Environmental Hearing Board

Adjudications and Opinions

1993

Volume I

COMMONWEALTH OF PENNSYLVANIA
Maxine Woelfling, *Chairman*

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

1993

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Member .....ROBERT D. MYERS

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Member .....JOSEPH N. MACK

Secretary.....M. DIANE SMITH

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1993.[1]

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.

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[1] This volume also contains one adjudication issued in 1992. That adjudication, South Fayette Township v. DER, 1993 EHB 1, was unintentionally omitted from the 1992 volume.

ADJUDICATIONS

OPINIONS AND ORDERS

1993 DECISIONS

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BO

SOUTH FAYETTE TOWNSHIP	:	
	:	**EHB Docket No. 89-044-MJ**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and MOHAWK MINING COMPANY, Permittee	:	**Issued:** September 25, 1992

ADJUDICATION

By Joseph N. Mack, Member

Synopsis

In this appeal of the issuance of a deep mining permit to Mohawk Mining Company, the appellant Township has not met its burden of proving that the Department abused its discretion in issuing the permit. The permittee's witnesses, employees of the Department, provided credible, convincing testimony addressing each of the objections raised by the Township in its appeal.

All matters not preserved by the Township in its post-hearing brief are deemed to have been waived.

PROCEDURAL HISTORY

This matter originated when the Township of South Fayette ("the Township") filed a Notice of Appeal from the granting of Mining Activity Permit No. 02881301 by the Commonwealth of Pennsylvania, Department of Environmental Resources, ("the Department") to Mohawk Mining Company ("Mohawk Mining") on January 26, 1989. Notice was received by the Township on January

30, 1989 and the appeal was timely filed on February 27, 1989. The Township on behalf of itself and its residents objected to the grant of the permit on the basis that the proposed deep mining activities were contrary to the Township's zoning ordinance and would have a deleterious effect on the area in which they were to be conducted, particularly with regard to springs and deep wells. The appeal expressed concern about traffic safety; dust, dirt, and noise created by the operation; and the safety and stability of the haul road due to mine subsidence. The appeal also challenged the extent and method of coal removal. In addition, the Township objected that the area to be mined is close to property being developed for quality housing, and contended that the proposed location of the mining activity would have an adverse effect on property values generally in South Fayette. Furthermore, the Township believed that the area sought to be mined was presently subject to polluted water and that there had been no provision made for the disposition of the water. Finally, the Township alleged that blasting from the mining operation would have an adverse effect on the residents in the area, and that the area to be mined was in close proximity to the Township's public schools.

On March 13, 1991 Mohawk Mining filed a motion to dismiss and/or to limit issues. The motion was denied by Board Member Terrance J. Fitzpatrick on March 15, 1991 on the basis of untimeliness, in that the matter was scheduled for hearing on April 4 and 5, 1991 and there would not be adequate time for a response and a ruling on the motion.

Following a change in the dates scheduled for hearing, Mohawk Mining, on April 25, 1991, filed a motion for reconsideration of its motion to dismiss and/or to limit issues. Board Member Fitzpatrick issued an Opinion and Order on June 6, 1991 in which, after granting reconsideration, he denied the motion to dismiss, holding that the Township's allegations of harm to its residents

were sufficiently specific to establish its standing to bring the appeal. However, the Opinion granted Mohawk Mining's motion to limit issues, in part. Specifically, the Opinion narrowed the issues on appeal by holding that the Township's allegations regarding compliance with the Township's zoning ordinance, decreased property values, and traffic safety were matters which were beyond the scope of the appeal, and thus, precluded the introduction of evidence on those issues at the hearing.

On June 7, 1991 this case was transferred to Board Member Joseph N. Mack for primary handling. A hearing was held on June 24 and 25, 1991 in the Pittsburgh State Office Building. At the close of the Township's case, Mohawk Mining moved for dismissal for failure of the Township to make a prima facie case. Because dismissal of an action requires a ruling by the entire Board, Mohawk Mining went forward with the presentation of its case, and then moved for a directed verdict.[1]

Mohawk Mining and the Township filed post-hearing briefs on September 23, 1991, and Mohawk Mining also filed a reply brief on October 7, 1991. No briefs were filed in this matter by the Department.

The record consists of five exhibits, two introduced by the Township, two introduced by Mohawk Mining, and one joint exhibit, as well as a transcript of 118 pages. After a full and complete review of this record we make the following findings of fact:

FINDINGS OF FACT

1. The Appellant herein is the Township of South Fayette in

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[1] Because we are dismissing the Township's appeal by this adjudication, we need not address Mohawk Mining's motions for dismissal and a directed verdict, and they are denied herein as moot.

Allegheny County, with a postal address of Drawer 515, Morgan, PA 15064. (NOA)[2]

2. The Permittee is Mohawk Mining Company, with a mailing address of P. O. Box 444, Cuddy, PA 15301. (NOA)

3. The Department of Environmental Resources is the agency designated to enforce the requirements of the Bituminous Mine Subsidence and Land Conservation Act ("Mine Subsidence Act"), Act of April 27, 1966, P.L. 31, as amended, 52 P.S. §1406.1 *et seq.*, and the regulations promulgated thereunder.

4. Mohawk Mining was issued Mining Activity Permit No. 02881301 by the Department on or about January 25, 1989, authorizing operation of a deep mine in South Fayette Township, Allegheny County. (NOA)

5. The entire Township is serviced by a community sewage facility except for a small area near the site of the mining permit. (TR. 24)

6. The haul road for the mine has been in use for a number of years and has supported truck traffic during that time. (TR. 24, 25)

7. No wildlife studies have been done in the area; the only observation of wildlife has been to casual observers and hunters in the area. (TR. 26, 63)

8. Susan Volle, a resident of the Township in the area of the mining permit site, is serviced by the Township's public water system and was not aware of any neighbors who relied on wells or spring water. (TR. 28, 29, 32, 33)

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[2] "NOA" when used herein is Notice of Appeal and "TR.____" refers to a page in the transcript of the hearing.

9. No studies were prepared by the Township or by anyone on behalf of the Township regarding possible effects of the proposed mining operation. (TR. 52)

10. The mining proposed by the permit application is room and pillar mining. (TR. 65, 66)

11. A review of the hydrogeology of the area indicates that the mining will not provide any additional deleterious effect on ground water or surface water in the general area of the mine. (TR. 76)

12. Based upon the soils of the area and the method of construction of the haul road, there appears to be no problem or danger with the haul road which will be caused by mining. (TR. 77-78)

13. The drillings which were submitted as part of the application indicate that the entire mine is not flooded but that there is some water in the old, existing workings. (TR. 84, 85, 86, 87)

14. The threat of pollution from septic problems on the surface is minimal at best. (TR. 89, 90)

15. The application and the permit specify that a support area consisting of at least 50 percent of the coal must be maintained within the designated support areas as support for all the dwellings and sewage systems above the mining area. (TR. 95)

16. The application also provided for subsidence control, that is maintaining at least 50 percent of the coal in place under Township Road Number 978 which will provide additional support for all dwellings and the area near the dwellings and the septic systems. (TR. 95, 96)

DISCUSSION

We first address the question of who carries the burden of proof in this matter. Section 21.101(c)(3) of the Board's rules reads as follows:

> (c) A party appealing an action of the Department shall have the burden of proof and burden of proceeding in the following cases unless otherwise ordered by the Board:
>
> ***
>
> (3) When a party who is not the applicant or holder of a license or permit from the Department protests its issuance or continuation.

25 Pa. Code §21.101(c)(3).

Thus, the burden of proof lies with the Township to demonstrate by a preponderance of the evidence that it was an abuse of discretion for the Department to have issued the permit in question to Mohawk Mining. James Hanslovan et al. v. DER, EHB Docket No. 90-076-MR (Adjudication issued August 12, 1992); Snyder Township Residents for Adequate Water Supplies v. DER, 1988 EHB 1202. The arguments made by the Township in its post-hearing brief concern the following matters: the instability of the land where the haul road is installed, the potential for a deleterious effect upon wildlife in the area, the concern that mine drainage from the mine will pollute the stream known as Dolphin Run, and the concern of residents that subsidence will adversely affect their septic systems and, therefore, pollute the water being discharged from the mine. All other matters which were not barred by Board Member Fitzpatrick's Opinion and Order of June 6, 1991 are deemed to be waived. Laurel Ridge Coal, Inc. v. DER, 1990 EHB 486. (Any issues not preserved by a party in its post-hearing brief are waived.)

In support of its case the Township presented the testimony of three fact witnesses. It presented no expert testimony. The Township initially called a township commissioner who indicated that the commissioners were opposed to the grant of the mining permit. The commissioner testified that there had been deer, wild turkey and other small game in the Dolphin Run area but that since the establishment of the road he had not seen any wild game.

Finally, he stated that the public road was sinking but could not relate that to the permit in any way, there having been no mining done at the time of the hearing. The Township also called the township manager who testified that the soil on the haul road was built on unstable ground based upon his reading of the soil survey of Allegheny County.

A township resident testified that she was concerned about water from the mine polluting Dolphin Run. She further testified that mining would cause her septic system to subside and that the septic system, if broken, would pour polluted sewer water into the groundwater and ultimately into the mine and Dolphin Run.

Three other township residents were identified and said that if they were permitted to testify their testimony would be exactly the same as the one township resident herein referred to.

This constitutes all of the case of the Township which, as has been indicated, was limited to instability of the haul road, the deleterious effect of the development upon wildlife in the area, the concerns about mine drainage and the pollution of Dolphin Run and the question of whether or not there would be subsidence which would adversely affect homeowners.

Mohawk Mining called two witnesses, a hydrogeologist and a mining engineer, both of whom were employees of the Department. Based upon the hydrogeologist's review, he determined that the haul road for the mine would cause no problem or danger, based upon the soils that he had observed and the method of construction. (F.F. 12) He further determined that the threat of pollution from septic problems on the surface was minimal at best. (F.F. 14) Finally, a review of the hydrogeology of the area indicated that the mining would not provide any additional deleterious effect on the surface water or groundwater in the permit area. (F.F. 11)

Both the application for the deep mine permit and the permit itself specified that a support area consisting of at least 50 percent of the coal be maintained within the pre-designated support areas as support for all the dwellings and the sewage systems above the mining area. (F.F. 15) The Department's mining engineer, called as a witness by Mohawk Mining, determined that the plan provided adequate support and subsidence control. (F.F. 15,16)

The witnesses presented by the permittee, Mohawk Mining, were experts in their fields, who provided credible and convincing testimony addressing each of the objections raised by the Township in its appeal.

Based on the record before us, we find that the Township has failed to meet its burden of proving that DER committed an error of law or abused its discretion in issuing the mining activity permit to Mohawk Mining. Further, Mohawk Mining and the Department witnesses called by Mohawk Mining demonstrated by a preponderance of the evidence that the permit application met the criteria set forth in 25 Pa. Code §86.37 and that the permit was properly issued.

CONCLUSIONS OF LAW

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

2. The appellant, South Fayette Township, has the burden of proving that the Department abused its discretion or committed an error of law in issuing the permit in question. 25 Pa. Code §21.101(c)(3).

3. The Department properly issued the permit pursuant to its authority under the Mine Subsidence Act, 52 P.S. §1406.1 *et seq.*, and 25 Pa. Code §86.37-86.42.

O R D E R

AND NOW, this 25th day of September, 1992, it is hereby ordered that the appeal of South Fayette Township at Docket No. 89-044-MJ is dismissed. It is further ordered that the motion for dismissal and motion for a directed verdict made by Mohawk Mining at the hearing of this matter are hereby denied as being moot.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 25, 1992

cc: **DER, Bureau of Litigation**
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Pittsburgh, PA
For Permittee:
Kathleen S. McAllister, Esq.
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M. DIANE SMITH
SECRETARY TO THE BOARD

MARY A. SENNETT	:	
	:	
v.	:	**EHB Docket No. 91-486-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: January 7, 1993**
and MILLERSVILLE BOROUGH, Permittee		

OPINION AND ORDER
SUR
MOTION TO DISMISS APPEAL
AND/OR TO LIMIT ISSUES

Robert D. Myers, Member

Synopsis

Where the facts alleged in a motion challenging standing are traversed by the Appellant, action on the motion is deferred to the hearing on the merits where the Appellant will be required to prove standing. Since standing is a jurisdictional matter, it can be raised at any time.

OPINION

This proceeding began on November 13, 1991 when Mary A. Sennett, Appellant, filed a Notice of Appeal from the issuance by the Department of Environmental Resources (DER) on October 11, 1991 of Permit No. 603270 to Millersville Borough, Lancaster County (Permittee), for the agricultural utilization of sewage sludge on the Barley farm in East Hopewell Township, York County, pursuant to provision of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*

On May 11, 1992 Permittee filed a Motion to Dismiss Appeal for Appellant's Lack of Standing and/or to Limit Issues, to which Appellant filed a Reply on June 1, 1992. Since this is a third-party appeal from a permit issuance, DER (in accordance with its policy) has not taken an active role and has not indicated its agreement or disagreement with the Motion.

The Motion challenges Appellant's standing to bring the appeal, alleging that she lives more than a mile from the site on a property that is not downgradient from the site and which, in fact, is in a different watershed. Accordingly, Permittee claims, Appellant has no direct, immediate and substantial interest that is affected by the Permit. The appeal should be dismissed or, in the alternative, certain issues should be stricken.

In her Reply, Appellant first claims that the Motion is not timely, that Permittee waived the standing issue by not raising it in its pre-hearing memorandum. Appellant then denies lack of standing, alleging that she lives less than a mile from the nearest sludge field, that her residence and pond are at a lower elevation than some of the sludge fields, and that she and her family fish and engage in other recreation in the watershed affected by the sludge utilization. In addition, she alleges experiencing odors at her residence, at the homes of neighbors adjoining the site and on the public roads crossing the site.

Obviously, there are factual disputes here that can't be resolved without a hearing. We see no reason to have a separate hearing on the Motion but, instead, will incorporate it into the hearing on the merits. Since standing is a jurisdictional matter, it can be raised at any time: *Del-AWARE Unlimited, Inc. v. DER et al*, 1990 EHB 759, affirmed in an unreported opinion of Commonwealth Court, dated April 22, 1992, at Nos. 1709 and 1819 C.D. 1990. Appellant has the burden of proof on this issue. She will have to demonstrate

at the hearing that she has the interest necessary to confer standing and that the interest extends to each of the issues she raises.

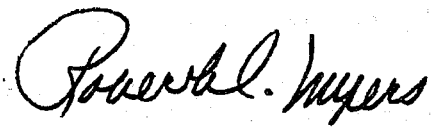
ORDER

AND NOW, this 7th day of January, 1993, it is ordered as follows:

1. Action on Permittee's Motion is deferred until the hearing on the merits.

2. The appeal shall be placed on the list of cases ready to be scheduled for hearing.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: January 7, 1993

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M. DIANE SMITH
SECRETARY TO THE BOAF

THE BABCOCK & WILCOX COMPANY	:	
	:	
v.	:	**EHB Docket No. 91-556-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: January 8, 1993**
and KOPPEL STEEL CORPORATION, Intervenor	:	

OPINION AND ORDER SUR

MOTION TO DISMISS FOR LACK OF JURISDICTION

By Robert D. Myers, Member

Synopsis

The Board denies DER's Motion to Dismiss for Lack of Jurisdiction. In reaching this result, the Board holds that DER's refusal to modify a NPDES permit to delete outfalls at facilities which the permittee has sold to others, who continue to discharge through them without permits of their own, is appealable because it requires the permittee to remain liable for discharges over which it no longer has legal control. DER's decision also is final on the issue despite the representation that the outfalls will be deleted after new permits are issued to the purchasers. Finally, the Board holds that entertaining the appeal will not amount to interference with DER's prosecutorial discretion.

O P I N I O N

On December 23, 1991 the Babcock & Wilcox Company (B & W) filed a Notice of Appeal seeking review of a November 21, 1991 letter from the Department of Environmental Resources (DER) Responding to B & W's request to delete certain outfalls from its NPDES Permit PA 0003239. On April 20, 1992 DER filed a Motion to Dismiss for Lack of Jurisdiction to which B & W filed a response on May 11, 1992. Koppel Steel Corporation was permitted to intervene by a Board Order dated May 12, 1992 but filed no response with respect to DER's Motion.

In its Motion DER contends that the Board has no jurisdiction to entertain B & W's appeal (1) because DER has not taken final action or made an adjudication and (2) because DER's exercise of prosecutorial discretion is not subject to judicial review.

The facts, as we have gathered them, appear to be as follows: DER issued NPDES Permit PA 0003239 to B & W on September 29, 1989. This Permit included the authorization for B & W to discharge industrial waste from 10 different outfalls at 3 separate facilities located in Beaver County - wastewater treatment plants in Beaver Falls, wastewater treatment plants in Koppel and a specialty metals facility in Big Beaver Borough. Subsequently, on September 25, 1990 B & W sold and conveyed 2 of these facilities - the wastewater treatment plants in Beaver Falls (4 outfalls) to P.M.A.C., Ltd. and the wastewater treatment plants in Koppel to P.M.A.C., Ltd. (2 outfalls) and to Koppel Steel Corporation (2 outfalls). Apparently, the latter corporation is part of NS Group, Inc. which has now become the owner of all the facilities at Koppel. B & W retains ownership of only the specialty metals facility in Big Beaver Borough (2 outfalls).

According to B & W , it notified DER (pursuant to terms of the Permit) prior to the sale of these facilities. About a year later, on October 3, 1991 B & W requested DER to modify the Permit in order to delete all of the outfalls except the 2 in Big Beaver Borough. On November 21, 1991 DER responded to the request stating, in part the following:

> At this time, it is not possible to break up this Permit or transfer any of these outfalls to the new owners of the properties in question. A meeting was held in our offices with all concerned parties on November 13, 1991, in which you participated. All permitting issues were discussed in detail. It was concluded that P.M.A.C. Ltd. and NS Group(Koppel Steel Corporation) must receive individual NPDES Permits for those outfalls which they own before we can delete those outfalls from your permit.

According to DER's Motion, NS Group Inc. had submitted a NPDES permit application for the facilities in Koppel on February 27, 1991. The application was found incomplete by DER and returned on February 26, 1992. On February 27, 1992 P.M.A.C., Ltd. filed applications for NPDES permits for the facilities in Beaver Falls. During all of the time subsequent to the sale, the purchasers apparently have been operating the facilities and discharging through the outfalls. Koppel Steel Corporation alleges in its Petition to Intervene that, if DER deletes the outfalls in Koppel from B & W's Permit before issuing a new permit to Koppel Steel Corporation, it will have to cease operations and lay off 440 employees.

DER's primary argument is that the November 21, 1991 letter does not constitute a final appealable "action" by DER. In this connection, DER contends that its refusal to delete the outfalls at this time makes no change in B & W's duties or obligations. Moreover, since DER's letter merely states what needs to occur before the outfalls can be deleted, it is not a final

decision on the matter. That would be made, we presume, only after individual NPDES permits are obtained by the purchasers.

Whether DER's refusal to modify a permit is appealable depends on the surrounding circumstances. We have held that it is appealable in some cases: *Springettsbury Township Sewer Authority v. DER*, 1985 EHB 492; *Consol Pennsylvania Coal Company v. DER*, 1988 EHB 448; and not appealable in others: *Westinghouse Electric Corporation v. DER*, 1990 EHB 515. The determining inquiry is whether the decision affects the "personal or property rights, privileges, immunities, duties, liabilities or obligations" of the Appellant (25 Pa. Code §21.2 (a), definition of "action"). DER claims that its decision (as reflected in the November 21, 1991 letter) does none of these things.

A permittee, whether under a NPDES permit or other permit issued by DER, accepts a broad range of statutory and regulatory duties and secures their performance by the posting of bonds. By undertaking these duties, the permittee risks the loss of the bond; but also risks financial resources required to pay civil penalties and future eligibility as a permittee, if violations occur. DER's NPDES permit issuance process is sensitive to these factors by requiring the applicant to demonstrate (1) that it has the legal power to control the discharges and to perform the numerous monitoring and reporting requirements, and (2) that it can be trusted to faithfully do it.

When a permittee loses the legal power to control the discharges and fulfill the other duties, regardless of how it happens, a serious problem arises with potentially disastrous impact on the environment. If the discharges cease, the problem may resolve itself easily, but if they continue, as they do here, through the operations of unpermitted entities, the carefully drawn line of responsibility begins to blur. It is for this reason (as well as others) that DER prohibits the transfer of permits without its approval.

B & W , by the sale of some of its facilities, could not force DER to accept the purchasers as the new dischargers without DER's consent; and DER was fully justified in requiring the purchasers to apply for and obtain their own individual permits for these outfalls.

The difficulty stems from DER's apparent acquiescence in the purchasers' continuing to use the outfalls for their discharges while the permit applications are pending, and DER's concomitant refusal to delete the outfalls from B & W's Permit. We can only conclude that these are related decisions because, if B & W's Permit were modified before new permits are issued, the purchasers would no longer be able to discharge and, as Koppel Steel Corporation avers, would have to cease operating.

We appreciate the importance of uninterrupted industrial operations and the jobs that go with them, but we also appreciate the dilemma created for B & W-remaining liable for a multitude of duties with respect to discharges it longer has the legal power to control. The fact that the dilemma had its genesis in B & W's voluntary decision to sell the facilities is not relevant; it exists solely because of DER's refusal to strike the outfalls from the Permit. B & W's duties and obligations are the same now as they were before the sale, but its loss of legal control over the discharges places these responsibilities in an whole new context. DER's decision has a direct and potentially destructive effect on B & W's "personal or property rights, privileges, immunities, duties, liabilities or obligations."

The decision also is "final" in the sense necessary for appeal to this Board. If, as DER maintains, B & W must wait until new permits are issued to the purchasers, the issue will become moot because, at that point, DER will issue a permit modification. If B & W has no recourse in the interim, the dilemma could continue as long as DER wants it to. It has

continued already for two years. While DER may truly intend to modify the Permit at some future time, its refusal to do so only after new permits are issued to the purchasers is a final, appealable action.

DER's argument that by allowing the appeal we are interfering with its prosecutorial discretion is convoluted. According to the argument, if we ultimately resolve the appeal in B & W's favor, we will be asking DER to allow unpermitted discharges to be made in violation of the law. Whether or not to allow such dischanges, the argument proceeds, is a matter solely of DER's discretion and cannot be adjudicated before this Board.

We have studiously refrained from interfering with DER's prosecutorial discretion: *Ralph Edney v. DER*, 1989 EHB 1356; *Gabriel v. DER*, 1990 EHB 526, but fail to see how this precedent could be violated here. If we ultimately decide in B & W's favor, we will order DER to delete the outfalls from B & W's Permit. If new permits have not been issued to the purchasers by then, no permits will exist authorizing discharges from these outfalls. If the discharges continue, DER will have to decide what (if anything) to do about it. That decision involves the exercise of prosecutorial discretion and will be made solely by DER and without any interference from this Board. The fact that our decision in this appeal may set in motion a chain of events that may require DER to exercise that discretion does not deprive us of jurisdiction. If it did, we would have no jurisdiction at all, because all of our decisions can lead to that result.

ORDER

AND NOW, this 8th day of January, 1993, it is ordered that DER's Motion to Dismiss for Lack of Jurisdiction is denied.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: January 8, 1993

cc: **For the Commonwealth:**
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M. DIANE SMITH
SECRETARY TO THE BOARD

GRAND CENTRAL SANITARY LANDFILL, INC. :
:
v. : EHB Docket No. 92-481-E
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: January 12, 1993

OPINION AND ORDER SUR
MOTION TO DISMISS

By: Richard S. Ehmann, Member

Synopsis

The Board dismisses an appeal from an action of the Department of Environmental Resources (DER) as untimely where the appeal was not filed within the thirty day period following DER's action but rather was filed following DER's subsequent reiteration of its action.

OPINION

Appellant Grand Central Sanitary Landfill, Inc. (Grand Central) began this appeal on October 22, 1992, when it requested this Board to review a letter from DER to Grand Central dated September 22, 1992, concerning Grand Central's August 27, 1992, request for clarification of DER's policy regarding use of waste tires at Grand Central's landfill.

On November 18, 1992, DER filed a Motion to Dismiss Grand Central's appeal and an accompanying memorandum of law. Grand Central has filed a response in opposition to DER's motion and a supporting memorandum of law. In

reviewing DER's motion we must view it in the light most favorable to the non-moving party, i.e., Grand Central. West Chillisquaque Township v. DER, 1989 EHB 392.

DER's September 22, 1992 letter is a response to a previous letter dated August 27, 1992 from Jan C. Hutwelker of American Resource Consultants, Inc. on behalf of Grand Central to DER regarding Grand Central's use of waste tires. DER's September 22, 1992 letter reads in pertinent part:

> The Department's letter to Grand Central dated August 4, 1992 indicates that the policy on the use of waste tires does apply to the Grand Central Landfill. The waste tires are approved as select fill which the Department has allowed to be used in the first eight foot layer of select waste on top of the protective cover material. The approval to utilize waste tires as select fill was outlined in the Department's April 18, 1991 letter to Grand Central.
>
> In addition, the Department's policy on the "storage of waste tires" has also been noted to apply to Grand Central on numerous occasions. The Department's letter dated October 9, 1991 to Mr. Nolan Perin indicated that "any additional tires brought onto the site should be stored in conformance with the Department's tire storage guidelines." Note that this waste tire storage directive was applied to Grand Central well in advance of the partial #2 construction certification approvals dated January 3, 1992 and April 7, 1992.
>
> In summary, the Department's continued position is that both the tire storage policy and the tire landfilling policy apply to Grand Central. Therefore, it is important to note that non-conformance with the above policy guidelines will result in appropriate enforcement actions, effective with the date of receipt of this letter.

(Exhibit A to DER's Motion)

In its motion, DER contends its September 22, 1992 letter is a reiteration of DER's August 4, 1992 and October 9, 1991 letters regarding the application of DER's tire use and storage policy to Grand Central and, as such, is not appealable; instead, it was DER's August 4, 1992 letter which Grand Central should have appealed.

Grand Central responds by arguing DER's August 4, 1992 letter was not a final appealable action because it did not direct compliance with any legislative act nor did it impose any liability on Grand Central. It further claims that it wrote its August 27, 1992 letter to DER to request clarification of whether DER's August 4, 1992 letter meant that DER's tire use policy was a modification of Grand Central's permit and required Grand Central's compliance therewith. Grand Central also asserts that DER's August 4 letter was not appealable because it lacked a statement that it was a DER action appealable to this Board. Additionally, Grand Central points to the language in DER's letter regarding future enforcement action and urges this language shows DER was, for the first time, notifying Grand Central that it was obligated to comply with DER's policy.

As we have previously explained, DER actions are appealable only if they are "adjudications" within the meaning of the Administrative Agency Law, 2 Pa.C.S. §101, or "actions" as defined at 25 Pa. Code §21.2(a)(1). In order to fall within either of these categories, DER's letter must have some impact on Grand Central's rights and duties. Lehigh Township, Wayne County v. DER, EHB Docket No. 91-090-W (Opinion issued May 22, 1992).

DER's motion points out that in DER's April 18, 1991 letter to Grand Central (which is referenced in DER's September 22, 1992 letter) DER stated that Grand Central could use whole tires as part of its first eight foot lift of select waste. (Exhibit B to DER's Motion) DER's October 9, 1991 letter to Grand Central (also referenced in DER's September 22, 1992 letter) stated that Grand Central should take certain actions with regard to the waste tires stored at its landfill in order to comply with DER's guidelines. (See Exhibit C to DER's Motion and Exhibit D to DER's Motion, "Interim Policy for the

Storage of Waste Tires... .") In its August 4, 1992 letter, DER explains that it has finalized its new policy and procedures for the use of waste whole tires and tire derived material in the construction of municipal waste landfills and is enclosing a copy of that policy. DER's August 4 letter continues:

> Based on the current practice of including a 6' to 8' layer of whole waste tires as part of your first 8' of select waste..., the new policy affects your landfill facility as follows:
>
> 1. All whole tires that are placed on top of your protective cover material are considered select fill and therefore are subject to the $2.00/ton recycling fee.
>
> 2. The placement of whole tires on top of the protective cover cannot occur on slopes greater than 10%.
>
> 3. To prevent the whole tires from experiencing floating, a geotextile fabric over the top of the tires (or other approved alternative method) must be utilized.
>
> The new guidelines become effective immediately. Based on the current construction features at your facility, and conformance with the above requirements, the placement of whole waste tires on the remaining portion of cell #2 must be discontinued. The placement of waste tires can resume on the floor area of the next constructed increment (i.e., cell #3).
>
> If you choose to utilize an alternative method in lieu of placing a geotextile layer on top of the tires, you should submit the details of the alternative method for prior Departmental approval. Concerning the $2.00/ton recycling fee reporting requirements, you should include the tire tonnage as a separate line item on your quarterly and annual operating reports.

DER's August 4, 1992 letter obviously altered Grand Central's rights and duties and, thus, was an appealable action. The August 4 letter mandates certain future conduct on the part of Grand Central, i.e., it must immediately discontinue its placement of whole waste tires on cell #2 at its landfill. While it would have been appropriate for DER to cite a statute, regulation, or

policy supporting its directive to Grand Central, its failure to cite to statute in the August 4, 1992 letter does not make that letter any less of a modification of Grand Central's permit. Nor is the lack of specific language in DER's August 4 letter determinative of the appealability of that letter, as DER has no duty to announce it has made a final and appealable decision. DER v. Derry Township, 10 Pa. Cmwlth. 619, 314 A.2d 868 (1973); Conshohocken Borough Authority v. DER, EHB Docket No. 91-276-MR (Opinion issued May 8, 1992); Borough of Lewistown v. DER, 1985 EHB 903. Pursuant to 25 Pa. Code §21.52(a), our jurisdiction does not attach to an appeal unless the appeal is filed within thirty days after a party appellant receives written notice of DER's action. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). If Grand Central was uncertain as to whether DER's August 4 letter was a permit modification, it should have filed a "protective appeal" with the Board within thirty days of its receipt of the August 4 letter setting forth DER's action. As an appellant, Grand Central could not wait to file its appeal until after it learned the basis for DER's action. Quaker State Oil Refining Corp. v. DER, 1986 EHB 245, affirmed, 108 Pa. Cmwlth. 610, 530 A.2d 942 (1987).

DER's September 22 letter reiterates that DER's policies regarding tire use apply to Grand Central. The fact that this letter goes on to inform Grand Central that non-compliance with DER's policy after DER's September 22 letter will result in DER taking enforcement action does not change the appealability of DER's August 4 letter or make DER's September 22 letter appealable, but merely warns Grand Central that DER will take prosecution action after this September 22 letter. As no appeals from any prosecution action taken by DER following the September letter have been filed with us as

yet, we need not now determine whether DER has waived its right to prosecute Grand Central for any violations occurring prior to DER's September 22 letter. If and when any such appeals from such DER prosecution actions are before us, we will then address the issue of the existence of violations and any DER waiver by this language in its September 22 letter.

As Grand Central failed to timely appeal DER's action in this matter, i.e., DER's August 4, 1992 letter, its appeal from DER's September 22, 1992 letter reiterating its position is untimely and this Board accordingly must dismiss this appeal for lack of jurisdiction.

ORDER

AND NOW, this 12th day of January, 1993, it is ordered that DER's Motion to Dismiss Grand Central Sanitary Landfill, Inc.'s appeal at EHB Docket No. 92-481-E is granted and the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

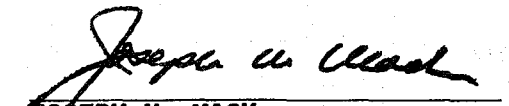
MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: January 12, 1993

cc: **Bureau of Litigation**
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For the Commonwealth, DER:
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M. DIANE SMITH
SECRETARY TO THE BO

CITY OF READING	:	**EHB Docket Nos. 90-529-MR**
	:	**91-520-MR, 91-521-MR,**
v.	:	**91-522-MR, 91-545-MR,**
	:	**91-564-MR**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: January 22, 1993**

OPINION AND ORDER
SUR
MOTION TO DISMISS

Robert D. Myers, Member

Synopsis

Appeals from DER refusals to reconsider prior denials of Federal grant participation in portions of a wastewater treatment plant construction project are not appealable actions and are untimely. Appeals should have been filed from the DER denials which were stated to be final actions on the part of DER.

OPINIONS

The above-docketed appeals all were filed by the City of Reading and were proceeding toward a joint hearing when the Department of Environmental Resources (DER), on September 2, 1992, filed a joint Motion to Dismiss. According to the Motion, the appeals all challenge refusals by DER to reconsider prior denials of requests for Federal grant participation with respect to Change Orders under Contracts 11-B, 12-C, and Television and Grouting, Construction Grant C-421083-02, City of Reading Sewage Treatment

Plant. DER had denied the Change Order requests when they were first presented, in letters stating that the actions were final. Appellant, instead of filing appeals from those denials, requested reconsideration and then appealed from DER's refusal to reconsider. These facts are supported by affidavit and exhibits and, since Appellant filed no response to DER's Motion, will be accepted as true.

As noted by DER, this precise situation was presented in *Conshohocken Borough Authority v. DER* (EHB Docket No. 91-276-MR, Opinion and Order sur Motion to Dismiss issued May 8, 1992), where we held that the appeals were untimely based upon *Borough of Lewistown v. DER*, 1985 EHB 903, and *Lansdale Borough v. DER*, 1986 EHB 654. Those decisions control the disposition of these appeals.

ORDER

AND NOW, this 22nd day of January, 1993, it is ordered as follows:

1. DER's Motion to Dismiss is granted.
2. The appeals are dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: January 22, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

JAMES F. WUNDER	:	
	:	
v.	:	**EHB Docket No. 91-404-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: January 22, 1993**

OPINION AND ORDER
SUR
MOTION FOR JUDGMENT ON THE PLEADINGS

Robert D. Myers, Member

Synopsis

Where DER denies a request under 25 Pa. Code §71.14 to order a municipality to revise its Official Sewage Facility Plan solely on the basis that the applicant has not shown that the subdivision has received local planning approval, as required by §71.14(c), judgment on the pleadings will be entered for the applicant, the nonmoving party, because it is clear that no subdivision is involved. The matter is remanded to DER for further action within 60 days.

OPINION

This proceeding was instituted on September 30, 1991 when James F. Wunder (Appellant) filed a Notice of Appeal challenging the denial by the Department of Environmental Resources (DER) on September 11, 1991 of Appellant's private request to have DER order Milford Township, Bucks County, to revise its Official Sewage Facilities Plan. On November 8, 1991 DER filed

a Motion for Judgment on the Pleadings with supporting legal memorandum. Appellant filed his Response with supporting legal memorandum on July 23, 1992.

DER's Motion is based on the theory that 25 Pa. Code §71.14, which governs private requests to revise Official Plans, prohibits DER from considering the request unless the subdivision has received prior approval under the municipality's zoning ordinance. Since there is no clear evidence that Appellant has received such approval from the Township, DER claims that it was justified in denying the request and is entitled to judgment on the pleadings. Appellant argues, however, that §71.14(c) is not applicable here because there is no pending request for a subdivision.

The facts, as we can gather them from the pleadings, show that Appellant owns a tract of land roughly 180 feet by 500 feet with a gross area of about 2 acres. He wants to sell the tract but, before doing so, wants to make certain that a single family dwelling can be erected on it. The tract is in the RA zone under the Township's zoning ordinance. Single family dwellings are a permitted use in that zone, but Appellant's tract may not meet the minimum lot-size requirements. The allegations on this point are not clear. In any event, Appellant claims that the tract has existed in single, separate ownership since prior to adoption of the zoning ordinance and, therefore, is not governed by the usual lot-size provisions.

The Township's Official Plan calls for the use of individual on-site sewage disposal systems in the RA zone. It has been determined that, because of the unsuitable soils, a conventional on-site disposal system is not permissible on Appellant's tract. Nor is a spray irrigation system, because of site restrictions and the presence of an intermittent stream. The nearest public sewers are 2.65 miles away. The only feasible alternative, apparently,

is a small flow treatment facility serving only Appellant's tract and discharging into a perennial stream.

Since the Township's Official Plan does not authorize such facilities, Appellant requested the governing body to approve a revision. When they refused, Appellant made a request to DER on January 21, 1991 to order such a revision. After seeking comments from the Township and the Bucks County Planning Commission, DER rejected the request on September 11, 1991. The appeal followed.

Motions for judgment on the pleadings are governed by Pa. R.C.P. 1034. We can enter judgment (in favor of either party) if we conclude that there are no factual disputes and that the successful party is entitled to judgment as a matter of law: Goodrich-Amram 2d §1034:1 *et seq.*

The regulation governing private requests to revise Official Plans, 25 Pa. Code §71.14, provides in subsections (a) and (b) that a property owner can make such a request to DER if he can show that the existing Official Plan is "inadequate to meet the...property owner's sewage disposal needs," and that the municipality has rejected the request. DER is required to solicit comments from local government agencies under subsection (d) and to consider certain specified factors in reaching its decision under subsection (e). Subsection (f) establishes time limits for DER's action.

Subsection (c), which is at the heart of this controversy, reads as follows:

> No private request to revise an official plan because of the subdivision of land will be considered by the Department unless the subdivision has received prior approval under municipal or county planning codes being

> implemented through Article VI of the Pennsylvania Municipalities Planning Code (53 P.S. §§10601-10619).[1]

This provision effectively prohibits action by DER when it has not been shown that a subdivision has received approval at the local level. "Subdivision" is defined in §71.1 as the "division or redivision of a lot, tract or other parcel of land into two or more lots, tracts, parcels or other divisions of land, including changes in existing lot lines."

It is clear that Appellant's request does not involve a subdivision of land but merely the development of an existing tract by the erection of a single family dwelling. As such, it is not subject to §71.14(c). Since the only reason given by DER for its refusal relies on §71.14(c), the refusal was erroneous as a matter of law. Accordingly, judgment on the pleadings will be entered in favor of Appellant. We are not in a position at this point to determine whether the requested revision should be approved.[2] Therefore, we will refrain from exercising our discretion in the matter and remand it to DER for proceedings in conformity with the provisions of §71.14(e). DER will be required to render its decision within 60 days.

