposal equipment and facilities.

25 Pa. Code § 103.21.

It is the Department's contention that the wetland mitigation expense does not fall within the definition of "construction" or "sewage treatment works" because it is not "essential to the sewage treatment plant system" and is not a device used "for treatment and disposal of sewage."

In contrast, the Authority asserts that the construction of the new wetland area was an "integrated part" of the construction of the sewage treatment structures since the expansion of the sewage treatment plant could not have been done without the wetland mitigation.

The construction given a statute by those charged with its execution and application is entitled to great weight and should not be disregarded. *Starr v. Department of Environmental*

Resources, 607 A.2d 321, 323 (Pa. Cmwlth. 1992); *Cambria Cogen Co. v. DER*, 1995 EHB 191, 205. Thus, in reviewing this matter, we are required to give deference to the Department's interpretation of the provisions of Act 339 and the regulations unless its interpretation is clearly erroneous. After examining the relevant statutory and regulatory provisions and the arguments presented by the parties in their briefs, we conclude that the Department properly excluded the cost of the wetland mitigation from eligibility under Act 339.

As noted above, Act 339 and the regulations authorize payment for "the altering, improving or adding to of existing treatment works...which are *essential to the sewage treatment plant system.*" 35 P.S. § 702; 25 Pa. Code § 103.21 (Emphasis added). In addressing costs which are nonreimbursable under Act 339, the regulations state, "After sewage treatment works are completed and placed in operation, only expenditures for additions or modifications *related to the sewage treatment process* will be considered for payment." 25 Pa. Code § 103.26 (d) (1) (Emphasis added). The sewage treatment plant system consists of "an arrangement of devices and structures for treatment and disposal of sewage." This includes "treatment and disposal devices and structures located inside the fence surrounding the treatment works site, outfalls to the receiving stream and their appurtenances, and liquid waste disposal equipment and facilities." 25 Pa. Code § 103.21.

Although construction of the replacement wetland was necessitated by the Authority's expansion and upgrading of its sewage treatment facility, the wetland mitigation measures cannot be said to be related to the sewage treatment plant or process. The wetland will not be used in connection with the treatment and disposal of sewage. The wetland is not a part of the sewage treatment works as defined in the regulations. The replacement of the wetland was *incidental to* and not *essential to* the expansion of the sewage treatment plant.

Moreover, Mark McShane, a senior project manager with Killam Associates and the individual who supervised the preparation of the Authority's Act 339 application, acknowledged that not all costs incurred in the construction of a sewage treatment plant are automatically eligible for funding under Act 339. Construction costs which do not qualify for funding under Act 339 include the following: construction of collector sewers, construction of an interceptor sewer upstream of the first connection, and replacement capital projects at the treatment plant or at a pump station. (F.F. 12) Only those costs considered to be essential to the sewage treatment plant system or related to the sewage treatment process are eligible for calculating the amount of subsidy under Act 339.

The Authority argues that the Department has made an arbitrary distinction between the construction of structures *inside* the perimeter of the sewage treatment facility and those *outside* the perimeter. Although this is one of the factors which the Department considered in determining that the construction of the replacement wetland was not related to the sewage treatment process (F.F. 9), this was not the only basis for the Department's decision. Robert Gibson, Chief of the Engineering and Construction Section of the Department's Division of Municipal Planning and Finance, and the person within the Department responsible for determining which construction costs are eligible for funding under Act 339, testified that the Department's decision would have been the same even if the replacement wetland had been located within the fenced-in perimeter of the sewage treatment plant. (F.F. 10) Whether constructed inside or outside the perimeter of the sewage treatment facility, the replacement wetland is not related to the sewage treatment process and, as a result, is not eligible for funding under Act 339.

In contrast, the Department's Robert Gibson testified that the cost of filling the existing wetland located adjacent to the sewage treatment facility was considered to be an eligible expense

by the Department. This was because the wetland was filled in preparation for construction of the expansion to the sewage treatment plant. (F.F. 11) Unlike the construction of the replacement wetland, the filling of the existing wetland was done in connection with the construction of the sewage treatment plant itself and, thus, was directly related to the plant's construction.

Act 339 and the regulations are clear in their directives. They do not authorize subsidies based on the entire cost incurred by a municipality or other public entity in the construction of a sewage treatment facility, but only for those structures or devices which are essential to the sewage treatment plant system or related to the sewage treatment process. Although the Authority's cost of constructing a replacement wetland was incurred in connection with the expansion of its sewage treatment facility, the replacement wetland is not a structure which is essential or related to the sewage treatment plant or process. Therefore, it is not eligible for funding under Act 339.

We, therefore, sustain the Department's action and enter the following conclusions of law.

CONCLUSIONS OF LAW

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

2. The Authority bears the burden of proof in this appeal. 25 Pa. Code § 1021.101 (a).

3. The mitigation of a wetland impacted by the upgrading of a sewage treatment facility is not an eligible construction cost under Act 339, 35 P.S. § 701 *et seq.*

4. The Department did not abuse its discretion in denying Act 339 funding for the costs incurred by the Authority in the wetland mitigation associated with the expansion of its sewage treatment facility.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANKLIN TOWNSHIP MUNICIPAL AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 95-201-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

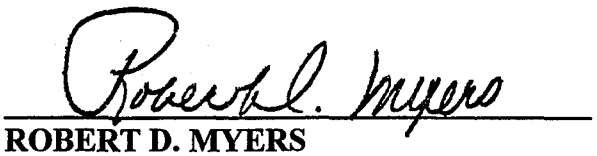
AND NOW, this 19th day of March, 1997, the action of the Department is sustained and the appeal of the Authority at EHB Docket No. 95-201-R is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

EHB Docket No. 95-201-R



ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: **March 19, 1997**

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

For the Commonwealth, DEP:
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Southwestern Region

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Greensburg, PA

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M. DIANE SMITH
SECRETARY TO THE BOARD

WILLIAM and MARY BELITSKUS	:	
RONALD and ANITA HOUSLER, PROACT,	:	
	:	
v.	:	**EHB Docket No. 96-196-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: March 19, 1997**
PROTECTION and WILLAMETTE	:	
INDUSTRIES, INC., Permittee	:	

OPINION AND ORDER ON SUNDRY DISCOVERY MOTIONS

By Robert D. Myers, Administrative Law Judge

Synopsis:

The Board grants Permittee's Motion to Compel Deposition Testimony, ruling that the areas of inquiry discussed in the Motion are appropriate. The Board also grants Permittee's Motion to Complete Appellants' Depositions Beyond the Discovery Deadline. The Board denies Appellants' Motion for Recovery of Travel Expenses, ruling that Appellants needed to file a mileage affidavit with their motion and that the "100 miles" stated in Pa. R.C.P. 4008 and 25 Pa. Code §1021.111(c) means a 100-mile radius. The Board also denies Appellants' Motion for a Protective Order, ruling that discovery necessarily involves some expense and inconvenience to all parties.

OPINION

The parties to this proceeding, especially the *pro se* Appellants (William and Mary Belitskus, Ronald and Anita Housler, and PROACT, an unincorporated association) and the Permittee (Willamette Industries, Inc.) have triggered a blizzard of paper fighting over discovery. It appears to us that the clashes arise, in part, from the Appellants' unfamiliarity with litigation procedures and, in part, from the Permittee's legal counsel's lack of success in dealing with *pro se* litigants.

It appears that nearly every step of this proceeding has generated disputes of one sort or another. The parties have fattened our files with copies of their correspondence and now have presented us with formal motions. These are Permittee's Motion to Complete Appellants' Depositions Beyond the Discovery Deadline, filed on December 23, 1996; Appellants' Motion for Recovery of Travel Expenses, filed on January 8, 1997; Permittee's Motion to Compel Deposition Testimony, filed on January 23, 1997; and Appellants' Motion for a Protective Order, filed on February 7, 1997 as part of Appellants' response to Permittee's Motion to Compel Deposition Testimony.[1]

The motions all stem from Permittee's attempts to depose Appellants. The time and place for the depositions were objected to by Appellants because it would require them to travel from their homes (somewhere near Kane, McKean County, Pennsylvania) to DEP's office in Meadville, Crawford County, Pennsylvania; and because it would subject them to economic burdens (travel expenses, loss of wages and childcare expenses). Appellants did not move for a protective order,

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[1] To their credit the parties have resolved, without our intervention, Appellants' Motion for Technical Representatives to be Present at the Settlement Conference and Appellants' Motion to Require Response to Written Interrogatories and Requests for Production of Documents.

however, and agreed (albeit reluctantly) to be deposed in Meadville -- The Belitskuses on December 17, 1996 and the Houslers on December 18, 1996.

William Belitskus was deposed first on the 17th and steadfastly refused to answer any question he deemed irrelevant to the appeal. After two hours of trying to get the deponent to respond, Permittee's legal counsel suspended this deposition and turned to Mary Belitskus. When she indicated she also would refuse to answer the questions put to her husband, the proceedings concluded.[2]

After ceasing the Belitskus depositions, Permittee's legal counsel (anticipating that the Houslers would take the same approach) called off the Housler depositions set for the next day. He informed the Houslers of this by telephone, explaining that he needed to get an order from the Board requiring all of the Appellants to answer his questions. The Houslers claim that, because of the last-minute cancellation of their depositions, Ronald Housler was unable to change his work schedule and, as a result, lost a day of work anyway.

Discovery is a process whereby a litigant may probe into the case of his adversary, learning as much as possible about the facts, the witnesses and the legal contentions. The goal of discovery is to narrow the issues, eliminate surprise and encourage settlement. The Rules of Civil Procedure dealing with discovery (4001- 4020), therefore, are to be liberally construed "to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable." Pa. R.C.P. 126.

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[2] The parties placed a telephone call to Judge Myers during the deposition seeking a ruling on Belitskus' duty to answer. While Judge Myers refused to preside over the deposition and rule question by question, he urged the parties to cooperate and advised them that discovery is very broad and wide-ranging.

Pa. R.C.P. 4003.1 authorizes discovery regarding any matter, not privileged, which is "relevant" to the proceeding. It is not ground for objection that the information sought will be inadmissable at the hearing if it is reasonably calculated to lead to the discovery of admissible evidence. While a fishing expedition cannot be allowed, a broad range of inquiry clearly is contemplated by the Rules.

In proceedings before this Board, standing is a requirement for all appellants. *Fred McCutcheon and Rusmor Incorporated v. DER et al.,* 1995 EHB 6. To satisfy the requirement, appellants must show that they have a direct, immediate and substantial interest in the DEP action they seek to challenge. *William Penn Parking Garage, Inc. v. City of Pittsburgh,* 346 A. 2d 269 (Pa. 1975). In order to test whether Appellants here have the requisite standing, Permittee can probe their interest by discovery. Since Appellants also may be witnesses at the hearing, Permittee may test their credibility during discovery. This involves possible bias or personal interest that may color a witness' testimony. *Anderson v. Pittsburgh Railways Co.,* 225 A.2d 548 (Pa. 1967).

The questions asked of William Belitskus, identified in paragraph 10 of Permittee's Motion to Compel Deposition Testimony, all fall within the scope of permissible discovery. While Appellants may be correct in saying that they have nothing to do with the NPDES permit which they are challenging, the questions do relate to Appellants' standing to challenge the action and to their credibility as witnesses. These are potentially issues on which Permittee can defend the action and are clearly within the parameters set by Pa. R.C.P. 4003.1.

Appellants ask us to "certify a full list of questions to be asked at the deposition." This is neither practical nor desirable. This Board has no way of exploring the mental processes of Permittee's legal counsel to come up with a range of questions that might be asked. Besides,

discovery is to be conducted by the parties without this Board's involvement unless absolutely necessary, and then only to a limited extent.

Appellants complain that they have been intimidated by Permittee's legal counsel, that they "found the entire deposition threatening and intimidating for citizens filing an appeal pro-se to have to go through." We sense from the deposition transcript that there was hostility between Mr. and Mrs. Belitskus and Permittee's legal counsel. Hostility, unfortunately, is a common by-product of our adversarial system of justice. It is not unusual for litigants to feel intimidated by the whole process, especially those (like Appellants) who have no attorney to intercede for them.

We are not convinced at this point that Permittee's legal counsel attempted to take advantage of Appellants' *pro se* status by undue intimidation. We admonish all parties and their legal counsel, however, to conduct these proceedings with civility and a minimum of hostility so that the imposition of sanctions will be unnecessary.

Appellants complain about the economic loss sustained by them in attending the December depositions, seek to recover some of it, and resist any further discovery because of the economic impact. This too, is a reflection of Appellants' lack of litigation experience. Oral depositions during pre-hearing discovery, whether scheduled by Appellants themselves or by other parties, will almost certainly interfere with Appellants' employment or business obligations and involve them in additional expenses for travel and childcare. These same impacts could also be experienced by witnesses for Permittee and DEP. While all parties should cooperate in minimizing these economic repercussions, there is no way to eliminate them from the process.[3]

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[3] A hearing in this case also will require all parties to take time off work and incur travel and other expenses.

Like most other activities (except recreation) in our modern society, litigation activities occur on weekdays. The parties are free to agree to take depositions on weekends or holidays, but this Board will not order them to do so. That would happen only under the most imperative circumstances in any case; circumstances not present here.

Appellants claim their travel expenses ($68.20) and lost wages ($351.10) related to the December depositions, citing Pa. R.C.P. 4008 and our rule at 25 Pa. Code § 1021.111(c). Rule 4008 applies where an oral deposition is to be taken more than 100 miles from the courthouse. In such a situation, "the court upon motion may make an order requiring the payment of reasonable expenses, including attorney's fees, as the court shall deem proper." The language of our rule at § 1021.111(c) is nearly identical but measures the 100 miles, not from a courthouse or Board office, but from the deponent's residence or principal place of business.

Appellants allege that the traveling distance from their homes to Meadville, Pennsylvania, where the December depositions were held, is 110 miles. Permittee denies the allegation and contends that it is less than 100 miles. In *Inmates of B-Block, et al. v. Jeffes,* 483 A.2d 569 (Pa. Cmwlth. 1984), a proceeding in Commonwealth Court's original jurisdiction, the successful plaintiffs sought deposition expenses under Pa. R.C.P. 4008. The Court dismissed the claim because plaintiffs failed to include an affidavit establishing the mileage. Appellants have not included such an affidavit either, and their claim must also be rejected.

Even if we were inclined to ignore the absence of an affidavit, we still would not grant the claim. We interpret the "100 miles" in § 1021.111(c) to mean a 100 mile radius.[4] If we construed

---

[4] Our research has not disclosed a decision in the civil courts interpreting the "100 miles" in Pa. R.C.P. 4008. Nor have the parties cited any.

it any other way, it would depend upon the route and method of travel chosen by the deponent. A claim for expenses could then be made in situations where the deposition site is considerably closer than 100 miles "as the crow flies." In this case, Meadville is within a 70-mile radius of Kane; yet Appellants claim to have traveled 110 miles by automobile.[5]

Finally, the lost wages are not an appropriate claim here. It must be remembered that Appellants chose to invoke the Board's jurisdiction here to review DEP's action with respect to Permittee. Appellants are not involuntary participants in this proceeding. There is an unavoidable economic side to litigation, as already noted, and lost wages or lost profits are part of that. *George M. Lucchino v. DER,* 1994 EHB 1434, 1446.

[5] Our ruling on travel expenses is, of course, limited to the applicability of Pa. R.C.P. 4008 and 25 Pa. Code §1021.111(c). Travel expenses can be claimed and, if established, awarded to a successful litigant after the case is concluded if the litigant brings himself within the scope of a fee-shifting statute. *See Township of Harmar v. DER,* 1994 EHB 1107; *George M. Lucchino v. DER,* 1994 EHB 1434.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILLIAM and MARY BELITSKUS	:	
RONALD and ANITA HOUSLER, PROACT,	:	
	:	
v.	:	**EHB Docket No. 96-196-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and WILLAMETTE	:	
INDUSTRIES, INC., Permittee	:	

ORDER

AND NOW, this 19th day of March 1997, it is ordered as follows:

1. Permittee's Motion to Complete Appellants' Depositions Beyond the Discovery Deadline is granted.

2. Appellants' Motion for Recovery of Travel Expenses and Motion for Protective Order are denied.

3. Permittee's Motion to Compel Deposition Testimony is granted.

4. Appellants shall appear for oral depositions at a place and time designated by Permittee's legal counsel (but not more than 30 days from the date of this Order and not more than 100 miles from Appellants' residences) and shall answer questions relating to the subjects identified in paragraph 10 of Permittee's Motion to Compel Deposition Testimony and all other questions that may be relevant to the pending appeal.