---

[1] We held in *Franconia Township v. DER*, 1991 EHB 1290, that the reference to Article VI is erroneous and should be Article V dealing with subdivision ordinances. DER's argument apparently overlooks this decision and claims that zoning approval is a prerequisite. Our decision does not turn on this point, however, and we would reach the same conclusion under either ordinance.

[2] Nor are we deciding whether Appellant's lot is entitled to local approval. That is a matter between Appellant and the Township and beyond our jurisdiction.

ORDER

AND NOW, this 22nd day of January, 1993, it is ordered as follows:

1. Judgment on the pleadings is entered in favor of Appellant.

2. The matter is remanded to DER with instructions to review Appellant's request on the merits and to make a determination in accordance with 25 Pa. Code §71.14(e).

3. DER's decision shall be made and communicated to all parties and the Board on or before March 23, 1993.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: January 22, 1993

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sb

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M. DIANE SMITH
SECRETARY TO THE BOARD

HALFWAY COALYARD, INC.	:	
	:	EHB Docket No. 83-133-W
v.	:	(Consolidated Docket)
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: January 26, 1993

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

By Maxine Woelfling, Chairman

Synopsis

The Board dismisses consolidated appeals by the operator of a mine site owned by the Commonwealth and mined pursuant to a lease agreement with the Department of Environmental Resources (Department). Appellant has failed to prove that the Department's involvement in negotiating the lease (which was assigned to Appellant) prevents the Department from holding the operator responsible, pursuant to §315 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.315 (Clean Streams Law), for treating seeps of acid mine drainage (AMD) emanating from its permit area.

BACKGROUND

This matter was initiated by the July 7, 1983, filing of a notice of appeal by Halfway Coalyard, Inc. (Halfway) seeking the Board's review of a June 9, 1983, order from the Department. The order, which was issued pursuant to the Clean Streams Law; the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.* (the Surface Mining Act); and §1917-A of the Administrative Code, the Act of April

9, 1929, P.L. 177, as amended, 71 P.S. §510-17 (the Administrative Code), directed Halfway to treat discharges from a mine site in Snow Shoe Township, Centre County, to meet the requirements of 25 Pa. Code §87.102. Halfway leased the site, which was located in the Sproul State Forest, from the Commonwealth and conducted surface mining operations pursuant to Mine Drainage Permit (MDP) 4777SM7.

The Department, on September 1, 1983, issued another order to Halfway, alleging that it had allowed discharges from certain of its treatment ponds in violation of the applicable effluent limitations and directing it, *inter alia*, to monitor the discharges and upgrade its treatment system. Halfway appealed this order to the Board on October 3, 1983, and its appeal, which was originally docketed at No. 83-225-M, was consolidated with its appeal of the June 9, 1983, order at Docket No. 83-133-M on November 28, 1983. Halfway's alleged failure to comply with the Department's September 1, 1983, order led to the issuance of a third order by the Department on February 13, 1984. Halfway appealed that order to the Board at Docket No. 84-098-M, which was consolidated with Docket No. 83-133-M at the latter docket number on June 29, 1984.

Halfway sought the release of bonds posted for the site in a completion report filed on July 8, 1985, and, in a letter dated September 25, 1985, the Department denied that request as a result of acid discharges from Halfway's permitted area. The bond release denial was appealed by Halfway to the Board at Docket No. 85-461-G and consolidated at Docket No. 83-133-W on May 1, 1986.

An alleged breach in a treatment ditch resulting in a discharge not in compliance with 25 Pa. Code §87.102, as well as a non-complying discharge from a final treatment pond, led to the issuance of a January 9, 1986, order

by the Department. That order was appealed by Halfway at Docket No. 86-076-W and was consolidated with Docket No. 83-133-W at the latter docket number by Board order dated March 2, 1987. Halfway's alleged discharge from the treatment ponds on the northern part of its permitted area in violation of the applicable effluent limitations for iron and manganese resulted in the Department's issuance of a January 27, 1987, compliance order to Halfway. It was appealed to the Board at Docket No. 87-057-W and consolidated at Docket No. 83-133-W by Board order dated March 24, 1987. Halfway's failure to comply with the January 27, 1987, compliance order led to the issuance of a March 17, 1987, compliance order which Halfway appealed to the Board on April 15, 1987, at Docket No. 87-142-W. That appeal, too, was consolidated at Docket No. 83-133-W.[1]

A hearing on the merits was held on August 10 and September 8-9, 1986, and the parties duly filed their post-hearing briefs. Halfway contended in its post-hearing brief that the Board had erred in excluding parol evidence concerning the negotiation of the lease, as well as denying the admission of certain other memoranda as inadmissible hearsay. The crux of Halfway's contentions, however, was that the Department orders were an abuse of discretion because the Department had actively participated in leasing the site for re-mining, knowing that re-mining would possible aggravate acid mine drainage on the site. Therefore, Halfway reasoned, it could not be held liable

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[1] Halfway's April 9, 1986, appeal of a March 4, 1986, compliance order for the permitted area was appealed to the Board at Docket No. 86-196-W. At Halfway's request, that appeal was, by Board order dated July 21, 1986, stayed pending the Board's adjudication at Docket No. 83-133-W.

for treating discharges which pre-dated its mining activities.[2]

The Department, on the other hand, contended that under §315(a) of the Clean Streams Law, Halfway was responsible for treating the discharges because they emanated directly from Halfway's mine site, regardless of whether the discharges pre-existed Halfway's mining or were degraded by it. The Department further argued that since it was acting in its governmental capacity when it took the challenged actions, Halfway could not raise any equitable defenses to the Department's order actions.

The record consists of a transcript of 500 pages and 26 exhibits. After a full and complete review of it, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is Halfway, which has a mailing address of 919 Conestoga Road, Suite 100, Rosemont, PA 19010.

2. Appellee is the Department, the agency of the Commonwealth with the authority to administer and enforce the Clean Streams Law, the Surface Mining Act, §1917-A of the Administrative Code, and the rules and regulations adopted thereunder.

3. Halfway was authorized to conduct surface coal mining at a site in Snow Shoe Township, Centre County, known as the Forest 1 Mine or State's

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[2] Halfway's post-hearing "brief" sets forth proposed findings of fact and conclusions of law. It contains no discussion of the application of the law to these facts. Halfway replied to assertions in the Department's post-hearing brief and also, through letters dated May 11 and November 9, 1987, directed the Board's attention to federal court decisions supporting Halfway's arguments. We have characterized Halfway's arguments as best we could given the absence of any legal argument in Halfway's post-hearing filings.

No. 1 Job, by MDP 4777SM7, which was issued by the Department on September 2, 1977. (N.T. 38; Ex. C-2)[3]

4. The Forest 1 Mine is located in Sproul State Forest, where the Commonwealth owns both the surface and mineral rights to the land on which Halfway mined. (N.T. 181; Ex. C-9)

5. The area on which Halfway mined was purchased by the Commonwealth from Kato Coal Company and is sometimes referred to as the Kato Coal Company purchase land. (N.T. 185, 293)

6. Halfway began mining activities at the Forest 1 Mine in October, 1977 pursuant to a lease with the Commonwealth and completed coal extraction activities approximately six years later. (N.T. 326; Ex. H-21 and H-22)

7. At the time of the hearing on the merits, the discharge which Halfway was directed to treat by the Department was a seep zone of more than 1000 feet in length. (Ex. C-9)

8. The discharge emanated directly from Halfway's mine site. (N.T. 4, 11, 157, 334, 406, 436, 453, 471-472, 479, 485; Ex. C-2, C-3, and C-9; Ex. H-2)

9. The discharge exceeded the applicable effluent limitations at 25 Pa. Code §87.102 and exhibited the characteristics of AMD.[4] (N.T. 4, 474-475; Ex. C-1)

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[3] References to the transcript of the hearing on the merits are denoted by "N.T. ___." References to the Department's exhibits are denoted by "Ex.C-___," while those of Halfway are designated by "Ex.H-___."

[4] AMD is typified by elevated concentrations of iron, manganese, and sulfates, high acidity, and low pH. (N.T. 474-475)

HISTORY OF THE FOREST 1 MINE

10. The Forest 1 Mine site was mined prior to 1965 when reclamation standards only required the restoration of the highwall and covering the coal seam extracted with a few feet of spoil.[5] (N.T. 180, 188, 194, 197-198)

11. In 1965, the Forest 1 Mine site had abandoned highwalls, piles of spoil, and depressed areas between the highwalls and spoil where water ponded during heavy rains. (N.T. 194-195)

12. Some of the spoil piles were covered with black shales and had no vegetation, while other spoil piles had well-established vegetation. (N.T. 194)

13. The Commonwealth considered the Forest 1 Mine for funding under the Appalachia Project, a joint state-federal program to reclaim abandoned mine lands. (N.T. 180-181)

14. Sometime prior to 1969 Appalachia Project funding in the amount of $235,000 was approved by the federal government for the Forest 1 Mine site; the state was to contribute 25% of the project amount. (N.T. 199, 210-211, 217-218)

15. The reclamation work to be funded by the Appalachia Project consisted of covering affected areas with clean spoil or top soil, restoring depressed areas to positive drainage, and eliminating some of the highwalls. (N.T. 218)

16. The two Commonwealth agencies involved with the project, the Department of Mines and Mineral Industries and the Department of Forests and

---

[5] Such mining is commonly referred to as "pre-Act mining." The Surface Mining Act, which was originally passed in 1945, was amended in 1965 to impose more stringent reclamation requirements on surface mining operations.

Waters[6] had differing opinions over how to proceed with the project. (N.T. 207)

17. While the Department of Forests and Waters believed the site would be improved by the Appalachia Project, it was concerned that areas already possessing a good growth of vegetation would be disturbed. (N.T. 206-210)

18. In April, 1969, Eugene Frund, who at the time of the hearing on the merits was Chief of the Bureau of Forestry's Mineral Section, was directed by Dr. Maurice K. Goddard, then Secretary of the Department of Forests and Waters, to re-examine the proposed Appalachia Project for the site. (N.T. 196, 213, 217)

19. In 1968, the Department retained Gannett Fleming Corddry and Carpenter, Inc. to investigate the Beech Creek Watershed (of which the site was a part) as part of its Operation Scarlift[7] initiative to reclaim abandoned mine lands. (N.T. 53-54, 62, 121-122; Ex. H-1)

20. Six monitoring points (MPs)--numbers 159 to 164--were sampled as part of the Operation Scarlift study of the site and watershed. (N.T. 58)

21. The quality of the flows at these MPs was analyzed on a monthly basis for one year, with the results at MPs 162, 163, and 164 showing elevated acidity, sulfates, and specific conductivity; moderately elevated iron; and low pH, all indicative of poor water quality. (N.T. 58-59; Ex. H-1)

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[6] These two agencies became part of the new Department of Environmental Resources with the passage of Act 275 of 1970. (N.T. 172)

[7] Operation Scarlift was financed by a 500 million dollar bond issue authorized by Article IX, §25, of the Pennsylvania Constitution and the Land and Water Conservation and Reclamation Act, the Act of January 19, 1968, P.L. (1967) 996, as amended, 32 P.S. §5101 *et seq.* Section 16(a)(1) of the statute allocated 200 million dollars "for the elimination of land and water scars created by past mining practices."

22. The Scarlift Study did not address the length of the seep zones on the site. (N.T. 121)

23. The cost of reclaiming the site was estimated to be $6,769,200. (N.T. 65; Ex. H-1)

24. The Scarlift Study, which was completed in December, 1970, was available for public inspection. (N.T. 53-54, 62, 121-122; Ex. H-1)

25. In early 1970, one Mr. Hartman expressed his interest in leasing a portion of the Kato Coal Company purchase land for surface mining and, in the process, undertaking some reclamation work. (N.T. 218)

26. The Department of Mines and Mineral Industries, which was in charge of the Appalachia Project, evaluated Hartman's request and was inclined to consider such a request in order to reduce state and federal expenditures for reclamation work. (N.T. 211, 222, 225-226)

27. Although Hartman proposed to mine a portion of the area which was to be reclaimed by the Appalachia Project, the reclamation work he proposed was not as extensive as that proposed for the Appalachia Project and his proposal was rejected. (N.T. 228-231)

28. In a memorandum dated January 31, 1972, Frund expressed his objection to the Appalachia Project disturbing parts of the site which were already satisfactorily replanted; recommended that the appropriated funds could be better spent on reclaiming sites with large volumes of AMD; and suggested that most of the site could be restored at no cost to the state or federal governments if private industry would remove additional coal reserves and restore the area. (N.T. 237, 239-240; Ex. H-10)

29. At some point after Frund's January 31, 1972, memorandum, the Appalachia Project was abandoned, and no other plans for restoring the site with public funding were considered by the Department. (N.T. 244-245)

30. In 1974, the Department received two other proposals to surface mine the Kato Coal Company purchase land, one from William Bamat and the other from a Mr. Carlin. (N.T. 246-247)

31. Any proposal to lease state forest land for surface mining was forwarded to the District Forester for his assessment of the impact mining would have on forest lands. (N.T. 172-173)

32. District Forester Paulhamus evaluated the Bamat and Carlin proposals, concluding that there was no justification for remining the area unless the water quality could be improved or recovery of the coal reserves was necessary to alleviate energy shortages resulting from the 1973-1974 Arab oil embargo. (N.T. 259-261; Ex. H-12)

33. Paulhamus reported the presence of black shales and highwalls on the area Halfway eventually mined. (N.T. 250, 260; Ex. H-12)

34. When heated by the sun, the toxic materials in black shales do not permit vegetative growth. (N.T. 250, 260; Ex. H-12)

35. Matthew Hrebar, a mining engineer with the Bureau of Forestry, also evaluated the Bamat and Carlin requests. (N.T. 256-258, 266, 277; Ex. H-14)

36. While Hrebar agreed with District Forester Pauhamus' conclusions, he was also concerned that if the area known as Beech Creek west were surface mined, there was a possibility that AMD would be increased. (N.T. 263, 267; Ex. H-14)

37. In September, 1974, Frund recommended to Department Secretary Dr. Maurice Goddard that the Bamat and Carlin proposals be rejected because the operators proposed taking only the easy-to-remove coal and not reclaiming the entire area. (N.T. 277, 281; Ex. H-5)

38. Secretary Goddard concurred with Frund's recommendation, and the Bamat and Carlin requests were denied.

39. Mr. Hrebar conducted an assessment of the mineable coal reserves on the Kato Coal Company purchase land; the assessment was independent of the Bureau of Forestry's assessment of the Bamat and Carlin mining proposals. (N.T. 292-293)

40. In July, 1978, Mr. Frund was contacted by Dr. H. Beecher Charmbury[8] on behalf of Halfway; prior to this contact, Frund was not familiar with Halfway. (N.T. 180, 293, 350)

41. During a July 8, 1975, meeting with the Department, Dr. Charmbury presented a proposal by the Warner Company[9] to lease a 408 acre site within the Sproul State Forest for surface mining. (N.T. 180, 293-294, 306)

42. The site which Halfway proposed to mine was part of the former Appalachia Project. (N.T. 306)

43. Halfway's proposal included topographic maps, an aerial photograph, and a description of the acidic material on the site. (N.T. 343, 345; Ex. C-12)

44. Like the Appalachia Project, Halfway proposed to eliminate dangerous highwalls and restore positive drainage on the site. (N.T. 306-307)

45. Halfway's proposal recognized that AMD was emanating from the site: "The drainage is acid in pH value with a considerable amount draining into the Council Run Watershed." (Ex. C-12)

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[8] Dr. Charmbury was Secretary of the Department of Mines and Mineral Industries from 1963 until the agency was merged into the new Department of Environmental Resources.

[9] Halfway was merged into the Warner Company in 1985. (N.T. 445)

46. Halfway's proposal expressly noted the presence of toxic materials on the site: "Due to the lack of regulatory requirements on the special handling of acidic material, top soil, and drainage, large areas are present with acid forming shale on the surface." (Ex. C-12)

47. Halfway was willing to remove the estimated one-and-one-half million tons of coal on the site; treat any water on or emanating from the site; stockpile and replace any toxic materials in the pit; restore and replant; and, if economical, daylight and seal any deep mines encountered during the course of its mining. (N.T. 306)

48. Halfway's proposal estimated that it would save the Commonwealth $200,000 in reclamation costs, while bringing in over one million dollars in royalties. (N.T. 308; Ex. H-19)

49. At the time of its proposal to the Department, Halfway was conducting a surface mining operation on the same coal seams on private land adjacent to the proposed lease site. (N.T. 133, 142-143; 335-336, 447, 449)

50. Halfway's former president, Duke Hall, was born and raised in Kato, approximately 3900 feet from the discharge which is the subject of Halfway's appeal. (N.T. 39, 140-141)

51. Halfway actively pursued the Kato Coal Company purchase land lease because it was already familiar with the area; it had a large active operation on an area contiguous to the site; it had equipment available and a storage facility and tipple in the area; there were substantial reserves of coal on the site; and Halfway needed the coal for its limestone operations. (N.T. 141-143, 310, 336, 351, 355, 446; Ex. C-12)

52. Frund solicited comments on Halfway's proposal from District Forester Paulhamus and Bureau of Forestry Mining Engineer Hrebar. (N.T. 298)

53. Representatives of the Department met with representatives of Halfway several times on the proposed lease site; Halfway officials even accompanied Frund to the portion of the north outslope on which the discharge at issue herein was located. (N.T. 300, 310, 353-354)

54. Halfway obtained exploratory mining permits and conducted core drilling on the site to evaluate whether there were profitable coal reserves. (N.T. 310)

55. The Department was receptive to the reclamation of the Kato Coal Company purchase land by a private miner because such mining would restore the land to a more useful purpose while at the same time abating AMD from the site, both at a savings to the taxpayers. (N.T. 239, 262)

56. Frund recommended to Secretary Goddard in a September 4, 1975, memorandum that leasing of the site be evaluated in view of the possibility that more coal reserves would have to be mined as a result of the Arab oil embargo. (N.T. 303-304, 307)

57. Thereafter, Frund recommended to Secretary Goddard in a September 20, 1976, memorandum that competitive bids be solicited for mining the site of Halfway's proposal. (N.T. 312; Ex. H-20)

58. Having received Secretary Goddard's approval, the Department, in February, 1977, solicited bids for leasing the Kato Coal Company purchase lands. (N.T. 310, 346)

59. The request for bids set a minimum royalty bid of $1.00 per ton and indicated that some areas off the leased premises would need to be restored and that some areas within the leased premises would need to be replanted. (N.T. 310-311)

60. There were four successful bidders, but the highest bidder was Owens Coal Mining Company (Owens) with a bid of a $2.20 royalty per ton. (N.T. 314-315)

61. Halfway, without any input from the Department, bid a $2.16 royalty per ton. (N.T. 346)

62. On April 1, 1977, the Commonwealth and Owens entered into a lease to mine the site. (Ex. H-21)

63. The lease recites conditions on the site:

> WHEREAS, part of those State Forest lands which will be affected by the proposed mining have been both deep and strip mined over a period of many years in the past when these lands and/or mineral coal rights were not owned by the Commonwealth of Pennsylvania and are now in need of reclamation and abatement of acid discharges which are emanating from the disturbed lands.
>
> (Ex. H-21, emphasis added)

64. The lease prescribes that the lessee comply with the laws of the Commonwealth and that in the event of a conflict between the terms and conditions of the lease and the law, the law applies:

> 1.1 Lessee shall comply with the provisions of the Surface Mining Conservation and Reclamation Act ... and shall apply for the necessary mining license and permit within thirty (30) days after final execution of this lease.
>
> * * *
>
> 4.2 Lessee shall comply in every respect with all the laws now existing, or hereafter enacted by the Commonwealth or the United States ....
>
> * * *
>
> 5.1 Lessee agrees to conduct all operations in such a manner as to comply with the provisions set forth in ... Exhibit 'B' attached hereto and made a part hereof.
>
> * * *

1.1 (Exhibit B) Lessee shall take all necessary precautions and measures throughout the entire course of this lease to insure strict compliance with all pertinent laws and rules and regulations promulgated thereunder, whenever enacted, including: the Air Pollution Control Act ... the Clean Streams Law ... the Solid Waste Management Act ... the Gas Operation Well-Drilling Petroleum and Coal Mining Act ... and the Surface Mining Conservation and Reclamation Act ...

1.2 Notwithstanding any provision in this lease, Lessee shall be held liable by the Commonwealth of Pennsylvania, or any agency of the Commonwealth, for the violation of any relevant laws, rules and regulations.

1.3 Before any mining, drilling or quarrying, Lessee shall acquaint itself with all of the applicable rules and regulations governed by each respective Act.

1.4 Prior to undertaking actual mining, drilling or quarrying, Lessee shall confirm in writing to Lessor that he has reviewed and thoroughly understands applicable requirements as contained in each of the aforementioned Acts.

1.5 During mining, drilling or quarrying, Lessee shall comply with all of the current applicable rules and regulations of the foregoing Acts. Where any of the rules and regulations differ concerning abatement of pollution, the more stringent rule shall apply.

(Ex. H-21, emphasis added)

65. The lease repeatedly recognizes the lessee's responsibility for any pollutional discharges emanating from the site:

1.6 Lessee shall at all times perform its work in such a manner as to substantially minimize the possibility of polluting the air, land, or bodies of water with any materials harmful to the environment.

* * *

1.10 The discharge of wastes to streams within the Commonwealth will not be permitted unless such discharges meet the standards of the Department of Environmental Resources.

* * *

4.5 Lessee shall be responsible for the treatment of any acid mine drainage which may be discharged as a result of their operations including that from any abandoned deep mine affected by its operations and shall limit its operation so that it shall not jeopardize the possible future sealing of deep mines in any coal seam encountered.

* * *

8.1 Without prior approval of Department, Lessee shall not locate any bore or core hole or any part of rig or slush pit within one hundred (100) feet of any stream or body of water on State Forest lands, and hereby agrees to prevent the contamination or pollution of springs, brooks, streams, or other waters on these lands in any manner whatsoever, by such means and measures as may be lawfully required by the Environmental Quality Board of the Commonwealth of Pennsylvania or its successors in function ....

8.2 Where construction, operation, or maintenance of any of the facilities on or connected with this lease causes damage to the watershed or pollution of the water resources, Lessee agrees to repair such damage and to take such corrective measures to prevent further pollution or damage to the watershed as are deemed necessary by an authorized representative of Department and to pay for any and all damage or destruction of property, fish, and wildlife resulting from operations under this lease.

(Ex. H-21, emphasis added)

66. The lease divided the site into separately denominated areas; Areas A and B were immediately upslope of the discharge at issue herein. (Ex. H-13 and H-21)

67. The lease did not require the lessee to do anything in Areas A and B, but the Department had the discretion under the lease to direct the lessee to affect Areas A and B. (N.T. 287, 318-319, 325-326, 349-351, 411, 413, 415; Ex. H-21)

68. The lease required the lessee to take one full cut around the Lower Kittanning seam outcrop. (N.T. 396-397, 480)

69. The Lower Kittanning seam was the uppermost coal seam and was 600 feet from the discharge and 500 feet from the southern border of Area A. (N.T. 410-411; Ex. H-32 (lease map))

70. Halfway was sorely disappointed when Owens was the successful bidder and undertook measures to secure assignment of the lease from Owens. (N.T. 347-387; Ex. H-22)

71. Owens requested that the lease be assigned to Halfway, and the Department consented to the assignment on April 29, 1977. (N.T. 314-317; Ex. H-22 and H-23)

72. Other than approving the assignment of the lease, the Department played no role in Halfway's efforts to secure assignment of the lease. (N.T. 347)

HALFWAY'S MINING OPERATIONS

73. Halfway's original 1977 permit application for the site included a field report which identified discharges from existing deep mines and strippings on the proposed permit area. (Ex. C-2)

74. Halfway did not investigate the site's potential to produce AMD because it believed that the Department's Bureau of Mining and Reclamation (BMR) was not then concerned with pre-existing seeps. (N.T. 136-138, 156)

75. In 1988, Wilson Fisher, Jr., president and chief engineer of Hess & Fisher Engineers, Inc., was retained by Halfway to prepare the update to Halfway's MDP.[10]

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[10] The federal Surface Mining Control and Reclamation Act, 30 U.S. §1201 *et seq.*, required surface mine operators to update their permits to meet the statute's interim requirements. (N.T. 38, 42-43)

76. When Fisher first visited the site in fall, 1978, Halfway had completed mining on the northern-most knob and, using the block cut method,[11] was progressing into the eastern-most portion of the MDP area in a northeast to southwest direction along the contour of the two exposed seams, the Lower Clarion and the Upper Clarion.

77. Halfway's update permit application expressly recognized that continued mining on the site would result in a decrease in water quality: "Disturbance of the overburden material will cause an inherent decrease in the quality of the perched water, but it will be contained within the site (with the aid of the relatively impermeable underclay) and treated as required." (Ex. C-3)

78. The update permit application also noted that the site was producing poor quality drainage. (N.T. 53, 91, 484-485; Ex. C-3)

79. The discharge which is the subject of this appeal did not exist when Halfway prepared its update permit application. (N.T. 483; Ex. C-3)

80. Hess and Fisher did not prepare an overburden analysis for the update permit application because such analyses were not generally prepared at that time. (N.T. 86)

81. Halfway's permit prohibited it from allowing untreated mine drainage to discharge from its permit area. (Ex. C-2 and C-3)

82. While the lease did not require Halfway to do anything in Areas A and B, Halfway requested permission from the Department to cast its spoils downhill into Area B; the spoils eventually spilled over into Area A. (N.T. 287, 318-320, 325-326, 349, 350-351, 411, 413, 415; Ex. H-21)

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[11] With the block cut method, each seam was exposed over an area of approximately 200 feet, the coal was extracted, and the rock material was trucked to and dumped on the previously-mined block. (N.T. 77)

83. Once Halfway elected to utilize Areas A and B in its operations, it was responsible for their restoration under the lease. (Ex. H-21, ¶ 4.9)

84. During its mining operations Halfway filled in and reclaimed open pits remaining from previous mining and regraded and planted the spoil. (N.T. 78)

85. Remining the site caused greater infiltration over a larger area, greater exposure to and reaction with pyritic lithologies, and elimination of higher perched aquifers. (N.T. 91, 472-474, 477-479)

86. Water permeated through the spoils left by Halfway's mining until it hit an aquitard underlying the Brookville coal seam, the lowermost coal seam mined. That water then moved downdip along that aquitard and emanated at the surface to form the subject discharge. (N.T. 50-51, 117-118, 473-474, 478-479)

87. Halfway mined within the recharge area for the discharge. (N.T. 121, 477-478)

88. Halfway's spoiling of at least one pyritic rider seam on the site contrary to its permit contributed to the discharge. (N.T. 477-478)

89. The discharge was hydrogeologically connected to Halfway's surface mining operations on the site. (N.T. 4, 11, 117-118, 119, 121, 472-473, 477-479; Ex. C-9)

90. Eugene Frund and Roger Dorsey, two Department employees called as witnesses by Halfway, were the only witnesses who actually saw the area of the discharge prior to Halfway's mining. (N.T. 250, 331, 388)

91. Both Frund and Dorsey presented uncontradicted eyewitness testimony that, at most, there were some wet, swampy areas with no evidence of pollution such as iron staining or dead vegetation. (N.T. 331-333, 404)

92. Joseph Lee, who first visited the Halfway site in 1983 at the request of his supervisor in order to investigate the seep zone, observed a series of small seeps from the toe of spoil which formed a damp area approximately 400 feet wide. (N.T. 471)

93. Lee later visited the Halfway site on September 3, 1986, and at that time he observed seeps emanating 15 feet higher in the spoil bank on both sides of the previous seep zone, as well as seeps below the area disturbed for treatment pond construction; there was also a 1200 feet area of dead woods which had been alive in 1983. (N.T. 471-472)

HALFWAY'S ESTOPPEL CLAIMS

94. No witnesses were called by Halfway to testify regarding the pre-lease dealings between the parties.

95. The lease was the full and final embodiment of the parties' contractual relationship. (N.T. 297)

96. The Department often provided for a credit against royalties for reclamation work, as it did with this lease. (N.T. 259; Ex. H-21)

97. The Commonwealth received approximately $975,000 in royalties from Halfway, and at the time of the hearing, there were no outstanding royalty payments. (N.T. 326-327)

98. The royalties received were placed in the Commonwealth's General Fund and did not go to the Bureau of Forestry or the Department. (N.T. 348)

99. Halfway mined 414,000 tons of coal for use in its limestone operations and for sale to others. (N.T. 354, 451)

100. Halfway grossed in excess of $10 million from the Forest 1 Mine site. (N.T. 452)

101. While Halfway sold the coal for $35 per ton, it was paying a royalty of only $2.20 per ton. (N.T. 451; Ex. H-21)

102. The Department employees who were responsible for exercising, negotiating, and administering the lease had no input into or connection with the issuance of the compliance orders that are the subject of this appeal. (N.T. 355, 413)

103. Those Department employees who were responsible for regulating Halfway's site had no input into or connection with the administration of the lease. (N.T. 329, 355, 413)

104. Halfway and the Department had equal knowledge of and equal access to the relevant facts prior to Halfway's mining. (N.T. 38-39, 53-59, 66, 86, 91, 121-122, 125, 132, 136-139, 140-142, 156, 194, 206, 210, 250, 310, 335-337, 343, 349, 352, 353-354, 447-449, 485; Ex. C-2, C-3, C-12; Ex. H-1, H-2, and H-13)

105. There was no data or evidence regarding the potential of the site to produce acid mine drainage that the Department had but Halfway lacked. (N.T. 136-139)

106. Halfway was a large, experienced, financially-healthy mining corporation. (N.T. 133, 142-143, 345, 346, 446-449, 499; Ex. C-12)

107. Halfway acted for its own reasons and based on its own investigation and profit-making analysis of the situation, not in reliance upon anything said or done by the Department.

108. At all time relevant hereto, the Department's BMR had no official policy regarding pre-existing pollutional discharges, although some individuals within the Bureau had an understanding that the Department would not take enforcement action against operators who aggravated pre-existing discharges. (N.T. 377-379)

109. This understanding was not founded in statutes, rules, regulations, or program guidance manuals, and it is unclear whether

individuals in any district mining office other than the Hawk Run office shared it. (N.T. 377-379)

DISCUSSION

This consolidated appeal involves the novel question of to what extent the Department may hold a mine operator liable for treatment of acid mine drainage emanating from a mine site which is owned by the Commonwealth and which was mined pursuant to a lease agreement with the Department.

We begin our discussion by examining the assignment of the burden of proof. The Department bears the burden of proof with regard to Halfway's appeals of the orders to abate pollutional conditions, 25 Pa. Code §21.101(b)(3), while Halfway bears the burden of proving that it satisfied all of the criteria for bond release at the Forest 1 Mine and, therefore, that the Department abused its discretion or acted contrary to law when it withheld bond release. Dunkard Creek Coal, Inc. v. DER, 1988 EHB 1197; H&R Coal Co. v. DER, 1986 EHB 979. Halfway also has the burden of proof with regard to any affirmative defenses it raises to the Department's actions. Aloe Coal Company v. DER, 1990 EHB 737.

Halfway does not dispute that the seep zone for which the Department issued the challenged orders is located within the boundaries of its MDP or that the seep zone's water quality failed to meet the effluent criteria set forth in 25 Pa. Code §87.102. Instead, Halfway contends that the Department's active participation in leasing the Forest 1 Mine site for remining in order to receive substantial royalties and achieve land reclamation at no cost to the Commonwealth renders its enforcement actions an abuse of discretion when the Department was aware that remining would cause an aggravation of pre-existing acid seeps. Halfway characterizes its defense as equitable in nature. It argues that equitable defenses are applicable against the

Commonwealth when exercising its police power and that their application does not depend upon a distinction between governmental and proprietary functions. In support of its defense, Halfway cites Mardan Corporation v. C.G.C. Music, Ltd., 600 F. Supp. 1049 (D. Ariz. 1984), affirmed on other grounds, 804 F.2d 1454 (9th Cir. 1986).[12] Further, citing Mardan, Halfway argues the enforcement orders, by requiring treatment of the entire discharge from the acid seeps, are inconsistent with Section 4.5 of the lease, which Halfway contends requires it to treat only the acid mine drainage it caused. Moreover, Halfway claims the Department's failure to treat the seeps prior to Halfway's mining supports the conclusion that in light of the highly polluted nature of Beech Creek, the Department was not concerned with the seeps as a source of AMD and risked their degradation in order to achieve no-cost reclamation and receive substantial royalties.

We have previously explained in Penn-Maryland Coals, Inc. v. DER, EHB Docket No. 83-188-W (Adjudication issued January 22, 1992), that although the Pennsylvania Supreme Court held in 1973 in Commonwealth v. Harmar Coal Company, 452 Pa. 77, 306 A.2d 308 (1973), that the origin of polluted water was irrelevant to a determination of liability under §315(a) of the Clean Streams Law, the issue of whether a mine operator was liable for discharges which pre-dated its operations was still controversial and regarded as unsettled by the industry. We further noted that any doubt regarding this issue was settled by the Commonwealth Court's decisions in Thompson & Phillips Clay Company v. Department of Environmental Resources, 136 Pa. Cmwlth. 300, 582 A.2d 1162 (1990), allocatur denied ___ Pa. ___, 598 A.2d 996 (1991); and

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[12] Any contentions not raised by Halfway in its Post-Hearing Brief are regarded as abandoned. Lucky Strike Coal Company and Louis J. Beltrami v. Commonwealth, Department of Environmental Resources, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

Clark R. Ingram, *et al.* v. Department of Environmental Resources, ___ Pa. Cmwlth. ___, 595 A.2d 733 (1991), in which it was held that for liability to attach under §315(a) of the Clean Streams Law, the only relevant issue is whether acid mine drainage is being discharged from the permitted area. See North Cambria Fuel Company v. DER, EHB Docket No. 85-297-G (Adjudication issued March 31, 1992).

It is undisputed that the seep zone is within the boundaries of Halfway's MDP and is discharging acid mine drainage. Thus, it is unnecessary for us to determine whether this acid mine drainage is emanating from pre-existing seeps which were affected by Halfway's mining or from seeps which came into existence as a result of Halfway's mining activities.[13] We would ordinarily conclude that the Department's issuance of the challenged enforcement orders and denial of bond release was not an abuse of its discretion. In view of the unusual factual circumstances surrounding this appeal, however, we will examine what Halfway characterizes as its equitable defense.

As the Department points out, the legal basis for Halfway's equitable defense is not clearly articulated in Halfway's post-hearing brief. Halfway apparently is relying on Mardan in a broad sense as holding that an active participant in causing pollution should not be permitted to gain by its actions. The Mardan decision is inapposite to the present appeal. Mardan involved an action to recover the costs of complying with the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C.

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[13] There is ample evidence in the record to support the conclusion that even if the discharges pre-dated Halfway's mining the Forest 1 Mine site, Halfway deleteriously affected them by drastically increasing their size, flow, and pollution load. (N.T. 88, 122-124, 125, 139-140, 146, 249-251, 370, 475-477, 486-487; Ex. C-1 and C-3; Ex. H-1)

§9601 *et seq.* (CERCLA), and the Resource Conservation and Recovery Act of 1976 42 U.S.C. §6901 *et seq.* (RCRA), brought by a purchaser against the sellers of a manufacturing facility. The seller-defendant corporations advanced the equitable defense of unclean hands, arguing private causes of action under CERCLA were restricted to actions where the plaintiff was not itself responsible for the creation of the hazardous condition.[14] The District Court held that because actions under §107 of CERCLA seek restitution, they are equitable in nature and, therefore, the unclean hands defense applied. It is apparent that the holding in Mardan was a narrow one based on the statutory provisions involved. Even if the holding were as broad as Halfway contends, the federal courts in Pennsylvania have rejected the Mardan decision because its application of the clean hands doctrine would interfere with Congress' objectives in enacting CERCLA. See, Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988); United States v. Union Gas Co., 743 F. Supp. 1144 (E.D. Pa. 1990); Chemical Waste Management v. Armstrong World Indus., 669 F. Supp. 1285, 1291, n.7 (E.D. Pa. 1987).

Although Halfway's theory for its defense is difficult to ascertain, it appears to be based upon an estoppel theory. Equitable estoppel as an affirmative defense to Department actions is recognized in proper circumstances. See, Foster v. Westmoreland Casualty Co., ___ Pa. Cmwlth. ___, 604 A.2d 1131 (1992); Chester Extended Care Center v. Commonwealth, DPW, 526 Pa. 350, 586 A.2d 379 (1991); N&L Coal Company v. DER, 1991 EHB 1331. Halfway is correct in asserting that the Commonwealth Court in Hauptmann v.

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[14] The doctrine of clean hands states that one who seeks equitable relief must appear before the court with clean hands. Mazer v. Sargent Electric Co., 407 Pa. 169, 173, 180 A.2d 63, 65 (1962). This means the party seeking relief must have acted fairly and without fraud and deceit in the litigation at issue. Fumo v. Redevelopment Auth. of Phil., 115 Pa. Cmwlth. 542, 541 A.2d 817 (1988), appeal dismissed, 524 Pa. 32, 568 A.2d 947 (1988).

Commonwealth, Department of Transportation, 59 Pa. Cmwlth. 277, 429 A.2d 1207 (1981), stated that the distinction between whether the Commonwealth had acted in its "governmental" or "proprietary" capacity, which was applied in many cases where the doctrine of estoppel was invoked against a Commonwealth agency (see, *e.g.*, Commonwealth v. Western Maryland Railway, 377 Pa. 312, 105 A.2d 336 (1954)), has apparently been abandoned. However, a number of subsequent Commonwealth Court cases have continued to apply the distinction. See, *e.g.*, Commonwealth, State Public School Building Authority v. Quandel, 137 Pa. Cmwlth. 252, 585 A.2d 1136 (1991) (equitable estoppel applicable to Commonwealth agency acting in proprietary capacity). Even if the governmental/proprietary distinction still remains, we are unable to rule that the Department's dealings with Halfway were strictly within either its governmental or its proprietary capacity. Clearly, when it issued the challenged orders, it was acting in its governmental capacity, yet when it dealt with Halfway's proposal to mine the site and pay royalties, it was operating in its proprietary capacity.