5. Failure to comply with this Order may subject Appellants to sanctions which may include the dismissal of their appeal.

ENVIRONMENTAL HEARING BOARD

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: March 19, 1997

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

For the Commonwealth, DEP:
Mary Susan Davies, Esquire
Northwest Region

For Appellant:
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Ronald and Anita Housler
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Kane, PA 16735

For the Permittee:
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DICKIE, McCAMEY & CHILCOTE
Two PPG Place, Suite 400
Pittsburgh, PA 15222-5402

bap

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717-787-3483
TELECOPIER 717-783-4738

COGS & ASSOCIATES, INC.	:	
	:	**EHB Docket No. 96-188-C**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 26, 1997**

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A Department of Environmental Protection's (Department) motion to dismiss is granted. Except in the case of appeals *nunc pro tunc*, the Board lacks jurisdiction over appeals filed more than 30 days after the appellant receives notice of the Department action.

OPINION

This matter was initiated with the September 11, 1996, filing of a notice of appeal by COGS & Associates, Inc. (COGS) of Georgetown, PA, in reference to an April 10, 1996, Department letter to COGS. In the letter, the Department directed COGS to reimburse the Department for $7,612 spent on COGS's behalf from the Small Operator Assistance Program (SOAP). The letter explained that SOAP funds were designed to provide financial assistance to small operators for coal mining operations, and it informed COGS that the Department requested reimbursement because COGS never conducted the coal mining. In its notice of appeal, COGS asserted that the Department was

not entitled to reimbursement because COGS:

(1) never benefitted from the SOAP funds;

(2) has no assets;

(3) never began mining;

(4) tried to comply, but forces outside its control prevented it from doing so.

The Department filed a motion to dismiss and supporting memorandum of law on January 13, 1997. The motion avers that COGS received the letter on April 13, 1996 (motion to dismiss, para. 10), and contends that the Board lacks jurisdiction over the appeal because COGS filed it more than thirty days after receiving notice of the Department's action. COGS filed no response or memorandum opposing the motion to dismiss. Since the motion to dismiss specifically avers that COGS received the Department's letter on April 13, 1996, and COGS failed to respond to that allegation, we deem COGS to have admitted that it received the letter then. 25 Pa. Code § 1021.70(f).[1]

Section 1021.52(a) of the Board's rules of practice and procedure provides:

> Except as specifically provided in [25 Pa. Code] § 1021.53 (relating to appeal *nunc pro tunc*), jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of the action or within 30 days after notice of the action has been published in the *Pennsylvania Bulletin*. . . .

With the exception of third-party appeals and appeals *nunc pro tunc*, appellants before the Board

---

[1] Section 1021.70(f) of the Board's rules provides:

> Except in the case of motions for summary judgment or partial summary judgment . . . the Board will deem a party's failure to respond to a motion to be an admission of all properly-pleaded facts contained in the motion.

must file their appeals within 30 days of receiving written notice of the Department's action or publication in the *Pennsylvania Bulletin*--whichever comes first. *See, e.g., Ziccardi v. DEP*, EHB Docket No. 96-161-R (Opinion issued January 6, 1997). Since COGS never avers that it is entitled to appeal *nunc pro tunc*, the only question here is whether COGS filed its appeal within the 30-day period set forth in section 1021.52(a). We hold that COGS did not. It received the Department's letter on April 13, 1996, but did not file its notice of appeal until September 11, 1996--151 days later.

Given the foregoing, dismissal is appropriate.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COGS & ASSOCIATES, INC.	:	
	:	**EHB Docket No. 96-188-C**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 26th day of March, 1997, the Department's motion to dismiss is granted, and the appeal of Cogs & Associates, Inc. is dismissed.

ENVIRONMENTAL HEARING BOARD

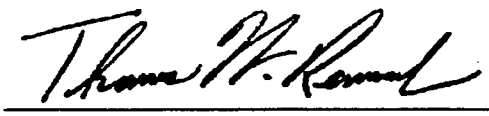
George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

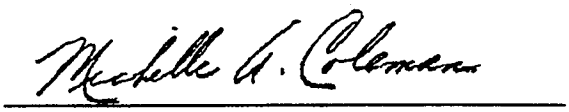
Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 96-188-C



THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 26, 1997

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

For the Commonwealth, DEP:
Paul J. Bruder, Esq.
Southcentral Region

For Appellant:
Lawrence L. Manypenny, Esq.
New Cumberland, WV

jb/bl

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STANLEY R. HOFFMAN, JR. & KAREN L. (CARLSON) HOFFMAN	:	
	:	**EHB Docket No. 96-237-C**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 26, 1997**

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A Department of Environmental Protection's (Department) motion to dismiss is granted. Except in the case of appeals *nunc pro tunc*, the Board lacks jurisdiction over appeals filed more than 30 days after the appellant receives notice of the Department action.

OPINION

This matter was initiated with the November 13, 1996, filing of a notice of appeal by Stanley Hoffman, Jr., and Karen (Carlson) Hoffman (collectively, Hoffmans) of Lindley, NY, to an October 8, 1996, Department order. In the order, the Department asserted that petroleum products from an underground storage tank facility owned by Hoffmans in Lawrenceville Borough, Tioga County, had escaped into the soil. The order directed Hoffmans to close the underground storage tanks at the site, to submit a site characterization report and remedial action reports, and to initiate certain remedial

measures with respect to the property. In their notice of appeal, Hoffmans asserted that they were not the owners of the property in question, that they were unaware that the Department had had an environmental assessment performed at the site, and that they were financially unable to comply with the order.

The Department filed a motion to dismiss and supporting memorandum of law on January 30, 1997. The motion avers that Hoffmans received the order on October 12, 1996 (motion to dismiss, para. 4), and contends that the Board lacks jurisdiction over their appeal because Hoffmans filed the appeal more than thirty days after receiving notice of the Department's action. Hoffmans filed no response or memorandum opposing the motion to dismiss. Since the motion to dismiss specifically avers that they received the order on October 12, 1996, and Hoffmans failed to respond to that allegation, we deem them to have admitted that they received the letter then. 25 Pa. Code § 1021.70(f).[1]

> Section 1021.52(a) of the Board's rules of practice and procedure provides:
>
> > Except as specifically provided in [25 Pa. Code] § 1021.53 (relating to appeal *nunc pro tunc*), jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of the action or within 30 days after notice of the action has been published in the *Pennsylvania Bulletin*. . . .

With the exception of third-party appeals and appeals *nunc pro tunc*, appellants before the Board must file their appeals within 30 days of receiving written notice of the Department's action or

---

[1] Section 1021.70(f) of the Board's rules provides:

> Except in the case of motions for summary judgment or partial summary judgment . . . the Board will deem a party's failure to respond to a motion to be an admission of all properly-pleaded facts contained in the motion.

publication in the *Pennsylvania Bulletin*--whichever comes first. *See, e.g., Ziccardi v. DEP*, EHB Docket No. 96-161-R (Opinion issued January 6, 1997). Since Hoffmans never aver that they are entitled to appeal *nunc pro tunc*, the only question here is whether they filed their appeal within the 30-day period set forth in section 1021.52(a). We hold that they did not. Hoffmans received the order on October 12, 1996, but did not file their notice of appeal until November 13, 1996--32 days later.

Given the foregoing, dismissal is appropriate.

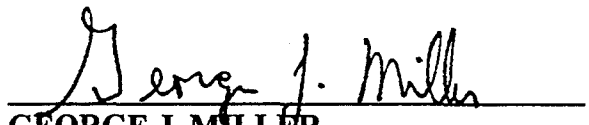
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STANLEY R. HOFFMAN, JR. & KAREN L. (CARLSON) HOFFMAN	:	
	:	**EHB Docket No. 96-237-C**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 26th day of March, 1997, the Department's motion to dismiss is granted, and Hoffmans' appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 26, 1997

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

For the Commonwealth, DEP:
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Northcentral Region

For Appellant:
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Karen L. (Carlson) Hoffman
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Lindley, NY 14852

jb/bl

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MR. & MRS. CARL MILLER	:	
	:	
v.	:	**EHB Docket No. 95-234-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DAVID LIBERTI, Permittee	:	**Issued:** March 31, 1997

OPINION AND ORDER ON PETITION FOR RECONSIDERATION

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A Department of Environmental Protection's (Department) petition for reconsideration is granted. The Board will reconsider an opinion and order denying a motion to dismiss where the party moving for dismissal requested dismissal only with respect to certain objections raised in the notice of appeal and the Board denied the motion on the basis that the movant could not prevail with respect to other objections.

In a third-party appeal of the reissuance of a National Pollution Discharge Elimination System (NPDES) sewage discharge permit, dismissal is appropriate with respect to property owners' claims that the permit authorizes a discharge onto their land in violation of common law and which impinges on their rights with respect to the property. Dismissal is not appropriate to the extent that the property owners claim that the permittee's past conduct may have violated the terms of his previous permit.

OPINION

This matter was initiated with the filing of a notice of appeal by Carl and Joy Miller (Appellants) seeking review of a September 25, 1995, Department of Environmental Protection (Department) decision to reissue a NPDES sewage discharge permit to David Liberti (Permittee), of Linden, Pennsylvania. The notice of appeal asserts that the Department erred by reissuing the permit because Permittee's past discharges have reduced the value of Appellants' land, and because the permit authorizes Permittee to discharge water onto Appellants' land, amounts to an inverse condemnation of their land, and will result in pollution to their land.

The Board has issued one previous opinion in this appeal. That opinion, denying a Department motion to dismiss, is the subject of the petition now before us. We issued the opinion and order on January 9, 1997. The Department filed a petition for reconsideration of that decision and a memorandum in support on January 17, 1997. Appellants filed an answer to the petition and a memorandum in opposition on January 31, 1997.

In our decision on the motion to dismiss, we noted that dismissal was appropriate only where no material factual disputes remained and the moving party was clearly entitled to judgment as a matter of law. We denied the Department's motion because the Department failed to establish that it was entitled to judgment as a matter of law with respect to the last of the four objections raised in the notice of appeal: namely, that, by reissuing the permit, the Department had abdicated its duty to protect the environment. We held that the Department could not prevail with respect to that issue because: (1) the Department has a duty, under section 92.13(b)(1) of the NPDES regulations, 25 Pa. Code § 92.13(b)(1), to ascertain that Permittee was in compliance with the provisions of his current NPDES sewage permit before reissuing the permit; (2) water sample analyses showed that

Permittee's system violated effluent limitations in his existing permit while the Department was deciding on his request for reissuance; and, (3) the Department abdicated its duty under section 92.13(b)(1) by reissuing Permittee's permit when his system violated the conditions of his existing permit.

The Department argues that we reconsider the motion to dismiss because, though it requested dismissal only of the first three objections in the notice of appeal, the Board denied the motion based on the fourth objection and failed to rule on the propriety of the motion with respect to the three objections the motion targeted. According to the Department, the Board's failure to rule on the three objections identified in the motion constitutes "extraordinary circumstances" justifying reconsideration. The Department also expressed concern that our opinion and order on the motion to dismiss seems to adopt--without qualification--certain of Appellants' factual contentions which the Department agreed not to contest only for purposes of the motion to dismiss. The Department requests that the Board reconsider its motion to dismiss with respect to the first three objections in the notice of appeal, and that we clarify the opinion and order to make it clear that the Department is not prejudiced by any of the facts it agreed not to contest only for purposes of the motion to dismiss.

Although Appellants oppose the Department's petition for reconsideration, they do not specifically state why reconsideration would be inappropriate. Instead, they confine their attention to the merits of the motion to dismiss, arguing that the Board should not dismiss the three objections identified in the motion because the objections pertain to pollution and are not simply claims pertaining to Appellants' property rights.

I. The standard for reconsideration

Section 1021.123 of the Board's rules, 25 Pa. Code § 1021.123, governs reconsideration of interlocutory orders. Regarding the criteria that will be used to evaluate petitions for reconsideration, section 1021.123 states only that the petition must demonstrate that "extraordinary circumstances" justify consideration of the matter by the Board. 25 Pa. Code § 1021.123(a). Precisely what constitutes "extraordinary circumstances" is unclear from the rules. Nor is there previous Board case law on the issue. Section 1021.123 became effective on August 31, 1996, and, since that time, we have confronted only two petitions for reconsideration of an interlocutory order. We denied one petition without determining whether "extraordinary circumstances" were present[1] and denied the second because it raised no issues apart from those we had already addressed in the underlying opinion and order.[2]

Prior to the effective date of section 1021.123, the Board had only one rule regarding reconsideration, and it did not, by its terms, distinguish between interlocutory and final orders. It provided that the Board would grant reconsideration of orders only for:

> compelling and persuasive reasons. . . , generally limited to instances where:
>
> > (1) The decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief the question.
> >
> > (2) The crucial facts set forth in the application are not as stated in the decision and would justify a reversal of the decision. In such a case, reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with

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[1] *See Grazis v. DEP*, EHB Docket No. 95-181-C (Opinion issued January 17, 1997) (denying a petition for reconsideration of an interlocutory order which was not submitted within 10 days of the Board's order as required by section 1021.123(a) of the Board's rules).

[2] *See People United to Save Homes v. DEP,* EHB Docket No. 95-232 (Opinion issued December 23, 1996).

due diligence have offered the evidence at the time of the hearing.

Former 25 Pa. Code § 1021.122(a).[3]

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

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

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

> (1) The final order rests on a legal ground or factual finding which has not been proposed by any party.
>
> (2) The crucial facts set forth in the petition
> (i) Are inconsistent with the findings of the Board.

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

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

25 Pa. Code § 1021.124(a).

Therefore, for the Department to show that it is entitled to reconsideration of its motion to dismiss, the Department must show that reconsideration would satisfy the criteria listed above and--in addition--that special circumstances are present which justify the Board taking the extraordinary step of reconsidering an interlocutory order.

II. Is reconsideration appropriate here?

The circumstances surrounding the motion to dismiss are "extraordinary" for purposes of section 1021.123(a) of our rules. Although the caption in the Department's motion refers to a "motion to dismiss," as opposed to a "motion for partial dismissal," the body of the motion clearly indicates that the Department requests dismissal only of the first three objections in the notice of appeal--not the fourth. (Motion to dismiss, p. 3) Nor did Appellants' raise the fourth objection in their response or memorandum in opposition to the motion to dismiss. By disposing of the motion on the basis of the fourth objection, we ruled on a legal ground and aspect of the appeal which had not been proposed by either party. Furthermore, because we intimated that Appellants were entitled to judgment as a matter of law on the fourth objection, Appellants could later argue that our determination that the Department erred by reissuing the permit is now "law of the case." Thus, though our decision on the motion to dismiss was an interlocutory order, it could still have a great impact on the resolution of the ultimate issue in this appeal. Given these circumstances, reconsideration is appropriate.

III. The motion to dismiss

The Department filed its motion to dismiss, as well as a supporting memorandum of law, on

February 29, 1996. Shortly thereafter, on March 15, 1996, the Department filed a supplemental memorandum in support. Appellants filed a memorandum in opposition to the Department's motion on March 29, 1996, but never filed a response. The Department filed a reply memorandum on April 17, 1996.

The factual backdrop of the appeal is not in dispute for purposes of this motion.[4] Appellants own land adjacent to a plot owned by Permittee containing a mobile home park. Like the reissued permit, Permittee's original permit authorized him to discharge wastewater from a sewage treatment facility at the mobile home park into an unnamed tributary of Pine Run. Prior to the point of discharge, the tributary is simply a dry bed or ditch. The water which runs downstream across Appellants' property consists entirely of Permittee's discharge. That discharge has caused a steady increase in the size of wetlands on Appellants' property, preventing Appellants from commercially developing their land and depriving them of the beneficial use and enjoyment of their property. The discharge has contained fecal coliform levels in excess of permit limits. The Permittee has not acquired an easement from Appellants to allow runoff from the discharge to pass through their property.

The Department moves for dismissal of the first three objections that Appellants raised in their notice of appeal. In those objections, quoted below verbatim, Appellants stated that they challenged the reissuance of the permit because:

I. The grant for discharge was contrary to the common law of Pennsylvania in

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[4] The recitation of the facts in this paragraph is taken from Appellants' memorandum in opposition to the motion to dismiss, pp. 1-2. For purposes of the motion to dismiss alone, the Department agrees not to contest the facts set forth in objections I, II, or III of the notice of appeal or those in the Appellants' memorandum in opposition to the motion. (Memorandum in support of the motion to dismiss, p. 2; reply memorandum, p. 1.)

that it permits an owner of land to discharge water on Appellants' land that is not natural drainage water from the Permittee's land causing Appellants substantial loss of use of their land.

II. The discharge of water by permittee in the past has increased the wet lands of Appellants causing loss of value to Appellants' land.

III. The previous grant of discharge given by the Commonwealth of Pennsylvania together with the current Permit, the subject of the instant appeal, has resulted and will result in continuing inverse condemnation of Appellants' land by the Commonwealth of Pennsylvania.

Notice of Appeal, p. 1, para. 3.

The Department argues that objections I, II, and III pertain only to alleged harm to Appellants' property rights and that dismissal with respect to those objections is appropriate because: (1) the permit conditions approval for the discharge upon the permittee acquiring all necessary property rights; (2) the permit neither conveys property rights itself nor authorizes any injury to those rights; and, (3) the reissuance of the permit does not interfere with any rights Appellants may have regarding their property under state or local law. With respect to objection I, the Department also maintains that whether the common law authorizes Permittee to discharge water that is not natural drainage water onto Appellants' land is irrelevant because such discharges are authorized by statute.

The arguments Appellants raise in their response and memorandum in opposition are convoluted.[5] Appellants contend that dismissal is inappropriate with respect to the objections

[5] For purposes of the motion to dismiss, we are only considering the arguments Appellants raised in their response and memorandum in opposition to the motion to dismiss--not those Appellants raised for the first time in their response or memorandum in opposition to the petition for reconsideration. Appellants were put on notice as to the issues potentially involved in the motion to dismiss when they received the Department's motion. They should have addressed those issues when they responded to that motion. They cannot correct the deficiencies in their response to the motion to dismiss simply by addressing those issues in their pleadings regarding the petition for

because: (1) the Department had a duty to inquire into property rights since Permittee's previous permit required that he obtain an easement for his discharge onto Appellants' property; (2) the Department may have failed to adequately consider the adverse economic effects on Appellants of granting the reissuance; and, (3) reissuance of the permit amounted to an inverse condemnation of their property.

We shall examine each of the objections the Department seeks to have dismissed independently.[6]

a. Objection I--The permit authorizes Permittee to discharge water--other than natural drainage water--onto Appellants' land, in violation of Pennsylvania common law.

This objection is based on a false premise: namely, that the permit authorizes Permittee to discharge water onto Appellant's land. The permit does *not* authorize Permittee to discharge onto Appellant's land. In fact, it does not refer to Appellants' land at all. The permit simply authorizes Permittee to discharge into the unnamed tributary.

The Department has the power to authorize sewage discharges into waters of the Commonwealth pursuant to section 202 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001, at 691.202. Section 202 provides that the Department may issue permits authorizing sewage discharges into "waters of the Commonwealth." As noted earlier in this opinion, the unnamed tributary which receives Permittee's discharge is nothing more than a

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reconsideration.

[6] We do not address Appellants' allegation that dismissal with respect to objections I-III is inappropriate because the Department may have failed to adequately consider the potential adverse consequences to Appellants of reissuing the permit. Appellants' allegation regarding economic effects far exceeds the scope of the objections raised in the notice of appeal, and therefore, it is waived absent a showing of good cause. *See Pennsylvania Game Commission v. DER*, 509 A.2d 877 (Pa. Cmwlth. 1986) *aff'd on other grounds*, 521 Pa. 121, 555 A.2d 812 (1989).

dry ditch or bed. Nevertheless, it is a "water of the Commonwealth" for purposes of the Clean Streams Law. The definition of "waters of the Commonwealth" at section 1 of the Clean Streams Law, 35 P.S. § 691.1, expressly includes "ditches, water courses, . . . and all other . . . channels of conveyance of surface . . . water. . . ."

Since the Department has the power to authorize sewage discharges into waters of the Commonwealth, it has the power to authorize Permittee to discharge into the unnamed tributary. The permit does *not* authorize any injury to or incursion onto Appellants' property. Indeed, it expressly provides that it "does not convey any property rights . . . or any exclusive privileges; nor does it authorize any injury to private property or any invasion of personal rights." (Part B of the reissued NPDES sewage permit, p. 10.)

Ordinarily, of course, a permit does not shield a permittee from liability for harm resulting from the permitted activity. It simply gives the permittee license to engage in an activity which the Commonwealth otherwise prohibits. NPDES sewage discharge permits are no exception. The permit reissued to Permittee does not insulate him from liability for any harm the discharge may cause to Appellants or their property; it simply grants him permission to discharge wastewater into the tributary subject to the conditions of the permit.[7] Since the permit only authorizes the actual

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[7] This result is consistent with our conclusion in *Bernie Enterprises, Inc. v. DEP,* EHB Docket No. 95-100-MR (March 5, 1996). That case involved an appeal of a permit under the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. § 693.1 *et seq.*, authorizing the permittee to install and maintain a storm sewer pipe on the appellant's land. The appellant argued, among other things, that the permit burdened his land by requiring that he acquiesce in the installation and maintenance of the pipe. The Board, however, rejected that argument. Noting that the permit expressly stated that it conferred no property rights upon the permittee, we held that the permit merely authorized the installation and maintenance of the pipe *vis-á-vis* the Commonwealth, and that the permittee would have to acquire the right to enter upon the land and install the pipe independent of permit.

discharge into the unnamed tributary--and not any harm to Appellants' property downstream--the permit does not affect Appellants' rights to their property. They have the same rights that they would have if Permittee were discharging without a permit. Given the foregoing, dismissal is appropriate with respect to objection I.

b. Objection II--Water discharged in the past has increased wetlands on Appellants' property, resulting in a decrease in the value of Appellants' land.

The situation with respect to objection II is more complicated. Objection II refers to harm resulting to Appellant's land from past discharges by Permittee. Appellants' basis for this objection is unclear from the notice of appeal or their memorandum in opposition. Section 92.13(b)(1) of the NPDES regulations provides that the Department may reissue a NPDES sewage permit if, among other things, the permittee is in compliance with his existing permit. Thus, when Appellants object that the Department should not have reissued the permit because previous discharges have harmed their property, they could either be raising that objection on its own merits or asserting that the Department erred by reissuing the permit because Permittee was not in compliance with the previous permit. Since objections raised in a notice of appeal must be read broadly, *see, e.g., Bradford Coal Company, Inc. v. DEP,* EHB 95-141-R (Opinion issued July 19, 1996), we will consider both possibilities.[8]

1. On its own merits

To the extent that Appellants are trying to raise the harm resulting to Appellants' property from past discharges on its own merits, dismissal is appropriate, for reasons similar to those outlined

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[8] We do not encounter the same sort of dichotomy with respect to objections I and III because neither of those objections make averments concerning Permittee's conduct. They simply challenge the terms of the permits issued. Therefore, those objections cannot be construed as raising the issue of whether Permittee was complying with the terms of his previous permit.

above with respect to objection I.[9] The reissuance simply authorizes Permittee to discharge into the tributary; it does not authorize him to allow the discharged wastewater to leave his property, much less to harm Appellants' land. Although Appellants maintain that they are concerned that their land will be harmed by the wastewater flowing onto their property, the permit has not affected their interest in the land at all. They have the same rights with respect to their land that they would have if Permittee were discharging without a permit.

2. Permittee not in compliance with the previous permit

We will not dismiss the objection to the extent that Appellants might assert that, by allowing wastewater from the discharge to harm Appellants' property in the manner alleged, Permittee violated the terms of his previous permit. Since section 92.13(b)(1) of the NPDES regulations provides that the Department must determine that a permittee is in compliance with his current permit before reissuing the permit, harm caused to Appellant's property in violation of the previous permit may be relevant in determining whether the Department reissued a permit to an individual who was not in compliance. As in the case of the reissued permit, the original permit stated that it "[did] not convey any property rights . . . or any exclusive privileges; nor does it authorize any injury to private property or any invasion of personal rights." (Motion to dismiss, at para. D of Attachment B to Attachment A.) While this language makes it clear that the permit does not *authorize* any harm to other's property, the language does not expressly prohibit such harm either. In their submissions regarding the motion to dismiss, neither party addresses the question of whether

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[9] There is at least one other major problem with this objection to the extent Appellants seek to raise it on its own merits. The problem arises from the fact that the objection refers only to the consequences of past discharges. It does not aver that any harm will result in the future. To the extent that Appellants seek to raise this objection with respect to harm caused by discharges occurring before the permit was reissued, the objection is irrelevant.

Permittee failed to comply with the provisions of his original permit by allowing discharged wastewater to increase the amount of wetlands on Appellants' property. We will not sift through the terms of the original permit ourselves. For purposes of this motion it is sufficient to note that, as the moving party, the Department had the burden of demonstrating that it was entitled to the relief requested. *Green Thornbury Committee v. DER*, 1995 EHB 294. To show that the Department was entitled to dismissal of this aspect of objection II, the Department had to show that Permittee would not have violated the terms of the previous permit even if wastewater from his discharge increased the wetlands on Appellants' property and decreased the value of their land. Since the Department failed even to address that issue, dismissal is inappropriate.

Objection III--The previous permit and the reissuance have resulted in an inverse condemnation of Appellants' land by the Commonwealth

An inverse condemnation--typically referred to in recent case law as a "*de facto* taking"--occurs where an entity clothed with the power of eminent domain substantially deprives an owner of the use and enjoyment of his property. *Conroy-Prugh Glass Company v. Commonwealth,* 321 A.2d 598 (Pa. 1974); *In re Condemnation by City of Philadelphia*, 398 A.2d 224 (Pa. Cmwlth. 1979). Even assuming that wastewater discharged by Permittee has greatly increased the wetlands and pollution on their property, the Appellants cannot show that a *de facto* taking occurred here. To establish that a *de facto* taking has occurred, a property owner must show--among other things--that the deprivation of his property "is the direct and necessary consequence" of actions of the entity having the power of eminent domain. *In re Condemnation by Commonwealth, Department of Transportation*, 506 A.2d 990, 993 (Pa. Cmwlth. 1986).

Even assuming the deprivation Appellants allege would constitute a substantial deprivation of the use and enjoyment of their property, Appellants would not have shown that a *de facto* taking

occurred because the deprivation would not "be the direct and necessary consequence" of the Department issuing Permittee his permit. As noted above in our discussion of objection II, the original and reissued permits simply authorized the discharge into the tributary; they did not authorize the Permittee to allow the water to harm Appellants' land, or even to leave his property. Therefore, to the extent that wastewater discharged into the tributary has harmed Appellants' land, the harm is not a direct and necessary consequence of the Department's issuing the permit; it is a consequence of Permittee's failure to get an easement as required by the permit. This is not a regulatory issue, but a matter in trespass and properly brought in another tribunal.

Accordingly, dismissal is appropriate with respect to objection III.

IV. Conclusion

Upon reconsideration of the Department's motion to dismiss, therefore, we shall grant the motion with respect to objections I and III in the notice of appeal. With respect to objection II, meanwhile, the Department's motion is granted in part and denied in part: granted to the extent that Appellants assert that the Department erred by reissuing the permit simply because water discharged by Permittee has resulted in increased wetlands, decreasing the value of Appellants' property, and denied to the extent that Appellants assert that the Department erred by reissuing the permit because Permittee was not in compliance with the previous permit.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MR. & MRS. CARL MILLER	:	
	:	
v.	:	**EHB Docket No. 95-234-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DAVID LIBERTI, Permittee	:	

ORDER

AND NOW, this 31st day of March, 1997, the Department's petition for reconsideration is granted and, upon reconsideration, the Department's motion to dismiss is:

1) granted with respect to objections I and III in the notice of appeal.

2) granted in part and denied in part with respect to objection II in the notice of appeal:

a) granted to the extent that Appellants assert that the Department erred by reissuing the permit simply because water discharged by Permittee has resulted in increased wetlands, decreasing the value of Appellants' property.

b) denied to the extent that Appellants assert that the Department erred by reissuing the permit because Permittee was not in compliance with the previous permit.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 31, 1997

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

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RAND AM, INC., MELCROFT COAL COMPANY, INC.	:	
v.	:	**EHB Docket No. 95-161-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MOUNTAIN WATERSHED ASSOCIATION, INC. Intervenor	:	**Issued: April 1, 1997**

ADJUDICATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board sustains the Department's denial of an application for the underground mining of bituminous coal where the applicant failed to demonstrate that the operation of the mine would not result in pollution to waters of the Commonwealth.

I. Introduction and Background

This appeal arises from the Department of Environmental Protection's ("Department") denial of Rand Am, Inc.'s ("Rand Am") application for an underground permit to mine bituminous coal.[1] The proposed mine, Rand Am No. 4, would comprise nearly 3,000 acres and the mining would be in the Middle Kittanning coal seam. The deep mine would be located in Fayette and Westmoreland Counties.

[1]According to the Department, this was the first deep mine permit application it ever denied.

Appellants are Rand Am and Melcroft Coal Company, Inc. ("Melcroft Coal"), the owner of the coal. (collectively "Rand Am" or "appellants"). The application was opposed by a local conservation group, the Mountain Watershed Association ("Mountain Watershed") which was granted intervenor status in this appeal.

Pursuant to a request of the parties, an extensive site view of the area of the mine was conducted just prior to the trial of this appeal. Trial was held in Pittsburgh for a period of eleven days between March 13, 1996 and April 3, 1996. Following the hearing, the parties filed extensive and well-written post-hearing briefs and reply briefs. The record consists of the pleadings, a joint stipulation of facts ("J.S."), a transcript totaling 2,103 pages and numerous exhibits.[2] After a full and complete review of the record and briefs, we make the following:

II. Findings of Fact

1. Appellants, Rand Am and Melcroft Coal are Pennsylvania corporations; both are located at P.O. Box 3026, Fort Lee, New Jersey 07024. The principals of Rand Am are Hobart and Ruth Orton. The officers and directors of Melcroft Coal are Mr. and Mrs. Orton and Mervyn Michelow. J.S 2, 4.

2. 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"); Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, P.L. 31, *as amended*, 52 P.S. §1406.1-1406.21a ("Mine Subsidence Act"); the Coal Refuse Disposal Control Act, Act of September 24, 1968, P.L.

[2]References to the transcript pages are referred to as "Notes of Testimony," abbreviated as "N.T."

1040, *as amended*, 52 P.S. §§30.51-30.206 ("Coal Refuse Disposal 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. §510-17 ("Administrative Code") and the rules and regulations promulgated thereunder. J.S. 1.

3. Mountain Watershed is a Pennsylvania non-profit corporation with a mailing address of R.D. #3, Box 354, Acme, Pennsylvania 15610. Mountain Watershed was formed to protect natural resources. Some members of Mountain Watershed are property owners who reside in the vicinity of the proposed underground mine. J.S. 5.

4. The Department awarded over $43,000 in Small Operation Assistance Programs (SOAP) Funds to Rand Am to construct, monitor, and sample piezometers. In total, the Department granted a total of $72,475 in SOAP funds to help Rand Am prepare its Application. J.S. 42; N.T. March 26, 1996 at 1453.

5. Rand Am's application was accepted by the Department's McMurray Office on August 24, 1993. J.S. 24.

6. Department hydrogeologist John Kernic holds a Bachelor of Science Degree in Geology from West Virginia University. Exhibit No. C-31.

7. Mr. Kernic has conducted over one hundred hydrologic investigations which relate to underground mining. He has worked on 70% of all the underground bituminous coal mine permit applications in Western Pennsylvania. N.T. March 26, 1996 at 1611-12.

8. Rand Am proposed to use room and pillar mining methods. J.S. 62.

9. Water would be pumped from the mine during mining. J.S. 63.

10. There are various streams in the area of the proposed mine including Indian Creek, Champion Creek, Little Champion Creek, Minnow Run and Poplar Run, and other unnamed tributaries to these streams. J.S. 9.