Even assuming that Halfway's argument regarding the relevance of governmental or proprietary action on the part of the agency succeeds, Halfway has not established the elements of an estoppel. Halfway must show that the Department: 1) intentionally or negligently misrepresented the effect remining would have on the Forest 1 Mine and the extent of Halfway's liability for seeps on the site, 2) knowing or having reasons to know that Halfway would justifiably rely on the misrepresentations, and 3) induced Halfway to act to its detriment. Foster, *supra*; Police Pension Fund Ass'n Bd. v. Hess, 127 Pa. Cmwlth. 498, 562 A.2d 391 (1989).

None of the various Department memoranda[15] which were admitted into evidence showed the Department misrepresented the status of the site. At the time when Halfway approached the Department with its mining proposal, signs of previous mining on the site, such as black shales, open pits containing water, cast and unregraded spoils, and sparse vegetation were evident. The Scarlift Study, which was open to public inspection, documented seeps which were coming from the area which had poor water quality. Despite these signs of pre-existing

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[15] In its post-hearing brief, Halfway contends the Board erred in refusing to admit several documents into evidence on the ground that they contained hearsay statements because these documents were not offered for the truth of the matter contained therein but rather to establish that a declaration was made and to explain a course of conduct on the part of the Department. Hearsay is an out-of-court statement, written or oral, offered in court for the purpose of proving the truth of the matter contained in the statement. Semieraro v. Com. Utility Equip. Corp., 518 Pa. 454, 544 A.2d 46 (1988). Halfway objects to the exclusion of Ex. H-4 (a lease between Riverhill Coal Company and the Department), Ex. H-6 (a memorandum from Earl Tarr to Maurice Goddard dated November 30, 1967), Ex. H-7 (notes of a meeting held on April 3, 1969), Ex. H-11 (a memorandum dated March 17, 1972), and Ex. H-16 (a memorandum dated September 19, 1974). It makes no effort in its brief to demonstrate how Board Chairman Woelfling's ruling on each of these items was in error, except as to Ex. H-4. As to Ex. H-4, Halfway asserted at the hearing that page 2 of the document required Riverhill to undertake complete reclamation at the site and Halfway was offering this document to prove that the Commonwealth failed to enforce this requirement, later motivating it to enter the transaction with Halfway (N.T. 187-190). Obviously, Ex. H-4 was offered to prove the truth of the statement contained therein regarding Riverhill's responsibility for reclamation of the site. Contrary to Halfway's assertion, Frund did not testify that he acted on the basis of this document in his dealings with Halfway; rather, he testified that researching his files for general background information in connection with Halfway's proposal he had "looked at" the Riverhill lease (N.T. 188). Regarding Ex. H-6, Halfway offered this document, which allegedly contained a statement relating to the effect of disturbing toxic spoil on the site, to show Frund and the Department had notice that disturbing the site would result in acid mine drainage (N.T. 202-203). Clearly, Ex. H-6 was offered for the truth of the matter contained therein. Halfway sought to introduce Ex. H-7 to show that the sufficiency of the Appalachia Project funds for restoration of the site was discussed by the Department and Halfway was unquestionably attempting to use Ex. H-7 for the truth of the statement contained therein (N.T. 213-214). As to Ex. H-11, Halfway offered this memorandum to show the cancellation of the Appalachia Project and to tie the reasons given for the cancellation in the memorandum to the recommendations made by Frund in a previous memorandum in order to prove the Appalachia Project was canceled as a result of the Department's desire to (footnote continued)

problems with the site, Halfway only performed what its experts termed as "superficial" exploratory drilling in connection with its MDP application because it believed the Department would not take enforcement action against an operator for pre-existing seep conditions on a site. Halfway never showed that the Department made such a representation to it at the time of assignment of the lease or issuance of the MDP.

At the merits hearing, when Halfway attempted to question Eugene Frund concerning what was said during discussions between Halfway and the Department relating to Halfway's mining proposal, its offer of proof was that it would show an interpretation of Item 4.5 of the lease which would support a finding that the Department had said it would hold the company responsible for only the AMD resulting from its mining and not for AMD coming from pre-existing seeps (N.T. 294, 298). Board Chairman Woelfling sustained the Department's objection to this line of questioning, based on the parol evidence rule, ruling there had been no showing that the lease was ambiguous (N.T. 297). See, In re Estate of Hall, 517 Pa. 115, 535 A.2d 47 (1987) (when written contract is ambiguous on any point or does not accurately reflect the intent of parties, parol evidence is admissible). The language of Item 4.5 of the lease is clear and unambiguous: "Lessee shall be responsible for the treatment of any acid mine drainage which may be discharged as a result of their operations...." (Ex. H-21). Moreover, even if it can be argued that the language does not reflect the intent of the parties, the Department and

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(continued footnote)
have a private mine operator restore the site (N.T. 245-246). The document was offered for the truth of the assertions (reasons for cancellation) contained therein. Exhibit H-16 was offered because it allegedly set forth the pre-existing condition at the site, *i.e.*, there was acid mine drainage emanating from two sources (N.T. 289). As with all of the other challenged documents, we also affirm Board Chairman Woelfling's ruling that Ex. H-16 was inadmissible hearsay evidence.

Owens, not Halfway, were the parties to the lease. While Halfway did secure assignment of the lease from Owens, the Department's only role was to approve the assignment (N.T. 347). We hereby affirm the Board Chairman's ruling, which is challenged in Halfway's post-hearing brief.

John Meehan, the Department's Reclamation Coordinator, testified that it was his understanding while he was District Mining Manager of the Hawk Run office between 1980 and 1984 that the Department would only take enforcement action against an operator for seeps which its mining affected, even if they were on its mine site. Meehan's "understanding" was not a written policy of the Department, nor was it contained in the Department's program guidance manual or uniformly applied by all of the district mining offices. Moreover, it was in conflict with the relevant law. Bologna Mining Company v. DER, 1989 EHB 270.

Halfway also has not sustained its burden of proving that it was induced by the Department to enter into the lease. It was Halfway which approached the Department seeking to mine the site, and, when it was not awarded the lease through the bidding process, Halfway approached Owens about having the lease rights assigned to Halfway. Even if Halfway sought the assignment because of its belief that the Department would not take enforcement action for seeps on the mine site which were not caused by Halfway, Halfway has not shown by clear and convincing evidence that its reliance on this belief was justifiable. Halfway's mining proposal noted that the AMD from the proposed site was considerable, yet it did not conduct a thorough investigation of the impact its mining would have on these seeps before it entered the lease and applied for its MDP. Moreover, Halfway was hardly unsophisticated and certainly able to make a reasoned business judgment based on its evaluation of the relevant factors.

Finally, even assuming there was any misrepresentation by the Department on which Halfway justifiably relied, we cannot conclude that Halfway suffered any detriment. The record demonstrates that Halfway grossed over 10 million dollars from the Forest 1 Mine.

Because the discharge at issue was on Halfway's permit area and exceeded the applicable effluent limitations, and Halfway's affirmative defense failed, the Department's orders to Halfway to treat the non-complying discharges were not an abuse of discretion. Similarly, because Halfway failed to establish that it was entitled to bond release under 25 Pa. Code §86.174, the Department's denial of bond release must be upheld.

We accordingly dismiss Halfway's consolidated appeals.[16]

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this proceeding.

2. The Department bears the burden of proof in an appeal of an order to abate a pollutional condition. 25 Pa. Code §21.101(b)(3).

3. Halfway bears the burden of proving by a preponderance of the evidence that all of the criteria for bond release were satisfied at its mine site. Dunkard Creek Coal, Inc. v. DER, 1988 EHB 1197.

4. Halfway bears the burden of proving any affirmative defenses it raises to the Department's actions. Aloe Coal Company v. DER, 1990 EHB 737.

5. Halfway failed to establish the essential elements of an estoppel.

6. The doctrine of equitable estoppel did not prevent the Department from issuing orders to Halfway or denying its bond release request.

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[16] In view of this Adjudication, there is no need for us to issue a separate opinion regarding the Department's Motion for Summary Adjudication.

7. The Department did not abuse its discretion by issuing Halfway's orders to treat AMD or denying its bond release request.

O R D E R

AND NOW, this 26th day of January, 1993, it is ordered that Halfway Coalyard, Inc.'s appeals, consolidated at EHB Docket No. 83-133-W, are dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

Board Member Richard S. Ehmann did not participate in this decision.

DATED: January 26, 1993

cc: **DER, Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

ELLIS DEVELOPMENT CORPORATION	:	
	:	
v.	:	**EHB Docket No. 88-412-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: January 26, 1993**

OPINION AND ORDER
SUR
MOTION TO DISMISS

Robert D. Myers, Member

Synopsis

An appeal from DER's imposition of a building and planning moratorium prompted by a municipality's failure to revise its Official Sewage Facilities Plan becomes moot after DER approves a revision which calls for the construction of a new regional treatment plant to be used instead of Appellant's and lifts the moratorium. Appellant's remedy, if it disagreed with the revision, was to appeal from its approval - a step it did not take. As a result, Appellant cannot litigate the use of its own plant as a permanent alternative. If DER disapproves of the use of Appellant's plant on an interim basis, Appellant can appeal from that denial.

OPINION

This proceeding began on October 11, 1988 when Ellis Development Corp. (Appellant) filed a Notice of Appeal from a September 6, 1988 letter of the Department of Environmental Resources (DER) addressed to Hemlock Township,

Columbia County (Township). The letter rejected the Township's latest effort to upgrade its Official Sewage Facilities Plan, gave the Township 60 days to file an acceptable Plan but imposed a moratorium on the issuance of sewage permits or the approval of planning modules within certain areas of the Township. This included an area Appellant was developing, the sewage from which was being treated by Appellant's DER-permitted facility.

After Appellant filed its pre-hearing memorandum, the proceedings were stayed (at the repeated requests of the parties) while the Township and a group of developers (including Appellant) worked together and with DER to formulate an Official Sewage Facilities Plan acceptable to DER. On August 20, 1992 DER filed a Motion to Dismiss the appeal as moot accompanied by a legal memorandum. The Township advised the Board on September 8, 1992 that it would not be taking a position on the Motion. Appellant filed an Answer to the Motion on September 10, 1992 and DER filed a Supplemental Memorandum of Law on September 11, 1992.

In its Motion to Dismiss, DER avers that Appellant owns and operates a sewage treatment plant which DER in 1985 designated the interim regional treatment plant for that area of the Township. Since the Township had failed to implement its 1973 Official Sewage Facilities Plan and had experienced considerable commercial development, DER notified the Township on January 20, 1987 to update the Plan. Subsequently, Appellant requested the Township to consent to an increase in the size of Appellant's treatment plant. The Township denied the request on May 9, 1988 stating that it was taking steps to provide publicly-owned treatment facilities in this area as soon as possible, if financially feasible. Appellant did not challenge this denial.

In August 1988 the Township submitted to DER a revised Official Sewage Facilities Plan which proposed the construction and operation of a

publicly-owned treatment plant and which contained no proposal for the expansion of Appellant's plant. This revision was rejected by DER in the letter of September 6, 1988 which also imposed the moratorium. As noted, Appellant took the present appeal from that letter.

On June 5, 1990 DER approved a revision to the Township's Official Sewage Facilities Plan which, *inter alia*, provided for the construction of a regional sewage treatment facility by Hemlock Township Sewer Corporation (Corporation), a consortium of developers to which Appellant belongs. DER's approval letter made clear that the moratorium would remain in effect until a final agreement, acceptable to DER, had been entered into between the Township and the Corporation. Completion of that step, the letter concluded, would allow for "submission of interim new land development planning proposals."

An agreement between the Township and the Corporation was finalized on or about April 28, 1992 and, as of June 1992, DER was inviting the submission of new planning modules proposing interim sewage disposal facilities and eventual connection to the Corporation's treatment plant. A June 5, 1992 letter from DER to the Township Solicitor suggested a holding tank as an interim measure. Another DER letter, this one dated July 31, 1992 and addressed to the Township, contained the following:

> We are prepared to receive and review any new land development proposals in the corporation service area. All proposals should identify the type of interim system proposed and should identify the corporation system as the intended permanent method of waste disposal. We will evaluate each interim method proposed based on Chapter 71 regulations and its adequacy to provide a reliable means for sewage disposal. Interested developers should obtain subdivision application postcards from our office which begins the sewage planning process. Be aware that our review of these interim proposals will include an assessment of progress on the implementation of the township's official sewage facilities plan.

Appellant admits all of these factual averments. While the record before us is unclear on the point, we assume that Appellant's sewage treatment plant will be phased out once the Corporation's plant is in operation.

DER argues that events transpiring over the past four years have rendered this appeal moot. Now the moratorium on building and development has been lifted in Appellant's area so long as the interim measures proposed to be used are acceptable to DER. These may include a holding tank, for instance, or any other method of sewage disposal allowed by the regulations and considered technically feasible for the proposed use.

Appellant's response to this argument is brief (no legal memorandum was filed). It asserts that, while the parties have agreed to the construction of a regional sewage treatment facility, that construction is contingent upon financing. DER's willingness to consider the use of interim measures cannot be totally relied upon. DER already has denied one of Appellant's interim proposals and, if the financing for the new facility is not obtained, DER may deny all use of interim measures. If that happens, according to Appellant, there will be no remedy other than this appeal.

DER counters this argument by contending that Appellant has a right to appeal the denial of any planning module and does not need to maintain the present appeal in order to protect the future.

A proceeding before the Board becomes moot when some event occurs that deprives the Board of the ability to render effective relief: *Willard M. Cline v. DER*, 1989 EHB 1101. In its Notice of Appeal Appellant objected to DER's moratorium because it would prohibit completion of Appellant's development and would also prohibit approval of Appellant's request to expand its sewage treatment facility. The only relief the Board could have given was an order exempting Appellant's development area from the moratorium. Since

DER has now lifted the moratorium, there is no additional relief the Board can give.

As for the expansion of Appellant's treatment plant, we could not have forced DER to approve that in October 1988 because no expansion request had been presented to DER. The request that had been filed with the Township had been rejected the previous May. Besides, once the Township had secured DER's approval to a revision to the Official Sewage Facilities Plan calling for the use of a new regional treatment plant, the expansion of Appellant's plant could have been approved only as an interim measure until the new plant had been built.

As noted, the revision was approved on June 5, 1990. If Appellant disagreed with the terms of the revision and its effect upon Appellant's treatment facility, the remedy was an appeal to this Board from DER's approval of the revision. Appellant took no such appeal and, as a result, is no longer able to litigate the use of its own treatment plant as a permanent alternative.

While we understand Appellant's concern that the Corporation's plant might not be built if financing cannot be secured, we do not agree that keeping this appeal alive will preserve any of Appellant's options with respect to its own treatment plant. The Corporation's plant is the only designated facility for this area in the Township's Official Sewage Facilities Plan. That designation would have to be changed by the Township (with DER's approval) from the Corporation's plant to Appellant's plant before Appellant would have the right to use the plant as a permanent alternative. We could not have compelled that result initially in this appeal, and we would not be able to mandate it in the future either.

The record is unclear whether DER has approved or denied the use of Appellant's plant as an interim measure or even whether Appellant has requested it. Nonetheless, an appeal would lie to this Board from such a denial and Appellant would have full opportunity to protect its interests. Keeping this appeal alive is unnecessary for that reason and for the additional reason that the use of Appellant's treatment plant on an interim basis was not raised as an issue in this appeal. For the foregoing reasons, we conclude that this appeal is moot.

Der's Motion includes, as alternatives, the allegations that its September 6, 1988 letter was not appealable and that Appellant has no standing to appeal. Appellant raised the doctrine of laches in response to these allegations. Because we have determined the appeal to be moot, we need not address these arguments.

ORDER

AND NOW, this 26th day of January, 1993, it is ordered as follows:

1. DER's Motion to Dismiss is granted.
2. Appellant's appeal is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: January 26, 1993

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOA

SUNSHINE HILLS WATER COMPANY	:	
v.	:	EHB Docket No. 88-538-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: January 27, 1993

ADJUDICATION

By Richard S. Ehmann, Member

Synopsis

A public water supply permittee's appeal from a DER order to apply to DER to amend its permit to treat its raw water to eliminate the iron and manganese in excess of the MCLs and then to install and operate the treatment facilities approved in the permit amendment is dismissed when each of the sample analysis results offered by DER and the permittee show violations of the MCL for manganese and over half show violations of the MCL for iron. The issues raised in the permittee's *pro se* Post-Hearing Brief, which are outside the scope of the hearing record and deal with occurrences subsequent to the issuance of DER's Order, will not be considered by this Board in judging the reasonableness of DER's decision to issue its order. Where the merits hearing's record fails to show compliance with DER's order, the suggestion in the permittee's Post-Hearing Brief that its compliance with the order has rendered this appeal moot will be rejected. Where there is no basis

established in the merits hearing record to overturn DER's order, it must be sustained.

BACKGROUND

On November 30, 1988, the Department of Environmental Resources ("DER") issued an administrative order to Sunshine Hills Water Company, Umakant Dash, President ("Sunshine") in regard to its water supply system in Penn Township, Perry County. The order was issued under authority of the Pennsylvania Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, as amended, 35 P.S. §721.1 *et seq.* ("PSDA"), 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 regulations adopted thereunder. This order required Sunshine to apply for an amendment to its water supply permit to reflect an addition of iron and manganese treatment equipment, to install this treatment equipment after DER issues the amendment, to prepare an emergency response plan of the type specified in 25 Pa. Code §109.707, to immediately provide effective disinfection of the water served its customers, and to notify DER of the names of Sunshine's two treatment plant operators who are certified to operate the plant according to the Sewage Treatment and Waterworks Certification Act, the Act of November 18, 1968, P.L. 1052, as amended, 63 P.S. §1001 *et seq.*

On December 30, 1988 we received Sunshine's appeal. After protracted but unsuccessful settlement negotiations Sunshine filed its Pre-Hearing Memorandum with us on October 4, 1989 and DER responded on November 15, 1989. In February of 1991 Sunshine wrote to this Board asking that this appeal be closed out but on March 5, 1991 it rescinded this request.

Thereafter on May 22, 1991 this Board held a hearing on the merits of Sunshine's appeal. Subsequently on June 17, 1991 the parties were ordered to file their respective Post-Hearing Briefs. DER filed its Brief with us on July 10, 1991. Sunshine failed to respond to our order. However, on November 12, 1992 we issued Sunshine a Rule to Show Cause why this appeal should not be dismissed for violation of our order directing the filing of Sunshine's Post-Hearing Brief. Thereafter on December 2, 1992 we received a three page letter from Sunshine purporting to be its Post-Hearing Brief. Thereafter DER moved to strike this letter filed by Sunshine. This motion is addressed within the adjudication.

Initially this matter was heard by Board member Terrance J. Fitzpatrick, who thereafter resigned from this Board before preparing a draft adjudication based on the merits hearing's record. It was then reassigned to Board Member Ehmann on November 12, 1992. Despite the circumstances of this resignation prior to adjudication, this Board is empowered to adjudicate the merits of this appeal from a "cold record". Lucky Strike Coal Co. et al v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

When DER issued its Compliance Order to Sunshine on November 30, 1988, it directed Sunshine to undertake five specific actions concerning its public water supply. At the commencement of the hearing DER stipulated that Sunshine had complied with paragraphs C, D and E of its order and thus those issues are no longer before us. (T-9 and 10)[1] The sole remaining issue deals with DER's directive to Sunshine to apply for an amendment to its PSDA permit to install the equipment necessary to achieve compliance with the iron

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[1] T-——is a reference to a page in the merits hearing's transcript.

and manganese standards found in 25 Pa. Code §109.202 and then to install and operate such equipment within sixty days of DER's issuance to Sunshine of the permit amendment.

In regard to the parties and their contentions in this proceeding we point out that each party is deemed to have abandoned any issue not raised in its Post-Hearing Brief according to Lucky Strike Coal Co. et al v. Commonwealth, DER, *supra*.

After a full review of the entire record in this appeal, including the transcript of 175 pages and thirty-one exhibits, we make the following findings of fact:

FINDINGS OF FACT

1. DER is the agency authorized to administer and enforce the PSDA, Section 1917-A of the Administrative Code and the regulations promulgated thereunder. (T-32 and 33)

2. Sunshine is a company engaged in the business of supplying drinking water to approximately 250 customers in the Sunshine Hills development located in Penn Township near Duncannon Borough in Perry County. (T-33 and 34; C-23)[2]

3. Umakant Dash is President of Sunshine and has been its owner and operator since 1980. (Notice of Appeal; C-24; T-141)

4. Sunshine's water supply system consists of two wells, chlorine disinfection, two partially buried metal water storage tanks and a distribution system. (C-24 and C-25)

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[2] C-___ is a reference to an exhibit offered by DER at the hearing and admitted into evidence.

5. A Maximum Contaminant Level ("MCL") is the maximum concentration of a contaminant in drinking water allowed if the water is considered safe for human consumption by DER and the federal government. (T-33)

6. The MCL for iron is 300 micrograms per liter (ug/l). (T-21)

7. The MCL for manganese is 50 ug/l. (T-21 and 22)

8. According to DER's files, its records show that on February 26, 1988 DER sampled Sunshine's water and, after its analysis showed violation of the MCLs for iron and manganese, sent Sunshine a Notice of Violation as to these exceedences of the MCL. (T-36, 37 and 38)

9. Sunshine responded to the Notice of Violation by letter saying flushing the system would correct the problem. (T-40, 43; C-23)

10. Also according to DER's records James Lehman, who collected the February 26, 1988 samples, sampled this water supply on November 10, 1988 for iron and manganese. Analysis of his three November samples on that date showed violations of the MCLs for iron and manganese. (C-14, C-15, and C-16; T-44 and 45)

11. DER's Deborah Rotz ("Rotz") conducted a survey of Sunshine's system on May 23, 1989 during which she sampled the water in the system. (T-88 and 89) The analysis of Rotz's sample also showed a violation of the manganese MCL. (C-13; T-93)

12. DER's Michael Stout ("Stout") sampled the water at three locations in Sunshine's distribution system on August 7, 1990 using DER's sampling procedure. (T-26 and 27) Analysis of each of these samples showed violation of both the iron and manganese MCLs at each location. (C-8, C-9 and C-10; T-25 and 26)

13. On August 20, 1990 Stout collected three samples of water in Sunshine's system in accordance with the procedures in DER's sampling protocol. (T-23) Analysis of these samples shows three violations of the manganese MCL and one violation of the iron MCL. (C-5, C-6 and C-7; T-23 and 24)

14. On September 4, 1990 DER's Stout sampled the water at four locations in Sunshine's system for iron and manganese either in trailers or at their outside taps. (T-19)

15. With each sample Stout would turn on the tap and let the water run for 2 to 3 minutes to purge the line of sediment and to make sure the water had not been sitting awhile. Stout would then collect his 500 milliliter sample, fix it with a 2 percent nitric acid solution (to fix the metals), pack the sample in ice and transport it to the laboratory for analysis, all as provided in DER's sampling protocol. (T-18)

16. Analysis of Stout's September samples showed violations of the manganese MCL in the water collected at all four locations and violations of the iron MCL at one of the four locations. (C-1, C-2, C-3, C-4; T-20 and 22)

17. DER's laboratory operation has oversight from the United States Environmental Protection Agency ("EPA") and is evaluated by that agency. It is EPA's protocol which is followed for analyses of these samples. (T-120 and 121)

18. All of DER's samples were analyzed in accordance with a methodology approved by the EPA and known as EPA Method 200.7. This method uses indirectly coupled argon plasma emissions to analyze these water samples as to iron and manganese. (T-106 and 107)

19. DER's Dennis Nevin is Chief of the Trace Metals and Solids Section of the Inorganic Division of DER's analytical laboratory. (T-103) His review of the sample data in this appeal shows no evidence of any error in analysis by DER's laboratory. (T-113)

20. Patricia Romano is a sanitarian supervisor for DER in the area where Sunshine's facility is located who supervises the people administering DER's drinking water program. Prior to her current position she was a DER sanitarian who enforced the PSDA. (T-31 and 32)

21. Romano signed a compliance order (C-21) issued to Sunshine on November 30, 1988 which required Sunshine to apply to DER for an amendment to its permit to treat for iron and manganese. (T-34 and 35)

22. As of the hearing Sunshine had not complied with that order and had not made application to DER for an amendment to its permit to cover iron and manganese treatment. (T-35)

23. Exhibit C-20 is a Water System Pre-feasibility Study of Sunshine's system from May of 1988 prepared by Gannett Fleming Water Resource Engineers, Inc. ("Gannett Fleming") for the Pennsylvania Infrastructure Investment Authority ("Penn Vest") as a result of Sunshine's application for financial assistance. (C-19) Gannett Fleming's report states that the MCL for manganese is consistently exceeded by Sunshine water and the iron MCL is also exceeded. (C-20, page 4; T-42)

24. The Gannett Fleming report recommends either connection of Sunshine to the nearby Duncannon Borough water system or treatment for iron and manganese but neither recommendation has been followed. (C-20; T-43)

25. Flushing Sunshine's water supply system does not solve the iron and manganese problems as evidenced by the continuing MCL violations. (T-44)

26. Iron and manganese contamination is common in community water supplies in this area of Pennsylvania, when the supply uses groundwater as its source of supply. (T-51)

27. Most community water supplies treat iron and manganese when it is a problem in their water. (T-51)

28. Iron and manganese are not health threats in and of themselves but cause aesthetic problems such as metallic taste and laundry staining. They also promote the growth of bacteria which is a health concern. (T-59)

29. In 1990 Sunshine discussed with DER staff use of sequestration as a method to test the iron and manganese in its water. (T-151)

30. DER's Water Supply Manual disapproves of the "sequestration" methodology for treatment of iron and manganese if the amount of iron and manganese, in combination, exceeds one milligram per liter in the water, as is the case at times in the water from Sunshine's system. (T-60)

31. Elmer Knaub is Romano's supervisor at DER and is a customer of Sunshine. (T-70 and 133)

32. DER has taken steps against other water supplies in the area for which Romano is a supervisor concerning iron and manganese problems. (T-136 and 137) These other supplies met DER's desires without DER having to issue them a compliance order. (T-137)

33. Sunshine has made improvements in the water supply system as recommended by Gannett Fleming but they are in areas other than that of iron and manganese treatment. (T-145)

34. Chemical analysis of the four samples admitted as Sunshine's Exhibit 53 which were collected for Sunshine show violations of the manganese MCL and one shows a violation of the iron MCL. (A-53)[3]

DISCUSSION

Since the instant appeal is from DER's issuance of a compliance order to Sunshine there is no question that DER has the burden of proof under 25 Pa. Code §21.101(b)(3). Based upon the stipulation of the parties at the hearing's commencement as to compliance with certain aspects of DER's order, DER has the burden of showing its order to Sunshine to apply to amend its permit to test for iron and manganese and to install and operate the system provided for in the permit's amendment was reasonable. DER's Brief concedes it has this burden.

The PSDA's Section 4 requires the Environmental Quality Board to adopt MCLs no less stringent than those under the Federal Act for all contaminants "regulated under the national primary and secondary drinking water regulations." See 35 P.S. §721.4. In turn 25 Pa. Code §109.202 requires that water supplies like Sunshine comply with the MCLs set by EPA and found at 40 C.F.R. §143.

The results of analyses by DER of its samples of Sunshine's water and those offered by Sunshine, all show the MCL for manganese is exceeded in every sample analyzed. Twelve of the sixteen DER analyses for iron in Sunshine's water showed the MCL for iron was exceeded by Sunshine's waters.[4] One of

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[3] A-___ is a reference to an exhibit offered by Sunshine at the hearing which was admitted into the record.

[4] DER also offered and we admitted samples of Sunshine's water collected footnote continued

Sunshine's five sample analysis results also shows the MCL for iron was violated.

Section 5(c) of the PSDA, 35 P.S. §721.5(c), authorizes DER to issue administrative orders to address violations of this statute and the regulations promulgated thereunder where drinking water standards are violated. With the MCL violations established by DER's evidence and such a statutory authorization it is clear DER was authorized to issue an order to Sunshine requiring it to abate the conditions causing the MCL violations by providing the degree of treatment needed to bring the iron and manganese levels below the maximums therefor found in the MCLs adopted in 25 Pa. Code Section 109.202(b)(2). Sunshine Hills Water Company v. DER, EHB Docket No. 91-518-E (Opinion issued November 5, 1992). DER has thus clearly established a *prima facie* case to support issuance of its order to Sunshine.[5]

In response to DER's position as set forth in its Brief Sunshine makes several arguments. First it asserts Sunshine's consultant recommended sequestration treatment technology be used and concluded it was adequate for Sunshine's system. Sunshine's alleged consultant is Gannett Fleming which studied Sunshine's system for the Water Facilities Loan Board and prepared the report which is Exhibit C-20. It was not Sunshine's consultant in doing so,

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continued footnote
by Elmer Knaub. As Knaub is both in charge of DER's administration of the PSDA in the geographic area including that served by Sunshine, the supervisor of the DER witnesses at this hearing and importantly a complaining customer of Sunshine, we have prepared this adjudication without reference to these samples even though Sunshine's Post-Hearing Brief mounts no challenge thereto.

[5] Having drawn the conclusion that DER's order is justified under Section 5(c) of the PSDA we do not deal with DER's statutory public nuisance argument under Section 12 of the PSDA and Section 1917-A of the Administrative Code of 1929, *supra*.

contrary to Sunshine's implicit suggestion. Sunshine offered no testimony by representatives of Gannett Fleming or otherwise that its system could comply with the MCLs for iron and manganese using sequestration. Despite the "quotation" from the report in Sunshine's Post-Hearing Brief, the report does not conclude that sequestration will bring the iron and manganese into compliance with the MCLs. Sunshine has attempted to mislead this Board by quotations from the report in its Brief which are out-of-context. The report admits the manganese MCL is consistently exceeded and that iron exceeds the MCL. It then says "DER drafted an order, which was not executed, for the Water Company to comply with the manganese MCL. To date, there is no treatment to remove or sequester the oxidation of manganese in the water supply." (C-20, page 4) On the following page (page 5), the report suggests phosphate addition to prohibit the oxidation of iron and manganese but does not say this will bring about compliance with the MCLs. On page 6 Gannett Fleming say flushing the water supply cuts down on deposits of oxidized iron and manganese and reduces the frequency when customers receive discolored water. It concludes that the system will need to be flushed when phosphate treatment is implemented. The language quoted by Sunshine: "The above practices constitute an adequate program for the operation of [Sunshine]" appears on page 15 of Exhibit C-20 and does not reference sequestration or phosphate addition as to water quality issues but deals with operation and maintenance issues such as fire hydrant exercise, billing/meter reading, system maintenance and repair and the need for better operation because the report says Mr. Dash lacks the time to devote to system management and operation. Furthermore we point out that we previously rejected sequestration as a technology to use in this facility by implication in our opinion in

Sunshine Hills Water Company v. DER, *supra*. There, based on the facts before us in that appeal, we sustained DER's denial of a variance from the requirement that Sunshine comply with these MCLs because Sunshine's application for the variance failed to demonstrate its compliance with the applicable regulations.

Next, Sunshine's Brief asserts it has diligently proceeded to comply with the order as evidenced by its Exhibit No. 9. It asserts DER is inconsistent as to approving treatment methodologies as evidenced by Sunshine Exhibits Nos. 6 and 11 and any delay in installation is due to DER indecision. We group these arguments together, not only because they are irrelevant to the issue of whether DER should have issued its order in the first place but also because they lack any factual support in the record. Sunshine Exhibits Nos. 9 and 6 were never even offered into the record at the hearing by Sunshine's counsel. Exhibit 11 was offered but was rejected by the sitting Board Member as irrelevant to the issue of whether DER should have issued its order in 1988. Sunshine Exhibit 11 is a letter from DER which Sunshine contended approved sequestration as treatment methodology. Exhibit 11 was dated May 9, 1990, which is roughly 18 months after the order's issuance. Sunshine failed to raise any challenge to the propriety of this evidentiary ruling by former Board Member Fitzpatrick in its Post-Hearing Brief and thus has waived it as an issue according to Lucky Strike Coal Co. et al. v. Commonwealth, DER, *supra*. With that argument's waiver Exhibit 11 is not before us either. The record contains no evidence to support any of these arguments by Sunshine. We cannot consider such fact based assertions where no *prima facie* case in support thereof is offered or of record. J. C. Brush v. DER, 1990 EHB 1521; Solomon Run Community Action Committee v. DER et al., EHB Docket No. 90-483-E

(Opinion issued January 24, 1992.)[6] We also point out these arguments are not advanced in Sunshine's Notice of Appeal and thus raising them now runs afoul of Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986) aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989).

In addition, Sunshine's post-hearing brief asserts DER is applying the MCLs to Sunshine but not to other water supplies. The only evidence on this issue comes from DER's Patricia Romano when called as a witness on behalf of Sunshine. There she stated other water suppliers with iron and manganese problems had complied with DER's requests or directions to treat without the need to issue an order as DER did here. (T-134 and 137) Her testimony was completely contrary to Sunshine's argument. Thus no case was made to support this argument.

Sunshine also asserts sequestration is a satisfactory treatment methodology as shown by DER's water supply manual and a graph attached to its brief. Of course the graph is not in evidence and we cannot consider it. Moreover the question of sequestration as a satisfactory methodology has no relevance to the issue of the propriety of DER's issuance of this order in 1988. If we find the order to be proper and DER denies a Sunshine proposal to treat using sequestration then in an appeal from that denial, the issue of the adequacy of sequestration is relevant but it is irrelevant now. Moreover, the evidence shows a large number of incidents where iron and manganese exceed 1 mg/l (1000 ug/l) as a combined total (see the analyses on Exhibits C-4, C-8,

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[6] While Sunshine had counsel to represent it in the preliminary stages of this appeal and at the merits hearing, it elected to file a *pro se* Post-Hearing Brief in the form of a letter. In response DER filed a Motion to Strike that brief. While DER's Motion appears to have merit in this adjudication, we have ruled in DER's favor on the merits so we have not addressed the Motion's merit.

C-9, C-10, C-11, C-12, C-17 and C-18), and Sunshine's own Post-Hearing Brief quotes DER's Public Water Supply Manual as saying sequestration shall not be used whenever the iron and manganese exceed 1 mg/l. Thus, were this argument relevant there would be ample evidence for its rejection.

Sunshine also attacks DER's samples saying they are not representative because in some cases the water was taken from an outside tap or from where the water is stagnant. While some samples were from outside taps as opposed to kitchen faucets there is no evidence to support an assertion that this water was not representative of water in the system. The witnesses stated they let the tap water "run" to remove stale or stagnant water before sampling. Sunshine did not rebut this evidence or show DER's samples were from otherwise stagnant locations. In the hearing it failed to offer evidence to support its assertion in any fashion. As a result we reject it.

Its assertion that DER analyzed its own samples rather than using an independent unbiased lab fails also because Sunshine failed to show bias in DER's lab. Moreover, Sunshine's own samples analyzed by its lab showed similar violations. (See A-53)

Finally Sunshine asserts its appeal is moot because it has submitted a treatment proposal to DER. Again there is nothing of record in this appeal to support this assertion. Although there is another Sunshine appeal pending before us at Docket No. 92-112-E in which a treatment proposal issue exists, we cannot draw from that appeal the conclusion that this contention in this appeal has factual support. Accordingly this argument fails and we must enter an order sustaining DER's action.

CONCLUSIONS OF LAW

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

2. DER bears the burden of proof that its decision to issue this order to Sunshine was a reasonable exercise of its discretion.

3. DER is the agency authorized to administer and enforce the PSDA and the regulations promulgated thereunder.

4. MCLs initially promulgated by EPA are incorporated into 25 Pa. Code Chapter 109 and are applicable under the PSDA to water supplies like that of Sunshine.

5. Section 5c of the PSDA (35 P.S. §721.5(c)) authorizes DER to issue orders to water suppliers when the quality standards applicable thereto are not met in the water served its customers.

6. Where the evidence shows continuous violations of the MCL manganese and extensive violations of the iron MCL in the water served to its customers by Sunshine, DER has met the burden of showing the reasonableness of its order to Sunshine to apply to DER to amend its permit to treat the iron and manganese and to promptly implement the permit amendment once it is issued by DER.

7. In an appeal from issuance of an order to provide the required degree of treatment pursuant to a water supply permit, issues dealing with which methodology to use in complying therewith are irrelevant.

8. Arguments raised for the first time in an appellant's Post-Hearing Brief and not appearing in its Notice of Appeal are barred by Pennsylvania Game Commission v. Commonwealth, DER, *supra*.

9. A party waives those arguments not raised in its Post-Hearing Brief under Lucky Strike Coal Co. et al. v. DER, *supra*.

10. The Board must reject fact based legal arguments raised by an appellant where the record is devoid of any facts supporting same J. C. Brush v. DER et al., *supra*.

11. In preparing an adjudication the Board will ignore references in a Post-Hearing Brief both to documents not offered into evidence at the hearing and other documents appearing for the first time as attachments to a party's Post-Hearing Brief.

O R D E R

AND NOW, this 27th day of January, 1993, it is ordered that the appeal of Sunshine Hills Water Company at EHB Docket No. 88-538-E is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: January 27, 1993

cc: **DER, Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

CITY OF HARRISBURG	:	
	:	
v.	:	**EHB Docket No. 88-120-W**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** January 28, 1993
and PENNSYLVANIA FISH AND BOAT COMMISSION,	:	
Intervenor	:	

OPINION AND ORDER SUR
MOTION TO QUASH MOTION FOR COMPULSORY NONSUIT

By Maxine Woelfling, Chairman

Synopsis

Appellant's motion to quash the Department of Environmental Resources (Department) motion for compulsory nonsuit is granted where the Department introduced evidence into the record during the Appellant's case-in-chief.

OPINION

Presently before the Board for disposition is a motion by the City of Harrisburg (City) to quash the September 8, 1992, motion for nonsuit filed by the Department after the conclusion of the City's case-in-chief. The procedural history of this long and complex matter has been outlined in previous opinions and need not be repeated here. See, City of Harrisburg v. DER and PA Fish Commission, 1989 EHB 365. For purposes of this opinion, the relevant history is as follows.