11. Many pollutional discharges from old abandoned mines exist in the vicinity of proposed Rand Am No. 4 mine. These acid mine discharges include the Kalp Discharge, Gdosky Discharge, other down-dip cropline seeps along Indian Creek, and discharges near or into Poplar Run, Little Champion Creek, and Champion Creek. J.S. 13.

12. Groundwater can move laterally within a geologic unit or vertically up or down between and through different units. N.T., March 19, 1996 at 586-87, March 1, 1996 at 1004, March 26, 1996 at 1642-44, March 27, 1996 at 1675-76.

13. The Department sent Rand Am application correction letters setting forth certain deficiencies in the application including missing, incomplete, inadequate, or erroneous information. J.S. 27, 32, 34, 37; N.T., March 26, 1996 at 1518-19; Exhibit Nos. J-10, J-13, J-16, J-18.

14. Rand Am filed responses to each of the application correction letters. J.S. 29, 33, 35, 38; Exhibit Nos. J-11, J-14, J-17, J-21.

15. On November 4, 1994, the Department issued a "Pre-Denial" letter to Rand Am discussing various deficiencies in the application and discussing the adequacy of Rand Am's proposed barriers. J.S. 40; N.T., March 26, 1996 at 1518-19, March 28, 1996 at 1832-33; Exhibit No. J-23.

16. After the letter was sent to Rand Am, the parties met and Rand Am installed sixteen (16) piezometer wells in four (4) locations, in or near the Proposed Permit Area. J.S. 43; N.T., March 14, 1996 at 291-292; Exhibit Nos. J-1 (Modules 7.1, 8.1), C-5, C-7.

17. A piezometer is a well that receives water from a defined geologic interval and monitors the head and water quality of that unit only. Exhibit No. J-1 (Pg. 77).

18. Groundwater has the potential to reach the surface if the piezometric head is higher than the surface elevation. N.T., March 19, 1996 at 527, March 21, 1996 at 1007, March 22, 1996 at 1180, March 27, 1996 at 1678.

19. Groundwater in the Middle Kittanning and other deep units generally flows along the inclination of the rock unit or down-dip. In this area down-dip is generally from west to east. N.T., March 21, 1996 at 1006-07, March 22, 1996 at 1144, March 26, 1996 at 1640-41, March 27, 1996 at 1686-87, 1810; Exhibit J-1 (Module 8.1(3)).

20. The primary purpose of piezometer Nos. 1-3 (Pz.1-3) was to ascertain the direction of groundwater movement in the area of the proposed coal mine; the primary purpose of piezometer No. 4 (Pz.-4) was to establish the source of the Coffman Discharge near Indian Creek. Exhibit Nos. J-1 (Module 8.6(c)); J-23, J-25.

21. The piezometers also show that groundwater flows from west to east. N.T., March 21, 1996 at 1015-16, March 22, 1996 at 1144, March 27, 1996 at 1686-87; Exhibit No. C-19.

22. The potential for pollutional discharges from the proposed Rand Am No. 4 mine exists in the Champion Creek and Indian Creek Valleys. N.T., March 22, 1996 at 1050-54, March 27, 1996 at 1711-13; Exhibit Nos. J-2 (Module 19.3 map), A-52.

23. The strongest potential for surface discharges from the proposed Rand Am No.4 mine in the Champion Creek Valley is between surface elevation 1,580 and 1,600, where the piezometric surface exceeds the land surface by forty-four to forty-five feet, and in the vicinity of elevation 1,540, where the piezometric surface exceeds the land surface by approximately fifty-nine feet.

N.T., March 22, 1996 at 1166-76, March 25, 1996 at 1302-03; Exhibit No. C-57.

24. The piezometer monitoring data was incorporated into the application. J.S. 45.

25. On June 30, 1995 the Department denied the application. J.S. 49; Exhibit No. J-30.

26. Dr. Meiser, Rand Am's expert, testified that the Middle Kittanning head elevation exceeds the surface elevation in two locations: the confluence of Champion Creek and Minnow Run and near the Town of Champion at Indian Creek. The potential for pollutional discharges exists at these locations. N.T., March 19, 1996 at 526-29; Exhibit No. A-52.

27. The best predictor of the water quality effects of future mining is past mining in the area. N.T., March 20, 1996 at 848-49, March 21, 1996 at 1092, March 22, 1996 at 1137-40.

28. The proposed Rand Am No.4 mine has the potential to create acid mine drainage. N.T. March 22, 1996 at 1136-39.

29. Acid mine drainage is caused by the oxidation of pyrite, and results in water with elevated acidity and metals, such as iron and manganese, and sulfate concentrations, and depressed pH and alkalinity. N.T., March 22, 1996 at 1137-38.

30. The Melcroft Nos. 1 and 3 mines, and the Fulton mine are Middle Kittanning mines that are the best comparison to the Rand Am No. 4 mine because of their close physical proximity and similar geologic settings. N.T., March 21, 1996 at 1036-37.

31. Post-mining discharges from these mines show the potential quality of post-mining discharges from the proposed Rand Am No. 4 mine. J.S. 13 (Pollutional discharge in the area of the proposed mine); N.T., March 21, 1996 at 1036-37, 1092-93, March 22, 1996 at 1137-43, 1147-50; Exhibit No. C-6.

32. Approximately twenty pollutional discharges associated with Melcroft No. 1,

Melcroft No. 2, Melcroft No.3 and Fulton mines were described at the trial. N.T., March 21, 1996 at 1048-96, 1104-111; Exhibit Nos. C-10R, C-11. Many of these discharges were observed by the Board on the site view.

33. Naturally occurring alkalinity is not a remedy for the polluted water that Rand Am No. 4 would produce. Alkalinity does not remove metals, such as iron and manganese, from water. N.T. March 21, 1996 at 1118-20.

34. Barriers are undisturbed portions of rock and coal which separate the mine from the surface, coal outcrops, other mines or bodies of water. J.S. 64; N.T., March 26, 1996 at 1513, 1616.

35. Barriers must be designed based upon site specific geologic and hydrologic information. J.S. 65; N.T., March 26, 1996 at 1514, 1516; Exhibit A-4 at 51.

36. The Department's 1983 "Manual to Assist in the Preparation of Permit Application for Bituminous Underground Coal Mines" ("Guidance Manual") is a guidance document, and does not establish binding requirements. N.T. March 13, 1996 at 167-188, 194, 196-200; Exhibit No. A-4.

37. The so-called "rule of thumb" formula (Barrier size (in feet)= 50 feet + one foot of barrier per foot of hydraulic head) is a starting point for case-by-case barrier design. N.T.,March 23, 1996 at 1514, 1516, March 27, 1996 at 1728-29.

38. A 1,200 foot barrier between Melcroft Nos.3 and the Coffman Discharge was not adequate to prevent a pollutional discharge. N.T., March 22, 1996 at 1204, March 27, 1996 at 1686-87.

39. Pollutional mine drainage from the Melcroft No. 3 mine is intercepted in Pz-4, which is 500 feet down-dip from the mine. The water in Pz-4 has very high metals and sulfate

concentration, and shows that a 500 foot barrier would be inadequate. N.T. March 25, 1996 at 1315-16, March 27, 1996 at 1691-94, 196; Exhibit Nos. J-1 (Module 8.1); C-5.

40. The barrier between the proposed Rand Am No.4 mine and the existing Melcroft No.3 mine is 350 feet. N.T. March 26, 1996 at 1620; Exhibit No. J-1 (Module 19.3).

41. All of the barriers proposed for the Rand Am No. 4 mine are less than 1,200 feet thick, and most are less than 500 feet thick. N.T., March 26, 1996 at 1619-20, 1622-23, 1630-31, 1639, 1648-50; Exhibit No. J-1 (Module 19.3).

42. There are various tests that appellants did not perform which can evaluate the hydrologic properties, competence of rocks, and assist in barrier design. These tests include:

a) rock quality data tests,
b) hydraulic conductivity tests,
c) tracer tests, and
d) fracture trace tests.

N.T., March 14, 1996 at 412-16, March 19, 1996 at 590, March 20, 1996 at 78, March 26, 1996 at 1592-93.

43. Appellants' application and responses to the Department's correction letters failed to demonstrate that their proposed barriers are adequate to prevent pollutional discharges. N.T., March 27, 1996 at 1683, 1709-10, 1713, 1727.

44. The "Coffman Discharge" is a pollutional discharge in the Indian Creek valley, about 1,200 feet down-dip from Melcroft No.3. N.T., March 21, 1996 at 1117, March 27, 1996 at 1686, 1695; Exhibit No. C-9A, C-10R.

45. The source of the Coffman Discharge is not the Shaffer mine but Melcroft No. 3 mine. Water from Melcroft No.3 mine flows through a 1,200 foot barrier to discharge at the

Coffman Discharge. N.T. March 21, 1996 at 117-18, March 22, 1996 at 1204-05, March 27, 1996 at 1686.

46. The Shaffer mine is a completed surface mine located north of the Coffman Discharge that was mined in the late 1970's. It is not the source of the Coffman Discharge. N.T., March 13, 1996 at 245, March 22, 1996 at 1211-12, March 27, 1996 at 1700-01; Exhibit Nos. C-9A, C-10R.

47. The Department may not approve a permit application unless the application is complete. 25 Pa. Code §86.37. N.T., March 26, 1996 at 1512, March 28, 1996 at 1831-1832.

48. The Department's denial of the application was timely. The Department sent Rand Am five application correction letters over an approximately two year period, and denied the application only three and one half months after the last information was submitted by Rand Am. J.S. 50; N.T. March 26, 1996 at 1537-1538.

49. Rand Am did not provide calculations for revised erosion and sedimentation controls in their application. N.T. March 27, 1996 at 1769-1771; Exhibit No. J-1 (Modules 12, 16).

50. Erosion and sedimentation controls are necessary to prevent sediment from entering the waters of the Commonwealth. Sediment is a pollutant which can smother the benthic organisms that live on the bottom of streams and provide food for fish. N.T. March 27, 1996 at 1769, March 28, 1996 at 1841.

III. Discussion

The main issue in this appeal is whether barriers of coal and rock which would separate proposed Rand Am No. 4 mine from the surface, other mines, coal outcrops or bodies of water were adequately designed. Barriers must be designed to prevent post-mining pollutional

discharges and reestablish pre-mining hydrologic conditions. Rand Am argues it followed the Department's Guidance Manual in designing its barriers. The Department contends the Guidance Manual is a starting point for case-by-case barrier design. (F.F.35) Because of the geological conditions in this area, the Department contends that the mine barriers need to be much more extensive than either set forth in the Guidance Manual or in Rand Am's application.

The Department denied Rand Am's application for a deep mine permit because Rand Am did not prove that the proposed coal mine would not result in post-mining pollutional discharges. An applicant for a coal mining permit must demonstrate that the proposed mine 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. 1978); *Hepburnia Coal Company v. Department of Environmental Resources*, 1992 EHB 1315, 1328; *Magnum Minerals v. Department of Environmental Resources*, 1988 EHB 867, 892; *Boyce Land and Fuel v. Department of Environmental Resources*, 1992 EHB 1,18. The Board's review of this permit appeal is *de novo*. *Warren Sand and Gravel Co., Inc. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975); *McKees Rocks Forging, Inc. v. Department of Environmental Resources,* 1994 EHB 220, 294; *Harmar Township v. Department of Environmental Resources*, 1993 EHB 1856. Moreover, if the Board decides that the Department's denial of Rand Am's permit application is an abuse of discretion, the Board has the power to order the Department to grant Rand Am a deep mining permit. *Magnum Minerals, Inc. v. Department of Environmental Resources*, 1983 EHB 522, 526.

Coal Barriers

Coal barriers must be maintained around the periphery of the mine. They serve a threefold

purpose:

1) To prevent water inflow from adjacent strip and underground mine workings and from coal outcrops and its associated fractured overburdens;

2) To inundate as much of the mine workings as possible to inhibit the oxidation of pyritic materials; and

3) To limit the discharge of mine water into adjacent mines or along outcrops.

The Department's Guidance Manual and so-called "rule of thumb" are certainly starting points in designing coal barriers to achieve these purposes. (F.F. 35-36) Nevertheless, the unique site conditions of each mine together with the applicable hydrogeologic and geologic data must be fully considered to design effective coal barriers. (F.F. 34) The Department carefully studied various abandoned mines in the vicinity of the proposed Rand Am No. 4 mine. The Department found that the coal barriers to these mines were not sufficient to prevent post-mining pollutional discharges, which supports the contention that Rand Am's coal barriers are inadequate. (F.F. 37- 38, 44)

In many instances the proposed coal barriers in the Rand Am No. 4 mine are only 350 feet thick and in most cases less than 500 feet thick. (F.F. 39-40) The Department proved by overwhelming evidence that the likely source of the Coffman Discharge is the Melcroft No. 3 mine, even though the Melcroft No. 3 mine pool is separated from the discharges by a 1,200 foot coal barrier. (F.F. 44)

Rand Am's expert testified that there would be two areas of likely pollutional discharges from the proposed mine. (F.F.25) Although he contended that these discharges would be minor, we

think the Department's view and evidence that these discharges would be substantial is more credible. (F.F. 21-22, 42)

It seems almost certain that mining of the Middle Kittanning Coal Seam in the proposed Rand Am No. 4 mine would produce pool water which would be acidic and contain elevated concentrations of iron and sulfate. (FF. 26-27, 29-30) The evidence strongly supports the Department's view that this mine pool would not be contained by Rand Am's proposed coal barriers but would instead result in the pollution of various waters of the Commonwealth, including Champion Creek, Little Champion Creek, and Indian Creek. (F.F. 26-27, 42)

Rand Am's allegations of bias are not supported by the record. The Department provided Rand Am ample and numerous opportunities to modify and amend its permit application. (F.F. 42) Rand Am did not meet the necessary regulatory requirements to obtain a permit to construct and operate Rand Am No. 4 mine. (F.F. 46)

The Department sent Rand Am five application correction letters over an approximately two year period. (F.F. 48) Rand Am alleges bias because the Department did not make a decision on the permit application within sixty days of the Informal Public Conference. However, as the Department explained at the trial, the sixty day requirement is not applicable if deficiencies remain in the application. Many of the deficiencies were set forth following the Informal Public Conference in the fourth and fifth correction letters.

The remaining allegations of bias centering on the Department's review of the Unsuitable for Mining Petition, public participation, and contacts between the Department's McMurray office and other Department officials are equally meritless. The Department denied Rand Am's application only after a painstaking and carefully detailed review of the entire application.

The language of 25 Pa. Code Section 89.54(a) of the regulations specifically states that there should be no gravity discharges from the surface or from the underground mine area to the surface. The preponderance of the evidence shows that regulation would be violated in multiple areas. It is Rand Am's burden to demonstrate compliance with the regulations during the permit application process. Rand Am did not meet its burden in this case.

The 350 foot barrier between Rand Am No. 4 and Melcroft No. 3 is insufficient to prevent pollutional discharges from occurring. (F.F. 39) Likewise, the 450 foot barrier between the proposed mine and the LaRosa strip mine is also inadequate. (F.F. 40)

The permit application was also defective in that Rand Am proposed no chemical treatment of the mine pool. Moreover, its erosion and sedimentation control structures are not adequately designed. (F.F.49-50)

We also reject Rand Am's argument that the denial of its permit results in a taking of its property. See *Lucas v. South Carolina Coastal Counsel*, 505 U.S. 1003, 112 S.Ct. 2886 (1992), *United Artists Theater Circuit, Inc. v. City of Philadelphia*, 635 A.2d 612 (Pa. 1993), and *Mock v. Department of Environmental Resources*, 623 A.2d 940 (Pa. Cmwlth. 1993). An applicant is required to meet the requirements set forth by the statute and regulations in order to obtain a permit to mine coal. These standards are set forth in great detail. After many months Rand Am was unable or unwilling to modify its application to conform with the law. It is always unfortunate when a great deal of money is unsuccessfully expended and a mine which could help solve America's energy and job needs is not developed. Nevertheless, these regulations and statutes are the result of decades of thought and work in this area. The goal of this Commonwealth is to promote and foster industry in an environmentally sound manner. This is what the Department certainly tried

to do in this case.

Rand Am's appeal will be dismissed for its failure to adequately design an underground mine in conformance with the laws of the Commonwealth.

Conclusion of Law

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

2. Rand Am has the burden of proving by a preponderance of the evidence that the Department acted unlawfully or abused its discretion in denying Rand Am's application for an underground permit to mine bituminous coal.

3. The Board's review of Departmental actions is *de novo*, and, as such, we may hear evidence which was not available to the Department at the time it took its action. *McKees Rocks Forging, Inc. v. DER*, 1994 EHB 220, 294.

4. Rand Am failed to demonstrate that the granting of a permit to construct and operate its underground mine would not result in pollution to the waters of the Commonwealth. 25 Pa. Code §86.37(a)(3); *Harman Coal Company v. Department of Environmental Resources*, 384 A.2d 289 (Pa. Cmwlth. 1978)

5. Rand Am failed to demonstrate that its proposed coal barriers would prevent pollutional discharges. 25 Pa. Code §89.54.

6. The Department did not abuse its discretion in denying Rand Am's permit application. *Lilly Penn Food Stores, Inc. v. Milk Marketing Bd.*, 472 A.2d 715 (Pa. Cmwlth. 1984).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RAND AM, INC., MELCROFT COAL COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 95-161-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MOUNTAIN WATERSHED ASSOCIATION, INC.	:	
Intervenor	:	

ORDER

AND NOW, this 1st day of April, 1997, Appellant's appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 1, 1997

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

For the Commonwealth, DEP:
Michael J. Heilman, Esq.
Bruce Herschlag, Esq.
Western Region

For Appellant:
Eugene E. Dice, Esq.
G. Bryan Salzmann, Esq.
William W. Thompson, Esq.
Harrisburg, PA

For Intervenor:
Terry Ging, Esq.
Robert P. Ging, Jr., Esq.
Confluence, PA

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GEMSTAR CORPORATION	:	
	:	
	:	
v.	:	**EHB Docket No. 97-010-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** April 1, 1997

OPINION AND ORDER ON
MOTION TO DISMISS AMENDED APPEAL

By George J. Miller, Administrative Law Judge

Synopsis:

An appeal of an enforcement order issued by the Department under the Solid Waste Management Act cannot be amended so as to add additional appellants after the 30-day time period for an appeal has passed. The appeal filed within the required 30 day period may be amended within 20 days after the filing of the appeal to add additional objections to the Department's order.

OPINION

Background:

This is an appeal from an order and civil penalty assessment issued by the Department of Environmental Protection (Department) on December 11, 1996 to Gemstar Corp. (Gemstar), Ski Brothers, Inc. (Ski Brothers), Joseph and Irene Sklodowski, as well as William and Janice Heichel, under the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. § 6018.101 et seq. The order directed Gemstar and Joseph and Irene Sklodowski to cease accepting

waste tires at the permitted tire facility, directed Ski Brothers and Joseph and Irene Sklodowski to cease accepting waste tires at the salvage yard and directed William and Janice Heichel to cease accepting waste tires at the Heichel property. The order also directed the removal of tires from the Gemstar facility as well as other remedial activities. In addition, the order required Gemstar to pay a civil penalty of $225,000 and required Ski Brothers to pay a civil penalty of $17,500. The order also required the individual recipients of the order to jointly pay civil penalties of $17,500.

Gemstar filed a timely appeal from this order on January 9, 1997. This appeal raised 12 objections, A through L, to the Department's action challenging the accuracy of the factual statements in the order and that the order is unreasonable, unconstitutional, contrary to Department policy and an abuse of regulatory process.

Twenty days later, on January 29, 1997, an amended appeal was filed by Gemstar which purported to amend the appeal to add as appellants Ski Brothers, Joseph and Irene Sklodowski and William and Janice Heichel. The amended appeal also purported to add four additional objections - M through S - to the order as being in contravention of the legislative policy in the Solid Waste Management Act and for reasons related to the Ski Brothers salvage yard, the Sklodowski property and the Heichel property.

The Department promptly moved to dismiss the amendment to the appeal "to the extent that the amendment attempts to add additional party appellants and alleged grounds for appeal relating to these additional party appellants." The motion states that the amendment is ineffective to add appellants other than Gemstar to the appeal because the 30 day period within which these additional persons might appeal expired well before the time of the filing of the amended appeal on January 29, 1997.

Appellant's answer to the motion does not deny that the amended appeal was filed more than 30 days after service of the order on the additional parties. It claims only that the appeal filed by Gemstar was filed as a skeleton appeal and that 25 Pa. Code § 1021.53 permits the addition of new parties beyond the 30 day period. In addition, the answer claims that there is no basis for dismissing objections M through S because each allegation set forth by the Department in the order adversely affects the status of Gemstar and that Gemstar takes responsibility for every tire on the Gemstar site and the surrounding sites.

DISCUSSION

The Board strikes the purported addition of the additional appellants by amendment to this appeal so that the only appellant in this appeal is Gemstar Corporation. Under the Board's rules at 25 Pa. Code § 1021.52, the Board's jurisdiction does not attach to an appeal from the action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the appellant has received written notice of the action. *Rostosky v. DER*, 364 A.2d 761 (Pa. Cmwlth. 1976). While the Board's rule at 25 Pa. Code § 1021.53 (a) provides for a right to amend the appeal within 20 days of filing the appeal, that provision relates only to an amendment to add additional grounds for appeal or objections to the Department's action. Under 25 Pa. Code § 1021.53(f), the Board may, upon written request and for good cause shown, grant leave for filing an appeal *nunc pro tunc*. However, nothing in the answer to the motion to dismiss provides a basis for an allowance for permitting the additional appellants named in the amended appeal to appeal beyond the 30 day period. *Grimaud v. DER*, 638 A.2d 299 (Pa. Cmwlth. 1994). In addition, section 605 of the Solid Waste Management Act requires that an appeal from an assessment of a civil penalty must be filed within 30 days, which appeal must be accompanied with the payment of the proposed penalty in full.

Failure to file the appeal within 30 days is a waiver of all legal rights to contest the violation or the amount of the penalty. 35 P.S. § 6018.605.

By contrast, the Board will not strike paragraphs M through S of the amended appeal other than paragraph P. These paragraphs add additional grounds for the appeal. While the grounds N through S appear to apply to the property of the other parties, all of them with the single exception of objection P, may well affect the responsibility of Gemstar. Paragraph 19 of Gemstar's answer to the motion claims that each allegation in these paragraphs affects the status of Gemstar and that Gemstar takes responsibility for the surrounding sites owned by the other proposed appellants.

Objection P, however, objects that the order fails to give Ski Brothers reasonable time to apply for and obtain permits required by the activity deemed to cause potential pollution. That objection appears to apply only to Ski Brothers which failed to file a timely appeal. Objection P is therefore stricken from the amended appeal.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

ORDER

AND NOW, this 1st day of April, 1997, IT IS HEREBY ORDERED as follows:

1. The amended appeal is stricken to the extent that it purports to add Ski Brothers, Inc., Joseph and Irene Sklodowski and William and Janice Heichel as appellants.

2. The motion to strike objections M, N, O, Q, R and S of the amended appeal is **DENIED**.

3. The motion to strike objection P of the amended appeal is **GRANTED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 1, 1997

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

For the Commonwealth, DEP:
Wm. Stanley Sneath, Esquire
Southeast Region

For Appellants:
Norman A. Matlock, Esquire
Philadelphia, PA

gm/bl

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LEATHERWOOD, INC.	:	
	:	
v.	:	**EHB Docket No. 96-249-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** April 8, 1997

OPINION AND ORDER ON PETITION FOR LEAVE TO INTERVENE

By Michelle A. Coleman, Member

Synopsis

A petition for leave to intervene is denied. The Board will not grant a petition for intervention where: (1) the Board has previously denied another petition for intervention filed by petitioners in the same appeal; (2) the petitioners currently have an appeal of the Board's denial pending before Commonwealth Court; and, (3) the petitioners do not aver that crucial circumstances have changed since the first petition was filed which justify submitting a second petition.

OPINION

This matter was initiated with the November 20, 1996, filing of a notice of appeal by Leatherwood, Incorporated (Appellant) to an October 21, 1996, order issued by the Department of Environmental Protection (Department). The order suspended a solid waste permit the Department had issued authorizing the construction and operation of the landfill, and also suspended two related NPDES permits: a soil and waterway NPDES permit and a water quality NPDES permit. The order stated that the Department suspended the permits because they were inconsistent with section 1220 of

the Federal Aviation Reauthorization Act of 1996. Appellant's notice of appeal asserted that, by issuing the order, the Department acted arbitrarily and capriciously, and otherwise acted contrary to law.

On March 13, 1997, Jefferson County, the Jefferson County Solid Waste Authority, the Clearfield-Jefferson Counties Regional Airport Authority, and Pine Creek Township (Petitioners) filed the petition to intervene. The Department does not oppose the petition (Petition to intervene, para. 21), and Appellant filed no response.

We deny the petition for intervention. This is not the first time Petitioners have attempted to intervene in this appeal. We denied the Petitioners' first petition to intervene (previous petition) in a December 24, 1996 order. Petitioners appealed that decision to Commonwealth Court on January 23, 1997, and the Commonwealth Court has yet to rule on that appeal. The two petitions for intervention are virtually identical. The petition currently before the Board differs from the previous petition only in that it refers to different holdings for the standard for intervention and includes more detail about the evidence Petitioners intend to introduce. The Petitioners never aver that they could not have included this information in the previous petition.[1] Nor do they otherwise aver that crucial circumstances have changed which would justify entertaining their current petition for intervention while their appeal regarding their previous petition remains pending before Commonwealth Court.

Absent such a change of circumstances, we know of no reason why Petitioners should get a second bite at the apple. There are many instances where litigants--or potential litigants--are dissatisfied with Board rulings. Their recourse is either to request reconsideration or appeal to

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[1] Indeed, given the nature of the information (*i.e.* holdings from case law decided before the previous petition was filed), it seems clear that Petitioners had access to it prior to filing the previous petition.

Commonwealth Court. They cannot wait until the time to request reconsideration has expired[2] and then simply file an "improved" version of the same motion or petition--much less do so while simultaneously appealing the Board's decision to Commonwealth Court. Were we to entertain such motions, we would not only compromise the judicial economy of proceedings before the Board, we might interfere with appeals before the Commonwealth Court as well.

[2] Petitions for reconsideration must be filed within 10 days of the Board order for which reconsideration is sought. 25 Pa. Code §§ 1021.123(a) and 1021.124(a). More than 10 days elapsed between the time the Board denied Petitioners previous petition and the filing of the instant petition. The Board issued the order denying the previous petition on December 24, 1996. Petitioners did not file the instant petition until almost three months later, on March 13, 1997.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

LEATHERWOOD, INC.	:	
	:	
v.	:	**EHB Docket No. 96-249-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 8th day of April, 1997, it is ordered that Petitioners' petition to intervene is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 8 , 1997

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library
For the Commonwealth, DEP:
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J. Frank McKenna, III, Esq.
Joseph K. Reinhart, Esq.
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Confluence, PA

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IRVIN E. AND THELMA G. STAMBAUGH AND IRVIN E. STAMBAUGH, JR.	:	
v.	:	**EHB Docket No. 96-043-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EAST PENNSBORO TOWNSHIP BOARD OF COMMISSIONERS and MICHAEL MANNING & ASSOCIATES, Intervenor	:	**Issued: April 15, 1997**

OPINION AND ORDER ON PETITIONS FOR IMPOSITION OF FEES AND COSTS AND ON JOINT REQUEST FOR HEARING

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

Petitions for imposition of fees and costs are denied where the petitions were filed more than 30 days after the Board issued the order under which the petitioners claim to have prevailed.

OPINION

This matter was initiated with the filing of a notice of appeal by Irvin and Thelma Stambaugh, and Irvin Stambaugh, Jr., (collectively, Stambaughs) who own residences at Acri Meadow Road, Enola, Pennsylvania. The appeal challenges a January 19, 1996, Department of Environmental Protection (Department) decision to approve a revision to East Pennsboro Township's (East Pennsboro) official sewage facilities plan. The revision pertains to lots in a proposed Hickory Ridge development which lie adjacent to Stambaughs' residences. On February 28, 1996, the Board informed East Pennsboro that it was an automatic party to the proceedings,

pursuant to 25 Pa. Code § 1021.51(g). On March 4, 1996, we granted Michael Manning & Associates (Manning), the developer of Hickory Ridge, leave to intervene. On September 13, 1996, Stambaughs filed a praecipe to withdraw their appeal, which the Board granted on September 17, 1996.

Manning filed a petition for costs and fees on November 4, 1996. East Pennsboro followed suit, filing a petition for costs and fees on December 5, 1996. The Department filed an answer to Manning's petition on November 22, 1996, and responded to East Pennsboro's petition on December 30, 1996.[1] Stambaughs did not file a response to Manning's petition for costs and fees,[2] but did file an answer to East Pennsboro's petition, on December 17, 1996. Subsequently, on January 29, 1997, Manning and East Pennsboro filed a joint request that the Board schedule a hearing for their petitions for costs.

The petitions for costs and fees are very similar. Both Manning and East Pennsboro request:

> 1) reimbursement of $405 in engineering fees and $1,240 in attorney fees, pursuant to 25 Pa. Code § 1021.76 of the Board's rules, incurred as a result of the supersedeas hearing;
>
> 2) reimbursement of $4,140 in attorney fees and $1,566 in "professional fees," pursuant to 25 Pa. Code §§ 1021.76 and 1021.124 of the Board's rules, associated

---

[1] The Department did not file a formal answer to East Pennsboro's petition; instead, it simply filed a letter stating that it adopted the position set forth in Stambaughs' answer to that petition.

[2] Stambaughs refer in their answer to another answer, one which they purportedly filed with the Board regarding the Manning petition. (Stambaughs' answer to the Manning petition, para. 47) They attach a copy as an exhibit. (Exhibit A) However, Stambaughs *never* filed an answer to the Manning petition. Even if they had, moreover, the answer would have been untimely. Answers to petitions for costs must be filed within 15 days of the filing of the application. *See* 25 Pa. Code §§ 1021.133 and 1021.143. Stambaughs' answer is dated November 21, 1996--two days after the deadline for responses expired.

with the appeal itself; and,

3) reimbursement of "legal fees," pursuant to 25 Pa. Code § 1021.76 of the Board's rules, incurred in the preparation of the petition for costs.

We will not consider the Department's response to either of the petitions for costs. Neither was timely filed. Responses to petitions for costs must be filed within 15 days of the filing of the application. *See* 25 Pa. Code §§ 1021.133 and 1021.143. The deadline for filing responses to Manning's petition for costs expired on November 19, 1996--three days before the Department filed its response. The deadline for filing responses to East Pennsboro's petition for costs expired on December 20, 1996--ten days before the Department filed its response.

With respect to the responses to the petitions for costs, then, we need only consider Stambaughs' answer to East Pennsboro's petition. In the answer, Stambaughs stated that they lacked sufficient information to determine whether the costs were reasonable. Stambaughs also argued that, whether the costs were reasonable or not, East Pennsboro was not entitled to them because Stambaughs had not acted in bad faith and because the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 *et seq.* (Sewage Facilities Act), did not authorize the award of such costs.

We need not proceed to a hearing to determine the factual issues in this appeal, because it is clear on the basis of the legal issues alone that neither Manning nor East Pennsboro can prevail in their petitions for costs.[3]

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[3] The Board can deny an application for costs *sua sponte* where it is apparent from the application that we will be unable to grant the relief requested. *See* 25 Pa. Code § 1021.132(c) (relating to applications for costs brought under the Costs Act, Act of December 13, 1982, P.L. 1127, 71 P.S. §2031 *et seq.* [the Costs Act]) and § 1021.142(c) (relating to applications for costs brought

Manning and East Pennsboro's petitions for costs were untimely. The Board may award costs only where authorized by statute. *Green Thornbury Committee v. DER*, 1995 EHB 294. Section 1021.132(b) of the Board's rules, 25 Pa. Code §1021.132(b), provides that applications for costs under the Costs Act must be filed within 30 days of the Board order under which the applicant claims to have prevailed. Section 1021.142(b) of the Board's rules, 25 Pa. Code §1021.132(b), imposes the same time limit for actions for costs brought under other statutes.[4] Both Manning and East Pennsboro failed to file their petitions within thirty days of our approval of the praecipe to withdraw Stambaughs' appeal. We approved the praecipe to withdraw on September 17, 1996. Manning filed its petition 58 days later, on November 4, 1996, and East Pennsboro filed its petition on December 5, 79 days after we approved the praecipe to withdraw.