On March 31, 1988, the City appealed the Department's March 2, 1988, denial of the City's March 4, 1987, request for water quality certification under §401 of the Clean Water Act, 33 U.S.C. §1341, for the City's proposed

Dock Street Dam and Lake Project. The City presented its case-in-chief on March 31; April 1, 2, 7, 8, and 9; May 5, 6, 7, 27, 28, and 29; June 25 and 26; and July 15 and 28, 1992. The Department conducted cross-examination of the City's witnesses as they testified. During its cross-examinations, the Department introduced many pieces of evidence, several of which were admitted into the record. On September 8, 1992, following the conclusion of the City's case-in-chief, the Department filed a motion for compulsory nonsuit, alleging the City failed to establish a *prima facie* case that the Department abused its discretion by denying the City's request for water quality certification.

The City, instead of answering the Department's motion for nonsuit, on September 16, 1992, filed a motion to quash, alleging a nonsuit under Pa. R.C.P. 230.1 is improper because the Department has already had evidence admitted into the record. The Department answered the City's motion to quash on October 6, 1992, arguing primarily that a nonsuit is not precluded under Pa.R.C.P. 230.1 because the Pennsylvania Rules of Civil Procedure do not generally apply to proceedings before the Board and because the Board has, in prior cases, entered a nonsuit after the Department introduced evidence into the record. The City filed its reply to the Department's answer on October 14, 1992.

The purpose of a motion for nonsuit is "to test the sufficiency of a plaintiff's evidence." Atlantic Richfield Co. v. Razumic, 480 Pa. 366, 382, 390 A.2d 736, 744 (1978). The Board has previously held that it may enter a nonsuit if a plaintiff fails "to prove a *prima facie* case." Welteroth v. DER and Clinton Township, 1989 EHB 1017, 1022. Because the purpose of a motion for nonsuit is to test a plaintiff's case, courts have traditionally held that a nonsuit may be entered only after a plaintiff presents its case and before a defendant has introduced evidence into the record. This way, only the

plaintiff's evidence is examined. See, Highland Tank and Manufacturing Co. v. Duerr, 423 Pa. 487, 489, 225 A.2d 83, 84 (1966). This standard has been applied to Pa. R.C.P. 230.1,[1] the rule of civil procedure currently governing the entry of nonsuit. See, Robinson v. City of Philadelphia, ___ Pa. Cmwlth. ___, ___, 612 A.2d 630, 633 (1992). Therefore, under Pa.R.C.P. 230.1, a nonsuit may be entered only if the party moving for nonsuit has not yet introduced any evidence into the record.

Proceedings before the Board are generally governed by the Administrative Agency Law, 2 Pa.C.S. Ch. 5, Subch. A, the General Rules of Administrative Practice and Procedure, 1 Pa. Code Part II, and the Board's own rules of practice and procedure, 25 Pa. Code Ch. 21. Nevertheless, when these rules do not cover a certain procedural issue, such as compulsory nonsuits, the Board looks to the Pennsylvania Rules of Civil Procedure for guidance. See, Welteroth v. DER and Clinton Township, 1989 EHB 1017, 1022 (employing the standards of the Pennsylvania Rules of Civil Procedure to determine whether an order of nonsuit is appropriate).[2]

The Department argues the Board held to the contrary in County of Schuylkill v. City of Lebanon Authority, 1991 EHB 1, in which the Board entered an order of nonsuit even though the Department had introduced evidence into the record. In doing so, the Board stated:

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1 Pa.R.C.P. 230.1 states: "In a case involving only one defendant, at the close of plaintiff's case on liability and before any evidence on behalf of the defendant has been introduced, the court, on the oral motion of a party, may enter a nonsuit if the plaintiff has failed to establish a right to relief ...."

2 The ability of the Board to look to the Pennsylvania Rules of Civil Procedure for guidance is derived from the powers inherent in the Board as an independent tribunal. This in no way means that these rules are binding upon the Board.

> Here, the Rules of Civil Procedure relating to non-suit cannot be absolutely applied, for a single Board member sitting as Administrative Law Judge could not, like a judge of the Courts of Common Pleas, grant a motion for non-suit, since the Board's rules of practice and procedure require a majority of Board Members to enter a final order, 25 Pa. Code §21.86.

Id. at 4. This statement, however, derived from the particular circumstances before the Board at that time. Because the situation in County of Schuylkill is factually distinguishable from the situation currently before the Board, the holding there regarding the Pennsylvania Rules of Civil Procedure in general, and Rule 230.1 in particular, is inapplicable to this case.

In County of Schuylkill, after the appellant had presented its case-in-chief, the intervenor made an oral motion for nonsuit. 1989 EHB at 2. The presiding Board Member advised the parties that she did not have the authority, sitting alone, to enter an order of nonsuit and that the hearing could be recessed to await a decision by the Board on the intervenor's motion. *Id.* at 2-3. Because the appellant expressed no preference, the intervenor, in the interests of expediency, was permitted to present its case-in-chief. *Id.* at 3. The Board later entered an order of nonsuit, holding that even though the moving party had introduced evidence into the record while awaiting the Board's decision, nonsuit was not precluded because of the nature of proceedings before the Board. The presiding Board Member had to allow the intervenor to present its evidence in order to keep the case moving forward. Otherwise, the case would have been delayed pending a decision by the entire Board on the intervenor's motion. Id. at 4.

The decision in County of Schuylkill is similar to the one reached in Kukich v. Serbian Eastern Orthodox Church of Pittsburgh, 415 Pa. 28, 202 A.2d 77 (1964). There, the plaintiff, because of scheduling problems with its

witnesses, had to wait over two months to complete its case-in-chief. The trial court, in the interests of expediency and judicial economy, then permitted the defendant to introduce its evidence instead of waiting for plaintiff to conclude its case. 415 Pa. at 29, 202 A.2d at 706. On appeal, the Supreme Court held that nonsuit was proper, even though the defendant had already introduced evidence into the record, because the defendant's introduction of evidence was necessary in order for the case to continue moving forward. *Id.* See also, Taylor v. DER and Essex-Ashford L.P., 1991 EHB 1926.

This is not the situation currently before the Board. Here, the Board was not faced with the situation of having to allow the Department to introduce evidence into the record or otherwise face a lengthy delay. The Department chose to introduce its evidence into the record during the City's case-in-chief in the belief that this was an appropriate litigation tactic, not to avoid a lengthy delay. As a result, the City's motion is granted and the Department's motion for compulsory nonsuit is quashed.

ORDER

AND NOW, this 28th day of January, 1993, it is ordered that the City of Harrisburg's motion to quash the Department's motion for compulsory nonsuit is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: January 28, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

CITY OF HARRISBURG	:	
	:	
v.	:	**EHB Docket No. 91-250-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: January 29, 1993**
and DAUPHIN COUNTY INTERMUNICIPAL	:	
SOLID WASTE AUTHORITY, Permittee	:	

OPINION AND ORDER SUR
APPELLANT'S SECOND MOTION
FOR PARTIAL SUMMARY JUDGMENT

By Joseph N. Mack, Member

Synopsis

The City of Harrisburg's motion for partial summary judgment on the issue of whether the Dauphin County Municipal Waste Management Plan violates §304(e) of Act 101 is denied. A county's municipal waste management plan which designates certain sites for the disposal of municipal waste does not violate §304(e) of Act 101, which deals with the right of municipalities other than counties to designate such sites. The primary responsisbility for the development of waste flow controls under Act 101 is assigned to counties pursuant to §303(e) of Act 101.

Summary judgment may be granted to a non-moving party under certain circumstances. Where no questions of material fact remain and the law supports the position set forth by the Authority and the Department of

Environmental Resources, summary judgment is granted to the Authority and the Department on the issue of whether the Dauphin County Plan violates §304(e) of Act 101.

OPINION

This case involves an appeal filed by the City of Harrisburg ("the City") on June 24, 1991, challenging approval by the Department of Environmental Resources ("the Department") of the Dauphin County Municipal Waste Management Plan ("the Dauphin County Plan" or "the Plan") on May 6, 1991. The City received notice of the approval on May 25, 1991, upon receipt of publication in the Pennsylvania Bulletin.

The Plan was developed by the Dauphin County Intermunicipal Solid Waste Authority ("the Authority") in response to the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, 53 P.S. §4000.101 *et seq.* ("Act 101").[1]

The City owns and operates an incinerator for the disposal of municipal waste. Under the Dauphin County Plan, municipal waste generated within the City of Harrisburg is to be disposed of at the City's incinerator, pursuant to a pre-existing city ordinance. The remainder of the municipal waste generated within Dauphin County is to be divided between Fulkroad Landfill (now known as Dauphin Meadows Landfill), located within Dauphin County, and Modern Landfill, located in York County. In addition, waste generated within the Borough of Highspire and the Township of Swatara is designated to go to the York County incinerator based upon pre-existing contracts.

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[1] Pursuant to §501(a) of Act 101, counties were required to submit to the Department an officially adopted municipal waste management plan for municipal waste generated within their boundaries. 53 P.S. §4000.501(a).

On September 24, 1992, the parties filed a joint stipulation with the Board, and a hearing in this matter has been scheduled for February 16 through 26, 1993.

The matter now before the Board is a Second Motion for Partial Summary Judgment ("Second Motion") filed by the City on December 10, 1992. [2] The City's Second Motion involves a single issue which relates to §304(e) of Act 101 and the ability of local municipalities to enter into disposal contracts without interference by the county.

The City contends that the Plan violates §304(e) of Act 101 because it designates where municipal waste within the County is to be disposed, rather than leaving municipalities with the right to enter into disposal contracts with existing facilities such as the City's incinerator.

Section 304(e) of Act 101 states in relevant part as follows:

> ...nothing in [Act 101] shall impair municipalities, other than counties, from entering into disposal contracts under Section 502(o).
>
> 53 P.S. §4000.304(e)

Section 502(o), in turn, provides in relevant part as follows:

> (o) Noninterference with certain resource recovery facilities and landfills --
> (1) No county municipal waste management plan shall interfere with the design, construction, operation, financing or contractual obligations of any municipal processing or disposal facility,

---

[2] The City had earlier filed a Motion for Partial Summary Judgment on July 20, 1992. In addition, the Authority had filed a separate Motion for Summary Judgment on July 17, 1992. The Board denied both motions on September 11, 1992, citing the complexity of certain issues which were of first impression and insufficient supporting documentation of the factual allegations contained in the motions, as well as imminently scheduled hearings which have now been rescheduled as indicated herein. The entertainment of this motion is an exception to the normal Board practice which discourages serial motions. The Board's willingness even to consider this motion's merit is prompted solely by the changed hearing schedule.

> including any reasonable expansion of an existing facility [which meets certain requirements as set forth in §502(o)]...
>
> 53 P.S. §4000.502(o)(1).

The City reads these provisions of Act 101 as specifically allowing municipalities to contract for waste disposal with existing facilities, without interference by a county's plan. The City argues that the Dauphin County Plan violates these provisions by forbidding municipalities from entering into such contracts by requiring that all of the County's municipal waste, other than the City's, flow to the two landfills designated within the Plan (with the exception of Highspire Borough and Swatara Township, as noted previously).

It is the City's position that there is a balancing of powers and rights under Act 101 which reserves local municipalities the right under §304(e) to enter into disposal contracts with existing facilities. The City asserts that this right is further illustrated by §304(d) of the Act, which authorizes municipalities to designate disposal sites for the flow of municipal waste by means of a local ordinance. 53 P.S. §4000.304(d).

The Authority and the Department filed responses on January 5, 1993, disputing the City's interpretation of §§304(e) and 502(o).[3] They assert that the Dauphin County Plan lawfully adopted a county-wide flow control ordinance in accordance with §303(e) of Act 101 and that, in doing so, it has not violated §304(e). Secondly, both state that the City has misquoted

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[3] The Board also received from the City on January 21, 1993 a document titled "Answer of City of Harrisburg to DCISWA's New Matter to the City's Second Motion for Partial Summary Judgment" as well as the City's Sur-Reply Memorandum in Opposition to the Briefs of DCISWA and DER Contra City's Second Motion. This information was received two days after the self-imposed date limitation of the City and was not considered herein. However, subsequent examination of the documents does not alter our opinion.

§304(e) in its brief and, thus, has changed its meaning. Thirdly, the Department and the Authority contend that the provisions of Act 101 on which the City relies are not applicable to it. The Department argues that the final sentence of §304(e) does not apply to resource recovery facilities, such as the City's incinerator. The Authority contends that the powers granted to municipalities in §304 of Act 101, including §304(e), deal with the collection, transport, and storage of municipal waste, but not with disposal thereof, except for a limited power in §304(d). Therefore, argues the Authority, if there is a balancing of power under Act 101, its intent was that municipalities should control the collection, transport, and storage of municipal waste and that counties should provide for its disposal. Finally, the Department maintains, as it did in its response to the City's earlier motion, that the City is a disappointed bidder, and that the aim of its appeal is simply to procure more waste for disposal at its incinerator.

Section 304(e) of Act 101

The question presented by the City's Second Motion is whether the Dauphin County Plan violates §304(e) by designating where municipalities within Dauphin County are to dispose of their waste, rather than allowing each municipality the option of entering into its own disposal contract. For the reasons set forth below, we find that the Dauphin County Plan does not violate §304(e) by directing the flow of municipal waste to certain designated sites.

The powers and duties of counties under Act 101 are set forth in §303. In particular, §303(e) reads as follows:

> (e) **Designated sites** -- A county with an approved municipal waste management plan that was submitted pursuant to section 501(a) [dealing with submission of plans], (b) [dealing with existing plans] or (c) [dealing with plan revisions] is also authorized to require that all municipal wastes generated within its boundaries shall be processed or disposed at a designated

> processing or disposal facility that is contained in the approved plan and permitted by the department under the Solid Waste Management Act...
>
> 53 P.S. §4000.303(e) (Emphasis added)

Thus, pursuant to §303(e), the primary responsibility for the development of waste flow controls under Act 101 is assigned to counties, which are specifically given the power to designate certain sites within their waste flow control plans for the processing and disposal of all municipal waste generated within the county.

If we were to read §304(e) of Act 101 as the City would have us read it, that is, that the right to designate disposal sites for municipal waste is reserved to the municipalities, that would render §303(e) of the Act as useless and without meaning. Certainly, if the Legislature's intent was that the designation of disposal sites was to be left to the municipalities, there would have been no reason to include §303(e) in the Act. Moreover, this Board has previously held that §303(e) of Act 101 authorizes counties to designate specific disposal sites within their municipal waste management plans. Washington County v. DER, EHB Docket No. 91-168-MJ (Opinion and Order Sur Cross-Motions for Summary Judgment issued April 2, 1992), slip op. at 9 (appeal pending before Commonwealth Court, No. 925 C.D. 1992). Thus, as the Department correctly notes in its brief, "the mere fact of flow control by the County Plan cannot violate section 304(e)."

The City argues that §304(e) protects the right of municipalities to enter into disposal contracts with §502(o) facilities. However, as both the Authority and the Department point out, the City misstates the relevant language of §304(e) in its argument. Whereas the City argues that §304(e) prohibits county plans from impairing the right of municipalities to enter into disposal contracts with §502(o) facilities, the actual language reads,

"Nothing in [Act 101] shall impair municipalities, other than counties, from entering into disposal contracts under section 502(o)." 53 P.S. §4000.304(e) (Emphasis added).

As the Department notes in its brief, there is no separate grant of authority under §304(e) for municipalities to enter into disposal contracts. Rather, §304(e) simply reiterates that no county plan may interfere with any contracts entered into under §502(o). As to whether the Dauphin County Plan violates the City's rights, if any, under §502(o), that is a separate matter outside the scope of the present motion. The City has not moved for summary judgment on this issue, as noted in footnote 11 of its Second Motion, and there are outstanding issues of material fact with respect to this matter.

The City also relies on §304(d). That provision reads as follows:

> (d) Designated sites.--A municipality other than a county may require by ordinance that all municipal waste generated within its jurisdiction shall be disposed of or processed at a designated permitted facility. Such ordinance shall include an ordinance that is part of a plan approved under section 501(b). [citation omitted] Such ordinance shall remain in effect until the county in which the municipality is located adopts a waste-flow control ordinance as part of a plan submitted to the department pursuant to section 501(a) or (c) and approved by the department. Except as provided in section 502(o) [citation omitted], any such county ordinance shall supersede any such municipal ordinance to the extent that the municipal ordinance is inconsistent with the county ordinance.
>
> 53 P.S. §4000.304(d) (Emphasis added).

The City argues that pursuant to this section, municipalities are authorized to control the flow of waste through local ordinance, and that such an ordinance cannot be superseded by a county's differing flow control plan where the ordinance relates to contracts with existing facilities under §502(o).

Again, this provision relates to contracts entered into under §502(o), which are outside the scope of this motion. Moreover, by designating the City's incinerator for the disposal of all municipal waste generated within the City of Harrisburg, the Plan has in no way interfered with the City's pre-existing ordinance which mandated that all municipal waste generated within the City be disposed of at the City's facility. (Paragraph 10 of Lukens Affidavit--Exhibit 2 to City's Second Motion)

Finally, in section D of its response brief, the Department argues that §304(e)'s protections are afforded only to "disposal contracts" and, thus, the City's incinerator does not fall within the scope of its coverage. The relevant language of §304(e) reads as follows: "Nothing in [Act 101] shall impair municipalities, other than counties, from entering into disposal contracts under section 502(o)." (Emphasis added.) The Department points to the definition of "disposal" in §103 of Act 101, which does not include "incineration". 53 P.S. §4000.103. Rather, the Department argues that §103 of Act 101 places the City's incinerator within the classification of a "resource recovery facility". Moreover, the parties have stipulated that the City owns and operates a "resource recovery facility". (Joint Stipulation, para. E.4.) A "resource recovery facility" falls under the definition of a "processing facility" in Act 101. 53 P.S. §4000.103. Thus, argues the Department, a resource recovery facility, such as the City's, would enter into processing contracts, not disposal contracts, and, therefore, would not fall within the protection of §304(e).

The Department's interpretation of the statutes it enforces is entitled to great deference unless clearly erroneous. The Helen Mining Company v. DER, EHB Docket No. 92-259-E. (Opinion and Order Sur Petition for Supersedeas issued September 9, 1992). We find that the Department's

interpretation of the relevant language of §304(e) is entitled to deference. The Department points out that Act 101 "is quite specific in its use and definition of the terms processing and disposal" and uses these terms "in a way that makes clear that they are different and refer to discreet activities." As the Department notes, §502(o)(1) speaks of "any municipal processing or disposal facility". (Emphasis added) 53 P.S. §4000.502(o)(1). The Department contends that this provision along with other paragraphs under §502 which also refer separately to disposal and processing show "that the legislature was fully aware of the distinction between disposal contracts and processing contracts." On this basis, and for the reasons set forth above, we find that the City's argument with respect to §304(e) of Act 101 must fail.

Because we have determined that the City is incorrect in its interpretation of §304(e) and that the County's Plan does not violate §304(e) we need not address the Authority's final argument that disposal is not one of the powers covered by §304(e).

Summary Judgment

Summary judgment may be granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035(b); New Hanover Corporation v. DER, EHB Docket No. 90-225-W (Opinion and Order Sur Motion for Partial Summary Judgment issued May 5, 1992).

Summary judgment may be awarded in favor of a non-moving party. Port Authority of Allegheny County v. Flaherty, 6 Pa. Cmwlth. 135, 293 A.2d 152 1972 (Citing Fed. R. Civ. P. 56); L. L. Bean, Incorporated v. Commonwealth, Department of Revenue, 101 Pa. Cmwlth. 435, 516 A.2d 820 (1986).

The City carries the burden of proof, both in its appeal and in this motion, of demonstrating that the Plan violates §304(e) of Act 101. 25 Pa. Code §21.101(a); Pa. R.C.P. 1035(b). We find, however, that the Plan does not violate §304(e) of the Act and that the Authority and the Department are entitled to judgment on this issue. Because no material questions of fact remain, we find that summary judgment may properly be granted to the Authority and the Department on the issue of whether the Plan violates §304(e) of Act 101.

O R D E R

AND NOW, this 29th day of January, 1993, it is hereby ordered that the Second Motion for Partial Summary Judgment filed by the City of Harrisburg is denied. Summary judgment is, however, granted to the Authority and the Department on the issue of whether the Dauphin County Plan violates §304(e) of Act 101.

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DATED: January 29, 1993

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CONCERNED RESIDENTS OF THE YOUGH, INC. and COUNTY OF WESTMORELAND	:	EHB Docket No. 86-513-MJ
v.	:	(Consolidated)
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MILL SERVICE, INC., Permittee	:	Issued: February 1, 1993

ADJUDICATION

By Joseph N. Mack, Member

Synopsis

DER's issuance of a permit for the construction and operation of a residual waste impoundment, known as "Impoundment No. 6", at Mill Service's Yukon Facility is sustained. The appellants have not met their burden of proving that DER abused its discretion or acted contrary to law in issuing the permit.

Although hazardous waste from Impoundment No. 5 at the Yukon Facility was being discharged into the groundwater at the time the permit for Impoundment No. 6 was issued, Mill Service had entered into a Consent Order with respect to the groundwater contamination and had implemented measures to abate it.

Pursuant to the language of the Consent Order, as approved by the Commonwealth Court, Mill Service's entry into the Consent Order placed it in compliance under §503 of the Solid Waste Management Act so that DER was not

barred by §503(c) or (d) from issuing a permit for Impoundment No. 6. The language of the Consent Order, as approved by the Commonwealth Court, is not subject to collateral attack in this appeal.

Finally, DER sufficiently considered air quality, noise, quality of life, and design of the impoundment in its review of the permit application.

BACKGROUND

This matter involves appeals filed by Concerned Residents of the Yough, Inc. ("CRY") and the County of Westmoreland ("Westmoreland County") on September 5, 1986 challenging the August 6, 1986 issuance of Solid Waste Disposal Permit No. 301071 by the Department of Environmental Resources ("DER") to Mill Service, Inc. ("Mill Service") for the construction and operation of a surface impoundment known as "Impoundment No. 6" for the disposal of residual waste at Mill Service's waste disposal and treatment facility in South Huntingdon Township, Westmoreland County, known as the "Yukon Facility".

The appeals also challenge the issuance of the following permits on August 6, 1986 in connection with the aforesaid solid waste permit: Water Obstructions and Encroachment Permit No. E65-164, Dam Safety Permit No. D65-153, and Earth Disturbance Permit No. (65) 65-84-8-2. (These permits and the solid waste disposal permit shall be referred to collectively herein as "the permit".) The appeals of CRY and Westmoreland County were consolidated at Docket No. 86-513-MJ on August 31, 1990.

History

Prior to issuance of the permit for Impoundment No. 6, Mill Service had entered into a Consent Order and Adjudication ("CO") with DER on May 24, 1985, which was approved by the Commonwealth Court on August 15, 1985. Commonwealth, DER v. Mill Service, Inc., No. 1406 C.D. 1985. The CO was

entered into as a result of DER's determination that hazardous waste leachate was being discharged from Impoundment No. 5 at the Yukon Facility and that it had contaminated the groundwater beneath the Facility.

The CO required, *inter alia*, that Mill Service (1) cease disposing of any solid waste in Impoundment No. 5, except for sludge from Impoundment No. 4 and from its leachate treatment facility, (2) subsequently close Impoundment No. 5, (3) monitor groundwater with respect to the Redstone Coal Seam aquifer and Pittsburgh Limestone aquifer, and (4) implement a plan for the pumping and treatment of groundwater with respect to the Pittsburgh Coal Seam aquifer. Paragraph 25 of the CO stated that Mill Service's execution of the CO (and a second CO relating to another waste facility operated by Mill Service) and compliance therewith placed Mill Service in sufficient compliance under §503 of the Solid Waste Management Act ("SWMA"), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, at §6018.503, such that DER would not deny issuance of any other permit or approval to which Mill Service would otherwise be entitled on the basis of the violations covered by the CO.[1]

Both CRY and Westmoreland County argue that pursuant to the language of §503(d) of the SWMA, *supra.*, DER was under a mandatory duty to deny the permit for Impoundment No. 6 since hazardous waste leachate from Impoundment No. 5 continued to be discharged into the groundwater without a permit after the signing of the CO and at the time of the issuance of the permit for Impoundment No. 6.

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[1] Section 503(c) of the SWMA states that DER may deny a permit if it finds that the applicant has failed or continues to fail to comply with any provisions of the SWMA or other environmental statutes or regulations. 35 P.S. §6018.503(c). Similarly, §503(d) states that any person who has engaged in unlawful conduct under the SWMA shall be denied any permit required under the SWMA unless the application demonstrates to the satisfaction of DER that the unlawful conduct has been corrected. 35 P.S. §6018.503(d).

It is not disputed by DER or Mill Service that hazardous waste constituents from Impoundment No. 5 continued to discharge into the groundwater after the signing of the CO and at the time of the permit issuance for Impoundment No. 6. Nor do Mill Service and DER dispute that Mill Service did not hold a permit for the disposal of hazardous waste leachate into the groundwater. However, both DER and Mill Service contend that Mill Service's entering into the CO, requiring it to abate the groundwater contamination, demonstrated "to the satisfaction of [DER] that the unlawful conduct ha[d] been corrected", pursuant to §503(d) of the SWMA.

Westmoreland County and CRY also raise additional arguments in their notices of appeal. Westmoreland County asserts that the violations which led to the CO show an inability on the part of Mill Service to comply with the environmental statutes and regulations, and that, therefore, the permit for Impoundment No. 6 should have been denied pursuant to §503(c) of the SWMA. The County also contends that the construction and operation of Impoundment No. 6 will create a nuisance and aggravate pre-existing harms.

CRY's appeal raises concerns regarding air pollution and argues that issuance of the permit violates Article 1, §27 of the Pennsylvania Constitution because the environmental harm to be reasonably expected from the construction and operation of Impoundment No. 6 clearly outweighs any economic benefits to be derived therefrom. Finally, both appellants contend that the amounts of the bond and public liability insurance set by DER are grossly inadequate.

A hearing on this matter took place from September 26, 1990 to October 3, 1990. Post-hearing briefs were filed by DER and Westmoreland County on January 22, 1991, by CRY on January 24, 1991, and by Mill Service on January 28, 1991. Reply briefs were filed by Westmoreland County on February

20, 1991, by CRY and Mill Service on February 21, 1991, and by DER on February 25, 1991.

After a full and complete review of the record we make the following findings of fact.

FINDINGS OF FACT

1. Appellant, CRY, is a non-profit, community organization with approximately 500 members, most of whom live in the Yukon area. (Vol. I, p. 138)[2]

2. CRY was formed in October 1985. At the time of the hearing on the merits, Diana Steck was the president of the group. (Vol. 1, p. 137)

3. Appellant, Westmoreland County, is the county in which the Yukon waste disposal facility is located. (Westmoreland N.A.)

4. DER is the agency with the duty and authority to administer and enforce the Solid Waste Management Act; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§691.1-691.1001 ("Clean Streams Law"); the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §§693.1-693.27 ("Dam Safety Act"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 ("Administrative Code"); and the rules and regulations promulgated pursuant to these acts.

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[2] The following designations are used herein to refer to the source of findings of fact: "N.A." refers to an appellant's notice of appeal; "Vol. ___, p.__" refers to a volume and page of the transcript of the hearing in this matter; "J.S. ___" refers to a stipulated fact in the parties' joint stipulation; "Ex. CRY ___" refers to an exhibit introduced by CRY at the hearing; and "Ex. MS ___" refers to an exhibit introduced by Mill Service at the hearing. Neither DER nor Westmoreland County introduced exhibits at the hearing.

5. Permittee, Mill Service, is a Pennsylvania corporation with a principal place of business at 1815 Washington Road, Pittsburgh, Pennsylvania 15241. (J.S. 1)

6. Mill Service owns and operates a waste treatment, storage and disposal facility located in South Huntingdon Township, Westmoreland County, known as the Yukon Disposal Facility (the "Yukon Facility"). (J.S. 2)

7. The Yukon Facility is composed of a series of separate waste management units, including a treatment system, and six surface impoundments. (J.S. 3) Impoundments No. 1-4 were closed at the time of the hearing. (Vol. 2, p. 130)

8. Impoundment No. 6 is the most recent disposal impoundment at the Yukon Facility. (J.S. 4)

Permit Application and Issuance of Permit

9. Mill Service submitted an application, dated June 20, 1984, for a permit under the SWMA to construct and operate Impoundment No. 6. That application took the form of an amendment to Mill Service's then pending Hazardous Waste Management Facility Part B Permit application for the Yukon Plant. (J.S. 5)

10. Mill Service submitted a revised Part B Permit application and a Solid Waste Disposal Permit application, dated April 19, 1985, requesting a solid waste permit to construct and operate Impoundment No. 6 as a residual waste facility. (J.S. 6)

11. As part of the permitting process discussed in Findings of Fact 9 and 10, Mill Service submitted applications dated June 12, 1984, July 2, 1984, and July 10, 1984 for an earth disturbance permit, a water obstructions and encroachment permit, and a dam safety permit, respectively. (J.S. 7)

12. As part of DER's sixteen-month review of the Solid Waste Disposal Permit application for Impoundment No. 6, it provided comments to Mill Service to which Mill Service responded, providing additional information where requested. (J.S. 8)

13. CRY expressed a number of concerns to DER regarding the Yukon Facility prior to the issuance of the permit for Impoundment No. 6. (Vol. 1, p. 144-145) These concerns were stated as follows: existing and potential health problems, truck traffic, air pollution, quality of life, and noise. (Vol. 1, p. 146-150)

14. On July 11, 1985, DER held a public hearing in Yukon, Pennsylvania regarding the Solid Waste Disposal Permit application for Impoundment No. 6, at which the above-stated concerns were expressed. (J.S. 9; Vol. 1, p. 152-153)

15. Prior to issuance of the permit for Impoundment No. 6, DER conducted a review of the long term compliance history of Mill Service and made a determination that Mill Service's compliance history was satisfactory and that its compliance with consent orders into which it had entered was good. (Vol. 1, p. 54; Vol. 6, p. 32-33; Ex. CRY-1; Ex. MS-EEE-17)

16. Immediately prior to issuance of the permit for Impoundment No. 6, DER performed an instantaneous compliance check and made a determination that Mill Service demonstrated compliance with the CO and applicable environmental statutes at the time the ultimate decision was made to issue the permit. (Vol. 1, p. 54, 136; Vol. 6, p. 9, 29-30; Ex. CRY-1)

17. On August 6, 1986, DER issued to Mill Service the following permits for the construction and operation of Impoundment No. 6 as a residual

waste impoundment: (a) Solid Waste Disposal Permit No. 301071; (b) Water Obstructions and Encroachment Permit No. E65-164; (c) Dam Safety Permit No. D65-153; and (d) Earth Disturbance Permit No. (65) 65-84-8-2. (J.S. 10)

18. On or about September 5, 1986, CRY and the County of Westmoreland filed appeals challenging DER's issuance of the aforesaid permits for the construction and operation of Impoundment No. 6. (J.S. 11; CRY N.A.; Westmoreland N.A.)

Geology and Groundwater Flow

19. Three groundwater flow horizons, or aquifers, underlie all or part of the Yukon Facility: the Pittsburgh Coal Seam, the Redstone Coal Seam, and the Pittsburgh Limestone Hydrostratigraphic Unit ("Pittsburgh Limestone"). (Vol. 4, p. 26-27; Vol. 2, p. 24)

20. An "aquifer" is a geologic unit which both stores and transports water. (Vol. 2, p. 24)

21. The Redstone Coal Seam is the highest unit stratigraphically. The Pittsburgh Coal Seam is intermediate, and the Pittsburgh Limestone is the lowest. (Vol. 2, p. 25; Vol. 4, p. 26-27)

22. A barrier pillar, which is a solid block of coal, remains in the Pittsburgh Coal Seam separating two closed underground mines, the Klondike Mine and the Magee Mine. (Vol. 4, p. 32, 71-72)

23. The barrier pillar provides an area of retarded groundwater flow. As a result, there tends to be a small localized pooling of mine water against the pillar. (Vol. 4, p. 32-33)

24. This pool is pumped by Mill Service as part of the abatement plan under the Yukon CO. (Vol. 1, p. 107)

25. The Pittsburgh Limestone crops out immediately east of the Yukon Facility. (J.S. 12)

26. The upper part of the Pittsburgh Limestone is an aquitard. (Vol. 4, p. 27)

27. An "aquitard" is a slowly permeable rock unit; groundwater does not move through it very readily. (Vol. 4, p. 27)

28. The Pittsburgh Limestone is a confined aquifer. (Ex. MS-QQ, p. 25)

29. A "confined aquifer" is a groundwater flow horizon which is saturated and confined by an aquitard. (Vol. 4, p. 28)

30. Groundwater flow in the Redstone Coal Seam, the Pittsburgh Coal Seam, and the Pittsburgh Limestone is influenced by the structural dip of the bedrock. (J.S. 13)

31. Wells constitute the primary water supply for approximately 20 homes in the area around the Yukon Facility. (Vol. 4, p. 85)

Design of Impoundment No. 6

32. The design of Impoundment No. 6, as approved by the DER, includes the use of a composite secondary liner, a synthetic primary liner, a leachate detection and collection system, and a compacted clay sub-base. (J.S. 32)

33. Compatibility testing was conducted on the liner proposed for Impoundment No. 6 by subjecting it to waste which might be placed in Impoundment No. 6. (Vol. 3, p. 72)

34. The testing determined that the type of liner selected for Impoundment No. 6 was compatible with the types of materials that would eventually be placed in the impoundment. (Vol. 3, p. 90)

35. The liner system approved for Impoundment No. 6 is as follows:

(a.) The bottom consists of a layer of compacted clay of variant thickness. (Vol. 3, p. 94)

(b.) On top of the clay is a layer of polyvinyl chloride ("PVC") synthetic material. (Vol. 3, p. 94-95)

(c.) The clay and PVC material comprise the secondary liner for the impoundment. (Vol. 3, p. 95)

(d.) Between the primary and secondary liners is a leachate detection and collection zone consisting of a synthetic drainage flownet backed with a geotextile fabric, allowing detection and collection of any materials which may leak through the primary liner. (J.S. 36)

(e.) The primary liner is comprised of high density polyethylene ("HDPE"). (Vol. 3, p. 95)

(f.) Immediately above the primary liner is a protective cover comprised of twelve inches of a permeable material. (Vol. 3, p. 95)

(g.) Within the protective cover is a leachate collection system consisting of perforated piping. (Vol. 3, p. 95)

36. The liner system covers all sides and the bottom of Impoundment No. 6. (J.S. 35)

37. The HDPE (primary) liner was designed with a certain degree of permeability, i.e. velocity of flow through a medium. Because of the liner's permeability, some amount of leakage will occur. (Vol. 3, p. 125; Vol. 5, p. 42-43)

38. Mill Service has contracted with the manufacturer of the primary liner to repair any leaks which may occur. (Vol. 3, p. 146)

39. The lining system of Impoundment No. 6 is designed and constructed in such a way so as to reduce the amount of any leakage flow. (Vol. 5, p. 43)

40. The purpose of having a multiple liner system is so that any leakage which occurs will be drawn into the leachate collection system. (Vol. 5, p. 43-44)

41. Before approving Mill Service's permit application, DER made a determination that the liner information submitted by Mill Service met its requirements for residual waste disposal. (Vol. 5, p. 67, 69)

42. Paragraph 36 of the permit states that if Impoundment No. 6 fails to perform as intended or designed, that is grounds for suspension or revocation of the permit. (Vol. 1, p. 166)

Waste Streams

43. Waste streams approved for disposal in Impoundment No. 6 include lime stabilized pickle liquors, wastewater treatment plant residues, grinding wastes, baghouse dusts, and any other industrial waste streams which may be added through the permit modification process. (J.S. 27)

44. The principal type of waste disposed at Impoundment No. 6 is waste pickle liquor. (Vol. 1, p. 37)

45. Pickle liquor is an acid used in steel processing to remove impurities from the surface of steel while it is being formed. After the pickle liquors have been spent, they lose their effectiveness and are discarded. (Vol. 1, p. 37)

46. Waste pickle liquor must be tested under the EP toxicity test to ensure that it is non-hazardous before it may be placed into Impoundment No. 6. (Vol. 1, p. 128)

47. The generator of waste which is brought to the Yukon Facility is responsible for analyzing the waste, running an EP toxicity test, and identifying the type of treatment scheme which will render the waste non-hazardous. (Vol. 2, p. 140)

48. It then becomes the responsibility of Mill Service to treat the waste and run an EP toxicity test on the treated waste. (Vol. 2, p. 140)

49. To neutralize waste pickle liquor, the waste acids are mixed together with lime to generate a material which is then discharged into the impoundment. This material is composed primarily of sulfates, calcium sulfates, calcium chlorides, iron, lead, chrome, and heavy metals. (Vol. 2, p. 147)

50. The neutralized waste pickle liquor consists of approximately 30-40% solids and 60-70% liquid. The solids remain in the impoundment, while the liquid goes into the leachate collection system, and is then pumped to the plant where it is either reused in the operation or treated at the treatment plant and discharged to a receiving stream. (Vol. 2, p. 147)

51. Condition No. 2 of the Solid Waste Disposal Permit expressly prohibits the disposal of hazardous waste, as defined in the regulations, into Impoundment No. 6. (J.S. 26)

Consent Order (CO)

52. On or about May 24, 1985, Mill Service and DER entered into the Yukon CO which was filed with the Commonwealth Court at Department of Environmental Resources v. Mill Service, Inc., No. 1406 C.D. 1985. (J.S. 22)

53. Timothy Kautz, former president of CRY, and Diana M. Steck, current president of CRY, filed comments on the proposed Yukon CO, and two residents of Yukon, Mr. & Mrs. Babich, moved to intervene in the proceedings. (J.S. 23)

54. On August 15, 1985, the Yukon CO was approved by the Commonwealth Court. (J.S. 24)

55. The CO was entered into as a result of DER's determination that, starting at least as early as March 7, 1983, hazardous waste constituents had

been discharging from Impoundment No. 5 which contaminated surface and/or groundwaters of the Commonwealth. (Ex. MS-CC, para. O)

56. Pursuant to the terms of the CO, on June 30, 1985, Mill Service was to cease depositing any solid waste in Impoundment No. 5 other than sludge from Impoundment No. 4 and from the leachate treatment facility. (Vol. 1, p. 133; Ex. MS-CC, para. 2, 6) DER took steps to ensure that Mill Service complied with this deadline by requiring Mill Service to notify its customers of the cessation of service and by making routine inspections. (Vol. 1, p. 133)

57. The CO required, *inter alia*, the closure of Impoundment No. 5 and the implementation of a plan to abate contamination of the Pittsburgh Coal Seam aquifer. (Ex. MS-CC, para. 5 and 18)

58. On August 6, 1986, the date of the permit issuance, Mill Service was still placing hazardous waste from Impoundment No. 4 into Impoundment No. 5. (Vol. 3, p. 51)

59. The CO contained a specific date by which Impoundment No. 5 was to be closed, October 31, 1987. (Ex. MS-CC, para. 5(b)). However, DER had not approved a closure plan by that date. (Vol. 1, p. 135)

60. Impoundment No. 5 was in the process of closure at the time of the hearing. (Vol. 2, p. 130)

61. The CO does not contain a specific date for abatement of the discharges from Impoundment No. 5 or for clean-up of the groundwater. However, there is a time schedule for submitting information, commencing and implementing the abatement plan, and carrying out the abatement procedures. (Vol. 1, p. 121-125)

62. Under the groundwater collection and treatment program approved by the Department, wells PW-1, PW-2 and PW-3 were drilled to permit pumping of

the groundwater, provided that there is a sufficient quantity of water in the Pittsburgh Coal Seam to pump. (J.S. 16)

63. The CO also required Mill Service to implement a groundwater monitoring plan for the Pittsburgh Coal Seam aquifer, the Redstone Coal Seam aquifer, and the Pittsburgh Limestone aquifer and to report the results thereof to DER on a quarterly basis. (Ex. MS-CC, para. 17 and 18)

64. The groundwater monitoring program for the Yukon Facility includes quarterly sampling of a series of wells designed to monitor the impact of Impoundments Nos. 1 through 6 on groundwater quality. All three of the water-bearing horizons, the Pittsburgh Coal Seam, the Pittsburgh Limestone, and the Redstone Coal Seam, are monitored. Additionally, wells SP-1, SP-2, and SP-3 monitor water contained in mine spoil near Impoundment No. 6. (J.S. 14)

65. As required by the groundwater monitoring and assessment programs set forth in the Yukon CO, Mill Service regularly monitors for the following parameters: chlorides, nitrate-nitrogen, ammonia-nitrogen, arsenic, cadmium, chromium, cyanide, barium and lead. (J.S. 15)

66. The groundwater monitoring program for the Yukon Facility also includes a series of wells specifically designed to determine the impact of Impoundment No. 5. Two horizons are currently monitored and have been monitored since 1983: the Pittsburgh Coal Seam and the Pittsburgh Limestone. Included in each zone are upgradient and downgradient wells so that comparisons to naturally occurring conditions can be drawn. (J.S. 18)

67. Because no portion of Impoundment No. 5 overlies or abuts the Redstone Coal Seam, this horizon is not specifically monitored with respect to Impoundment No. 5. (J.S. 17)

68. Wells PC-1, PC-3, PC-4, PC-5, PC-8, and PC-9 serve as downgradient wells for monitoring the impact of Impoundment No. 5 on groundwater in the Pittsburgh Coal Seam. Wells PC-2, PC-6 and PC-7 serve as upgradient or background wells. (J.S. 19)

69. Wells W-4, W-5 and W-6 serve as downgradient wells for monitoring the impact of Impoundment No. 5 on groundwater in the Pittsburgh Limestone. Wells W-9, TB-210, W-10, W-11, W-12, W-13 and W-14 serve as upgradient wells. (J.S. 20)

70. Surface mining of the Pittsburgh Coal Seam occurred in the southern portion of the Impoundment No. 6 area before Mill Service acquired the property. Mine spoil created by this activity contains limited quantities of groundwater at the spoil's contact with the underlying aquitard of the Pittsburgh Limestone. Groundwater in this horizon near Impoundment No. 6 flows downdip, to the northwest. (J.S. 29)

71. Groundwater that exists in the mine spoil beneath and abutting the Impoundment No. 6 embankment fill above the aquitard comprising the top of the Pittsburgh Limestone is monitored by background Well SP-1 and downgradient Wells SP-2 and SP-3. (J.S. 30)

72. The Impoundment No. 6 groundwater monitoring network for the Pittsburgh Limestone includes two upgradient wells (Wells W-9 and TB-210) and five downgradient wells (Wells W-10, W-11, W-12, W-13, and W-14). (J.S. 31)

73. The CO addressed all of the existing violations DER was aware of at the Yukon Facility and set forth what DER determined to be remedial actions necessary to maintain compliance with all applicable regulations. (Vol. 1, p. 109-110)

74. Mill Service constructed a series of collection ditches and tanks around the perimeter of Impoundment No. 5 to collect any waste which may

migrate through the walls of the impoundment. (Ex. MS-CC, para. R; Vol. 3, p. 12-13)

75. The parameters and values listed in Appendix B of the CO for the Redstone Coal Seam aquifer and the Pittsburgh Limestone aquifer are as follows:

Parameter	Background Level (mg/l)
Chlorides	125.0
Nitrate-Nitrogen	5.0
Ammonia-Nitrogen	0.5
Arsenic	0.25
Barium	0.5
Cadmium	0.01
Chromium	0.025
Lead	0.05
Cyanide	0.01

(Ex. MS-CC, Appendix B)

76. These values were intended to reflect what DER and Mill Service had determined to be representative of the background levels of the groundwater of the Redstone Coal Seam and Pittsburgh Limestone, as that groundwater enters onto the site of the Yukon Facility. (Ex. MS-CC, para. 17(a); Vol. 1, p. 49)

77. Pursuant to paragraph 17(b) of the CO, Mill Service may not allow the concentration of contaminants in the groundwater of the Redstone Coal Seam and Pittsburgh Limestone to exceed the background levels set forth in Appendix B. (Ex. MS-CC, para. 17(b).)

78. Pursuant to paragraph 17(d) of the CO, if a quarterly sample of the groundwater of the Redstone Coal Seam shows that any of the background

levels of Appendix B are being exceeded, Mill Service is required to commence sampling on a monthly basis for the purpose of determining if the three subsequent monthly samples verify that the background level is being exceeded. (Ex. MS-CC, para. 17(d).) The same requirement applies to the Pittsburgh Limestone aquifer whenever analysis of a groundwater sample shows that both the chloride value and any other value are being exceeded. (Ex. MS-CC, para. 17(c).)[3]

79. When a parameter was exceeded as described in paragraph 17(d) of the CO, Mill Service conducted monthly monitoring and submitted the results to DER with the next quarterly report. (Vol. 3, p. 137)

80. The Yukon CO requires Mill Service to implement an abatement plan for the Pittsburgh Coal Seam aquifer; it did not require any such abatement plan for the Redstone Coal Seam aquifer or the Pittsburgh Limestone aquifer. (Vol. 1, p. 76-77) DER never contended that Mill Service had caused any contamination to the Pittsburgh Limestone aquifer. (Vol. 1, p. 77)

81. The parameters and values listed in Appendix B of the CO for the Pittsburgh Coal Seam are as follows:

Parameter	Maximum Level (mg/l)
Chlorides	20,000
Nitrate-Nitrogen	1,500
Ammonia-Nitrogen	300
Arsenic	0.4
Cadmium	1.6

[3] Although paragraph 17(c) of the CO reads that "Mill Service's obligations under subparagraph 17(b) shall be triggered" (emphasis added) when the chloride value and any other value are exceeded, this appears to be a typographical error and should instead read "17(d)". That this is a typographical error is also noted by Mill Service in its post-hearing brief in footnote 3 on page 15.

Parameter	Maximum Level (mg/l)
Chromium	0.4
Cyanide	0.7
Barium	10
Lead	0.6

(Ex. MS-CC, Appendix B)

82. Pursuant to paragraph 24(c) of the Yukon CO, the contaminants in the Pittsburgh Coal Seam aquifer are not to exceed the levels specified in Appendix B at any monitoring point downgradient of the pumping wells. (Ex. MS-CC, para, 24(c))

83. According to Russell S. Davis, Mill Service's Executive Vice President, at the time of the hearing Mill Service had implemented the requirements of the CO. (Vol. 3, p. 18-26, 44)

84. Hazardous waste leachate from Impoundment No. 5 continued to discharge into the groundwater after May 24, 1985, the date on which the CO was signed. (Vol. 3, p. 36) There was no requirement by DER or the CO that Impoundment No. 5 cease discharging leachate into the groundwater as of May 24, 1985. (Vol. 1, p. 98-99)

85. Mill Service never obtained a permit from DER for the discharge of leachate containing hazardous waste constituents from Impoundment No. 5 into the groundwaters of the Commonwealth. (Vol. 1, p. 95, 98)

86. As of August 6, 1986, the date on which the permit was issued for Impoundment No. 6, to DER's knowledge, Impoundment No. 5 was still discharging leachate containing hazardous waste constituents into the groundwater without a permit. (Vol. 1, p. 99; Vol. 3, p. 50)

87. At the time of the issuance of the permit for Impoundment No. 6, it was DER's belief that at some point the leachate being released by Impoundment No. 5 would cease, based on the following requirements of the CO:

the cessation of use and subsequent closure of Impoundment No. 5 and the groundwater abatement program consisting of the pumping of the Pittsburgh Coal Seam aquifer. (Vol. 1, p. 100)

88. Paragraph 25 of the CO contains the following language:

> 25. Mill Service's execution of this Order and an Order of even date herewith relating to the Bulger Facility and compliance with both orders shall place Mill Service in sufficient compliance under Section 503 of the Solid Waste Management Act that the department may not deny issuance of permits, licenses or permit amendments (i.e., module 1 approvals) to which Mill Service is otherwise entitled, based upon the violations identified in this Order and the Order covering the Bulger facility.
>
> (Ex. MS-CC, para. 25)

89. DER considers the entry into a legally-enforceable document which sets forth a timetable for compliance to constitute a demonstration of "compliance to the satisfaction of the department" for purposes of §503 of the SWMA, 35 P.S. §6018.503. (Vol. 1, p. 114, 118)

90. DER considered Mill Service's entry into the CO to be a prerequisite for the issuance of a permit to Mill Service for Impoundment No. 6. (Vol. 1, p. 108)

91. The CO requires Mill Service to continue pumping the Pittsburgh Coal Seam aquifer until each well shows a concentration of chlorides of less than 250 mg/l and a concentration of nitrates of less than 10 mg/l. (Ex. MS-CC, para. 18(c))

92. The aforesaid levels had not yet been obtained on August 6, 1986, the date on which the permit for Impoundment No. 6 was issued. (Vol. 1, p. 92) Nor on August 6, 1986 was there a date certain by which the levels would be attained. (Vol. 1, p. 93)

93. Mill Service implemented the groundwater pumping operation prior to issuance of the permit for Impoundment No. 6. (Vol. 1, p. 108)

Groundwater Monitoring Data

94. Mill Service submitted groundwater monitoring reports to DER on a quarterly basis pursuant to paragraph 17(a) of the CO. (Vol. 3, p. 60; CRY Ex. 3 and 3A)

95. At the time it issued the permit for Impoundment No. 6, DER had available to it the results of groundwater monitoring conducted at the Yukon Facility through March 1986. (Vol. 3, p. 52-54)

96. The monittoring reports for the first quarter of 1986 showed that nitrate and cyanide levels had been exceeded for Well W-2, which monitors the Redstone Coal Seam, and that the nitrate level had been exceeded for Well W-4, a downgradient monitoring well for the Pittsburgh Limestone. (Ex. CRY-3A, Ex. MS-EEE-22; J.S. 20)

97. The level of chlorides in the monitoring wells for the Redstone Coal Seam during the period from May 24, 1985 to August 6, 1986 exceeded the background level of Appendix B of the CO. (Vol. 2, p. 31)

98. Chlorides are a good marker of migration of contaminants because they are mobile and easy to detect. (Vol. 2, p. 28) However, chloride is a common element which can result from various sources. (Vol. 2, p. 75)

99. Well W-5, which is closer to Impoundment No. 5 than is Well W-6, did not show high chloride levels, as did Well W-6. (Vol. 2, p. 73) Both are downgradient wells from Impoundment No. 5. (Vol. 2, p. 38)

100. The first monitoring report submitted by Mill Service after entering into the CO showed chloride and barium for Well W-6 exceeding the levels in Appendix B. (Vol. 3, p. 137-138)

101. The chemistry data for Well W-6 is far different than that for any other wells installed at the Yukon Facility, in that it shows a higher percentage composition of sodium and chloride. (Vol. 4, p. 41)

102. There is virtually no nitrate in Well W-6. (Vol. 4, p. 41)

103. Before reaching Well W-6, any seepage from Impoundment No. 5 would have to travel through an underground coal mine with high levels of sulfate, a very mobile constituent. (Vol. 4, p. 43)

104. Well W-6 shows a relatively low concentration of sulfate, which indicates that it is not being contaminated by Impoundment No. 5. (Vol. 4, p. 42-43)

105. Any contamination not captured by the pumping wells would either discharge to the surface or move into the mine pool, some of which discharges to Sewickley Creek. (Vol. 2, p. 49)

106. A report prepared by Earth Science Consultants, an environmental consulting firm which had worked on a variety of projects for Mill Service since 1983, concluded that the closure of Impoundment No. 5 would reduce seepage to underground mine workings over time, and that a net improvement in water quality downgradient of the Yukon Facility would occur. (Vol. 4, p. 7, 10, 20, 21, 50; Ex. MS-LL) This report was provided to DER. (Vol. 4, p. 50)

Air Quality

107. Staff from DER's Bureau of Air Quality conducted testing at the Yukon Facility prior to the issuance of the permit for Impoundment No. 6. (Vol. 6, p. 11)

108. The Air Quality staff conducted high volume sampling in 1985, both upwind and downwind of the Yukon Facility, particularly to check for fugitive emissions. (Vol. 6, p. 11)

109. The Air Quality staff also placed portable gas chromatographs on the site of the Yukon Facility in 1985-1986 to conduct site readings of organic contamination. (Vol. 6, p. 11)

110. In response to complaints from Yukon area residents, DER conducted high volume sampling from October 1984 through December 1984, both upwind and downwind of the Yukon Facility. The testing showed no violations. (Vol. 6, p. 13)

111. The permit for Impoundment No. 6 addresses air quality as follows: (Vol. 1, p. 79)

(a.) Condition 14 of the Solid Waste Disposal Permit requires Mill Service to comply with the fugitive emission standards of 25 Pa. Code, Chapter 123. (Ex. MS-C, Exhibit 1, p. 12; Vol. 1, p. 80-81)

(b.) Condition 15 of the Solid Waste Disposal Permit requires Mill Service to operate Impoundment No. 6 such that air contaminants emitted into the atmosphere do not cause or contribute to any ambient air quality standard thereunder being exceeded outside the Mill Service property line. (Ex. MS-C, Exhibit 1, p. 12; Vol. 1, p. 81)

(c.) Condition 16 of the Solid Waste Disposal Permit states that nothing in the permit shall be construed as limiting DER's authority to take enforcement action against Mill Service if the Yukon Facility, despite conformance with Conditions 14 and 15, causes or contributes to air pollution as defined in the Air Pollution Control Act, 35 P.S. §4001 *et seq.* (Ex. MS-C, Exhibit 1, p. 12; Vol. 1, p. 82-83)

(d.) Attachment A and Appendix B to the Solid Waste Disposal Permit contain interim operating guidelines with respect to air toxic substances and step-by-step procedures for evaluating the emission of air toxic substances, respectively. (Ex. MS-C, Exhibit 1)

112. Mill Service was not monitoring ambient air quality at the property line at the time of the hearing. (Vol. 1, p. 164)

Noise, Quality of Life, Bond Amount

113. Although DER considered noise as a factor in the application review process, no noise standards were in existence at the time of the permit issuance. (Vol. 1, p. 85-87)

114. DER considered aesthetics and quality of life as factors in its review of the permit application. (Vol. 1, p. 87)

115. The bond which Mill Service posted in connection with issuance of the permit covers the closure of Impoundment No. 6 as anticipated in the permit application. If closure involves more than was anticipated, the bond will not be sufficient to cover the cost. (Vol. 1, p. 166)

DER Motion to Strike or Reopen

Before turning to a discussion of the issues herein, we must first address the Motion to Strike or Reopen the Hearing filed by DER on or about February 20, 1991. In its motion, DER requests that the Board either strike the argument raised by CRY on pages 69 through 76 of its post-hearing brief, or in the alternative, to reopen the hearing to allow testimony on the issue raised therein by CRY.

On pages 69 through 76 of CRY's post-hearing brief, it contends that despite the fact that Mill Service was issued a permit for the disposal of residual waste, it has been allowed by permit to dispose of hazardous waste in Impoundment No. 6. CRY asserts that the principal type of waste handled by Impoundment No. 6, lime stabilized waste pickle liquors, is a hazardous waste under both state and federal law. In support of its argument, CRY cites the case of U. S. v. Conservation Chemical Co. of Illinois, 733 F Supp. 1215 (N.D.

Ill. 1989), which dealt with the classification of spent pickle liquor as hazardous waste.

In its motion to strike and supporting memorandum, DER argues that CRY is precluded from making this argument at this time because it was not raised in CRY's notice of appeal. DER also argues that this is not an issue which could have been raised only after discovery since the permit clearly stated the type of waste which would be handled by Impoundment No. 6.

In a response to DER's motion filed on or about March 13, 1991, CRY argues that it did raise the issue of illegal disposal of hazardous waste generally in paragraph 11 of its notice of appeal which states that the issuance of the permit violates Article 1, §27 of the Pennsylvania Constitution because the expected environmental harm outweighs any benefit thereof. CRY also contends that this issue was addressed in paragraph 2 of its notice of appeal which alleges that Mill Service is and has consistently been in violation of §403(b)(9)[4] of the SWMA, which makes it unlawful for any person who treats or disposes of hazardous waste to fail to "[t]reat, store and dispose of all such waste in accordance with the rules and regulations of [DER] and permits, permit conditions and orders..." 35 P.S. §6018.403(b)(9). CRY also contends that this issue was set forth generally in its pre-hearing memorandum.

CRY further argues that DER materially misrepresented that Impoundment No. 6 was to be used for the disposal of residual waste and that only after the hearing did it become apparent to CRY that hazardous waste was to be disposed in Impoundment No. 6.

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[4] Although paragraph 2 of CRY's appeal refers to "35 P.S. §6018.403(9)" (Emphasis added), this appears to be a typographical error and should, instead, read "35 P.S. §6018.403(b)(9)".

Finally, CRY disputes DER's argument that if the material in question is not stricken, then the record should be reopened to allow additional testimony on this subject. CRY contends that this is strictly a legal interpretation involving no questions of fact.

Mill Service filed a reply to CRY's response on or about March 28, 1991, joining in DER's motion to strike the disputed portion of CRY's post-hearing brief.[5] In response to CRY's allegation that DER and Mill Service did not represent to CRY that hazardous waste was to be disposed in Impoundment No. 6, Mill Service argues that the simple reason is that Mill Service is not disposing of hazardous waste in Impoundment No. 6. Mill Service further points out that the permit clearly states in paragraph 2 that it authorizes the disposal of "lime stabilized waste pickle liquor sludge that does not exhibit any of the hazardous waste characteristics", and in paragraph 3.a that "pickle liquors which have been lime stabilized" are approved for disposal.

Therefore, contends Mill Service, if CRY was going to make the argument that lime stabilized waste pickle liquors and pickle liquor sludge are hazardous waste and not proper for disposal in Impoundment No. 6, it could have done so when it filed its appeal. Furthermore, notes Mill Service, the Conservation Chemical case on which CRY relies was decided in November 1989 and could have been brought to the Board's attention by CRY long before the post-hearing stage.

Any issue not raised by an appellant in its notice of appeal is deemed to be waived unless good cause is shown for raising it at a later time. Commonwealth, Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa.

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[5] Westmoreland County filed no response to DER's motion.

Cmwlth. 78, 509 A.2d 877 (1986), aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989); NGK Metals Corp. v. DER, 1990 EHB 376. Good cause may be demonstrated by fraud or breakdown in the Board's operation or by the necessity for further discovery, provided that a statement to that effect is contained in the notice of appeal. *Id.*

We first examine whether CRY did, as it contends, raise this issue in its notice of appeal. Mindful of the Commonwealth Court's holding in Croner, Inc. v. Commonwealth, DER, 139 Pa. Cmwlth. 43, 589 A.2d 1183 (1991), if we find that CRY's notice of appeal raised this issue, even in general terms, then we must deny DER's motion.

As noted above, CRY claims that this issue was raised by paragraphs 2 and 11 of its appeal. Paragraph 11 deals with Article 1, §27 of the Pennsylvania Constitution and reads as follows:

> 11. The issuance of these permits violates Article 1, Section 27 of the Pennsylvania Constitution in that the environmental harm reasonably to be expected from the construction and operation of impoundment #6 far exceeds and clearly outweighs any economic benefits to be derived therefrom.

Article 1, §27 reads as follows:

> **§27. Natural resources and the public estate**
> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

In protecting the above-stated rights, DER is required to measure its action, in this case issuance of the Impoundment No. 6 permit, with the three-point test set forth in Payne v. Kassab, 11 Pa. Cmwlth. 14, 312 A.2d 86

(1973), aff'd, 14 Pa. Cmwlth. 491, 323 A.2d 407 (1974), aff'd, 468 Pa. 226, 361 A.2d 263 (1976), as follows:

> 1. Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
>
> 2. Does the record demonstrate a reasonable effort to reduce environmental incursion to a minimum?
>
> 3. Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?
>
> 312 A.2d at 94.

It is the third prong of this test which CRY, in paragraph 11 of its appeal, contends has not been met, and it is this paragraph which CRY now states covers the claim made in pages 69-76 of its post-hearing brief.

We understand paragraph 11 of CRY's appeal to allege that DER did not properly weigh the potential for environmental harm in its decision to issue a permit for Impoundment No. 6. Even in the most general sense, it would be difficult to read paragraph 11 as claiming that lime stabilized waste pickle liquors are hazardous waste and that the permit illegally authorizes Mill Service to dispose of hazardous waste in Impoundment No. 6.

CRY also asserts that this issue was raised by paragraph 2 of its appeal, which reads as follows:

> 2. Mill Service is presently in violation and has consistently been in violation of the Solid Waste Management Act, 35 P.S. Sec. 6018.403 (9)[sic] at both its Yukon site and its Bulger site, for failing to "[t]reat, store and dispose of all such waste in accordance with the rules and regulations of the department and permits, permit conditions and orders of the department."

As noted hereinabove, §403(b)(9)[6] of the SWMA makes it unlawful for any person who treats or disposes of hazardous waste to fail to treat, store, or dispose of it in accordance with DER's rules and regulations or permit conditions. 35 P.S. §6018.403(b)(9).

The wording of paragraph 2 is determinative. Therein, CRY states that "Mill Service is presently in violation of [§403(b)(9) of the SWMA]". We read this statement as referring to the alleged leaching of hazardous waste from Impoundment No. 5 into the groundwater, as set forth in the CO. Mill Service could not have "presently" been in violation of §403(b)(9) of the SWMA for failing to "[t]reat, store, and dispose of [hazardous] waste" in accordance with the rules and regulations or conditions of its permit at Impoundment No. 6 since it had just been issued a permit for the construction and operation of Impoundment No. 6. We do not read paragraph 2 as asserting that lime stabilized waste pickle liquors are hazardous waste and that in issuing the permit for Impoundment No. 6 DER improperly authorized Mill Service to dispose of hazardous waste.

We find that CRY's notice of appeal did not raise the issue which it is now attempting to argue on pages 69-76 of its post-hearing brief. Moreover, if as CRY asserts, this issue were raised by its appeal, we question why it was not raised during the hearing. As Mill Service points out in its reply to DER's motion, the opening statement of CRY's counsel at hearing indicates that CRY did not contemplate raising the issue of whether lime stabilized waste pickle liquors should be categorized as hazardous waste or whether hazardous waste was to be disposed of in Impoundment No. 6. In his opening statement, CRY's counsel stated as follows:

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[6] See footnote 4.

> Now, the kind of **residual waste** that we are dealing with in this case are [sic] residual waste from the steel mill operations, primarily pickle liquors...
>
> They are neutralized and then they are placed in the residual waste pit. Now, these acids are hazardous waste [a]t the time they are taken to the Mill Service plant[,] **but EPA has deregulated those wastes and reduced the classification from a hazardous waste to a residual waste once the waste has been treated by Mill Service.**
>
> Now, the significance of the--at least that's my understanding, Your Honor, that **once they treat the waste, they are no longer considered hazardous.**
>
> (Vol. 1, p. 11-12. Emphasis added.)

Additionally, we do not find that this issue is one which could have been raised only after discovery. Nor do we accept the argument made by CRY in its response that only after the hearing did it become apparent to CRY that hazardous waste was to be disposed of in Impoundment No. 6. As Mill Service correctly argues, CRY knew or should have known exactly what types of waste were to be disposed of in Impoundment No. 6 at the time it appealed the permit issuance since the solid waste permit for Impoundment No. 6 clearly lists the types of waste which may be handled by Impoundment No. 6. Paragraph No. 2 of the solid waste permit states, "This permit authorizes the disposal of (1) lime stabilized waste pickle liquor sludge that does not exhibit any of the hazardous waste characteristics and (2) non-hazardous residual waste. (Ex. MS-C, p. 5) Paragraph 3.a goes on to list "pickle liquors which have been lime stabilized" as a type of waste stream generally approved for disposal in Impoundment No. 6. (Ex. MS-C, p. 5) Thus, CRY knew or should have known at the time it filed its appeal that lime stabilized waste pickle liquors were to be disposed of in Impoundment No. 6.

As for CRY's reliance on the Conservation Chemical case, it is true that this case was not decided until more than three years after CRY's appeal was filed. However, although the Conservation Chemical case was decided in November 1989, the first time that CRY thought to raise this issue was not until it filed its post-hearing brief in January 1991.

We agree that DER and Mill Service would be severely prejudiced if the Board were to consider this new issue raised for the first time in CRY's post-hearing brief. As DER notes, this issue raises several factual questions, including how the waste disposal activities at issue in Conservation Chemical compare to those at issue in this case, and what evidence DER considered and relied upon in determining that lime stabilized waste pickle liquor was excluded from the list of hazardous waste.

DER requests that if its motion to strike is denied, then, in the alternative, the record should be reopened to allow all of the parties the opportunity to present evidence on this subject. Petitions to reopen the record for the purpose of supplementing it with additional evidence after the hearing has closed but before an adjudication has issued are governed by §35.231 of the General Rules of Administrative Practice and Procedure, 1 Pa. Code §31.1 *et. seq.*, at §35.231. Spang & Company v. Commonwealth, DER, 140 Pa. Cmwlth. 306, 592 A.2d 815, 818 (1991), *allocatur* denied, ____ Pa. ____, 600 A.2d 543 (1991). The petition to reopen the record must clearly state the facts claimed to constitute grounds requiring a reopening, "including material changes of fact or law alleged to have occurred since the conclusion of the hearing." 1 Pa. Code §35.231(a) (Emphasis added).

CRY clearly had an opportunity to raise this issue at an earlier stage of the proceedings, at least prior to the hearing, but did not do so. Therefore, a reopening of the record is not appropriate.

For the reasons set forth above, we grant DER's motion to strike pages 69-76 of CRY's post-hearing brief, and deny its alternate motion to reopen the hearing in this matter.

DISCUSSION

In this third party appeal of DER's issuance of a permit to Mill Service for the construction and operation of Impoundment No. 6, CRY and Westmoreland County have the burden of proving that DER abused its discretion or acted in contravention of the law in issuing the permit. 25 Pa. Code §21.101(c)(3); J. C. Brush v. DER, 1990 EHB 1521.

§503 of SWMA

As noted earlier in this Opinion, the primary argument raised by both CRY and Westmoreland County is that DER was barred by §503(d) of the SWMA, 35 P.S. §6018.503(d), from issuing the permit to Mill Service for Impoundment No. 6 when hazardous waste leachate from Impoundment No. 5 at the Yukon Facility continued to discharge into the groundwater.

Section 503(d) of the SWMA reads in relevant part as follows:

> (d)Any person...which has engaged in unlawful conduct as defined in this act...shall be denied any permit or license required by this act unless the permit or license application demonstrates to the satisfaction of [DER] that the unlawful conduct has been corrected...
>
> 35 P.S. §6018.503(d)

Thus, as Westmoreland County notes in its post-hearing brief, §503(d) mandates the denial of a permit to anyone who has violated the SWMA, unless the offender can show that the unlawful conduct has been corrected. See Fiore v. Commonwealth, DER, 98 Pa. Cmwlth. 35. 510 A.2d 880, 883 (1986).

In addition, CRY points to §503(c) of the SWMA as a further bar to issuance of the permit for Impoundment No. 6.[7] That section reads in relevant part as follows:

> (c)...[DER] may deny...any permit or license if it finds that the applicant...has failed or continues to fail to comply with any provision of [the SWMA]...the Clean Streams Law...the Air Pollution Control Act...and the Dam Safety and Encroachments Act...or any other state or Federal statute relating to environmental protection or to the protection of the public health, safety and welfare; or any rule or regulation of [DER]...or if [DER] finds that the applicant... has shown a lack of ability or intention to comply with any provision of [the SWMA]...as indicated by past or continuing violations...
>
> 35 P.S. §6018.503(c).

CRY argues that Mill Service has shown a lack of ability or intention to comply with the requirements of the SWMA as indicated by the violations at the Yukon Facility (and its sister Bulger facility) which led to the signing of the CO.

Pursuant to the terms of the CO, any violations which occurred prior to the signing of the CO on May 24, 1985 and which were addressed in the CO could not act as a bar under §503 of the SWMA to Mill Service being granted a permit for Impoundment No. 6.[8] However, CRY and Westmoreland County argue that Mill Service continued to allow the discharge of hazardous waste leachate into the groundwater without a permit after the signing of the CO and up to

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[7] Although Westmoreland County raised §503(c) of the SWMA in its notice of appeal, it did not address this provision in its post-hearing brief. Any issues not pursued by a party in its post-hearing brief are deemed to be waived. Lucky Strike Coal Co. v. DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

[8] This matter was addressed earlier in this appeal in an Opinion and Order Sur Mill Service's Motion in Limine, which was issued on September 17, 1990. See 1990 EHB 1134, 1139-41.

the issuance of the permit for Impoundment No. 6, and that this continuing violation should have acted as a bar under §503 of the SWMA to Mill Service being issued a permit for Impoundment No. 6.

There is no dispute by any of the parties that, at the time DER issued the permit to Mill Service for Impoundment No. 6, hazardous waste leachate from Impoundment No. 5 was still being discharged into waters of the Commonwealth without a permit. (F.F. 84, 85, 86) Because the permitless discharge of hazardous waste leachate from Impoundment No. 5 continued after the signing of the CO and had not ceased at the time the permit for Impoundment No. 6 was issued, Westmoreland County and CRY contend that Mill Service could not have "demonstrate[d] to the satisfaction of [DER] that the unlawful conduct ha[d] been corrected" in compliance with §503(d) of the SWMA.

Mill Service and DER counter that Mill Service's entry into the Yukon CO, which provided for the abatement of groundwater contamination in the Pittsburgh Coal Seam and the monitoring of water in the Pittsburgh Coal Seam, Redstone Coal Seam, and Pittsburgh Limestone, was a sufficient demonstration of compliance under §503(d). DER's Regional Director Charles Duritsa testified that DER considers the entry into a legally enforceable document which sets forth a timetable for compliance to constitute a demonstration "to the satisfaction of [DER] that the unlawful conduct has been corrected" for purposes of §503(d) of the SWMA. (F.F. 89) Both Westmoreland County and CRY dispute this interpretation. In its post-hearing brief, Westmoreland County argues as follows:

> The only reasonable meaning to be afforded SWMA §503(d) is that DER cannot be satisfied that unlawful conduct--the permitless discharge of hazardous, solid waste into the groundwater--has been corrected short of receiving acceptable evidence that the discharges <u>are no longer occurring.</u>
>
> (p. 2. Emphasis added)

The County argues that if the Legislature had intended that §503(d) require only a showing that the applicant is in the process of correcting the unlawful conduct, rather than a showing that the conduct has been corrected, it would have chosen the language used in the permitting sections of the Clean Streams Law, *supra*, and the Surface Mining Conservation and Reclamation Act ("SMCRA"), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.* Section 609 of the Clean Streams Law deals with the withholding of permits by DER and states in relevant part as follows:

> The department shall not issue any permit required by this act...if it finds, after investigation and an opportunity for informal hearing that:
>
> ...(2) the applicant has shown a lack of ability or intention to comply with such laws as indicated by past or continuing violations. Any person...which has engaged in unlawful conduct as defined in [35 P.S. §691.611]...shall be denied any permit required by this act unless the permit application demonstrates that the unlawful conduct is being corrected to the satisfaction of the department...
>
> 35 P.S. §691.609 (Emphasis added)

SMCRA contains similar language:

> The department shall not issue any surface mining permit...if it finds, after investigation and an opportunity for an informal hearing that (1) the applicant has failed and continues to fail to comply with any provisions of this act...or (2) the applicant has shown a lack of ability or intention to comply with any provision of this act...as indicated by past or continuing violations. Any person...which has engaged in unlawful conduct as defined in [52 P.S. §1396.24] ...shall be denied any permit required by this act unless the permit application demonstrates that the unlawful conduct is being corrected to the satisfaction of the department...
>
> 52 P.S. §1396.3a(d) (Emphasis added)

In contrast, the relevant language of §503(d) of the SWMA reads "has been corrected to the satisfaction of the department." (Emphasis added.) The County argues that the language of §503(d) leaves no room for DER to deem a permit applicant to be in compliance with the statutory requirements by simply showing that violations are being corrected. Rather, argues the County, the applicant must show that the violations have been corrected.

In summary, then, the County and CRY contend that, based upon the language of §503(d), DER could not lawfully issue a permit to Mill Service for the construction and operation of Impoundment No. 6 until the groundwater contamination at the Yukon site had been abated and Mill Service was no longer discharging hazardous waste leachate to waters of the Commonwealth.

As noted previously, paragraph 25 of the CO addressed the permit bar provisions of §503(d) and §503(c) of the SWMA. The language of the CO, including that of paragraph 25, was approved by the Commonwealth Court and is not subject to a collateral attack in this appeal. Pennsylvania Human Relations Commission v. Ammon K. Graybill, Jr., Inc. Real Estate, 482 Pa. 143, 393 A.2d 420, 422 (1978). The language of paragraph 25 reads as follows:

> 25. Mill Service's execution of [the Yukon CO and the Bulger CO] and compliance with both orders shall place Mill Service in sufficient compliance under Section 503 [c and d] of the [SWMA] that [DER] may not deny issuance of permits...to which Mill Service is otherwise entitled, based upon the violations identified in [the CO]...
>
> (F.F. 88) (Emphasis added)

This language acts to remove the permit bar of §503(d) and §503(c) with respect to any violations covered by the CO. Because the CO addressed the discharge of hazardous waste leachate from Impoundment No. 5 and groundwater

contamination at the Yukon Site, these violations could not be used as a basis for denying the permit for Impoundment No. 6. Therefore, although Westmoreland County and CRY are correct in their assertion that Mill Service had not yet abated the discharge of hazardous waste leachate from Impoundment No. 5 at the time of the permit issuance for Impoundment No. 6 and that Mill Service did not hold a permit for this discharge, this could not form the basis for the denial of a permit for Impoundment No. 6, based on the language of paragraph 25 of the CO.

In light of this holding, we need not address the parties' further arguments regarding DER's interpretation of §503(d) or CRY's contention that the CO does not meet DER's definition of a legally enforceable document with a timetable for compliance.

The elimination of the §503 permit bar by paragraph 25 of the CO did not simply depend on Mill Service entering into the CO, however, but also on its compliance with the terms thereof. Both CRY and Westmoreland County dispute that Mill Service has, in fact, complied with the requirements of the CO. Both argue that on various occasions, parameters for which Mill Service is required to test have exceeded the levels contained in Appendix B of the CO. The groundwater monitoring results submitted by Mill Service for the first quarter of 1986 showed that Well W-2, a monitoring well for the Redstone Coal Seam, exceeded both the nitrate and the cyanide levels of Appendix B and that Well W-4, a downgradient monitoring well for the Pittsburgh Limestone, exceeded the nitrate level. (F.F. 96) Well W-6, a downgradient monitoring well for Impoundment No. 5 in the Pittsburgh Limestone, exceeded the chloride level; however, Well W-5, also a downgradient well for Impoundment No. 5 in the Pittsburgh Limestone, did not show an excess chloride level. (F.F. 99, 100) CRY's expert, geologist Burt Waite, testified that several parameters

had been exceeded with respect to the Redstone Coal and Pittsburgh Limestone monitoring wells. (Vol. 2, p. 28-37)

Pursuant to paragraph 17(d) of the CO, whenever a quarterly sample showed that any background level of Appendix B had been exceeded for the Redstone Coal Seam or that the chloride level and any other parameter had been exceeded for the Pittsburgh Limestone, Mill Service was required to commence sampling on a monthly basis for at least three months thereafter. (F.F. 78) This monthly monitoring was performed by Mill Service whenever a background level was exceeded, and the results were submitted to DER with the next quarterly monitoring report. (F.F. 79)

The appellants argue, however, that any monthly sampling which may have been conducted following the 1986 first quarter results would not have been reviewed by DER at the time the permit was issued on August 6, 1986, because, due to lag time, at the time DER issued the permit it did not have monitoring reports after March 1986 available to it for review. (F.F. 95) The appellants argue that it was an abuse of discretion for DER to have issued the permit without waiting to receive the results of the monthly sampling.

Had the monitoring report for the first quarter of 1986 been the only data which DER had in its possession prior to issuance of the permit, we might find that it was an abuse of discretion for DER not to wait for the results of further monitoring before issuing the permit. However, Mill Service had been submitting monitoring reports to DER for over one year prior to issuance of the permit pursuant to the terms of the CO. Thus, DER had sufficient information available to it with respect to groundwater monitoring at the Yukon site. Based on this, we do not find that DER abused its discretion by issuing the permit without waiting for the results of further monitoring.

In conclusion, we find that DER was not barred by §503(d) or §503(c) of the SWMA or by the terms of the CO from issuing the permit for Impoundment No. 6 to Mill Service.