---

under other statutes).

[4] Section 1021.142(b) provides, in pertinent part, "An applicant [for costs and fees] shall file an application within 30 days of the date of a final order of the Board."

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

IRVIN E. AND THELMA G. STAMBAUGH AND IRVIN E. STAMBAUGH	:	
v.	:	**EHB Docket No. 96-043-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EAST PENNSBORO TOWNSHIP BOARD OF COMMISSIONERS and MICHAEL MANNING & ASOCIATES, Intervenor	:	

ORDER

AND NOW, this 15th day of April, 1997, Manning and East Pennsboro's petitions for costs and fees, and their joint request for a hearing, are denied.

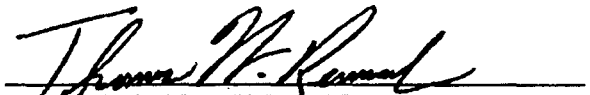
ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 15, 1997

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

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and
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LAWS, STARUCH & PISARCIK
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Lisa Marie Coyne, Esq.
Camp Hill, PA

For Manning:
Anthony Nestico, Esq.
PIERCE & NESTICO
Hershey, PA

jb/bl

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SAMUEL C. LYKENS, JR.	:	
	:	
v.	:	**EHB Docket No. 96-252-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 15, 1997**

OPINION AND ORDER ON MOTION TO DISMISS APPEAL

By Robert D. Myers, Administrative Law Judge

Synopsis:

The Board dismisses the appeal of a civil penalty assessed under the Storage Tank Act when the Appellant fails to appear at a hearing scheduled to consider his contention that he was unable to prepay the penalty at the time of filing the appeal. Appellant's voluntary petition under Chapter 13 of the Bankruptcy Code is not an excuse because the automatic stay provisions do not apply to this proceeding and because Appellant, as a debtor in possession, remains in control of the litigation initiated by him.

OPINION

Samuel C. Lykens, Jr., Appellant, filed a Notice of Appeal on November 19, 1996, challenging an Assessment of Civil Penalty in the amount of $31,500, issued by the Department of Environmental Protection (DEP) on October 21, 1996. The Assessment was made pursuant to section 1307 of the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as*

amended, 35 P.S. § 6021.1307, with respect to a site in Port Matilda Borough, Centre County.

In his Notice of Appeal, Appellant contended that he was financially unable to prepay the civil penalty at the time of filing his appeal (as required by section 1307 of the Act) and would be denied his constitutional rights if not allowed to appeal the Assessment without prepaying the penalty. When an appellant makes this contention in his Notice of Appeal, this Board must determine whether the contention has merit, holding a hearing if necessary. *Twelve Vein Coal Co. v. DER*, 561 A.2d 1317 (Pa. Cmwlth. 1989); *Stanley T. Pilawa and Disposal, Inc. v. DEP*, EHB Docket No. 96-108-MR (Opinion issued July 18, 1996).

On DEP's motion, we scheduled such a hearing for February 19, 1997 and, at the parties' joint request, rescheduled it for March 10, 1997. On February 24, 1997, Appellant wrote to DEP advising that Appellant had filed a voluntary petition in bankruptcy on February 11, 1997 and was invoking the protection of the automatic stay provisions of the Bankruptcy Code. Appellant formally demanded that DEP withdraw its motion for a hearing before the Board or seek an indefinite postponement of the hearing.[1]

DEP responded on March 3, 1997 to Appellant's February 24, 1997 letter, denying that the automatic stay provisions were applicable and refusing to withdraw its motion or seek a postponement of the hearing. On March 5, 1997, Appellant replied to DEP, reiterating his insistence that the automatic stay applied to this appeal and warning that, if DEP persisted in going forward with the hearing, Appellant would seek a contempt order from the Bankruptcy Court and seek attorneys' fees. In addition, Appellant maintained that he would not participate in the March

[1] A copy of Appellant's February 24 letter, which was sent via facsimile transmission to DEP, was sent to the Board by first class mail but did not arrive until March 4, 1997.

10 hearing. On March 7, 1997, DEP wrote to Appellant citing case law for the proposition that the automatic stay did not apply to this appeal and urging him to read the cases before electing not to attend the hearing.

While the parties copied the Board with their correspondence, neither party communicated directly with the Board. No formal motion was filed by Appellant asking for a postponement of the hearing. No documents were filed with the Board evidencing the filing of a voluntary petition in bankruptcy. No order of the Bankruptcy Court was served on the Board.

As a result, the scheduled hearing was convened in Harrisburg on March 10, 1997 before Administrative Law Judge Robert D. Myers, a Member of the Board. DEP was present and represented by legal counsel. Appellant was neither present personally nor by his legal counsel. DEP moved at the hearing that the appeal be dismissed because Appellant had not shown on the record that he was financially unable to prepay the civil penalty at the time the appeal was filed.

Judge Myers expressed his concurrence with DEP's position that the automatic stay did not apply but expressed his concern that Appellant may have lost control over the litigation once the bankruptcy petition was filed. DEP represented that the petition was filed under Chapter 13 which allows the debtor to remain in possession of his assets and in control of his litigation. DEP had no documentary proof of the representation and requested to supplement the record at a later time with a copy of the petition. This was granted, the motion was taken under advisement and the hearing was adjourned.

Later that day DEP filed with the Board a certified copy of a Voluntary Petition, filed by Appellant in the United States Bankruptcy Court for the Middle District of Pennsylvania on February 11, 1997, and given docket number 1-97-00513. The Voluntary Petition clearly established that

Appellant filed under Chapter 13.

There is no doubt about the fact that Appellant has failed to present any evidence to prove his contention that he was financially unable to prepay the civil penalty on November 19, 1996 when the Notice of Appeal was filed. The question is whether his Voluntary Petition under Chapter 13 of the Bankruptcy Code, 11 U.S.C. §§ 1301-1307, is a legal interposition excusing or, at least, postponing his obligation to this Board.

We held in *Torbert v. DER,* 1988 EHB 400, that the automatic stay provisions of the Bankruptcy Code do not apply to actions to enforce a state's police or regulatory powers, relying on *Penn Terra Limited v. Department of Environmental Resources,* 733 F.2d 627 (3d Cir. 1984). In *DER v. Marileno Corporation et al.,* 1989 EHB 206, we dismissed Marileno's contention that the automatic stay provisions prevented DER from pursuing a complaint for civil penalties before this Board and entered a partial default judgment because of Marileno's failure to answer the complaint. Later that same year, in *Roswel Coal Company, Inc. v. DER*, 1989 EHB 224, we dismissed appeals from civil penalty assessments for failure to prepay the penalties where the appellant was a debtor in possession under Chapter 11 of the Bankruptcy Code.

As we pointed out in these decisions, the automatic stay intervenes only to stop DEP efforts to actually collect a money judgment. Proceedings to determine the amount of a civil penalty, initiated by DEP as in Marileno, or proceedings to seek Board review of a civil penalty already assessed by DEP, initiated by the assessee as in *Roswel* and the present case, do not fall within that proscription.

Moreover, as we observed in *Torbert*, the automatic stay provisions are under the control of the United States Bankruptcy Court which has injunctive power to aid in its enforcement. We have

heard nothing from the Bankruptcy Court in the present case, further confirming our interpretation of the governing law.

Finally, we are satisfied that Appellant still has control of this appeal which he filed on his own volition. As a debtor in possession under Chapter 13 of the Bankruptcy Code, he remains in *de facto* and *de jure* possession of all his assets, including causes of action. 11 U.S.C. § 1306. Therefore, he was fully capable of proceeding with his appeal.

We conclude that Appellant's Voluntary Petition in Bankruptcy under Chapter 13 did not excuse him from appearing at the March 10, 1997 hearing to present evidence of his inability to prepay the civil penalty on November 19, 1996. We, therefore, will grant DEP's motion to dismiss the appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SAMUEL C. LYKENS, JR.	:	
	:	
v.	:	**EHB Docket No. 96-252-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 15th day of April, 1997, it is ordered as follows:

1. DEP's motion to dismiss is granted.

2. The appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 15, 1997

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

For the Commonwealth, DEP:
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Office of Chief Counsel
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Williamsport, PA 17101

For Appellant:
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HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

SOIL REMEDIATION SYSTEMS, INC.	:	
	:	
v.	:	**EHB Docket No. 97-006-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 15, 1997**

OPINION AND ORDER
DISMISSING APPEAL

By George J. Miller, Administrative Law Judge

Synopsis:

An appeal is dismissed for failure to file the appeal within 30 days after the Appellant received written notice of the Department's decision not to extend an air quality plan approval which had expired by reason of the Appellant's failure to complete construction of an air contamination source as required by a condition of the plan approval.

OPINION

Background:

On or about October 28, 1996, Soil Remediation Systems, Inc. (SRS or Appellant) requested that the Department of Environmental Protection (Department) extend its plan approval for Appellant's soil remediation facility. On December 6, 1996, Appellant was notified by facsimile and by first-class mail transmission of a letter to SRS denying its request for an extension of the plan approval. (Department's Motion, ¶2 and Ex. A; Appellant's Response, ¶3). The letter stated that the plan approval expired on November 30, 1996 pursuant to Condition 8.a of the plan approval and

25 Pa. Code § 127.113(a) because construction of the air contamination source had not been completed. The notice went on to state that the Department was unable to approve Appellant's request for extension of the plan approval as the Department has no evidence that construction has commenced as required by 25 Pa. Code § 127.113(b). (Department's Motion, Ex. A). The letter was received by SRS that day. In addition, the same letter was sent to SRS by first-class mail on December 6, 1996. (Affidavit of Thomas J. McGinley attached to the Department's Motion as Ex. F). The Notice of Appeal filed by SRS was not received by the Board until January 7, 1997, more than 30 days after the notice of the Department's action was sent to SRS.

DISCUSSION

The Board's rules at 25 Pa. Code § 1041.52 state that the jurisdiction of the Board will not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of the action unless a different time is provided by statute.

The Appellant contends that the appeal is timely because it was filed within 30 days of the time it received service of the letter representing the Department's action by certified mail. It points out that § 7(e) of the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. § 4006.1, provides as follows:

> Whenever the department shall refuse to grant an approval or to issue or reissue a permit hereunder or terminate, modify, suspend or revoke a plan approval or permit already issued, such action shall be in the form of a written notice to the person affected thereby informing him of the action taken by the department and setting forth, in such notice, a full and complete statement of the reasons for such action. Such notice shall be served upon the person affected, either personally or by certified mail, and the action set forth in the notice shall be final

> and not subject to review unless, within thirty (30) days of the service of such notice, any person affected thereby shall appeal to the hearing board, setting forth with particularity the grounds relied upon.

Unfortunately, this provision of the Air Pollution Control Act does not apply to the Department's action in this case. It applies only to a refusal to grant a plan approval or to issue or reissue a permit under the Act or to terminate, modify, suspend or revoke a plan approval or a permit already issued. In this case, the Department took no such action. The action that it took was a decision that it could not extend the plan approval that had terminated by its own condition which required that construction be completed by November 26, 1996. Construction had not been completed by that time. The Department's action was based on a finding that construction had not yet commenced at the time of the Department's action.

The provision of the Air Pollution Control Act which is applicable to the Department's decision not to extend the plan approval is section 13 of the Air Pollution Control Act, 35 P.S. § 4010.2 which provides that a person aggrieved by an administrative action of the Department issued pursuant to the Air Pollution Control Act has the right within 30 days from actual or constructive notice of the action to appeal the action to the Environmental Hearing Board. Since Appellant acknowledges that it did receive actual notice of the Department's action more than 30 days before its appeal was filed by the Board, the appeal must be dismissed for lack of jurisdiction. However, Appellant is free to submit a new application for a plan approval to the Department.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOIL REMEDIATION SYSTEMS, INC.	:	
	:	
v.	:	EHB Docket No. 97-006-MG
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 15th day of April, 1997, upon consideration of the motion of the Department to dismiss the appeal for failure to file the appeal within 30 days of the Department's action, the appeal is hereby **DISMISSED** for lack of jurisdiction.

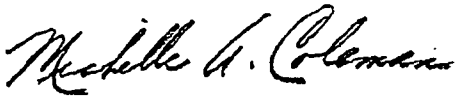
ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 97-006-MG



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 15, 1997

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

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

For Appellant:
Richard Wiedman, Esquire
ECKERT SEAMANS CHERIN & MELLOT
Pittsburgh, PA

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EMPORIUM WATER COMPANY	:	
	:	
v.	:	**EHB Docket No. 96-175-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 17, 1997**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Member

Synopsis

A motion for summary judgment is granted. Under the doctrine of administrative finality, an appellant cannot challenge the terms of a condition in a public water supply operations permit when he failed to file a timely appeal to the same terms in a previously issued public water supply construction permit.

OPINION

This matter was initiated with the August 23, 1996, filing of a notice of appeal by Emporium Water Company (Appellant) to a public water supply operation permit (operating permit) it received from the Department of Environmental Protection (Department) on July 24, 1996. In the notice of appeal, Appellant raises a number of objections to special condition E (condition E) in the operating permit, which requires that Appellant reduce the flow through its filtration plant when incoming water exceeds certain levels of turbidity. The notice of appeal averred that, by putting condition E

in the operating permit, the Department had acted arbitrarily and failed to consider all relevant facts. Accordingly, the notice of Appeal requests that we strike condition E.

On February 25, 1997, the Department filed a motion for summary judgment and a supporting memorandum of law. In its motion, the Department asserts that it must prevail as a matter of law because Appellant was already bound by a nearly identical condition, condition B, in its pre-existing public water supply construction permit (construction permit). According to the Department, the doctrine of administrative finality precludes Appellant from challenging condition E in the operating permit because Appellant failed to appeal condition B in the construction permit. Appellant failed to file any response to the Department's motion.

When ruling on motions for summary judgment, the Board looks to Rules 1035.1 to 1035.5 of the Pennsylvania Rules of Civil Procedure. *See, e.g., Tranguch v. DEP*, EHB Docket No 95-255-C (Opinion issued February 25, 1997). Subsection (a) of Pa.R.C.P. 1035.3 provides that, in response to a motion for summary judgment, "[t]he adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within 30 days after service of the motion. . . ."

The Department made and supported numerous factual assertions in its motion. Among other things, it averred that:

> (1) Condition B became part of the construction permit as a result of an April 19, 1996, amendment to the construction permit and provides:
>
> > This condition replaces and modifies special condition F of construction Permit No. 129501.
> >
> > When raw water turbidity is less that 30 NTU [Nephelometric Turbidity Units], the herein approved facilities shall be operated at an absorption clarifier loading rate of 15 gpm/sq. ft. or less and a filter loading rate of 4 gpm/sq. ft. or less.

> When raw water turbidity exceeds 30 NTU, the herein approved facilities shall be operated at an absorption clarifier loading rate of 10 g.p.m./sq.ft. or less and a filter loading rate of 2.67 g.p.m./sq. ft. or less.
>
> (Motion for summary judgment, para. 15 and Ex. 5)

(2) Appellant did not appeal the April 19, 1996, amendment to its construction permit. (Motion for summary judgment, para. 17 and Ex. 1)

(3) Condition E of the operating permit, issued on July 24, 1996, provides:

> When the raw water turbidity is less that 30 NTU, the herein approved facilities shall be operated at an absorption clarifier loading rate of 15gpm/sq. ft. or less and a filter loading rate of 4 g.p.m./sq. ft. or less. When the raw water turbidity exceeds 30 NTU, the herein approved facilities shall be operated at an absorption clarifier loading rate of 10 g.p.m./sq.ft. or less and a filter loading rate of 2.67 g.p.m./sq. ft. or less.
>
> (Motion for summary judgment, para. 20 and Ex. 6)

Since Appellant failed to file a response, we shall treat the facts alleged by the Department as established for purposes of this motion.[1]

The only remaining question is whether the doctrine of administrative finality precludes Appellant from challenging the terms of Condition E in the operating permit when Appellant failed to challenge Condition B in the construction permit. For purposes of our analysis, condition B in the construction permit and condition E in the operating permit are identical. The language in the two is identical except that, in condition E, the Department added the word "the" before both references to "raw water turbidity." This difference, obviously, is immaterial for purposes of

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[1] We could have entered judgment against Appellant simply on the basis of his failure to respond to the Department's motion for summary judgment. Subsection (d) of Pa.R.C.P. 1035.3 provides, "Summary judgment may be entered against a party who does not respond." The explanatory comment accompanying Rule 1035.3 states, "The rule permits entry of judgment for failure to respond to the motion but does not require it."

determining whether the doctrine of administrative finality applies.

The doctrine of administrative finality precludes any collateral attack on an appealable action which was not challenged by a timely appeal. *See DER v. Wheeling-Pittsburgh Steel Corporation*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*, 473 Pa. 432, 375 A.2d 320 (1977), *cert. denied*, 434 U.S. 969 (1977); *People United to Save Homes v. DER*, EHB Docket No. 95-232-R (Opinion issued November 27, 1996). Since Appellant failed to file a timely appeal to the terms in Condition B in the construction permit, it cannot challenge those same terms in Condition E in the operating permit. The fact that the conditions were in two different types of water supply permits is immaterial. While the doctrine of administrative finality is typically invoked to preclude the litigation of issues where permits are revised or reissued, it can also apply where an appellant could raise the same issue in an appeal of a different permit. *See, e.g., Fuller v. DER*, 1990 EHB 1726 (holding that appellants challenging the issuance of water quality management permits could not collaterally attack issues resolved in a related official plan approval or encroachments permit).

In light of the foregoing, the Department has established that it is clearly entitled to judgment as a matter of law.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EMPORIUM WATER COMPANY	:	
	:	
v.	:	**EHB Docket No. 96-175-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 17th day of April, 1997, it is ordered that the Department's motion for summary judgment is granted and Appellants' appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 17, 1997

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

For the Commonwealth, DEP:
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jb/bl

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TELECOPIER 717-783-4738

GARY L. REINERT, SR.,	:	
	:	
v.	:	**EHB Docket No. 97-012-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 17, 1997**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By Robert D. Myers, Administrative Law Judge

Synopsis:

The Board denies a Petition for Supersedeas in an appeal from the forfeiture of a surety bond by the guarantor. The supersedeas was requested when DEP began collecting the bond while this appeal was pending. The Board holds that Appellant's estoppel argument, which is the core of his appeal, is most likely to be resolved against him and in favor of DEP. That being the case, the equities on Appellant's side are not sufficient to tip the scales in his favor.

OPINION

Gary L. Reinert, Sr., Appellant, filed a Notice of Appeal on January 13, 1997, seeking Board review of a Declaration of Forfeiture of Surety Bond No. 111 3319 2200 in the amount of $150,000 issued by the Department of Environmental Protection (DEP) on December 12, 1996. The Surety Bond, with National Granulating Co., Inc. (NGC) as Principal and with The American Insurance

Company as Surety, was issued on June 9, 1995 to comply with the terms of a Consent Order and Agreement dated June 13, 1995 between DEP and American Typlax Systems, Inc. (ATSI) and NGC (1995 CO & A). The CO & A and the Surety Bond pertained to Residual Waste permit No. 301264 for a waste tire processing facility in the City of Washington, Washington County, Pennsylvania. Appellant claimed in the Notice of Appeal that he is the guarantor for the Surety Bond and received notice of the forfeiture on December 16, 1996.

On March 17, 1997 Appellant filed a Petition for Supersedeas and an Application for Temporary Supersedeas. These filings were prompted by DEP's decision to demand payment on the Surety Bond despite the fact that an appeal was pending. The Surety, in obedience to the demand, had forwarded a check to DEP on March 14, 1997.

After a conference call with the parties, the Board issued an Order on March 19, 1997 providing as follows:

1. A temporary supersedeas is granted.

2. The Department will not cash the check from the surety on the forfeited bond or otherwise collect the funds until further order of this Board.

3. A hearing on the Petition for Supersedeas shall be held before the Honorable Robert D. Myers beginning at 9:30 a.m. on March 25, 1997, in Hearing Room 1 at the offices of the Environmental Hearing Board, Second Floor, Rachel Carson State Office Building, 400 Market Street, Harrisburg, Pennsylvania.

4. The temporary supersedeas will expire at the conclusion of the hearing on March 25, 1997, unless extended by order of this Board.

DEP filed its Response to the Petition for Supersedeas on March 24, 1997.

A hearing on the Petition was held as scheduled on March 25, 1997 at which both Appellant and DEP were represented by legal counsel and submitted evidence in support of their legal

positions. At the conclusion of the hearing, Judge Myers stated that he could not issue a ruling from the bench but needed time to consider the evidence and legal arguments. DEP agreed to hold the check from the Surety until a decision is issued and to give Appellant a letter to that effect.

Appellant filed a Memorandum of Law on March 25, 1997. DEP filed on April 1, 1997. Supplements were filed by both parties on April 3, 1997.

The narrative of facts which follows is based on the record at this stage of the proceedings. The exhibits attached to DEP's Memorandum of Law will not be considered.

ATSI applied for and, on November 30, 1988 received from DEP, Municipal Waste Permit No. 101530 for a solid waste processing facility - a waste tire processing facility - located on a 0.5 acre site at 41 Detroit Avenue, Washington (Washington County), PA 15301. (the Site). The operation approved by this Permit was the shredding of tire casings and the eventual recycling of the shreds to form a rubber-plastic alloy called Typlex. Among the conditions of the Permit was paragraph 18 requiring ATSI to (a) store the waste tires prior to processing so as to prevent any public nuisance or harm to the environment and public health; and (b) comply with Chapter 285 of the DEP regulations at 25 Pa. Code dealing with "Storage, Collection and Transportation of Municipal Waste."

On November 5, 1991, DEP suspended the Municipal Waste Permit because of violations at the Site, specifically the failure to recycle tire shreds into Typlex. Because of this failure, waste tires and shreds were stored at the site for periods exceeding one year. DEP and ATSI entered into a Consent Order and Agreement on December 12, 1991 (1991 CO & A) which allowed ATSI to resume operations under specific conditions governing the receipt of waste tires and the removal of tires and shreds.

ATSI filed an application on October 29, 1993 for a modification to the Municipal Waste Permit in order to change the name of the permittee from ATSI to NGC[1] and in order to increase the acreage to 5.5. DEP refused to issue the modification until ATSI and NGC entered into the 1995 CO & A which imposed new conditions for receipt and removal of tires and shreds and made both ATSI and NGC responsible for past violations. When the modification issued on June 19, 1995, it named NGC as the permittee, changed Municipal Waste Permit No. 101 530 to Residual Waste Permit No. 301264, and extended the permit area to 5.5 acres.

Appellant became involved with the Site during the spring of 1995 when he was approached by the principals in NGC and offered a 60% ownership share for an undisclosed amount of money. Appellant decided to do a "due diligence"[2] investigation before making a decision on the offer. About one week later DEP threatened to close down operations at the Site because of continuing violations. Entering into the 1995 CO & A was the only way to keep this from happening. That

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[1] NGC was identified in the application as a Pennsylvania Corporation formed on April 6, 1993. Its relationship to ATSI is unclear from the evidence.

[2] Due Diligence - Because a buyer of property or a business assumes environmental responsibility at the time of acquisition, environmental due diligence has developed as a pre-purchase tool for obtaining pertinent information about environmental conditions and compliance history. Knowledge of any and all potential contamination enables purchasers to determine their potential liability and manage environmental risk.

Having first conducted a due diligence inquiry further benefits buyers by allowing them, if no contamination was found, to assert an "innocent landowner" defense to any future liability. This exception seems to have emerged in two arenas: (1) under common law principles imposing successor liability for preexisting obligations of the seller, i.e. tort liability; and (2) as an exception to statutorily imposed strict liability, i.e. CERCLA and HSCA.

Congress created the innocent landowner defense to CERCLA liability, in 1986 when it passed the Superfund Amendments and Reauthorization Act (SARA) Act of 1986, Pub. L. No. 99-499. The defense is codified at 42 U.S.C. §§ 9601 (35)(B) and 9607(b)(3). HSCA has a similar innocent-landowner provision at 35 P.S. § 6020.701(b)(1)(vi)(A).

agreement, however, required the posting of a $150,000 Surety Bond and the payment of a $20,000 civil penalty in four installments. NGC did not have the financial resources to do this and requested Appellant to help out. Since Appellant could not complete his due diligence unless the Site remained in operation, he agreed.

In order to obtain the Surety Bond from The American Insurance Company, Appellant joined NGC as indemnitor in a Specialty Surety Indemnity Agreement and backed it up with a $150,000 Irrevocable Letter of Credit from Integra Bank. Appellant secured Integra Bank by giving Open-End Mortgages on certain pieces of real estate: (1) one in the Borough of Ambridge, Beaver County, Pennsylvania, owned by Dressel Associates, Inc.;[3] and (2) three in the Borough of Bell Acres, Allegheny County, Pennsylvania, owned by Appellant.

Appellant also paid the first installment ($5,000) of the $20,000 civil penalty with a check from Roadrunner Planning and Consulting, another of Appellant's businesses.

During the summer of 1995, Appellant proceeded with his due diligence investigation. While the testimony is not entirely clear on the point, it appears that Appellant was managing the operation during this period. He was aware of the 1995 CO & A and its requirements and arranged for the removal of about 8,000 tons of tires/shreds. He also was communicating with officials of DEP. Anthony D. Orlando, the Regional Manager for DEP's Waste Management Program, believed that Appellant was a 51% owner of NGC at this time.

While Appellant denied that he ever represented to DEP or others that he was president of NGC, two letters dated August 30, 1995 addressed to Orlando suggest otherwise. These letters are

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[3] Dressel Associates, Inc. is one of the businesses Appellant is involved in.

joint requests for approval of the use of shreds as protective cover at two landfills and bear signatures on behalf of the requesting parties. Appellant signed both letters as

Gary Reinert
President
National Granulating Company, Inc./
EZ-Ship Recycling, Inc.[4]

Although these letters are on the letterheads of Chambers, William H. Martin, Inc. in one instance, and of the Arnoni Group in the other, Appellant signed them.

George Sabocheck, a DEP Solid Waste Specialist, was responsible for inspecting the Site to determine compliance with the 1995 CO & A. In that capacity, he was there on September 11, 1995, the 90th day following execution of the 1995 CO & A, to determine whether NGC had reduced its inventory of whole or processed tires to 5,000 tons as required by paragraph 2 of the 1995 CO & A. He found in excess of 14,000 tons and noted a violation of paragraph 2 of the 1995 CO & A.

For some unexplained reason, DEP did not send a letter to NGC until November 8, 1995, almost two months later.[5] The letter notified NGC of the violation, reminded NGC of the automatic accumulation of civil penalties, and admonished that further enforcement action could be taken if the penalties were not paid by November 17, 1995. There is no evidence concerning whether this penalty was ever paid.

In the meantime, Appellant had completed his due diligence investigation, having expended some of his own funds to keep the Site in operation. On September 25, 1995 he wrote to NGC

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[4] EZ-Ship Recycling, Inc. is one of Appellant's businesses.

[5] A representative of NGC signed Sabocheck's September 11, 1995 inspection report but there is no evidence that a copy was left with him or mailed to NGC.

advising them of the basis on which he would be willing to invest in NGC as a consequence of the "negative results of [his] due diligence study." NGC responded to the letter on October 28, 1995 terminating the negotiations. The language of this letter (and Appellant's reply of November 3, 1995) lends further credence to the proposition that Appellant was operating the Site and managing NGC during the summer of 1995.

While Appellant states that NGC kicked him off the Site, his absence did not last long. According to his testimony, NGC ceased operating about November 1, 1995. Detroit Street Partners (DSP), the owners of the land on which the Site was located, took possession of the Site, its buildings, equipment and inventory, and asked Appellant to act as their agent in selling the inventory. Appellant agreed and began his activities about December 1, 1995.

Although this testimony indicates that the Site was shut down during November 1995, Sabocheck's inspection reports show the receipt of nearly 70,000 tires during the month. The inventory as of November 29, 1995 was 173,021 whole tires and 15,367 tons of shreds. While the shreds had risen only about 4% since September 11, 1995 the whole tires had gone up by 15%. The evidence does not disclose which person or entity received the money for these additional tires, but presumably it went to NGC.

When Appellant resumed activities at the Site on December 1, 1995, he acted through E-Z Ship Recycling, Inc. (E-Z Ship). NGC had sent notice to its customers that E-Z Ship was taking over the accounts and collectibles as of December 1, 1995. E-Z Ship, as a result, brought tires onto the Site during December 1995 and January 1996 totaling more than 76,000 for which it received the money. Although aware of these activities, DEP did nothing to shut down the operation. DEP and E-Z Ship were attempting to negotiate a new consent order and agreement. (CO & A).

E-Z Ship repaired the fire suppression system during this period and moved all of the stock -piled inventory into areas protected by this system. E-Z Ship also baled a number of tires, thereby reducing fire potential.

Some whole tires (including some brought to the Site by E-Z Ship) were removed to a landfill in Ohio. About 5,900 tons of shreds (exclusively NGC's) were shipped early in 1996 to the Canestrale site in Westmoreland County where they were to be stored temporarily until ready for use in a cogeneration plant at Clarion, Pennsylvania. Appellant claims he was told by the broker that no permit was needed for this storage and that he informed DEP of that statement on December 6, 1995. Nonetheless, DEP did nothing until January 18, 1996 when it issued a compliance order requiring the shreds to be removed from the Canestrale site because of the lack of a permit.

E-Z Ship and Canestrale apparently entered into a CO & A with DEP (date unknown) providing for the removal of the shreds. This removal was accomplished late in November 1996. According to Appellant, the entire Canestrale fiasco cost him $170,000. Whether DSP reimbursed any of this is unknown.

DEP issued a compliance order on February 2, 1996 requiring E-Z Ship to cease operating the NGC Site without a permit. While a copy of the compliance order is not in evidence, it apparently required E-Z Ship to stop its activities there and remove all the tires and shreds brought onto the Site by E-Z Ship.

Despite the February 2, 1996 compliance order, Appellant and DEP continued negotiating a CO & A for the Site. Negotiations on the Canestrale site were apparently proceeding at the same time. Still further negotiations were underway for a site in Lancaster Township (county not specified). A CO & A was entered into with respect to the Lancaster Township site in February

1996. Appellant agreed to bale the 400,000 tires existing on the site in exchange for permission to bring in 300,000 additional tires. He accomplished this, spending about $250,000.[6] Appellant was also seeking a general permit for the processing, storage and beneficial use of waste tires.

In these negotiations, all going on more or less simultaneously, Appellant dealt frequently with DEP legal counsel Jody Rosenberg. She represented to him that anything he could do to improve conditions at the NGC Site would help to convince DEP not to forfeit the Surety Bond immediately. This was one of the reasons he removed shreds to the Canestrale site and one of the reasons he agreed to clean up that site after DEP intervened to stop that operation. It was also his motivation in going in to clean up the Lancaster Township site. He admitted, however, that she never "come right out and said there was any definite arrangements that they [DEP] would not act on the bond." (N.T.73).

On July 10, 1996, Rosenberg sent a letter to Appellant informing him that, since he had not responded to DEP's proposed final draft of a CO & A sent to him on May 10, 1996, DEP considered the negotiations for the NGC Site to be at an end. She went on to say that DEP would be taking enforcement action on the February 2, 1996 compliance order and would forfeit the Surety Bond. Moreover, the general permit applied for by E-Z Ship would not be issued because of E-Z Ship's noncompliance status. She concluded by holding out the possibility of settlement if E-Z Ship was willing to remove from the NGC Site all the tires it brought there and take them to a legal disposal or processing facility.

Upon receipt of this letter, Appellant concluded that, if he removed the E-Z Ship tires from

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[6] Whether this is a gross or net figure is not known.

the NGC Site, the Surety Bond would be released.

On August 20, 1996, Appellant and others filed an Involuntary Petition to place NGC in Chapter 7 bankruptcy. What became of this Petition is not on the record.