Air Pollution

Paragraph 4 of CRY's notice of appeal states as follows:

> 4. Past operations at the existing pits have caused significant air pollution, such that numerous persons in the area have been made ill by inhaling particulates from the hazardous waste disposal activities. This is a public and private nuisance, a potential hazard to the public health, and adversely affects the environment, in violation of the Solid Waste Management Act, 35 P.S. 6018.503.

CRY argues that DER abused its discretion by failing to require any testing to determine whether air quality standards were being exceeded and by failing to require any air pollution control devices.

The record shows that staff from DER's Bureau of Air Quality conducted testing at the Yukon Facility prior to the issuance of the permit for Impoundment No. 6. (F.F. 107) In response to complaints from Yukon area residents, DER first conducted high volume sampling from October 1984 through December 1984, both upwind and downwind of the Yukon Facility. (F.F. 110) The testing showed no violations. (F.F. 110) The Air Quality staff conducted further high volume sampling in 1985, again both upwind and downwind of the Yukon Facility, to check for fugitive emissions (F.F. 108), and placed gas chromatographs on the site in 1985-1986 to conduct readings checking for organic contamination. (F.F. 109)

In addition, the permit which was issued for Impoundment No. 6 addresses matters pertaining to air quality. Condition 14 of the permit requires Mill Service to comply with the fugitive emission standards of 25 Pa. Code, Chapter 123. (F.F. 111(a)) Condition 15 requires Mill Service to

operate Impoundment No. 6 so that any contaminants emitted into the atmosphere do not cause any ambient air quality standard to be exceeded outside the property line of the Yukon Facility. (F.F. 111(b)) Condition 16 states that nothing in the permit shall be construed as limiting DER's authority to take enforcement action against Mill Service if the Yukon Facility, despite conformance with Conditions 14 and 15, causes or contributes to air pollution as defined in the Air Pollution Control Act, 35 P.S. §4001 *et seq.* (F.F. 111(c)) Finally, Attachment A and Appendix B to the permit contain interim operating guidelines with respect to air toxic substances and step-by-step procedures for evaluating the emission of air toxic substances, respectively. (F.F. 111(d)) Thus, the permit clearly addresses the subject of air quality and specifically prohibits Mill Service from exceeding the standards for ambient air pollution.

CRY, however, argues that there is no method for monitoring compliance with the Air Pollution Control Act and applicable regulations because the permit does not require any air quality testing.

In its reply brief, Mill Service addresses this argument by countering that CRY did not produce any evidence which demonstrated that such monitoring was necessary or required by the SWMA or the regulations, that CRY failed to produce any evidence demonstrating that an air pollution problem existed at the Yukon Facility, and that CRY has ignored the testing which was performed by DER prior to the permit issuance and the appendix to the permit which details air pollution requirements. DER does not address CRY's argument.

Section 502(d) of the SWMA states that an application for a solid waste permit shall set forth the manner in which the operator plans to comply with the requirements of, *inter alia*, the Air Pollution Control Act, and that

no permit approval may be granted unless the plan provides for compliance with that act. 35 P.S. §6018.502(d).

As we have noted above, the permit which was issued to Mill Service requires Mill Service to comply with the fugitive emission standards of 25 Pa. Code, Chapter 123 and to operate the facility in such a way that no ambient air quality standard is exceeded. We are aware of no provision in the SWMA or the regulations promulgated thereunder which would mandate air quality testing as proposed by CRY.

CRY cites two cases in support of its argument: Robert Kwalwasser v. DER, 1986 EHB 24, and Coolspring Township v. DER, 1983 EHB 151. However, as Mill Service discusses in its reply brief, these cases do not provide support for CRY's argument. Coolspring Township involved an appeal by the Township and area residents of DER's issuance of a permit for the disposal of sewage sludge on farm land. One of the appellants' complaints was that the permit did not require chemical analysis of the septage or the soil on the site and that it required only limited monitoring of water wells serving residents near the site. The applicable regulations did not require monitoring of water wells, soil testing, or chemical analysis of sludge generated by residential septic tanks. The Board initially determined that the appellants carried the burden of proof in the appeal and that the appellants' expert testimony did not meet the burden of showing that their recommended monitoring and testing programs were needed to protect the health, safety, and welfare of residents in the vicinity of the site. On the other hand, continued the Board, it is DER's responsibility to insure that a permit, once granted, is operated in a fashion which preserves the public health, safety and welfare. Based on this, the Board held as follows:

> ...where appellants have produced as much expert testimony about the need for monitoring as they

> have in this appeal, and where the monitoring would be inexpensive and inoppressive (as it would be in the instant appeal), we feel the burden falls on DER to show that adding monitoring requirements to the permit is unlikely to additionally protect the public health, safety and welfare.
>
> Id. at 177.

Unlike the appellants in Coolspring Township, however, CRY has presented no expert testimony concerning the need for air monitoring. CRY's president, Diana Steck, testified that air quality problems existed in the area around the Yukon site and that DER's monitoring was inadequate. However, Mrs. Steck was not competent to testify as to the adequacy of DER's monitoring and whether Mill Service's activities were causing or contributing to air quality problems. Nor did CRY present any test results establishing the existence of air pollution problems. Had CRY presented clear evidence of air quality problems resulting from operation of the Yukon Facility, then only at that point would the burden have shifted to DER and Mill Service, as per Coolspring Township, to demonstrate that air quality monitoring should not be required.

At issue in Kwalwasser, *supra*, was a surface mining permit which contained a dust control plan, but which imposed no requirement on the permittee for monitoring the effectiveness of its dust control measures. Although the Board recognized that there were no regulations requiring DER to provide for such monitoring in the permit, it did not view this as automatically relieving DER of the responsibility for requesting such monitoring. The Board determined, however, that DER had not abused its discretion by not requiring dust control monitoring:

> ...Kwalwasser has not put forth expert testimony about the need for monitoring dust levels; on his sole testimony about his concerns that dust from [the permittee] Kerry's mining operations will

> adversely affect him, we cannot hold that DER has abused its discretion in failing to require dust fall monitoring.
>
> Kwalwasser, 1986 EHB at 62.

Likewise, CRY has presented us with no expert testimony about the need for air monitoring. We cannot find that DER abused its discretion in not requiring such monitoring solely on the basis of Mrs. Steck's testimony that air quality problems existed.

However, as CRY points out, the Board in Kwalwasser went on to state in dicta as follows:

> Nevertheless, we do think it would be an abuse of discretion for DER to permit Kerry's mining to approach closer and closer to Kwalwasser's property without ever giving any thought to the possibility of monitoring the effectiveness of Kerry's dust control measures so that these measures - if insufficient - can be improved before mining commences on Phase II immediately adjacent to Kwalwasser's property.
>
> *Id.* at 62-63 (Emphasis in original)

Based on the above, CRY argues that it was an abuse of discretion for DER not to require as part of the permit application information concerning the potential for air pollution from the Yukon site and for DER not to impose a requirement in the permit that Mill Service monitor for fugitive emissions and ambient air quality.

However, in Kwalwasser, it was recognized by the parties that there was a problem or potential problem with dust which could result from the permittee's mining operation. For this reason, a dust control plan was incorporated into the permit. In the present case, no problem with air quality in connection with the Yukon Facility has been established. DER's testing prior to issuance of the permit produced no evidence of the need for air monitoring as part of the permit, nor did CRY introduce any expert

testimony or evidence of an air pollution problem with respect to the Yukon site. Moreover, in Kwalwasser, the Board did not find that DER had abused its discretion by not imposing any monitoring requirements in the permit. Rather, the Board stated that it would be an abuse of discretion for DER to allow mining to proceed closer to the appellant's property "without ever giving any thought to the possibility of monitoring the effectiveness of [the permittee's] dust control measures." *Id.* at 62 (Emphasis added)

For the reasons set forth above, we find that DER did not abuse its discretion by not imposing requirements in the permit for the monitoring of fugitive emissions and ambient air quality.

Article I, Section 27 of Pennsylvania Constitution

CRY contends in its notice of appeal that issuance of the permit violates Article I, §27 of the Pennsylvania Constitution in that the environmental harm reasonably to be expected from the construction and operation of Impoundment No. 6 exceeds and outweighs any economic benefits to be derived therefrom.

Specifically, CRY argues that the issuance of the permit for Impoundment No. 6 fails under the third prong of the Payne v. Kassab test, *supra*, 312 A.2d at 94, in that DER failed to give any consideration to noise, air quality, the potential of the liner for leakage, and quality of life in its review of the permit. Because air quality issues were discussed in the previous section, we shall focus on the other factors herein.

1) Noise and Quality of Life

Citing Kwalwasser, *supra*, CRY asserts that DER has a duty to regulate noise generation and that the enjoyment of quiet, serene surroundings is a public right. CRY argues that the testimony provided by DER Regional Director Charles Duritsa, who headed the Bureau of Solid Waste Management at the time

of the permit issuance, indicated that no consideration was given to noise in DER's review of the permit application for Impoundment No. 6. Specifically, CRY points to Mr. Duritsa's testimony that there were no standards for noise promulgated by the Commonwealth at the time of the permit review and, thus, there was no regulatory standard which had to be met by Mill Service's application. (Vol. 1, p. 86-87)

Similarly, in the Kwalwasser case, a DER witness testified that there were no rules and regulations requiring DER to examine noise generation in the course of its review of a surface mining permit application. The Board determined, however, that DER's failure to give any consideration to noise in reviewing the permit application involved therein was an abuse of discretion. *Supra*, at 65.

In the present matter, we do not find from Mr. Duritsa's testimony that DER gave no consideration at all to noise in its review of the permit application, as suggested by CRY. On the contrary, Mr. Duritsa testified that the issue of noise "was a concern expressed by the citizens ... [and] was thus addressed by the Department in [its] review" of Mill Service's permit application. (Vol. 1, p. 87) Also, when asked whether DER had given any consideration to noise from trucks and construction vehicles in the operation of the facility, Mr. Duritsa replied that in "the general overall environmental assessment process, the number of trucks entering the site was assessed." (Vol. 1, p. 85) The burden is on CRY to show that DER gave no consideration to noise in its review of the permit application. We find that the evidence presented by CRY does not meet this burden.

Nor has CRY demonstrated that DER failed to consider quality of life in its review of the application. When questioned whether DER considered the effects that the permit could potentially have on aesthetics and quality of

life in Yukon, Mr. Duritsa responded that this was taken into consideration in the overall review of the permit application (Vol. 1, p. 87) and that the issue of "quality of life" is embodied in all of the environmental regulations. (Vol. 1, p. 87-88) CRY has provided no basis for finding that DER failed to consider quality of life in its review of the permit application.

2) Potential for Leakage

In Section II.D. of its post-hearing brief, CRY argues that issuance of the permit for Impoundment No. 6 was an abuse of discretion because the liner for the Impoundment is likely to leak.

Witnesses for both Mill Service and DER conceded that the Impoundment's primary liner had a limited life span. Mill Service's Vice President-Engineering, Carl Bender, acknowledged that there is a definite potential for leakage with this type of liner (Vol. 3, p. 125), and Mill Service's expert witness, Walter Lorence, testified that in his opinion the liner "will begin to leak shortly after it's put into operation." (Vol. 5, p. 42)

The liner's potential for leakage is attributable to its design. The primary liner for Impoundment No. 6 is manufactured of high density polyethylene (HDPE). (F.F. 35(e)) The HDPE liner was designed with a certain degree of permeability, i.e. the velocity of flow through a medium. (F.F. 37) Because the liners are designed to be permeable to some degree, some amount of leakage will occur. (F.F. 37) For this reason, the liner system is set up in such a way so as to reduce the amount of flow. (F.F. 39) The purpose of having a multiple liner system is so that any leakage which occurs will be drawn into the leachate collection system. (F.F. 40) The design of Impoundment No. 6 includes a multiple liner system, leachage detection zone;

and leachate collection system. (F.F. 32) Any leaks which may occur in the primary liner are to be repaired by the manufacturer of the liner. (F.F. 38)

Therefore, even though CRY is correct in its argument that the primary liner is likely to leak, the liner system of Impoundment No. 6 was designed in recognition of this potential for leakage and was constructed in such a manner as to prevent the migration of leachate through the system into the groundwater.

Based on the information presented to us regarding the design of the landfill's liner system and the precautionary measures incorporated into the design to prevent the migration of leachate in the event of a failure in one of the liners, we find that it was not an abuse of discretion for DER to have approved the liner system and issued the permit for Impoundment No. 6.

Adequacy of Bond Amount and Insurance

Finally, as noted at the beginning of this adjudication, both CRY and Westmoreland County had questioned the adequacy of the bond amount and insurance coverage in connection with Impoundment No. 6. However, neither party pursued these matters in its post-hearing brief, and, therefore, they are deemed to be waived. Lucky Strike, *supra*.

Conclusion

In conclusion, we find that CRY and Westmoreland County have not met their burden of proving that DER abused its discretion or committed an error of law in granting to Mill Service a permit for the construction and operation of Impoundment No. 6 at the Yukon facility.

CONCLUSIONS OF LAW

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

2. A third party appealing the issuance of a permit by DER bears the burden of proving by a preponderance of the evidence that DER abused its discretion or committed an error of law in issuing the permit. 25 Pa. Code §21.101(c)(3).

3. Any issue not raised by an appellant in its notice of appeal is deemed to be waived unless good cause is shown for raising it at a later time, such as where the issue could have been revealed only through discovery. Pennsylvania Game Commission, *supra*.

4. CRY's notice of appeal did not raise the issue argued on pages 69-76 of its post-hearing brief, that DER has improperly authorized Mill Service to dispose of hazardous waste at Impoundment No. 6. Because CRY has not demonstrated good cause for raising this issue for the first time in its post-hearing brief and because DER and Mill Service would be severely prejudiced by allowing this issue to be raised at this late date, it is deemed to be waived.

5. Pursuant to the language of paragraph 25 of the CO, as approved by the Commonwealth Court, any violations which were addressed by the CO may not act as a bar under §503 of the SWMA to Mill Service being issued a permit for Impoundment No. 6.

6. The language of the CO, as approved by the Commonwealth Court, may not be collaterally attacked. Pennsylvania Human Relations Commission, *supra*.

7. DER was not barred by §503(d) or §503(c) of the SWMA or by the terms of the CO from issuing the permit for Impoundment No. 6.

8. DER did not abuse its discretion by not imposing requirements in the permit for the monitoring of fugitive emissions and ambient air quality.

9. DER did not violate Article I, §27 of the Pennsylvania Constitution in issuing the permit for Impoundment No. 6.

10. It was not an abuse of discretion for DER to approve the liner system for Impoundment No. 6.

11. Any issues not contained in a party's post-hearing brief are deemed to be waived. Lucky Strike, *supra*.

12. CRY and Westmoreland County have not met their burden of proving that DER abused its discretion or acted contrary to law in issuing the permit for Impoundment No. 6.

O R D E R

AND NOW, this 1st day of February, 1993, it is ordered that DER's issuance of the permits in question to Mill Service is sustained and the appeals of CRY and Westmoreland County at EHB Docket No. 86-513-MJ (Consolidated) are dismissed.

ENVIRONMENTAL HEARING BOARD

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Board Member Richard S. Ehmann is recused.

DATED: February 1, 1993

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CONCORD RESOURCES GROUP OF PENNSYLVANIA, INC.	:	**EHB Docket No. 92-416-W**
v.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and	:	
COUNTY OF CLARION, Intervenor	:	**Issued: February 1, 1993**

OPINION AND ORDER SUR MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, TO CERTIFY FOR IMMEDIATE INTERLOCUTORY REVIEW

By Maxine Woelfling, Chairman

Synopsis

A motion to reconsider the denial of a motion to compel responses to interrogatories is denied where the movant has failed to present extraordinary and compelling reasons. The reasons advanced for reconsideration were presented in the motion to compel and thoroughly considered in the ruling on it.

Motions to certify interlocutory orders for immediate review by the Commonwealth Court are governed by Pa.R.A.P. No. 1311. The amendments to that rule, which became effective on July 6, 1992, and apply to actions commenced before, *inter alia*, governmental units after that date, authorize a party to request certification within 30 days of entry of the order and, therefore,

supersede 1 Pa. Code §35.225(a). The issue for which certification is sought is not a controlling issue of law, and immediate interlocutory review would only delay the ultimate resolution of the matter.

OPINION

This matter was initiated with the September 1, 1992, filing of a notice of appeal by Concord Resources Group of Pennsylvania, Inc. (Concord Resources) seeking review of the Department of Environmental Resources' (Department) August 3, 1992, denial of Concord Resources' Phase I siting application for a commercial hazardous waste treatment and disposal facility to be located in Millcreek Township, Clarion County. The Department denied the application pursuant to 25 Pa. Code §269.12 because the site did not comply with the so-called Phase I exclusionary criteria set forth at 25 Pa. Code §§269.21-269.29 in that there were wetlands within the boundary of the proposed facility. The petition to intervene of Clarion County, one of the host municipalities of the proposed facility, was granted by the Board's order of October 27, 1992, while the petition to intervene of Representative David Wright was denied in a December 3, 1992, opinion and order.

Concord Resources' notice of appeal raises numerous challenges to the Department's denial, most relating to the determination that wetlands were present within the proposed facility's boundary. However, three of the objections, specifically

> 24. The record and comments of Karl Sheaffer and other officials evidence that the DER's decision on this application and the standard of review applied to the application were unduly influenced by the history of violent and continuing local opposition to this project.
>
> 25. Karl Sheaffer's denial of the Concord application was precipitous, without technical merit, and issued without considering readily available information, compelling the conclusion that the denial was *ultra vires* and driven more

> by a desire to jettison the project than by the substantive merits of the application.
>
> 26. The DER abused its discretion by allowing its decision on the siting criteria to be influenced by factors other than the merits of the siting application under review, including a fear of further threats and violence during the siting process.

relate to the Department's purported motivation in denying the application and are the genesis of the issue now before the Board.

Concord Resources' First Set of Interrogatories, which were served on the Department on September 25, 1992, sought, *inter alia*, information regarding the identity of Clarion County residents who had oral or written communications regarding Concord Resources' application with the Department since 1988, as well as the nature of those communications. The Department objected to these interrogatories on the grounds that they were overly broad, vague and ambiguous and that the information which was being sought was not relevant or calculated to lead to admissible evidence.

Concord Resources filed a motion to compel responses to these interrogatories on December 1, 1992, and the Department responded to the motion on December 14, 1992. The Board, in a December 16, 1992, order, denied Concord Resources' motion to compel on two grounds:

> The interrogatories at issue (Nos. 7-13) are overly broad and burdensome in that they relate to the facility, in general, as well as the permit application at issue in this appeal and apply to all personnel within the Department. Moreover, they seek information which is not relevant to this proceeding. The Department's stated basis for denying Concord Resources' permit application was that the facility was to be sited in an area excluded by 25 Pa. Code §269.23 and, therefore, the Department was mandated by 25 Pa. Code §269.12 to deny the application. Thus, the relevant issues before the Board are whether wetlands are present in Area 4. The sentiments of the residents of Clarion County regarding the proposed facility and how they were

> expressed to the Department are not relevant to the Department's determination of the existence of wetlands on the proposed site.

Thereafter, on January 5, 1993, Concord Resources filed a motion for reconsideration or, in the alternative, to certify for interlocutory review. The Department and Clarion County oppose the motion.

With regard to the motion for reconsideration, the Board has long held that interlocutory orders, such as this one, will only be reconsidered in exceptional circumstances. Magnum Minerals, Inc. v. DER, 1983 EHB 589. Concord Resources' request for reconsideration is little more than a reiteration of the reasons it advanced in support of its motion to compel, with the added assertion that the Board's refusal to compel the Department to respond to the contested interrogatories operated as a grant of partial summary judgment. The substantive legal arguments were considered in ruling on the motion to compel and will not be re-examined here. The Carbon Graphite Group, Inc. v. DER, 1991 EHB 690, 693.

In the alternative, Concord Resources has requested that the order of December 16, 1992, be certified for interlocutory appeal to the Commonwealth Court,[1] arguing that the issue of whether Concord Resources is entitled to inquire into the nature and effect of the citizens' communications with the Department is a dispositive issue. The Department and Clarion County both

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[1] What Concord Resources wishes the Board to certify for interlocutory review has been muddled by its declaration in its reply to the responses of the Department and Clarion County that it is requesting the Board to certify its denial of reconsideration "should it in fact issue a denial." The Board will hold Concord Resources to its request in Paragraph 9 of its motion - "should the Board refuse to reconsider its ruling, it should, pursuant to 1 Pa. Code §35.225(a) and 42 Pa.C.S.A. §702(b) certify this matter for immediate interlocutory review." "This matter" is the denial of the motion to compel.

assert that the request for certification is untimely under 1 Pa. Code §35.225(a) and does not satisfy the standards for certification for interlocutory appeal. The issue of timeliness will first be addressed.

The General Rules of Administrative Practice and Procedure, 1 Pa. Code §31.1 *et seq.*, as they relate to adjudicatory proceedings are applicable to the Board unless inconsistent with the Board's rules of practice and procedure. 25 Pa. Code §21.1(c). The Board has applied the ten day time limit in 1 Pa. Code §35.225(a) to requests to certify for interlocutory appeal, and, by that standard, Concord Resources' request is untimely. Ganzer Sand & Gravel, Inc. v. DER, 1991 EHB 1371. However, Rule 1311(b) of the Pennsylvania Rules of Appellate Procedure was amended, effective July 6, 1992, to provide that in actions or proceedings commenced after July 6, 1992,

> an application for an amendment of an interlocutory order to set forth expressly the statement specified in 42 Pa.C.S. §702(b) shall be filed with the lower court or other government unit within 30 days after the entry of such interlocutory order and permission to appeal may be sought within 30 days after entry of the order as amended. The trial court must act on the application within 30 days....
>
> (emphasis added)

The note accompanying the rule states that it is "to govern only actions or administrative proceedings originally commenced in a court, Commonwealth agency or local agency after July 6, 1992." (emphasis added). Thus, Pa.R.A.P. 1311(b) must be read to supersede 1 Pa. Code §35.225(a). Because Concord Resources' appeal was filed after July 6, 1992, Pa.R.A.P. 1311(b) applies to its request to certify and its request was timely. Thus, the merits of Concord Resources' request to certify must be addressed.

Section 702(b) of the Judicial Code, 42 Pa.C.S.A. §702(b) provides for the certification of interlocutory orders for appeal where they involve

controlling questions of law on which there are substantial grounds for difference of opinion and where an immediate appeal therefrom would materially advance the ultimate disposition of the matter. While there may be substantial grounds for a difference of opinion regarding the relevancy of these citizen communications, it is not a controlling question of law in this matter. The sole reason for the Department's denial of the Phase I siting application was the presence of wetlands within the boundary of the proposed facility. The Department is mandated by 25 Pa. Code §269.12 to deny a Phase I siting application if it determines the facility will be located in an excluded area; wetlands are such an excluded area under 25 Pa. Code §269.23. Our only task is to review the correctness of the determination regarding the presence of wetlands. If the Department's determination is correct, the Board must affirm the Department's denial. If it is not correct and the Board finds there are no wetlands on the site, the Department's action must be reversed. Put another way, whether or not the Department's determination was somehow prompted by citizen participation in the process, if it is correct, the Board must affirm it. Consequently, the Board's denial of Concord Resources' motion to compel discovery on the identity and nature of citizen input can hardly constitute a controlling question of law.

Even if the Board's refusal to compel the Department to respond to interrogatories regarding its communications with citizens were a controlling issue of law and there were substantial grounds for difference of opinion, it cannot be concluded that immediate appeal would hasten the ultimate disposition of Concord Resources' challenge to the Phase I denial. This is a discovery dispute, first and foremost. Certifying it for interlocutory appeal can only serve to delay the ultimate disposition of Concord Resources' appeal. City of Harrisburg v. DER and Pennsylvania Fish Commission, 1990 EHB

585. Moreover, even if the Commonwealth Court were to agree with Concord Resources' interpretation of the relevancy of citizen communications for discovery purposes, the only issue herein is whether wetlands are present within the boundary of the proposed hazardous waste treatment and disposal facility. Regardless of citizen sentiment and the manner in which it was communicated to the Department, the Department's denial will stand or fall on the merits of its determination regarding the presence of wetlands.

O R D E R

AND NOW, this 1st day of February, 1993, it is ordered that Concord Resources' motion for reconsideration or, in the alternative, request for certification for interlocutory review, is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: February 1, 1993

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Kenneth T. Bowman, Esq.
Southwest Region
For Appellant:
Cathy Curran Myers, Esq.
OBERMAYER, REBMANN, MAXWELL & HIPPEL
Harrisburg, PA
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Robert W. Thomson, Esq.
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Pittsburgh, PA
b]

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
101 SOUTH SECOND STREET
SUITES THREE-FIVE
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M. DIANE SMITH
SECRETARY TO THE BOA

JOHN and SHARON KLAY, d/b/a FAYETTE SPRINGS FARMS	:	
v.	:	EHB Docket No. 92-280-E
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: February 4, 1993

OPINION AND ORDER SUR MOTION TO DISMISS

By: Richard S. Ehmann, Member

Synopsis

An appeal of a letter of the Department of Environmental Resources (DER) is dismissed where the letter is not an appealable action of DER.

OPINION

This appeal was begun on July 31, 1992 by John and Sharon Klay, d/b/a Fayette Springs Farm (the Klays), challenging a letter dated July 1, 1992 from DER's Stephen R. Balta to Gary Altman, the attorney representing the Klays, concerning an on-lot elevated sand mound type sewage disposal system which was being installed by Frederick and Rhonda Zeigler (the Zeiglers) on property located adjacent to the Klays' Fayette Springs Farm in Wharton Township, Fayette County pursuant to Sewage Disposal Permit No. K-66706 (the permit) issued by the Wharton Township Sewage Enforcement Officer (SEO) in late April of 1992. DER's July 1, 1992 letter was a response to two previous letters which DER had received from Attorney Altman concerning the Zeiglers' system.

In his letter dated May 26, 1992, Attorney Altman asserted that the

Zeiglers' system would be located 43 feet uphill from the Klays' spring, which he said was a violation of the "100 foot water supply setback" contained in DER's regulations. Attorney Altman further asserted that the permit should not have been issued by the township because the system was not in compliance with DER's regulations, and he requested DER to inspect the system.

In his letter dated June 9, 1992, Attorney Altman asserted that DER was incorrectly interpreting its regulations at 25 Pa. Code §73.13 regarding the isolation distance to be applied between the Zeiglers' system and the Klays' spring.[1] He urged that the 100 foot isolation distance contained in §73.13(c)(3) should be applied to the Zeiglers' system because the Klays had purchased their spring as a clean water source to be used for farm purposes and in the production of wine. Attorney Altman's June 9, 1992 letter further raised problems with the permit regarding the sand mound system's design and construction, sewage flows, and the test hole locations. The letter concluded:

> My clients want this system moved to the proper 100 foot isolation distance, measured at the very least from the toe of the absorption area, and preferably located downhill from the spring. Mr. and Mrs. Zeigler have such an area where they can move the sand mound. Please order them to do so,

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[1] Section 73.13 of DER's regulations at 25 Pa. Code provides in pertinent part:

> (a) Minimum horizontal isolation distances shown in subsections (b) and (c) shall be maintained between the sewage disposal system and the features itemized. ...
>
> * * *
>
> (c) The following minimum horizontal isolation distances between the features named and the perimeter of the absorption area apply:
>
> (3) An individual water supply ... -- 100 feet.
>
> * * *
>
> (5) Streams, lakes or other surface water -- 50 feet.

> and to otherwise correct the problems with this permit.

(Appendix E to DER's motion)

DER's July 1, 1992 letter advised that DER had inspected the Zeiglers' property and had concluded that the township's application of the 50 foot isolation distance for a sewage disposal system from surface water was appropriate with regard to the Klays' spring. DER's letter further stated that DER would be notifying Wharton Township (by copy of the July 1, 1992 letter) of the Klays' concerns regarding design and construction of the Zeiglers' system and requesting the township's SEO to evaluate those concerns and, if necessary, oversee modifications. DER also said it would be making recommendations to Wharton Township regarding sewage flows from the system and of the need to amend or revoke the permit until deleted test hole locations were completed. DER's letter concluded:

> At this time the Department is not going to order Wharton Township to revoke the permit. However, the aforementioned conditions should be placed on the permit. We will expect the Township to submit copies of any permit revisions or correspondence related to the permit within seven days of the appropriate action.

Appendix A to DER's motion.

The township's SEO later advised DER in a letter dated July 14, 1992 that the township had followed DER's recommendations and that the permit had been amended to reflect test hole locations which had been included in documentation but inadvertently omitted from the permit.

Presently before the Board for consideration is DER's Motion to Dismiss the Klays' appeal based on the argument that DER's July 1, 1992 letter is not appealable. DER's motion urges the challenged letter did not constitute an order of DER to Wharton Township nor was it a *de facto*

promulgation of a regulation, contrary to the claims raised in the Klays' notice of appeal. Moreover, DER asserts its decision not to order Wharton Township to revoke the Zeiglers' permit was an act of DER's prosecutorial discretion and is thus not reviewable by the Board. DER's motion is accompanied by a supporting brief and the affidavit of DER's Water Quality Specialist Supervisor, Jack Crislip.

In their response and accompanying brief, the Klays argue DER's July 1, 1992 letter is an appealable action. While the Klays acknowledge that DER's letter is not a direct DER order, they contend that DER has made a decision in this matter that the 50 foot isolation distance contained in DER's regulations should be applied as to the Zeiglers' system and the Klays' spring and that DER has made a decision that this 50 foot distance must be measured in a specific way which accommodates the decision that the 50 foot distance applies. The Klays further assert, in an attempt to create a DER action, that these DER decisions effectively and improperly added requirements to DER's regulation which were promulgated by the Environmental Quality Board. Specifically, the Klays contend, without pointing us to any supporting evidence, that DER has added the requirement to its regulation at 25 Pa. Code §73.13(c)(3) that in order for the 100 foot isolation distance to apply to the Klays' spring, it would have to be a protected water supply rather than an individual water supply as is stated at §73.13(c)(3). Further, the Klays contend DER changed its regulations regarding measuring of the isolation distance, found at 25 Pa. Code §§73.1 and 73.13(c) (which state that the isolation distance should be measured from the perimeter of the system's absorption area) in that they believe DER's William Davis did not measure the isolation distance between the Zeiglers' system and their spring from the proper point. Additionally, the Klays contend they are adversely affected by

DER's decision that the 50 foot distance applies because that distance will result in pollution of their spring.

In reviewing DER's Motion and the Klays' response thereto, we must view the motion in the light most favorable to the Klays, as they are the non-moving party. West Chillisquaque Township v. DER, 1989 EHB 392.

DER actions are appealable only if they are "adjudications" within the meaning of the Administrative Agency Law, 2 Pa.C.S. §101, or "actions" as defined at 25 Pa. Code §21.2(a)(1).[2] Lehigh Township, Wayne County v. DER, EHB Docket No. 91-090-W (Opinion issued May 22, 1992).

As DER points out in its brief, Section 7 of the Sewage Facilities Act (SFA), Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.7, requires a property owner to obtain a permit from the local municipality before installing or altering an individual sewage system. This permit is to indicate that the site and the plans and specifications of the proposed system are in compliance with the provisions of the SFA and the standards adopted pursuant to the SFA. Section 8 of the SFA, 35 P.S. §750.8, entrusts local agencies with the powers and duties to administer Section 7 of the SFA. DER is given oversight responsibility by Section 10 of the SFA, 35 P.S. §750.10, including the power to order a local agency to undertake actions deemed by DER to be necessary to effectively administer Section 7 of the SFA

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2 The definition of action is found at 25 Pa. Code §21.2(a). It is:

> An order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person, including, but not limited to, denials, modifications, suspensions and revocations of permits, licenses, and registrations; orders to cease the operation of an establishment or facility; orders to correct conditions endangering waters of the Commonwealth; orders to construct sewers or treatment facilities; orders to abate air pollution; and appeals from and complaints for the assessment of civil penalties.

in conformance with DER's rules and regulations. See Board of Supervisors of Middle Paxton Township v. DER, 1991 EHB 546.

Under Section 16(a) of the SFA, 35 P.S. §750.16(a), a person who is aggrieved by an SEO's grant or denial of a permit under the SFA is afforded the right to request a hearing before the local agency. Thus, the legislature has specifically placed jurisdiction over appeals from SEO permit issuance decisions with the local agency, not this Board. Here, the Klays have appealed the Wharton Township SEO's grant of the Zeiglers' permit to the Wharton Township Board of Supervisors pursuant to §16(a). (See Appendix C to DER's motion and the affidavit of Jack Crislip.)

DER's letter in this matter, although suggestive to the township, is not binding on that local agency. We point out that the overall tone of DER's letter appears to be carefully worded to be advisory rather than mandatory. It merely notified Wharton Township that certain aspects of the permit should be reevaluated and recommended that the township should take certain actions with regard to the permit.

We find no merit to the Klays' contentions that DER has *de facto* promulgated additions to its regulations. These assertions obviously have been raised in an attempt to bootstrap this appeal past DER's Motion and on to a merits hearing. These alleged DER actions are not reflected in its letter of July 1, 1992. No where in DER's July 1, 1992 letter is there even a suggestion that 25 Pa. Code §73.13(c)(3) now contains some requirement that a water supply belong to a classification of "protected" water supply in order for the 100 foot isolation distance to be applicable. Nor is there anything before us which would support the Klays' allegation that DER has added or attempted to add any requirements to its regulations regarding measuring of isolation distances. Further, we point out that in order for even a DER

policy regarding isolation distances to constitute a regulation, the policy must constitute a "binding norm" of general applicability and future effect. See Commonwealth, DER v. Rushton Mining Co., 139 Pa. Cmwlth. 648, ___, 591 A.2d 1168, 1173 (1991), allocatur denied at ___ Pa. ___ , 600 A.2d 541 (1991); Manor Mining & Contracting Corporation v. DER, EHB Docket No. 86-544-F (Adjudication issued March 23, 1992). That the Klays have not even attempted to show DER has established such a binding norm regarding isolation distances further demonstrates the weakness of their *de facto* promulgation of regulation argument.

DER's July 1, 1992 letter advised that DER concurred with the township's decision that the 50 foot isolation distance was applicable and it would not be ordering the township to revoke the permit. DER's decision not to order Wharton Township to revoke the Zeiglers' permit was within DER's prosecutorial discretion and, thus, not appealable to this Board. Margaret C. and Larry H. Gabriel, M.D. v. DER, 1990 EHB 526; Ralph D. Edney v. DER, 1989 EHB 1356. While we recognize the Klays are concerned about the effect of the Zeiglers' system on their spring, that concern cannot make DER's letter appealable. Thus, we enter the following order dismissing the Klays' appeal for lack of jurisdiction.

ORDER

AND NOW, this 4th day of February, 1993, it is ordered that the Department of Environmental Resources' Motion to Dismiss is granted and the Klays' appeal at EHB Docket No. 92-280 is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: February 4, 1993

cc: **Bureau of Litigation, DER:**
Library, Brenda Houck
For the Commonwealth, DER:
Theresa Grencik, Esq.
Southwest Region
For Appellant:
Gary N. Altman, Esq.
Uniontown, PA

jm

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ENVIRONMENTAL HEARING BOARD
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M. DIANE SMITH
SECRETARY TO THE BO

VESTA MINING COMPANY	:	
	:	**EHB Docket No. 88-050-MJ**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 10, 1993

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

By Joseph N. Mack, Member

Synopsis

The Board dismisses an appeal by Vesta Mining Company ("Vesta") challenging effluent limits imposed by the Department of Environmental Resources ("DER" or "the Department") in Vesta's 1986 coal mining activity permit and a 1988 revision thereto. The Department's imposition of water quality-based effluent limitations was proper. The burden of proof in this appeal remains with Vesta and does not, as Vesta asserts, shift to DER.

Procedural History

This matter involves an appeal filed by Vesta on February 24, 1988 seeking review of the Department's January 28, 1988 revision of Vesta's coal mining activity permit.

In 1986, Vesta was issued Coal Mining Activity Permit 63841304 ("the 1986 permit") for an underground coal mine located in Washington County known as the Vesta mine (sometimes hereinafter referred to as "the mine"). The 1986 permit imposed certain effluent limitations for a discharge from the mine

designated as "outfall 007". Vesta filed an appeal of the 1986 permit at EHB Docket No. 86-573-R, in which it challenged, *inter alia*, the effluent limits for outfall 007. On September 3, 1987, this appeal was consolidated with appeals of certain other coal mining activity permits at Rushton Mining Co. et al. v. DER, EHB Docket No. 85-213-F.[1]

Due to deterioration in the quality of the discharge of outfall 007, Vesta constructed a treatment facility in 1987 for the purpose of treating the discharge. Vesta applied for a revision to its 1986 permit to reflect the construction of the treatment facility, and the revision was issued by DER on January 28, 1988 ("the 1988 permit"). The 1988 permit did not change the effluent limitations for outfall 007 as were set forth in the 1986 permit.

On February 24, 1988, Vesta filed the present appeal in which it stated that it was seeking review of DER's action "revising the Appellant's CMAP [Coal Mining Activity Permit] #63841304 [the 1986 permit] to impose more stringent effluent limits for outfall 007." The appeal objects to DER's action as being arbitrary, capricious, and an abuse of discretion. It further contends that the receiving stream into which outfall 007 discharges was improperly classified and that the effluent limit was improperly calculated.

A pre-hearing stipulation was entered into by the parties and filed with the Board on October 10, 1991. A hearing was held in Pittsburgh on October 31 and November 1, 1991 before Administrative Law Judge Joseph N.

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[1] On January 22, 1990, the Board granted the appellants' cross motion for partial summary judgment in the Rushton appeal and declared invalid fifteen standard permit conditions contained in all of the coal mining activity permits involved in the appeal. Rushton, 1990 EHB 50. DER appealed that decision to the Commonwealth Court, which affirmed the Board's order. DER v. Rushton Mining Co., et al, 139 Pa. Cmwlth. 648, 591 A.2d 1168, (1991), *allocatur denied*, ___ Pa. ___, 600 A.2d 541 (1991). No further disposition has been made of the remaining issues in the Vesta appeal of the 1986 permit.

Mack, a member of the Board. Vesta and DER were represented by legal counsel.

At the start of the hearing, both parties stipulated that a decision in this case regarding the effluent limitations for outfall 007 would be *res judicata* as to the earlier appeal of the 1986 permit consolidated at Rushton, EHB Docket No. 85-213-F. (TR. 5)[2]

Post-hearing briefs were filed by DER on May 18, 1992 and by Vesta on May 19, 1992. The Department filed a reply brief on June 15, 1992, and on June 18, 1992, Vesta indicated by letter that it did not intend to file a reply brief in this matter.

The record consists of the pleadings, the pre-hearing stipulation, a hearing transcript of 366 pages, 11 Board exhibits ("Bd. Ex.") (Ten listed in the transcript as 1 through 10, the eleventh being supplied to the Board by the parties after the hearing), five exhibits of the appellant ("App. Ex."), and eight exhibits of the Commonwealth ("Comm. Ex."), for a total of 24 exhibits. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. The appellant is Vesta Mining Company, a Pennsylvania corporation having its principal place of business at 3025 Washington Road, McMurray, Pennsylvania 15317. (Stip. 1)

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the Clean Streams Law, Act

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[2] "TR. ____", when used herein, refers to a page in the transcript of the hearing. "Stip. ____" refers to a stipulated fact in section E of the parties' pre-hearing stipulation.

of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, and the regulations adopted thereunder and, specifically, Chapter 93 of 25 Pa. Code.

3. The Vesta mine which is the subject of this litigation is a deep mine located in Washington County near the Monongahela River in the Townships of Amwell, North Bethlehem, and West Bethlehem and the Borough of Deemston. The mine has temporarily ceased operations. (TR. 7-8; Stip. 3)

4. The mine is covered by Coal Mining Activity Permit 63841304 which was issued in 1986. (Stip. 3, 5)

5. A discharge, designated as "outfall 007", emanates from the "Three Butt 'B' Drift" entry to the mine and discharges to Fishpot Run. (Stip. 4; TR. 9, 17-18)

6. A second discharge from the Vesta mine, designated as outfall 002, is located approximately 500 feet upstream from outfall 007. (TR. 12)

7. The 1986 permit imposed certain effluent limitations for outfalls 002 and 007. (Stip. 6, 12)

8. Vesta filed an appeal of the 1986 permit challenging, *inter alia*, the effluent limitations set forth therein. This appeal was subsequently consolidated with other appeals of coal mining activity permits at Rushton Mining Co. v. DER, EHB Docket No. 85-213-F. (Stip. 7)

9. It has never been necessary for Vesta to treat the discharge at outfall 002 to meet the effluent limitations set by the 1986 and 1988 permits. (TR. 20-21)

10. In 1987, the quality of the discharge at outfall 007 deteriorated, and it became necessary for Vesta to treat the discharge at outfall 007 to meet the 1986 permit's effluent limitations because of low pH level and elevated levels of iron and manganese. Vesta constructed a

treatment facility for the purpose of treating the discharge. (Stip. 4, 8; TR. 17, 18)

11. Vesta applied for a revision to the 1986 permit to include the treatment facility. This revision was issued by the Department on January 28, 1988. (Stip. 9)

12. The 1988 permit did not change the effluent limitations for outfall 007 set forth in the 1986 permit. (Stip. 9)

13. The effluent limitations set forth in Vesta's 1986 and 1988 permits are equal to the water quality parameters set forth in Chapter 93 of the regulations for this stream. (TR. 160, 161)

14. The effluent limits contained in both the 1986 permit and the 1988 permit are water quality-based limits, that is, the discharge will not cause the water quality of the receiving stream to exceed baseline minimum quality parameters. (TR. 280)

15. The designated use of a stream can be determined at a point of discharge through an aquatic biology study. (TR. 240) However, if a stream is listed in 25 Pa. Code Chapter 93 as having a designated use, the Department does not normally require an aquatic biology study to determine the stream's use. (TR. 240)

16. Fishpot Run has a designated use, which is set forth in 25 Pa. Code §93.9v as "Warm Water Fishes". (TR. 210-211)

17. Vesta did not contact the Department's Bureau of Water Quality Management to request a determination by the Department as to where the first point of designated use would be on Fishpot Run. (TR. 356)

18. In calculating the effluent limits for outfalls 007 and 002, the Department used an estimated Q_{7-10} flow for Fishpot Run. (Stip. 11)

19. "Q_{7-10}" flow is defined at 25 Pa. Code §93.1 as "[t]he actual or estimated lowest 7 consecutive-day average flow that occurs once in 10 years for a stream with unregulated flow, or the estimated minimum flow for a stream with regulated flow." 25 Pa. Code §93.1

20. Q_{7-10} flow is a flow which occurs less than one percent of the time. (TR. 350)

21. A stream's use which is protected during a time of Q_{7-10} flow will be protected at all other times of higher flow. (TR. 340)

22. Even if a stream has a Q_{7-10} flow of zero, where there is a designated use at a discharge point, that use must be protected, and the effluent limitations are established at the point where this use first occurs. (TR. 24)

23. The Department has in certain situations established effluent limitations so that the criteria of Chapter 93 would be met at the point of discharge. Most of these situations involved streams with a Q_{7-10} flow estimated to be zero or which are known to have periods of low or no flow. (TR. 351, 352)

24. Fishpot Run has been dry on several occasions upstream of outfall 002. In 1992, it was dry for a period of four or five months. (TR. 22)

25. In July, August and September of 1991, the sole component of flow in Fishpot Run was the discharge from outfalls 002 and 007, based upon monitoring of the stream above and below the two outfalls. (TR. 59-67)

26. However, even during this dry period in 1991, there was minnow life in a small pool near the bridge below the 007 outfall, and there were

benthic macroinvertebrates under rocks in that same general area. (TR. 92, 93)

27. Vesta's expert, Larry Lee Simmons, observed aquatic organisms in Fishpot Run both above and below the 002 and 007 outfalls at monitoring points SU-2 and SU-3. These included caddis flies and mayflies at SU-2 and SU-3, as well as minnows at SU-2. (TR. 125, 130)

28. A balanced aquatic community exists when there are several taxa or groups of benthic macroinvertebrates present whose life cycles are sufficiently long so as to indicate that water is present for a significant part of the year. A balanced aquatic community is further indicated by a predator/prey relationship existing between these organisms. (TR. 342-343)

29. Caddis flies and mayflies can be found in Fishpot Run. They have a sufficiently long life cycle such as to indicate that there is substantial flow in the stream for an extended period of time. A predator/prey relationship exists between the minnows and benthic macroinvertebrates which are present in Fishpot Run. (TR. 346) A balanced aquatic community exists in Fishpot Run.

30. Based on field sampling conducted in October 1983, there was a flow of approximately 150 gallons per minute in the streambed of Fishpot Run upstream of outfall 007. (TR. 209, 210)

31. The discharge rate of outfalls 002 and 007 into Fishpot Run is substantially greater than the Q_{7-10} flow of the stream. (TR. 281)

32. Vesta did not submit any information to the Department which indicated an error in the Department's calculation of the Q_{7-10} flow or which provided a basis for reconsideration of the effluent levels of the 1986 permit. (TR. 141, 142)

33. Vesta did not conduct a comprehensive aquatic survey on Fishpot Run and does not know what effect an increase in the specific limits prescribed in Chapter 93 would have on the existing aquatic community. (TR. 164, 165)

34. According to the Department's water pollution biologist, Thomas Proch, applying best available technology ("BAT") limitations to outfall 007 may not be sufficient to protect the most sensitive species of fish and other organisms that might be present in a warm water fishery. (TR. 352, 353)

35. The effluent limitations which are contained in the current permit for outfall 007 protect the designated use in Fishpot Run. (TR. 357)

DISCUSSION

Vesta carries the burden of proving that DER erred in imposing the effluent limitations in question. Manor Mining and Contracting Corp. v. DER, EHB Docket No. 86-544-F (Adjudication issued March 23, 1992). Vesta argues, however, that while the initial burden of proof rests on it, the burden then shifts to the Department to sustain those matters or contentions which are asserted as affirmative conclusions or propositions by the Department. Specifically, Vesta maintains that if it meets its burden of proving that the Q_{7-10} flow of Fishpot Run is zero, then DER has the burden of proving its contention that the stream's designated use as a warm water fishery exists at the point of the outfall 007 discharge to the stream.

For this proposition, Vesta points to 25 Pa. Code §21.101(a), which provides that the burden of proof will normally rest with the party asserting the affirmative of an issue.

The Department asserts, on the contrary, that the burden of persuasion or burden of proof does not shift but remains on Vesta at all

times. The Department contends that, while the burden of going forward or producing evidence may shift during a hearing, the burden of proof never leaves the party on whom it is originally placed. We agree with the Department, as this proposition has been articulated in detail by the Board in Easton Area Joint Sewer Authority v. DER, 1990 EHB 1307, as well as the Superior Court in McClosky v. Nu-Car Carriers, Inc., 387 Pa. Super. 466, 564 A.2d 485 (1989), appeal denied, ____ Pa. ____, 575 A.2d 115 (1990). With this principle in mind, we hold that the burden of proof in the present action is with Vesta as to the issues raised in its appeal. However, the Department holds the burden of proving any affirmative defenses it asserts in this appeal.

On the substantive side of its appeal, Vesta argues that DER: (1) erred and committed an abuse of discretion by failing to calculate a Q_{7-10} of zero for Fishpot Run; (2) erred and committed an abuse of discretion when it failed to have a biologist determine the first point downstream where the designated stream use could be supported and that, as a result, the record is inadequate to conclude that Fishpot Run is capable of supporting a warm water fishes use at outfall 007; and (3) erred in failing to recalculate or reconsider the effluent limits for outfall 007 when the 1988 revision was issued.

The first two of these contentions revolve around the regulation at 25 Pa. Code §93.5(b)(1) which provides:

> Except if otherwise specified in this chapter, the water quality criteria in this chapter shall be achieved at stream flows equal to or exceeding Q_{7-10}. For streams where the Q_{7-10} flow is estimated to be zero, water quality criteria shall be achieved at the first downstream point

> where the stream is capable of supporting designated water uses as defined in Section 93.4.[3]

Vesta argues that Fishpot Run has a Q_{7-10} flow of zero if properly calculated, and that the Department's sanitary engineer, Ray Lattner, erred in his calculations because he improperly used Ten Mile Creek as a comparison stream. Vesta argues that §93.5(b)(1), by its terms, then requires the Department to establish the first downstream point where the stream can support its designated use as a warm water fishery. Vesta argues, further, that this point of first use is the Monongahela River. The Department responds to this argument in two ways: it argues, first, that the designated use of warm water fishery is to be protected wherever it is found, and, secondly, that the interpretation of the regulation urged by Vesta would eliminate the requirement that water quality criteria in Fishpot Run or any other stream be achieved at stream flows equal to Q_{7-10} for all streams with a Q_{7-10} flow of zero. The Department further argues that the "first downstream point" refers to the stream itself and indicates that the protected use comes where the stream, from its headwaters to its mouth, can sustain its designated use as set out at 25 Pa. Code §93.4.

The interpretation urged by Vesta could make Fishpot Run and any other similarly situated stream a drain for the mine without reference to any designated use or existing stream life. We do not believe this is the intention of the Clean Streams Law or of §93.4. We, therefore, hold that,

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[3] Section 93.4, together with §93.9v, specifically designates Fishpot Run's use as "Warm Water Fishes".

regardless of the Q_{7-10} flow of the stream, the question of protected use is a matter to be determined by the existence of "life" in the streambed as contemplated by the designated use set out in §93.4.

In the instant case the Department's and Vesta's witnesses agree that there was, at the point of discharge during the summer of 1991, life in the streambed comprised of small fish and macroinvertebrates. (F.F. 26)[4] This was described by the Department witness, Thomas Proch, the only qualified aquatic biologist to testify, as a balanced aquatic community and indicative of a "first use" situation where the stream does have a designated use (warm water fishes) which is to be protected by the limits established in the effluent limitations for the outfall 007 in question here. (F.F. 28, 29) It should be noted that the summer of 1991 was conceded to be one of the driest periods in the recent history of Western Pennsylvania and that there were areas of the length of Fishpot Run which were without surface running water, a zero or near zero situation resulting in pools in the streambed where the stream life was concentrated, and where the observations of the macroinvertebrates and small fish took place. Vesta argues that these observations do not make a "warm water fishery", but Vesta does not present us with any evidence which would or could contradict the expert testimony of Proch as to the definition or what would properly make up the characteristics of a "warm water fishery". As we have clearly set out earlier, the burden of proof, on all aspects of the appeal is on Vesta, and the mere assertion that

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[4] "F.F. ____" refers to a finding of fact hereinabove.

the qualifications for the definition "warm water fishery" are not met is not enough. To persevere on this issue, Vesta would have to give us credible evidence of a contrary position, which is lacking here.

Vesta further argues that DER erred in not concluding that the Q_{7-10} of Fishpot Run was zero, and then goes on to say that if this had been the conclusion of the Department, it would have been compelled by its custom or practice to then have a Department biologist determine, by a biological stream survey, that point in the stream where the stream was capable of maintaining its designated use. Vesta argues that these two failures were an abuse of discretion and that, as a result, the effluent limitations imposed at outfall 007 should be set aside. This assumes that the method of calculating the Q_{7-10} of Fishpot Run is mistaken and that this mistake or error would then trigger the customary or usual biological examination of the stream for its point of first use, or point where its designated use is first possible.

The testimony of Vesta's witnesses is to the effect that if the Department had used a different stream for comparison, then the Q_{7-10} of Fishpot Run would have more closely approached zero. However, the testimony of Vesta's witnesses does not indicate an error in the method of determining the Q_{7-10} of the stream but merely that there could have been a different way to arrive at the Q_{7-10} of Fishpot Run, and that if this had been the result, then the practice of the Department was to secure a biological assessment as previously noted. Vesta does not offer us its own biological assessment of the stream but only asks us to hold that the failure of DER to have such an assessment performed is such an abuse of discretion as to cause us to invalidate the effluent limitations imposed by DER. The Department has no obligation under either statute or regulation to perform the assessment. As

we have already held, the burden of proof as well as the burden of going forward is on the appellant where the appellant seeks to invalidate the effluent limitations set by the Department. Manor Mining, *supra*. Where Vesta has not given us any basis for such invalidation except to allege that the Department has a custom of seeking a biological assessment when the Q_{7-10} is zero, we hold that that burden has not been met.

Moreover, even if, as Vesta asserts, a different comparison stream had been used which resulted in a Q_{7-10} flow of zero being calculated for Fishpot Run, that would not have resulted in different effluent limits since the discharge rate of the outfalls overwhelms the Q_{7-10} flow. (F.F. 31) In a low flow or no-flow situation, the question becomes where the stream sustains its designated use as set forth in 25 Pa. Code §93.9v. The testimony presented by both parties indicates clearly that minnows and a macro-invertebrate colony exist in Fishpot Run even during dry seasons (F.F. 26) and that this life is sustained by the discharge of outfalls 002 and 007, which constitutes the majority or all of the flow in Fishpot Run at these outfalls. The indicia of a warm water fishery are present at outfall 007, and the effluent limits for 007 contained in the 1986 permit are protecting this designated use. (F.F. 35)

Vesta goes on to argue that the record in this case is not adequate to conclude that Fishpot Run is capable of supporting a Warm Water Fishes use at the point of discharge, i.e. at outfall 007. Vesta complains that the Department never sent a biologist to make any determination of use. Vesta admits that the lay witnesses observed certain life in the stream and streambed which was later characterized by the Department's witness Mr. Proch. Vesta further asserts, wrongly, that the burden of proof on this issue is on

the Department. We have held to the contrary that the burden is on Vesta, and lacking evidence from Vesta, we find the testimony of Mr. Proch to be credible as to the life in the stream. Furthermore, the stream itself is classified by 25 Pa. Code §93.4 as a warm water fishery, and the definition and interpretation of the Department, lacking evidence to the contrary, is entitled to great weight. Manor Mining, *supra*. Moreover, DER is bound by its own regulation. Mil-Toon Development Group v. DER, 1991 EHB 209, 212.

The last argument that Vesta makes deals with the failure of the Department to reconsider or recalculate the effluent limitations when it issued the 1988 revised permit. In making this argument, Vesta relies on Florence Mining Company v. DER, 1991 EHB 1301. In Florence the appellant had submitted to the Department information on the change in the discharge volume at the outfall in question. The Board held that the Department's failure to consider such information of change in volume and quality at a discharge while retaining the effluent limitations would at least permit Florence to challenge, by whatever means, the erroneousness of the unchanged effluent limitations.

In the instant case, Vesta has neither alleged nor indicated that there has been a change in volume or quality of the discharge. The only indication of change is that Vesta recognized the necessity of treating a discharge which had changed to acid mine drainage and sought effluent limitations after such treatment.

Vesta seeks to change or invalidate the effluent limitations at the 007 outfall without having given DER or the Board any justification for such change. Under Florence, *supra*, the burden is still on the appellant to demonstrate the water quantity and quality changes which necessitate the

recalculation of the effluent limitations. If, after having been made aware of the changes, the Department fails to consider them, then the appellant has the burden of demonstrating that that failure has led to erroneous conclusions by the Department. Here, we have no new information and no evidence of an erroneous conclusion on the part of the Department. The Department has no other choice in the present circumstances but to apply the more stringent water quality-based effluent limits prescribed by 25 Pa. Code §93.5, rather than the technology-based effluent limits urged by Vesta.

CONCLUSIONS OF LAW

1. Vesta has the burden of proof in this appeal challenging the effluent limitations inserted in its permit by DER. Manor Mining, *supra*.

2. In establishing effluent limitations, DER must apply the more stringent of technology-based or water quality-based effluent limitations. 25 Pa. Code §93.5.

3. The designated use of Fishpot Run is for "Warm Water Fishes". 25 Pa. Code §93.4 and §93.9.

4. The "point of first use" refers to that point where the stream can sustain its designated use.

5. DER is entitled to a presumption of correctness in interpreting its own regulations, unless its interpretation is clearly erroneous. Manor Mining, *supra*.

O R D E R

AND NOW, this 10th day of February, 1993, it is hereby ordered that the appeal of Vesta Mining Company is dismissed.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: February 10, 1993

cc: **DER, Bureau of Litigation**
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Western Region
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SECRETARY TO THE BOA

TUSSEY MOUNTAIN LOG HOMES, INC. and TUSSEY MOUNTAIN RECYCLING	:	
v.	:	**EHB Docket No. 92-453-MJ**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES BEAVER TOWNSHIP RECYCLING CO. and MR. ETIENNE OZORAK	:	**Issued:** February 10, 1993

OPINION AND ORDER
SUR MOTION TO DISMISS

By Joseph N. Mack, Member

Synopsis

A letter from the Department of Environmental Resources ("DER") which notifies the applicant of a third party's objections to its grant application and DER's position thereon, and which seeks to remind the applicant of its obligations under the law before DER may take further action on its application for grant funding for a recycling program, does not constitute an appealable action.

OPINION

This matter involves an appeal filed by Tussey Mountain Recycling and Tussey Mountain Log Homes, Inc. (herein collectively referred to as "Tussey Mountain") on October 8, 1992 challenging a September 9, 1992 letter from the Department of Environmental Resources ("DER") to Mr. Etienne Ozorak, County Recycling Coordinator for Crawford County. The letter addresses objections filed by Tussey Mountain to an application submitted by Beaver Township to DER

for a grant to implement and conduct a municipal waste recycling program under §902 of the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 101, 53 P.S. §4000.101 *et seq.*, at §4000.902, for the recycling of newspapers within a portion of Crawford County. The first several paragraphs of the letter contain Tussey Mountain's objections and DER's evaluation of the objections. The letter expresses DER's opinion that, at the present time, "economic's [sic] favor the Beaver Township proposal." The letter concludes with the following paragraph quoted here in full:

> Should the Township wish to pursue grant funding for this project a Public Notice must be run in a newspaper of general circulation before this office can consider it for funding. The notice must be advertised one (1) day a week for two (2) consecutive weeks and must remain open for comment from the public for thirty (30) days from the date of the first publication. Once that proof of publication has been received and any and all comments have been addressed, including the above, the Department will consider the application for funding. If there are any questions or need for assistance, please feel free to contact Mr. Guy McUmber or myself.

The letter is signed by Richard L. Neville, Recycling Specialist, Northwest Region.

On December 28, 1992, DER filed a motion to dismiss the appeal, contending that the September 9, 1992 letter does not constitute an adjudication or final action which is appealable. Tussey Mountain filed a reply in opposition to DER's motion on January 19, 1993.

Section 4(a) of the Environmental Hearing Board Act empowers the Board to hold hearings and issue adjudications on orders, permits, licenses or decisions of DER. We have consistently held that the Board's jurisdiction attaches only when DER has made an "adjudication" as defined by the Administrative Agency Law, 2 Pa. C.S.A. §101, or has taken an "action" as

defined by 25 Pa. Code §21.2(a). Both of these involve a final determination by DER which will have an effect on personal or property rights, immunities, duties, obligations or liabilities. Borough of Ford City v. DER, 1991 EHB 169.

The letter under consideration in this case has two components. The first component is a summary of Tussey Mountain's objections to Beaver Township's application and an explanation of DER's position in relation to those objections. The second part of the letter is a reminder from DER to Beaver Township that more information must be submitted before the application review can proceed.

The Commonwealth Court has addressed this second issue in Sandy Creek Forest, Inc. v. DER, 95 Pa. Cmwlth. 457, 505 A.2d 1091 (1986). At issue in that case was a DER letter which asked Sandy Creek to send additional information before a determination could be made. The Court held that "a letter from an agency stating what the law requires is not a final action or adjudication and is not appealable", citing Kerr v. Commonwealth, Department of State, 35 Pa. Cmwlth. 330, 385 A.2d 1038 (1978). The letter in this appeal asks Beaver Township to submit proof of publication before further action can be taken. This case falls squarely into the Commonwealth Court's description in Sandy Creek; clearly there is no action or adjudication in regard thereto.

Tussey Mountain counters that, notwithstanding the fact that DER has not taken final action on the application, the tone of the September 9, 1992 letter indicates that DER has foreclosed further consideration of Tussey Mountain's objections and has, thereby, made a final determination. However, a letter which merely sets forth DER's position on certain matters, but which neither changes the status quo nor imposes an affirmative obligation does not constitute an appealable action. See Environmental Neighbors United Front v.

DER, EHB Docket No. 91-372-MJ (Opinion and Order Sur Motion to Dismiss issued September 24, 1992); Westtown Sewer Co. v. DER, EHB Docket No. 91-269-E (Consolidated) (Opinion and Order Sur Appealability issued February 4, 1992); Sandy Creek Forest, *supra*. This is particularly true in the present situation where the letter in question requires a response by the recipient before DER can take any action, and, further, where the appellant, Tussey Mountain, is not the addressee of the letter but is merely being advised of DER's comments to Beaver Township. See also Westtown Sewer Company v. DER, EHB Docket No. 92-100-E (Opinion and Order Sur Motion to Dismiss issued July 14, 1992). If and when DER does take final action on Beaver Township's application for grant funding, Tussey Mountain will have an opportunity to challenge that action.

Because we find that DER's September 9, 1992 letter does not constitute an appealable action, we have no jurisdiction to hear Tussey Mountain's appeal and, therefore, it must be dismissed.

O R D E R

AND NOW, this 10th day of February, 1993, it is hereby ordered that the motion of the Department of Environmental Resources to dismiss the appeal of Tussey Mountain is granted and the appeal at EHB Docket No. 92-453-MJ is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: February 10, 1993

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Robert Thompson, Chairman
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For Mr. Etienne Ozorak:
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M. DIANE SMITH
SECRETARY TO THE BC

UPPER MONTGOMERY JOINT AUTHORITY	:	
	:	
v.	:	EHB Docket No. 92-172-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: February 11, 1993

OPINION AND ORDER SUR
DER'S MOTION TO DISMISS
FOR LACK OF JURISDICTION

By: Richard S. Ehmann, Member

Synopsis

A DER decision to deny grants funding announced by letter to the grant applicant is challengable in a timely appeal to this Board. DER's Motion to dismiss this appeal as untimely filed is granted, where the appellant appeals from a March 1992 DER letter reciting that its application to amend its federal grant is denied as ineligible for funding and DER had previously written the applicant/appellant in November of 1991 reciting the same decision but appellant had failed to appeal from that letter.

Where appellant fails to show misleading conduct by DER but rather shows its own misinterpretation of DER's conduct, it has failed to prove an essential element necessary to assert DER is equitably estopped from raising this argument. Where DER uses form letters to respond to the applicant/appellant's Change Orders under existing Construction Grants and routinely reconsiders denials thereof, DER's failure to use the identical procedure in denying an application to amend this grant does not give rise to an equitable estoppel argument. The absence of the word "final" in a DER

letter stating its decision that a proposed amendment of Appellant's grant is ineligible for grants funding does not make the letter any less a final decision by DER. DER need not insert a notice of a right to appeal to a letter announcing a DER decision in order to make the decision announced therein an appealable action. The letter announcing DER's decision denying eligibility for grants funding of appellant's proposed grant amendment did not become any the less an appealable DER action or adjudication because it says it "advises" appellant that the proposal was ineligible, since this letter is not mere non-binding DER advice but advises of DER's final action on this request.

OPINION

Background

On April 22, 1992, Upper Montgomery Joint Authority ("UMJA") appealed to this Board from DER's denial of UMJA's application to amend its federal Clean Water Act grant for construction of facilities to expand and upgrade UMJA's sewage treatment plant (including additional sewers and expanded pump stations). The DER letter challenged by UMJA's appeal is dated March 23, 1992 ("March letter") and provides in part: "In view of the above, the cost for sludge development is considered grant ineligible."

After the filing of the parties' Pre-Hearing Memoranda and on August 20, 1992, DER filed the instant Motion to Dismiss. DER's Motion contends UMJA's appeal is untimely. It suggests that by letter dated November 12, 1991 ("November letter") DER notified UMJA that: " .... we cannot make the costs for developing the Sludge Management Plan grant eligible", and UMJA took no timely appeal therefrom. It next contends that UMJA, through its consultant, requested reconsideration of DER's denial of funding, and that DER's March

letter merely reiterates DER's November 12, 1991 rejection of UMJA's request to amend its grant to cover this cost. Accordingly, the motion concludes that an appeal filed in April of 1992 is untimely under 25 Pa. Code §21.52, when DER's letter was sent in November of 1991. It also asserts that since the March letter does not alter UMJA's rights, duties or obligations, it is not an action or adjudication reviewable by this Board.

Understandably, UMJA has responded to the Motion, opposing it. Appellant's Objections And Answers To DER's Motion To Dismiss For Lack Of Jurisdiction as filed by UMJA and its accompanying memorandum raise a battery of defenses to DER's Motion. First, UMJA asserts that DER's November letter was not a final action and thus was not appealable by UMJA to this Board. It also asserts there was subsequent correspondence between the parties and DER gives a new reason for denial in its March letter and, thus, neither of the parties felt the November letter was DER's final decision. UMJA further asserts DER failed to include in the November letter its usual notice that its decision on eligibility was final (as it had as to "change orders" under this same grant to UMJA), to include a notice of UMJA's right to appeal the decision, or even to say its November decision was final. UMJA also says that based upon DER's past dealings with it on these matters, DER routinely entertained informal requests to reconsider its initial response when that response was negative, without the need for an appeal each time DER said no, and that UMJA relied on DER's past course of conduct to conclude the November letter was not DER's final decision on the matter at issue. Finally, it asserts the March letter was a final appealable DER action.

After a conference call with the attorneys for the parties, it was clear that UMJA was trying to assert some type of estoppel argument as to

DER's Motion and that, as it had failed to attach so much as an affidavit to its response to the Motion, a hearing on the merits of at least that issue would be necessary. Accordingly, a hearing limited to DER's Motion was held on September 25, 1992.

Thereafter, on October 29, 1992 and November 9, 1992, UMJA and DER filed their Briefs on the issues raised by this Motion.

Discussion

As UMJA does not dispute that an appeal filed in April of 1992 would be untimely under 25 Pa. Code §21.51 in regard to a DER action taken in November of 1991, we will consider the issues raised in UMJA's brief as to why we should ignore the November letter and focus solely on the March letter or why DER is estopped from asserting the November letter makes UMJA's April 1992 appeal untimely.

The hearing record and exhibits establish that in October of 1991, UMJA's consulting engineers submitted a letter to DER's Bureau of Water Quality Management on behalf of UMJA requesting that UMJA's grant be amended to add funds to the amount previously authorized by the United State Environmental Protection Agency ("EPA") in order to cover a percentage of the costs of three items for which a grant had not previously been sought.[1] (UMJA Exh. S-1)[2] The grant to UMJA was initially in the amount of

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1 For a discussion of planning and administration of grants, see Franklin Township Municipal Sanitary Authority, et al. v. DER, 1990 EHB 916.

2 Citations to T-___ are citations to the transcript of the hearing on this Motion. Exhibits are identified as UMJA Exh.___.

$6,592,950 of a project costing $8,790,000 (UMJA Exh. A).[3] It was first offered by EPA to UMJA in 1984. (UMJA Exh. S-1) Included within UMJA's request for an amendment were monies to cover asbestos removal, funds to cover replacement of a sewer in East Greenville Borough to alleviate an alleged flow surcharge condition, and funding of a sewage sludge management plan's engineering and the equipment to be used for implementing such a plan. After this request to amend the grant was reviewed by DER on November 12, 1991, it wrote back to David Busch ("Busch"), a financial specialist working for BCM Engineers, Inc. ("BCM") who are UMJA's consultants. Insofar as the letter concerned the sludge management study, it provided:

> We have completed the review of the subject amendments dated October 7, 1991 and advised the following:
>
> 1. The professional engineering services in conjunction with development of Sludge Management Plan relates to the facilities planning function. Please be advised that since the Municipal Wastewater Construction Grant Amendment of 1981 (Public Law 97-117) eliminated funding of the project planning, we cannot make the costs for developing the Sludge Management Plan grant eligible.
>
> ...
>
> Further processing of the amendment request is pending the receipt of the compliance to the above items Nos. 2 and 3. In the meantime, should you come up with any questions in preparing the reply, please call me at 215-832-6097.
>
> (UMJA Exh. S-2)

A carbon copy of this letter was sent to Robert Shaner, Chairman of UMJA. Upon receipt of this letter, Busch discussed appealing it with BCM's Dennis

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[3] The attachments to the October 7, 1991 letter from UMJA's consultant show the project cost to have risen to $16,685,850, with the portion thereof for grant participation having grown to $16,044,773. (UMJA Exh. S-1)

Cappella, who was BCM's project engineer for the UMJA project financed by the grant. (T-49-50) While Busch testified that he felt from the letter that DER was looking for a way to make the study grant eligible (T-44), he never offered any explanation as to why he drew that conclusion and admitted discussing with Cappella whether to file an appeal from the letter to this Board. (T-50-51).

Dennis Cappella also discussed filing an appeal to this Board with UMJA's Board in an early December meeting. He testified that since BCM felt it could still try to submit further justifications on eligibility to DER, the UMJA Board agreed to pursue that approach now and, if it was unsuccessful, to file an appeal later. (T-62) On December 12, 1991, Cappella also talked with DER's Robert Furlan about UMJA's pending application to amend the grant, telling Furlan that more information to justify eligibility would be submitted on UMJA's behalf. (T-57) Cappella was of the impression it would be received by DER. (T-58) Cappella testified that Furlan did not repeat that it was DER's final position that grant was ineligible (T-58), but he admitted that his conversation with Furlan centered around the entire amendment and how it was being processed, not the portion of the proposed grant amendment involving this sludge management study. (T-57)

On February 4, 1992, BCM submitted UMJA's additional information supporting justification of eligibility for an amendment of the grant to fund this study to DER. (UMJA Exh. S-3) By letter dated March 23, 1992, DER responded with a letter which in its entirety stated:

> This is in response to your project consultant's February 4, 1992 request relative to sludge management plan grant eligibility.

> Please be advised that the alternative approved under the 201 facility plan accepted the continued disposal of dewatered sludge onto farmland.
>
> The grant condition No. 20 does not require development of the sludge management plan. The development of the sludge management plan was necessary for the authority to secure the agricultural utilization of sludge permit.
>
> In view of the above, the cost for sludge development is considered grant ineligible.
>
> (UMJA Exh. S-4)

Based upon this letter UMJA appealed and, as to the instant proceeding, asserts the March letter is appealable but the November letter was not.

UMJA's Brief argues the November letter was not delivered to UMJA and was not final, so it could not be appealable. It goes on to suggest that the November letter is merely advice, not a DER action or decision, because it says UMJA is advised the grant is ineligible rather than stating a DER "final" decision. UMJA also says the circumstances around the November letter are critical in deciding whether that letter is appealable. UMJA asserts the lack of a paragraph announcing UMJA's right to appeal, the letter's ambiguous nature, and the posture of the parties in interpreting the letter all suggest that letter is unappealable. UMJA also argues that the November letter did not alter its rights because it did not order UMJA to do or refrain from doing anything. Further, it argues a lack of notice to UMJA as a party because the letter was sent to BCM, not UMJA, and therefore it could not constitute a decision on UMJA's rights without there being a denial of UMJA's right of due process. Finally, UMJA asserts DER failed to follow its prior course of dealings with UMJA over denials when it sent the November letter. UMJA then asserts the March letter is appealable because: (1) it does not advise of

ineligibility but states it is ineligible; (2) the March letter went to UMJA not BCM; (3) the March letter does not reference the November letter or reiterate what is said there; and (4) the March letter comports with prior DER procedure in denials.

We began examining the issues here by noting that they have appeared before us in other appeals involving grants. Most recently in Conshohocken Borough Authority v. DER (Opinion issued May 8, 1992), Board Member Robert D. Myers was confronted with an appeal from a second letter on grant ineligibility and wrote:

> This field was ploughed, disced and thoroughly harrowed by the Board in Borough of Lewistown v. DER, 1985 EHB 903, and Lansdale Borough v. DER, 1986 EHB 654. We held that DER's rejection of Federal grant participation is a final, appealable action even if the letter communicating the rejection does not specifically say so. We held further that a subsequent refusal by DER to reconsider the rejection is not an appealable action. The soundness of these decisions has not paled with time and govern our disposition of this appeal.

The observation is equally applicable here.

In reviewing DER's November letter we begin be defining what is appealable, as we have before. As stated in Lehigh Township Wayne County v. DER, Docket No., 91-090-W (Opinion issued May 22, 1992):

> Actions of the Department are appealable only if they are "adjudications" within the meaning of the Administrative Agency Law, 2 Pa.C.S.A. §101, or "actions" as defined at 25 Pa. Code §21.2(a)(1). To fall within either of these categories, the Department's letter of February 8, 1991, must have some impact on the Township's rights and duties. See Perry Brothers Coal Company v. DER,

1982 EHB 501, M. C. Arnoni Company v. DER, 1989 EHB 27, and James Buffy and Harry K. Landis, Jr., v. DER, 1990 EHB 1665, at 1692.[4] [Footnote supplied.]

While under West Chillisquaque Township v. DER, 1989 EHB 392, we would have to deny the DER's Motion if it is a close question of whether the first letter was appealable or not, there is no close question here. DER's November letter says DER "cannot make the costs for developing the Sludge Management Plan grant eligible." Clearly, this means they are ineligible, and such a DER decision impacts unfavorably on UMJA's application to amend its grant and its ability to get grant monies to fund any portion of cost of preparation of the plan. In this regard, the testimony, that Busch and Cappella discussed taking an appeal and that Cappella discussed it with UMJA's Board before deciding to try to change DER's mind first and appealing only if that was unsuccessful, clearly materially weakened UMJA's claim that it could not tell the November letter was final and appealable.

UMJA's Brief suggests that DER's November letter is merely advice and, as advice, does not render a final decision. It points to the absence of "final" as a word in the letter -- as in some statement that this is DER's final decision that the costs are ineligible. Such an argument elevates form over substance. DER does "advise" in its letter, but it is not rendering advice. Instead, it advises of a decision which concludes the costs are ineligible, just as it might, in a permit denial situation, advise an applicant that its application is denied. The lack of the word "final" in the letter falls into the same category of error. As stated in Municipal Authority of Buffalo Township v. DER, 1990 EHB 803 and elsewhere, substance, not form, controls. While DER may use forms to receive information from a

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4 This is another of the appeals involving grants eligibility issues.

grantee or permittee and may transmit decisions using one form or another, DER's decision or action is appealable based on what is said and what its impact is, not on whether a form letter is used or not or whether one word or another appears or fails to appear in DER's letter.

UMJA also asserts that the lack of a paragraph notifying UMJA of its right to appeal to this Board shows the November letter was not intended by DER to be appealable. If this were true for that letter, then it would be true for the March letter, which UMJA says is clearly appealable, because the March letter contains no notice of appeal rights. Moreover, the absence of a paragraph giving notice of a right to appeal does not impact on the appealability of the decision. Lewistown Borough v. DER, *supra*; Conshohocken Borough Authority v. DER, *supra*; Commonwealth of Pennsylvania v. Derry Township, et al., 10 Pa. Cmwlth. 619, 314 A.2d 868 (1973).[5]

UMJA's next argument is that because DER sent this letter to Busch at BCM rather than to UMJA's Chairman (Robert Shaner), DER did not intend its letter to be its final decision on this matter. It points to past DER correspondence on UMJA requests for Change Orders under this grant to show that all final decisions on Change Orders were sent to Shaner, as was the March letter. This argument ignores several critical facts. First, the November letter to BCM's Busch shows a carbon copy was also sent to Mr. Shaner. Secondly, UMJA stipulated on the record that BCM had authority from

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[5] The number of appeals to us on grants-related matters wherein the lack of a notice of a right to appeal is raised by the grantee suggests to us and should suggest to DER that DER would better serve the public (not to mention better using the time expended by its lawyers in appeals of this type) by placing such a notice on its letters making final decisions concerning grants, amendments and change orders. Clearly, it would not require the expending of much effort to place the standard notice used elsewhere by DER in such letters.