After receiving a copy of DEP's October 7, 1996 Notice of Intent to Forfeit Bond, Appellant obtained a letter from DSP stating its intent to pursue the personal guaranties by individuals associated with NGC in order to achieve the removal of all rubber from the Site. He forwarded copies of the letter to Orlando and Rosenberg on October 23, 1996. Rosenberg later told him that, if DSP was successful in getting the Site cleaned up, DEP would not have to forfeit the Surety Bond.[7]

As noted earlier, DEP forfeited the Surety Bond on December 12, 1996, and Appellant took this appeal on January 15, 1997. He continued his efforts to find a solution to the NGC Site problem but was unsuccessful. Apparently, Appellant removed all E-Z Ship tires and shreds from the NGC Site and was issued a general permit.

On February 27, 1997, an arsonist set fire to shreds on the NGC Site which quickly got out of control because of high winds. The fire lasted for about ten days and consumed most of the tires and shreds on the Site. Toxic substances and other pollutants were released from the Site into the atmosphere and nearby surface streams. About 100 residents were evacuated and an elementary school was closed. There was concern for a nearby gas station and a high pressure natural gas line that runs behind the Site.

Governor Ridge proclaimed a disaster emergency on March 5, 1997, invoking the powers

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[7] Rosenberg left DEP late in 1996 and presently resides in New York State. DEP was unable to contact her before the hearing in order to have her testify about her conversations with Appellant.

of the Emergency Management Services Code, Act of November 26, 1978, P.L. 1332, *as amended*, 35 Pa. C.S.A. §§ 7101-7709. Meanwhile, on February 28, 1997, Orlando requested Robert J. Slatick, DEP's Chief of the Division of Certification, Licensing and Bonding to proceed to collect the Surety Bond despite the fact that this appeal was still pending. Orlando knew it was a departure from DEP policy but felt it was warranted by the emergency. Slatick was asked to place the proceeds in a special sub-fund of the Solid Waste Abatement Fund dedicated to the NGC Site. The funds could then be drawn on to pay part of the $1.5 million DEP has expended on the Site as of mid-March 1997.

A demand for payment of the Surety Bond was made by DEP on March 3, 1997. The American Insurance Company was further advised on March 7, 1997 that, unless payment was received by March 14, 1997, punitive action would be taken against the Surety. The American Insurance Company delivered a check for $150,000 to DEP on March 14, 1997 in return for a Release and Assignment of Claim and a commitment that, if Appellant was successful in this appeal, DEP would return the $150,000 with interest. Appellant claims, however, that DEP's commitment does not benefit him because, once the Surety disburses the funds, he will be called upon to make good on his guarantee. This will result in the loss of the real estate pledged to secure Integra Bank.

We can grant a supersedeas when a petitioner shows by a preponderance of the evidence (1) that he will suffer irreparable harm, (2) that he is likely to prevail on the merits, and (3) that there is no likelihood of injury to the public or other parties. Where pollution or injury to the public health, safety or welfare exists or is threatened, a supersedeas cannot be granted. Section 4(d), Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7516. 25 Pa. Code § 1021.78.

The critical issue, in our judgment, is whether Appellant has shown a likelihood of prevailing on the merits. To do so, he has to show that DEP violated the law or abused its discretion in forfeiting the Surety Board. Appellant does not seriously contest DEP's statutory authority to forfeit the Surety Board. DEP contends that this duty is mandated by section 505(d) of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.505(d)

That section provides that, when violations exist at a site or when the site has been abandoned, DEP "shall" forfeit the bond. We do not accept DEP's argument that the statutory language eliminates all discretion on DEP's part. Certainly, DEP has discretion to determine *when* to take this step. Since violations occur on almost every solid waste processing and disposal site on a regular basis (usually minor or technical in nature), DEP would be forfeiting bonds left and right for violations that in most instances are easily corrected and of short duration. That has not been happening, in our view, and bolsters our conclusion that DEP does, indeed, have some discretion in the matter.

That discretion, in fact, is apparent in this case. Violations existed at the NGC Site from September 1995 on, as reported by Sabocheck. Orlando considered forfeiting the Surety Bond in late 1995 but decided to let Appellant try to bring the Site into compliance. Forfeiture did not occur until December 12, 1996, a year later.

While DEP does have some discretion as to when to invoke forfeiture, section 505(d) clearly requires that forfeiture must follow at some point if a site remains in violation or has been abandoned. The evidence is undisputed that the NGC Site remained in violation from September 1995 on. While other entities were in possession of the Site after November 1995, both parties agree that NGC had walked away from it at that point. Clearly, DEP had the statutory authority to step

in, at any time after September 1995, to forfeit the Surety Bond. The forfeiture, accordingly, was in strict accordance with the law.

Appellant's argument on the legality of the forfeiture stems from the language of section 505(d) of the SWMA, 35 P.S. § 6018.505 (d), that follows the forfeiture provision. The section goes on to provide that DEP shall certify the forfeiture to the Department of Justice for collection. Since DEP demanded collection of the Surety Bond in this case, Appellant argues that there was an illegality. The parties dispute this point strenuously but it is irrelevant, in our opinion.

What is at issue in this appeal is whether DEP acted legally and properly in forfeiting the Surety Bond. The only DEP action we can supersede, therefore, is the forfeiture. Collection of the Bond was not even attempted until February 1997, more than a month after the appeal was filed. That attempt prompted Appellant to seek a supersedeas, but it is the forfeiture itself that is the subject of the appeal. What we decide, either at this point or ultimately, will affect collection of the Surety Bond but only as a consequence of our assessment of DEP's forfeiture action.

The core of Appellant's case is equitable estoppel -- prohibiting DEP from forfeiting the Surety Bond. The forfeiture, therefore, was an abuse of DEP's discretion. DEP argues that this Board cannot consider the issue because we lack equity powers. This has been a continuing DEP argument for many years. As we pointed out in *City of Harrisburg v. DEP et al.*, 1996 EHB 1518, we do have some equity powers, including the power to grant a supersedeas (25 Pa. Code § 1021.76), or a temporary supersedeas (25 Pa. Code § 1021.79) and to impose sanctions (25 Pa. Code § 1021.124). Prior Board decisions have considered and, in some instances, granted equitable estoppel against DEP. Some of the more recent decisions are *Ambler Borough Water Department v. DER*, 1995 EHB 11; *Bethlehem Steel Corporation v. DER*, 1994 EHB 1371; *Benco, Inc. of*

Pennsylvania v. DER, 1994 EHB 168; *Altoona City Authority v. DER*, 1993 EHB 1727 and 1782; *Upper Montgomery Joint Authority v. DER,* 1993 EHB 192; *Halfway Coalyard, Inc. v. DER,* 1993 EHB 36; *Willowbrook Mining Company v. DER*, 1992 EHB 303.[8]

Neither party raises the point but Appellant's claim seems to us to fall more within the scope of promissory estoppel than equitable estoppel. DEP's promise to withhold forfeiture of the Surety Bond, which is the basis for Appellant's estoppel argument, was a representation of current intentions but, even more, a representation of future intentions. We will weigh the claim against both standards.[9]

Commonwealth Court pointed out in *Department of Commerce v. Casey*, 624 A.2d 247 (Pa. Cmnwlth. 1993), that equitable estoppel is a doctrine of "fundamental fairness" and can be applied against a government agency like DEP. To invoke the doctrine, it must be shown that DEP

(1) intentionally or negligently misrepresented some material fact;

(2) knew or had reason to know that the other party would justifiably rely on the misrepresentation; and

(3) induced the party to act to its detriment because of a justifiable reliance upon the misrepresented facts.

Foster v. Westmoreland Casualty Co., 604 A.2d 1131 (Pa. Cmwlth 1992)

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[8] It is also difficult to understand how we are to balance the equities, when considering whether to grant a supersedeas, if we have no power even to consider equities. *See, e.g. Keystone Cement Company v. DER,* 1992 EHB 590; *Al Hamilton Contracting Company v. DER,* 1993 EHB 598; *Elmer R. Baumgardner et al v. DER*, 1988 EHB 786.

[9] Equitable estoppel and promissory estoppel are not synonymous. *Department of Public Welfare v. School District of Philadelphia,* 410 A.2d 1311 (Pa. Cmwlth. 1980).

Promissory estoppel, as pointed out in *Murphy v. Bradley*, 537 A.2d 917 (Pa. Cmwlth. 1988), derives from section 90 of the Restatement (second) of Contracts and is the law in Pennsylvania. It can be applied against a government agency like DEP. *Department of Public Welfare v. School District of Philadelphia, supra*, 410 A. 2d 1311 (Pa. Cmwlth 1980). To invoke the doctrine it must be shown that DEP

(1) made a promise which DEP could reasonably expect to induce action or forbearance on the part of the promisee: and

(2) which does induce action or forbearance on the part of the promisee.

If these two elements are present, the promise is enforced only if necessary to avoid injustice. *Murphy v. Bradley, supra*, 537 A. 2d 917 (Pa. Cmwlth. 1988).

Whether the estoppel is equitable or promissory, Appellant has the burden of establishing it by clear, precise and unequivocal evidence. *Blofsen v. Cutair*, 333 A.2d 841 (Pa. 1975).

DEP and Appellant were negotiating CO & As on several sites, including the NGC Site, more or less simultaneously. DEP represented[10] that it would not forfeit the Surety Bond if something could be worked out on the NGC Site.[11] CO & As were eventually signed by DEP and Appellant on several other sites. Appellant does not claim that any of those CO & As included a provision relating to the Surety Bond; and we are certain that if they did, Appellant would have

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[10] DEP objected strongly to any evidence of what took place during settlement negotiations, citing 1 Pa. Code § 35.115. We agree with this principle; but, when a claim for estoppel is based on representations made during these negotiations, we have a duty to at least consider them. *Arasi v. Neema Medical Services, Inc.*, 595 A.2d 1205 (Pa. Super. 1991); *Straup v. Times Herald*, 423 A.2d 713 (Pa. Super. 1980).

[11] The work done on the Site, and the money expended, by Appellant in connection with his due diligence investigation occurred before these negotiations.

brought it up.

Negotiations for the NGC Site failed, however. We have no evidence of documents exchanged between the parties except for Rosenberg's July 10, 1996 letter announcing that negotiations were over and that DEP would forfeit the Surety Bond.[12] Since it is clear that DEP did not forfeit the Surety Bond prior to July 10, 1996, it fulfilled its part of the bargain. Appellant could not justifiably believe that the promise to forbear would forever bind DEP. He had to know that continued forbearance depended on the execution of a CO & A for the NGC Site -- just as he had done with respect to the other sites. Anything he did on the NGC Site during this period that would constitute a detriment to him was done at his own risk.

In any event, Appellant knew when he received Rosenberg's July 10, 1996 letter that negotiations for a CO & A for the NGC Site were at an end and that DEP would forfeit the Surety Bond. Anything Appellant did on the Site after that date once again was done at his own risk. Appellant challenges this conclusion, arguing that Rosenberg's representations in the July 10, 1996 letter and afterwards induced him to believe that the Surety Bond would not be forfeited.

Appellant calls our attention to the third paragraph of the letter where Rosenberg proposes a settlement on the basis of E-Z Ship removing the tires it brought to the NGC Site. Appellant testified that he believed from that offer that his Surety Bond would be refunded if he removed E-Z Ship's tires. How he could expect DEP to settle for so minor an improvement after failing to get a CO & A for the Site is not explained. In any event, Appellant has misread the letter.

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[12] The May 16, 1996 proposed final draft of a CO & A sent to Appellant by Rosenberg was marked as and exhibit and used, in part, to cross-examine Orlando, but was never offered or admitted into the record.

The first paragraph deals with termination of negotiations for a CO & A. The second paragraph states that DEP will initiate enforcement of orders already issued with respect to the Site and will forfeit the Surety Bond. In the third paragraph, DEP reminds Appellant that one of the previously issued orders was directed against E-Z Ship, that the order had not been complied with and that, because of the noncompliance, DEP could not issue the general permit E-Z Ship had applied for. Rosenberg then went on to state in that same paragraph that if Appellant was "interested in proposing a schedule for compliance with the *Order*"(emphasis ours), he was to contact her. She then indicated that, if E-Z Ship was willing to remove from the Site, within a reasonable time, all the tires it brought there and remove them to a legal disposal or recycling facility, "settlement of this is matter can be reached."

The settlement discussed in the third paragraph is compliance with the February 2, 1996 compliance order directed to E-Z Ship. That is clearly stated by Rosenberg. When she used the words "settlement of this matter'', she obviously meant the compliance order mentioned earlier in the same paragraph. Appellant could not reasonably conclude that removal of E-Z Ship's tires would result in a return of the Surety Bond, the forfeiture of which was announced in the first paragraph. In point of fact, E-Z Ship did remove its tires from the NGC Site, DEP took no steps to enforce the February 2, 1996 compliance order, and issued a general permit to E-Z Ship. The actions of the parties make clear that the settlement proposed in the third paragraph related only to the compliance order and not to the Surety Bond. Whatever Appellant did on the Site after receipt of the July 10, 1996 letter[13] was not based on any continuing promise or representation by DEP

[13] According to the evidence, the things done during this period related primarily to achieving compliance with the February 2, 1996 compliance order. Removing E-Z Ship's tires to a suitable

relating to the Surety Bond.

The final representation of Rosenberg to Appellant, according to Appellant, arose after DEP issued the Notice of Intent to Forfeit Bond on October 7, 1996. Appellant secured a letter from DSP confirming that DSP intended to pursue personal guarantees for the removal of rubber from the NGC Site from individuals associated with NGC. Appellant sent copies both to Rosenberg and Orlando on October 23, 1996. Appellant claims that, in discussions with Rosenberg after that date, she represented that, if DSP was successful in getting the Site cleaned up, DEP would not have to resort to the Surety Bond.

A lawsuit was filed in the Court of Common Pleas of Allegheny County (Civil Division, Case No. 6D96-17390) late in November 1996 in which DSP sought to hold certain individuals personally liable for cleaning up the Site. Despite the pendency of this lawsuit, DEP forfeited the Surety Bond on December 12, 1996.

Rosenberg's representation was not, as Appellant contends, a promise to hold off on the forfeiture until the litigation was concluded. It had not yet even been commenced when she and Appellant discussed it. Besides, it simply stated the obvious. If someone went in and cleaned up the Site, the Surety Bond would not have to be forfeited. Appellant could not reasonably conclude, in our opinion, that forfeiture (which had already been noticed on October 7, 1996) would be held off indefinitely while civil litigation worked its way through the Allegheny County courts.

Aside from this, there is no evidence that Appellant changed his position after the discussion with Rosenberg. Filing of the lawsuit cannot serve because that was done by DSP, not by Appellant.

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disposal or recycling facility clearly was in this realm.

While Appellant was trying to get something worked out on the NGC Site even after the forfeiture and right up to the time of the fire, there is nothing that shows that he did anything to his detriment during that time.

Whether measured against the standards for equitable estoppel or promissory estoppel, we conclude that there is no likelihood that Appellant will prevail on this issue. And since the issue is the core of Appellant's case, we conclude that there is no likelihood that he will prevail on the merits.

On occasion, we have been persuaded to grant a supersedeas even though we believed that the petitioner would not prevail on the merits. *See, e.g. Keystone Cement Company v. DER*, 1992 EHB 590. Those cases always involved compelling equities on the part of the petitioner that outweighed the other factors in granting a supersedeas. Those facts are not present here. Appellant agreed to guarantee the $150,000 Surety Bond, before doing his due diligence investigation, for a Site he knew was in violation of environmental laws and regulations. He had to know the considerable risk he was taking by that action.

Moreover, Appellant's actions on the NGC Site were of a mixed variety. Clean-up, of course, but also income acquisition -- making money from tires picked up by E-Z Ship from customers of NGC and placing them on the NGC Site. While we are not opposed to profit motivation, we conclude here that Appellant's actions on the NGC Site were not entirely to his detriment. Why else would he have continued them for twelve months or more?

Appellant's equities are not enough to counter the strong likelihood that his appeal will fail on the merits. Therefore, a supersedeas will not be granted.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

GARY L. REINERT, SR.,	:	
	:	
v.	:	**EHB Docket No. 97-012-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

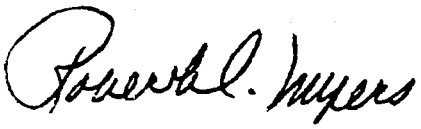
ORDER

AND NOW, this 17th day of April 1997, it is ordered as follows:

1. The Petition for Supersedeas is denied.

2. DEP is free to proceed with collection of the Surety Bond in the manner provided by law.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: April 17, 1997

See next page for a service list.

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