UMJA to deal with DER with regard to both applications for amendments to grants and Change Orders but not to decide whether to file appeals or not. (T-81) Thirdly, while DER form letters setting forth its final decisions on Change Orders routinely were sent to Mr. Shaner, there is no evidence offered to show there were ever any other attempts to amend the grant and substantial evidence showing the differences between Change Orders and grant amendment applications. In short, it is clear Change Orders and grant amendment applications are two different animals. Finally, DER's explanation as to why it had written to Busch--because the main emphasis of DER's November letter was engineering issues on the other two aspects of the application to amend the grant rather than this eligibility determination (T-128) -- was not challenged either by contrary testimony or effectively on cross-examination. In short, UMJA's evidence did not show any reason the letter should not have gone to Busch with a copy to Shaner or harm to UMJA by that happening. Again, this is in part true because of the evidence of timely discussions between BCM and UMJA on whether or not to appeal the November letter.

UMJA also alleges DER's past course of conduct in dealing with UMJA created in UMJA the belief that it could seek to reverse this decision by DER through the submission of a better justification for the request to amend, without the need to appeal every time DER said no, and that UMJA relied thereon in not filing such an appeal from the November letter. While this argument implicitly recognizes the appealability of the November letter, contrary to UMJA's other arguments, in essence it asserts that appealability could be ignored based on circumstances and DER's prior conduct, so UMJA elected to ignore it and should not now be penalized for doing so.

UMJA Exhibits B through R deal with Change Orders. According to UMJA's Exhibit A, this grant was for the design and construction of an expansion and upgrade of this sewerage system. Testimony from DER's Furlan establishes that Change Orders cover circumstances where there is a need to modify an element of the project during construction from what was approved in the terms of the original grant at to the contracts' plans and specifications. (T-85) Where such a circumstance exists, normal procedure is for the grantee's consulting engineers, like BCM, to negotiate with the grantee's contractor on the circumstance's changes and costs, secure approval from the grantee (here UMJA), and submit it to DER as a Change Order. DER then follows a prescribed review procedure to review the Change Order and, if it is within the scope of the project as previously approved, it is found eligible and the grantee is notified by form letter. (T-60, 85-86) Grantees may also be notified that the circumstance in the Change Order is ineligible and thus rejected or that it is approved in part and denied in part. (T-85) DER will routinely reconsider its position on a Change Order if new information is submitted. (T-85) Importantly, when a Change Order is submitted and approved, the amount of the grant is not increased, but any costs associated therewith are paid from reserve and contingency funds which are part of the initial grant. (T-89)

With an application to amend a grant, what is sought is an increase in the amount of the total grant to cover costs incurred by an entity like UMJA for other than a construction change. For this, DER has no standard review procedure in part because, depending on circumstances, such requests may be in the form of a simple letter, or as here, an amendment related to a bid, in which case a "Part B" application (with line items to fill in) is

submitted, as was done here.[6] Moreover, with amendments to grants, the final decision is not DER's to make but EPA has the final say. (T-60, 87)[7]

From this discussion, it is clear that except in one instance, Change Orders differ from Part B Applications to amend a Grant in many ways, ranging from what is sought through how they are submitted and reviewed, to where decisions are reached and how they are transmitted to grantees like UMJA. It is also clear that while the Change Order form letters might serve as a basis for making an argument on UMJA's behalf in an appeal from a Change Order's denial, we have a grant amendment scenario before us instantly, and BCM has no knowledge of the form for denial of such amendment requests on which to rely (no evidence was offered as to UMJA's independent knowledge of the form for such denials, though UMJA's counsel agreed it had the burden with regard thereto). (T-8) Thus, with two dissimilar types of requests from grantees to DER, we have not been offered and cannot find a reasonable basis on which to sustain UMJA's reliance as to the grant amendment in DER's conduct as to Change Orders.[8] This is a critical conclusion because a party asserting any

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6 In one circumstance a Change Order could form a basis for a grant amendment and, thus, Change Orders and amendments are related at that point. This deals with the type of scenario where, for example, sewer construction runs into rock formations where none was anticipated by DER, EPA and the grantee (the unforeseen circumstances). (T-89-90) This is not suggested by either party to be the situation here.

7 BCM's staff testified that with Change Orders, a form letter is used by DER concerning denials, but they did not say it was used on denials of proposed amendments (T-60) BCM's staff has no recollection of the form for such denials. (T-61) Further, they admit that the form letter for Change Order denials varies from time to time. (T-60)

8 DER's Brief suggests this is the first amendment sought with regard to this grant, but that fact is *de hors* the record. The record is also silent as to there being other amendments from which a course of conduct might have developed, however.

equitable estoppel claim must show misleading words, conduct or silence by the party against whom the estoppel is asserted. Fair Acres Geriatric Center v. Commonwealth, DPW, 107 Pa. Cmwlth. 293, 528 A.2d 1008 (1987), alloc. denied ___Pa. ___, 541 A.2d 1139 (1988). Thus, we conclude that to the extent UMJA asserts equitable estoppel, it has failed to prove the first of the three-pronged test for establishing same.[9] It has only shown it misinterpreted DER's letter.

Lastly, UMJA asserts that its February 4, 1992 letter to DER and the March letter address new reasons for DER approval of the proposed amendment by UMJA and their rejection by DER. The testimony from DER's Chandu Patel sustains UMJA's assertion. Patel testified that the reasons for denial in the November letter and the March letter are different because the justifications submitted in October of 1991 and February of 1992 are different. (T-128) Patel concluded the November letter was final as to the positions taken by BCM for UMJA in BCM's October letter and the March letter was final as to the added information BCM submitted on February 4, 1992. (T-131) Thus, UMJA might assert a timely appeal as to the issues raised in the March letter.

Even if this argument is asserted by UMJA, it constitutes no defense to DER's Motion. Pursuant to 25 Pa. Code §21.51, UMJA had to file an appeal within 30 days of receipt of the November letter for our jurisdiction to attach thereto. Joseph Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364

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9 It is also far from clear that UMJA has presented unambiguous proof of its reasonable reliance on the alleged misrepresentations of DER in light of the testimony that it discussed appeals and decided to try to get DER to change its mind (reserved taking an appeal until after that effort) especially in light of the common practice of taking of "protective appeals" to this Board and the ease with which UMJA or BCM could have inquired of DER's intent. We need not reach that issue, however.

A.2d 761 (1976). UMJA discussed an appeal with BCM's Cappella in early December so, though the record does not state the exact date that BCM and UMJA received DER's letter, it is clear this appeal filed in April of 1992 is long after this 30 days expired. UMJA does not dispute this conclusion. When the decision in the November letter went unchallenged by timely appeal, it became final and binding on DER and UMJA. While new grounds may have been raised in the BCM letter of February 4, 1992, even if they have merit, they only form one of several distinct grounds that UMJA contends that DER should have found adequate to allow this amendment. However, by February DER's rejection of the amendment has become final as to another ground. George and Barbara Capwell v. DER, 1987 EHB 174. Moreover, as we have held elsewhere, where one of several grounds for rejection of an application for permit is found meritorious, our inquiry on the other grounds cease because that becomes meaningless exercise. Keystone Chemical Company v. DER, Docket No. 91-186-E (Opinion issued December 4, 1992); Empire Coal Mining and Development, Inc. v. DER, Docket No. 91-115-MR (Opinion issued February 11, 1992). That same rationale applies here as to the basis for the decision reflected in the March letter. Accordingly, we must enter the following Order.

O R D E R

AND NOW, this 11th day of February, 1993, it is ordered that DER's Motion To Dismiss is granted and this appeal is dismissed.

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DATED: February 11, 1993

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SECRETARY TO THE BOARD

DAVIS COAL	:	
	:	
v.	:	**EHB Docket No. 90-526-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 16, 1993

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

By Joseph N. Mack, Member

Synopsis

The Surface Mining Act and the regulations promulgated thereunder require that a road which is constructed for the purpose of accessing a mine site must be bonded and covered by the operator's surface mining permit. The evidence in this matter demonstrates that Davis Coal constructed and used an access road to its mine site which was located off the permit site and which was not bonded. Therefore, we sustain the Department of Environmental Resources' issuance of a compliance order to Davis Coal for conducting surface mining activity not covered by its permit.

Background

This appeal was filed by Davis Coal on November 30, 1990 from a compliance order issued by the Department of Environmental Resources ("the Department") on November 8, 1990. The order charges Davis Coal with constructing and using an access road to its mine site which was not bonded or

covered by its surface mining permit while the only bonded access road to the site was blocked and impassable.

A hearing was held on June 12, 1991. June Davis, the owner and operator of Davis Coal, a sole proprietorship, appeared on behalf of Davis Coal. A Joint Pre-Hearing Stipulation, into which the parties had entered on June 6, 1991, was admitted at the hearing as Board Exhibit No. 1. The record consists of a transcript of 59 pages, two Board exhibits, five exhibits introduced by the Department, and one exhibit introduced by Davis Coal. After a full and complete review of the record, we make the following findings of fact:

FINDINGS OF FACT

1. The appellant is Davis Coal, a sole proprietorship owned by June Davis with a business address of R. D. 1, Box 126, Ford City, Pennsylvania 16226. (J.S. 2)[1]

2. The Department is the agency of the Commonwealth empowered to administer and enforce the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §§1396.1 *et seq.* ("Surface Mining Act"); the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§691.1 *et seq.* ("Clean Streams Law"); Section 1917-A of the Administrative Code, Act of June 7, 1929, P.L. 177, as amended, 71 P.S. §510-17 ("Administrative Code"), and the regulations promulgated by the Environmental Quality Board pursuant to these Acts ("the regulations").

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[1] "J.S. ___" refers to a paragraph in section E of the Joint Pre-Hearing Stipulation. "T. ___" refers to a page in the transcript of the hearing. "Comm. Ex. ___" refers to an exhibit introduced by the Department at the hearing. "App. Ex. ___" refers to an exhibit introduced by the appellant Davis Coal at the hearing.

3. Surface Mining Permit No. 65860110 ("permit") was issued to Davis Coal on October 28, 1987, covering 47 acres in Bell Township, Westmoreland County, known as the Stover Mine (sometimes hereinafter referred to as "the mine site"). (J.S. 4)

4. The Stover Mine, as permitted, contains only one approved bonded access road. (T. 17-18) The bonded access road is located in the northwest corner of the permit area. (Comm. Ex. D) It is shown as a thin, black line on Comm. Ex. D.

5. Russell C. Dill is a Surface Mining Conservation Inspector with the Department. (T. 11)

6. On November 8, 1990, Mr. Dill conducted an inspection of the Stover Mine site. (J.S. 5; T. 16)

7. On that date, the bonded access road was blocked off with an earthen barrier, and the highwall had been cut across the road so that it was impassable. (T. 16, 50; Comm. Ex. H-1 and H-2)

8. Because of the highwall and earthen barrier, the bonded road could not have been used to access the mine site. (T. 35)

9. It is a common practice for surface mines to construct an earthen barrier to prevent people from driving on a road where there is a hazard, such as a highwall, at the end. (T. 34)

10. Because the access road was blocked, Inspector Dill drove down a road ("pre-existing road") located adjacent to the permit site, parallel to its western boundary. (T. 18) The pre-existing road is shown as a green line on Comm. Ex. D.

11. While he was driving on the pre-existing road toward the permit area, Inspector Dill observed that someone using a highlift had cleared brush

from an area to construct a road ("connecting road") which connected the pre-existing road with the bonded access road on the Stover Mine site. (J.S. 6; T.19) The connecting road is marked in red on Comm. Ex. D.

12. The size of the connecting road was approximately 15 feet wide by 30 feet long. (T. 22)

13. The connecting road was located off the permitted area and was not bonded or authorized under SMP No. 65860110. (J.S. 7; T. 19, 21)

14. The connecting road had signs of usage, including several sets of vehicle tracks and water in a mud puddle. (T. 27)

15. Inspector Dill met June Davis' husband, Bob Davis, who arrived at the mine site shortly after Inspector Dill. According to the testimony of Inspector Dill, Mr. Davis is an employee of Davis Coal "from time to time". (T. 20)

16. Mr. Davis stated to Inspector Dill that he had used a highlift from the Stover Mine Site to clear the area where the connecting road was built. He further stated that the connecting road was being used to access the mine site, (T. 20) and that the work going on at the mine site that day was the repair of a D9 bulldozer. (T. 20) Inspector Dill advised Mr. Davis that he was not to use the connecting road as an access road, and Mr. Davis parked his vehicle on the pre-existing road and walked across the connecting road to the mine site. (T. 38)

17. Inspector Dill made a note of the conversation with Mr. Davis in his inspection report prepared on November 8, 1990. (T. 21; Comm. Ex. B)

18. Comm. Ex. F-7 and F-9 are pictures of the connecting road taken by Inspector Dill from the bonded surface mine area looking in the direction of Inspector Dill's vehicle and Mr. Davis' truck parked on the pre-existing

road. (T. 28, 31, 26-27) The photographs show signs of usage of the connecting road.

19. Inspector Dill concluded that the connecting road was being used as the primary access to the mine site since the only bonded access road was impassable due to the earthen barrier and the highwall. (T. 33)

20. During Inspector Dill's visit to the mine site on November 8, 1990, the only activity which was occurring on the site was the repair of a D9 bulldozer which had a broken track. (T. 29, 38)

21. Other pieces of equipment which were on the mine site were a 180G CAT track hoe, a Grade All, an AC-7G highlift, and an inoperable Autocar tri-axle dump truck. (T. 30)

22. There was also a coal stockpile located on the mine site. (T. 30)

23. On November 8, 1990, Compliance Order No. 90G362 ("compliance order") was issued to Davis Coal for conducting surface mining activity without a permit. Specifically, the compliance order cited Davis Coal for using an access road which was not bonded and which was located off the permit area. (T. 37; Comm. Ex. A)

24. The Department requires that an access road to a mine site be bonded because it may involve considerable earth-moving activity which will require reclamation. (T. 37)

25. According to June Davis, who testified on behalf of Davis Coal, the bonded access road was reopened sometime after Inspector Dill's November 8, 1990 inspection. (T. 52)

26. A follow-up inspection was conducted by Inspector Dill on December 11, 1990, at which time he observed that the area subject to the compliance order, the connecting road, had been seeded and mulched. (J.S. 8)

27. The coal which was stockpiled on the mine site on the date of Inspector Dill's visit was not shipped until approximately seven months later, during the week of the hearing. (T. 51-52)

DISCUSSION

In this appeal of a compliance order, the Department has the burden of proving that the issuance of the compliance order was not an arbitrary exercise of its authority or an abuse of discretion. 25 Pa. Code §21.101(b)(3); C & L Enterprises v. DER, 1991 EHB 514, 532. The scope of the Board's review is to determine whether the Department acted arbitrarily or abused its discretion in issuing the order. Warren Sand and Gravel Company, Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975).

Section 4(a) of the Surface Mining Act prohibits surface mining without a permit having first been obtained from the Department. 52 P.S. §1396.4(a). Likewise, the regulations prohibit any person from operating a mine unless he has first obtained a permit from the Department. 25 Pa. Code §86.11.

The Surface Mining Act defines "surface mining" in relevant part as the extraction of minerals from the earth...and retrieving them from the surface...and all surface activity connected with surface or underground mining, including but not limited to...site preparation...entry...and construction and activities related thereto... 52 P.S. §1396.3 (Emphasis added).

The regulations define "surface mining activities" in relevant part as follows:

> Activities whereby coal is extracted from the earth...and surface activity connected with surface or underground mining, including...site preparation, entry...and construction and activities related thereto...The term includes activities in which the land surface has been or is disturbed as a result of, or incidental to, surface mining operations of the operator, including, but not limited to, private ways and roads appurtenant to a surface mining operation...
>
> 25 Pa. Code §§86.1, 87.1 (Emphasis added).

Prior to commencing mining, a permittee must file with the Department a bond for the land affected by the operation. 52 P.S. §1396.4(d); 25 Pa. Code §86.143. An "affected area" includes "land in which the natural land surface has been disturbed as a result of or incidental to the surface activities of the operator including private ways and roads appurtenant to the area..." 25 Pa. Code §87.1.

Clearly, a road constructed for access to a mine site constitutes a surface mining activity within the definition of the Surface Mining Act and the regulations and must be bonded and authorized by permit.

Davis Coal does not dispute the existence of the "connecting road" which connected the mine site with the pre-existing road nor the fact that the connecting road was located on an area which was not bonded or covered by the surface mining permit. Davis Coal contends, however, that the Department did not prove (1) that Davis Coal constructed the connecting road, or (2) that

Davis Coal used the road in connection with its mining operation. Davis Coal also argues that, at the time the compliance order was issued, it was not conducting surface mining at the mine site.

Surface Mining Activity

Davis Coal's third argument, that it was not conducting surface mining at the time the compliance order was issued, may be immediately rejected. Davis Coal bases its argument on the contention that its equipment was not functioning at the time of Inspector Dill's visit to the site and that the only activity going on at the mine site at that time was the repair of equipment.

As we have noted above, the definition of "surface mining" is not limited solely to the act of extracting minerals from the earth but encompasses "all surface mining activity connected with surface mining". 52 P.S. §1396.3; 25 Pa. Code §§86.1, 87.1. As the Department correctly points out in its brief, "surface mining activity" does not occur only on those days when coal removal is taking place but includes all activities conducted at and in connection with a surface mining operation. This includes constructing haul roads and track repair on the mining equipment. Although Davis Coal's equipment may have been down for repair at the time of Inspector Dill's visit to the site and at the time the compliance order was issued, it was conducting surface mining activity and, thus, remained subject to the requirements of the Surface Mining Act and the regulations thereunder.

Connecting Road

The Department has charged Davis Coal with constructing and using the connecting road as an access road to the Stover Mine Site in violation of the permit and bonding requirements of the Surface Mining Act and the regulations.

The term "access road" is defined in the regulations as one which is "located and constructed for minimal and infrequent use to transport equipment and personnel to current and future activity sites." 25 Pa. Code §87.1. Although Davis Coal does not dispute the existence of the connecting road off the permit site, it argues that the Department did not prove that Davis Coal constructed the road or used it in connection with its mining operation.

The Department relies primarily on Inspector Dill's testimony that, during his visit to the mine site on November 8, 1990, Bob Davis stated to Inspector Dill that he had cleared the area of the connecting road with a highlift and that it was being used to access the mine site. (F.F. 11) However, because Mr. Davis did not testify at the hearing, his statements to Inspector Dill are hearsay, unless admissible as an exception to the rule against hearsay.

The Department contends that Mr. Davis' statements constitute an admission against Davis Coal. However, Mr. Davis' statements act as an admission against Davis Coal only if Mr. Davis is an agent of Davis Coal with authority to make the statements. DeFrancesco v. Western Pennsylvania Water Co., 329 Pa. Super. 508, 523-524, 478 A.2d 1295, 1303 (1984).

Inspector Dill testified that Mr. Davis is the husband of June Davis, who is the sole proprietor of Davis Coal, and that he is "employed [by Davis Coal] from time to time." (F.F. 15) The evidence indicates that, on the date of Inspector Dill's visit, Mr. Davis was actively participating in the operation at the Stover Mine Site. However, based on this alone, we cannot infer that Mr. Davis is an agent of Davis Coal with the requisite authority to make these statements. He was not employed by Davis Coal on a regular basis, and, although his wife is the proprietor of the operation, there is no

indication in the record that he shares any control or interest in it. Therefore, we are unable to accept Mr. Davis' statements to Inspector Dill as admissions against Davis Coal.

However, even without the statements of Mr. Davis, we find that the evidence indicates that the connecting road was constructed solely for the purpose of accessing the Stover Mine Site.

According to Inspector Dill's observation, brush had been cleared from the area by someone using a highlift. (F.F. 11) The cleared area connected the pre-existing road to the permit site. (F.F. 11) The only other access road to the mine site had been cut by a highwall, and therefore, the only means of accessing the site at that time was by using the connecting road. (F.F. 7, 8, 19) Inspector Dill observed that the connecting road showed visible signs of usage, including several sets of vehicle tracks. (F.F. 14) This was further documented by photographs of the connecting road taken by Inspector Dill. (F.F. 18) In addition, although the record is not clear as to the exact location of where Inspector Dill met Mr. Davis at the site on November 8, 1990, it is clear that it was in the general vicinity of the connecting road, as evidenced by the Department's photographs and Inspector Dill's testimony, and that Mr. Davis relied on the connecting road to enter the mine site. (F.F. 16, 18) Finally, Davis Coal's notice of appeal admits that "[a] worker drove his pick-up truck down an existing road and onto the permitted area." Since the connecting road was the only means of ingress to the mine site from the pre-existing road at that time, it is clear that Davis Coal was, indeed, using the connecting road as an access road to the site.

We hold that the evidence supports the Department's finding that Davis Coal constructed and was using the connecting road as an access road to the mine site, particularly since the only bonded access road was unusable at the time. The evidence further shows that the connecting road was constructed on land which was not bonded or permitted in violation of §§4(a) and 4(d) of the Surface Mining Act, 52 P.S. §§1396.4(a) and (d), and §§86.11 and 86.143 of the regulations. We conclude, therefore, that the Department has met its burden of proving that the compliance order was properly issued and was not an abuse of discretion.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this appeal. §4 of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7511 *et seq.*, at §7514.

2. The Department has the burden of proving that the issuance of the compliance order was not an abuse of discretion or arbitrary exercise of its authority. 25 Pa. Code §21.101(a).

3. The construction and usage of an access road to a mine site constitutes "surface mining activity". 52 P.S. §1396.3.

4. The statements of a third person may be considered admissions of a party only if they are made by an agent of the party with authority to make the statements. DeFrancesco, *supra*.

5. The Department met its burden of proving that Davis Coal constructed and used an access road to its mine site which was located off the permit site and which was not bonded.

O R D E R

AND NOW, this 16th day of February, 1993, it is hereby ordered that the Department's issuance of Compliance Order No. 90G362 to Davis Coal is sustained, and the appeal of Davis Coal at EHB Docket No. 90-526-MJ is dismissed.

ENVIRONMENTAL HEARING BOARD

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DATED: February 16, 1993

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M. DIANE SMI
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CITY OF HARRISBURG	:	
	:	
v.	:	**EHB Docket No. 91-250-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and DAUPHIN COUNTY INTERMUNICIPAL	:	
SOLID WASTE AUTHORITY, Permittee	:	**Issued:** February 17, 1993

OPINION AND ORDER SUR MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, MOTION FOR AMENDMENT OF ORDER TO CERTIFY QUESTION FOR INTERLOCUTORY APPEAL

Synopsis

The City of Harrisburg's request for reconsideration of the Board's decision granting partial summary judgment to the Department of Environmental Resources and the Dauphin County Intermunicipal Solid Waste Authority on the issue of §304(e) of Act 101 is denied where exceptional circumstances are not present. However, the Board includes in its Order the necessary statement for an interlocutory appeal by permission pursuant to 42 Pa. C.S. §702(b).

OPINION

This is an appeal by the City of Harrisburg ("the City") from the Department of Environmental Resources' ("the Department's") approval of the Dauphin County Municipal Waste Management Plan ("the Plan"). The Plan was prepared and submitted by the Dauphin County Intermunicipal Solid Waste

Authority ("the Authority") pursuant to the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, 53 P.S. §4000.101 *et seq.*. ("Act 101")

On December 10, 1992, the City filed with the Board a Second Motion for Partial Summary Judgment on the question of whether the Plan violated §304(e) of Act 101. In an Opinion and Order issued on January 29, 1993, the Board denied the motion as to the City, but granted summary judgment to the Department and the Authority on the question of whether the Plan had violated §304(e).

The matter now before the Board is a motion filed by the City on February 8, 1993. The motion asks for reconsideration of the January 29, 1993 Opinion and Order or, in the alternative, for certification of the question involved therein to allow an interlocutory appeal to the Commonwealth Court. On February 11, 1993, the Authority filed an answer in opposition to the City's motion.

Motion for Reconsideration

The Board's rules provide that reconsideration will be granted only for "compelling and persuasive reasons", generally limited to the following instances:

> (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 such question.
>
> (2) The crucial facts set forth in the application are not as stated in the decision and are such as 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 due diligence have offered the evidence at the time of the hearing.

25 Pa. Code §21.122(e). With regard to interlocutory orders, such as the one involved here, reconsideration will be granted only where "exceptional circumstances" are present. Cambria Coal Co. v. DER, 1991 EHB 361, 363; City of Harrisburg v. DER, 1990 EHB 585, 588.

The bases for the City's request for reconsideration are, first, that the Board's January 29, 1993 Opinion and Order rested in part on an argument raised in the Department's response to the City's Second Motion for Partial Summary Judgment which, the City asserts, none of the parties had ample opportunity to address, and, secondly, that the matter involved is one of first impression which presents "exceptional circumstances".

The City asserts that there was not ample opportunity for the parties to address an argument raised in the Department's response to the City's Second Motion for Partial Summary Judgment centering on the definition of "disposal" in Act 101 and the Legislature's failure to include the term "processing" in §304(e). We note that the City was given an opportunity to file a reply to the Department's and the Authority's responses and did, in fact, file a reply which addressed the aforesaid argument. Because the reply was not timely filed by the City based on its own self-imposed deadline, and based on the parties' request that this matter be expedited due to the imminency of the merits hearing, the arguments contained in the reply were not addressed in the Opinion and Order.[1] However, because the Board's decision to grant summary judgment to the Department and the Authority did not rest entirely on this argument but, rather, was based primarily on a reading of §303(e) of Act 101 in conjunction with §304(e), even if we granted reconsideration and then resolved this "interpretation of 'disposal'" argument

[1] That hearing has now been cancelled because of our entry of the order herein certifying the issue for appeal.

in the City's favor, the City still would not have prevailed on its motion for partial summary judgment.

The City's second argument is that exceptional circumstances are present because this is a case of first impression. We agree that this is a matter of first impression before the Board. However, it was the City which brought this matter before us in its Second Motion for Partial Summary Judgment, and merely because we have rendered a decision contrary to the City's position on this matter is not grounds for reconsideration. Moreover, the mere fact that a matter is one of first impression does not *ipso facto* create exceptional circumstances sufficient to justify reconsideration.

Because we find that exceptional circumstances are not present which would justify a reconsideration of our January 29, 1993 decision, that portion of the City's motion seeking reconsideration is denied.

Motion for Certification to Permit Interlocutory Appeal

The City has also requested that we certify our Order of January 29, 1993 to allow an immediate appeal to the Commonwealth Court pursuant to §702(b) of the Judicial Code, Act of July 9, 1976, P.L. 586, as amended, 42 Pa. C.S.A. §101 *et seq.*, at §702(b). Section 702(b) deals with appeals of interlocutory orders as follows:

> (b) **Interlocutory appeals by permission.**--When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.
>
> 42 Pa. C.S. §702(b).

We believe that our January 29, 1993 Order, granting summary judgment to the Authority and the Department on the question of whether the Dauphin County Plan violates §304(e) of Act 101, constitutes a final order pursuant to Rule 341(a) of the Rules of Appellate Procedure.[2] Under that rule, an appeal may be taken as of right from any final order of an administrative agency.

However, in order to insure that the City will not be denied its right to an appeal based on the language of our Order, we shall certify our Order of January 29, 1993 to allow an appeal to the Commonwealth Court under §702(b) of the Judicial Code. The question addressed in our Opinion and Order of January 29, 1993 meets the standards for an interlocutory appeal by permission. Our interpretation of §304(e) involves a controlling question of law in this matter and is a central issue in the City's appeal. Because this question is one of first impression, there may be a substantial ground for difference of opinion. Allowing immediate appellate review of this matter is likely to result in a more economical use of judicial resources and material advancement to an ultimate termination of the matter. Therefore, we shall include in our Order the necessary language to permit an appeal under 42 Pa. C.S. §702(b).

O R D E R

AND NOW, this 17th day of February, 1993, it is hereby ordered as follows:

1. The City's motion for reconsideration is denied.

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[2] Rule 341 of the Rules of Appellate Procedure was amended on May 6, 1992. The new rule became effective on July 6, 1992. However, because this action arose prior to July 6, 1992, it is governed by the language of Rule 341 prior to its amendment. See Publisher's Note, Pennsylvania Rules of Court-State (West Publishing Co., 1992) p. 532-33.

2. Pursuant to 42 Pa. C.S. §702(b), it is the Board's opinion that its ruling that the Dauphin County Plan does not violate §304(e) of Act 101 because it precludes local municipalities from entering into disposal contracts with existing facilities involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal may materially advance the ultimate termination of this matter.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

Board Member Robert D. Myers is recused.

DATED: February 17, 1993

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M. DIANE SMITH
SECRETARY TO THE BC

CITY OF HARRISBURG	:	
	:	
v.	:	**EHB Docket No. 88-120-W**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: February 19, 1993**
and PENNSYLVANIA FISH AND BOAT COMMISSION,	:	
Intervenor	:	

OPINION AND ORDER SUR
MOTION IN LIMINE

By Maxine Woelfling, Chairman

Synopsis:

A motion to preclude the testimony of expert and fact witnesses first identified in a party's pre-hearing memorandum is denied where the opposing party does not file the motion until 16 months after the filing of the pre-hearing memorandum.

OPINION

Presently before the Board for disposition is the City of Harrisburg's (City's) motion *in limine* to limit the expert testimony to be offered by the Department of Environmental Resources (Department) during the Department's case-in chief.

The procedural posture of this case was outlined in detail in City of Harrisburg v. DER, 1988 EHB 925, and will not be repeated. For purposes of this opinion, the relevant history is as follows. During the period established for discovery, the City propounded interrogatories on the Department asking the Department to identify each individual who would be

providing expert opinions, whether the Department intended to call these individuals to testify, and if so, the subject matter of their testimony, the substance of their testimony, the bases of their testimony, and their expertise. The Department responded in due course, identifying only 15 individuals, and stating in addition that "final decisions about who will provide opinions, facts or calculations have not been made." The Department never supplemented these answers, and discovery ended on July 20, 1990.[1]

The Department filed its pre-hearing memorandum on April 29, 1991. In it, the Department listed 37 individuals as expert witnesses. This list included at least 12 named individuals and four unnamed employees of federal agencies who had not been previously identified in the Department's answers to interrogatories.[2]

The City presented its case-in-chief over the course of 16 hearing days between March 31 and July 28, 1992. The City then filed this motion *in limine* on September 1, 1992, approximately three weeks before the Department was scheduled to begin presenting its case-in chief on September 24, 1992. The Department filed its response to the City's motion *in limine* on September 21, 1992. The City replied to the Department's response three days later, on

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[1] Pa. R.C.P. 4007.4 requires a party to supplement its answers when the party realizes it will be calling additional experts to testify at trial. The Department argues that its pre-hearing memorandum supplements its answers to interrogatories and contains the information required under Pa. R.C.P. 4003.5(a)(1). A pre-hearing memorandum, however, is not the proper way to supplement answers to interrogatories. The Department, therefore, did not identify these 16 experts in its answers to interrogatories, as required under Pa. R.C.P. 4003.5(a)(1).

[2] The 12 named individuals were: Charles Gravata, Joseph Ellam, Dennis Dickey, David Lambert, Greg Johnson, Michael Hayden, Timothy Alexander, Thomas McElroy, Dawana Yannacci, W. D. Swan, S. W. Berkheiser, and D. B. MacGauchlin. The four unnamed individuals were employees of: U.S. Army Corps of Engineers, U.S. Geological Survey, U.S. Environmental Protection Agency, and U.S. Fish and Wildlife Service.

September 24, 1992.

By order dated September 24, 1992, the Board postponed all future hearings in this case pending resolution of the Department's September 8, 1992, motion for compulsory nonsuit and this motion *in limine*. [3]

In this motion, the City requests that the Board preclude the Department from offering the expert testimony of the four unnamed individuals and the 12 witnesses first identified in the Department's pre-hearing memorandum. The City argues that such an order limiting the Department's expert testimony is warranted under the Pennsylvania Rules of Civil Procedure, Rules 4003.5(b), 4007.4, and 4019(i), and the cases interpreting those provisions. The Department contends that the City will suffer no prejudice if the Department's experts testify and that the Pennsylvania Rules of Civil Procedure, therefore, do not preclude their testimony.

The Board's rules of practice and procedure regarding discovery, 25 Pa.Code §21.111, state that written interrogatories are to be propounded and answered in accordance with the Pennsylvania Rules of Civil Procedure. Rule 4003.5(a)(1) of the Pennsylvania Rules of Civil Procedure authorizes a party to propound interrogatories on an adverse party concerning the identity of the party's expert witnesses and the subject matter, substance, and basis of their testimony. Furthermore, Pa. R.C.P. 4003.5(b) states:

> If the identity of an expert witness is not disclosed in compliance with subdivision (a)(1) of this rule [Rule 4003.5 (a)(1)], he shall not be permitted to testify on behalf of the defaulting party at the trial of the action. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief.

Additional sanctions are listed at Pa. R.C.P. 4019(i), which states:

---

[3] By order dated January 28, 1993, the Board granted the City's motion to quash the Department's motion for compulsory nonsuit.

> A witness whose identify has not been revealed as provided in this chapter shall not be permitted to testify on behalf of the defaulting party at the trial of the action. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief.

Although these rules, on their face, appear to preclude the testimony of all 16 of the expert witnesses in question, the Pennsylvania Supreme Court has held that their application requires a balancing of the facts of each case to determine whether extenuating circumstances are present to excuse a defaulting party's failure to include information on all of its expert witnesses. Feingold v. Southeastern Pennsylvania Transportation Authority, 512 Pa. 567, 517 A.2d 1270 (1986). The court held there are four basic considerations in this balancing:

> (1) The prejudice or surprise in fact of the party, against whom the excluded witness would have testified.
>
> (2) The ability of that party to cure the prejudice,
>
> (3) The extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and
>
> (4) Bad faith of (sic) willfulness in failing to comply with the court's order.

512 Pa. at 574, 517 A.2d at 1273.

Looking at these four factors, it is clear the City will suffer some prejudice from the testimony of these 16 experts. Their testimony involves a review of the project's impacts on surface and ground water quality as well as an analysis of the computer modeling used by the City to determine these impacts. It is equally clear, however, that the City will not suffer any surprise from their testimony. The City has been aware of it since the Department filed its pre-hearing memorandum on April 29, 1991. Furthermore,

the City took no action to compel the Department to supplement its answers to interrogatories, nor did the City take any other measure designed to cure the prejudice resulting from the testimony of previously undiscovered witnesses. Lastly, although the City has already presented its case-in-chief, additional hearings have not been scheduled. It is possible, therefore, to permit the Department to supplement its answers to interrogatories without disrupting the orderly and efficient trial of the case.

The City contends in its motion that it would be inappropriate to permit the Department to supplement its answers to interrogatories because the City has already presented its case-in-chief and will not be able to counter the testimony of these 16 expert witnesses. The City, however, is solely to blame for this situation. It chose to wait until concluding its case-in-chief to bring this motion to limit expert testimony. The City thereby ran the risk that this motion would be denied and these experts would be permitted to testify. Had the City brought this motion at the proper time, following receipt of the Department's pre-hearing memorandum, the City would not be faced with this problem.

For the foregoing reasons, we enter the following order.

ORDER

AND NOW, this 19th day of February, 1993, it is ordered that:

(1) The City's motion *in limine* is denied;

(2) On or before March 5, 1993, the Department shall supplement its answers to interrogatories pursuant to Pa. R.C.P. 4007.4 for the 16 expert witnesses discussed in this opinion and order;

(3) A pre-hearing conference shall be scheduled for the purpose of establishing deadlines for the filing of any direct written testimony by the Department and the Pennsylvania Fish and Boat Commission and scheduling the remaining days of the hearing on the merits. It is the Board's intention to begin hearings as soon as the undersigned Board Member's schedule permits.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: February 19, 1993

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M. DIANE SMI
SECRETARY TO THE

ROGER AND KATHY BEITEL and TOM AND JANET BURKHART	:	
v.	:	**EHB Docket No. 92-278-E**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and BETH CONTRACTING, INC., Permittee	:	**Issued: February 19, 1993**

OPINION AND ORDER SUR
BETH CONTRACTING'S MOTION TO DISMISS

By: Richard S. Ehmann, Member

Synopsis

In a third party's appeal from DER's approval of a transfer of a surface mining permit, the permit transferee's Motion To Dismiss will be granted where the third party appellants fail to show they have standing to challenge the transfer. Where appellants failed to timely appeal from a DER settlement with transferor of claims that mining caused the degradation of appellants' water supply, appellants may not use that water supply's degradation and the settlement as a basis for challenging the subsequent permit transfer. Allegations of DER's failure to more diligently prosecute the permit transferor for causing degradation of appellants' water supply are not reviewable by this Board and fail to create standing in appellants. Where the permit transferee agrees to accept liability for all violations at the mine site pre-dating transfer, allegations of violations by the transferor do not create standing, particularly since the transferor remains liable, jointly with the transferee, for any such violations.

OPINION

On July 28, 1992, Roger and Kathy Beitel and Tom and Janet Burkhart (collectively "Beitels") appealed to this Board from DER's June 26, 1992 letter to Beitels notifying them that DER had transferred Surface Mining Permit No. 32840103 from Joseph Peles ("Peles") to Beth Contracting, Inc. ("Beth"). This permit covers a strip mine located in Cherryhill Township, Indiana County.

Beitels' Notice Of Appeal states as grounds for appeal:

> The mining operation conducted on the site in question is in violation of department regulations which have been ignored and not sited [sic] by DER officials.
>
> (b) unauthorized discharge, which pollution has not been abated.
>
> (c) the only stated reason for the application is to shield Joseph Peles from operational liabilities.
>
> (d) at the hearing conducted in this matter, Appellants were prevented from cross-examining or examing [sic] in any fashion representatives of the applicant.

In their Pre-Hearing Memorandum, Beitels assert that the license should not have been transferred when it was under investigation for violations, that Beitels' well water has been rendered impotable by the mining operations, that Peles was ordered to provide alternative drinking water and to remedy the situation but has failed to do so, that Beitels unsuccessfully attempted to intervene in an enforcement proceeding against Peles but were rebuffed when DER and Peles entered into a Consent Order which has now been reopened, that Beitels attended the "hearing" on the application to transfer

the permit but were not allowed to cross-examine Peles or Beth and that at that hearing the reason for transfer was stated to be to avoid personal liability for Peles.[1]

Beth's Motion To Dismiss alleges that after Peles' mining of the site covered by this permit had begun, DER ordered Peles to provide Beitels a suitable temporary water supply and to implement a plan for a permanent replacement or treatment. It also asserts that DER denied Peles a bond release for a portion of this site and that Peles appealed both of these DER actions to this Board at consolidated Docket No. 91-391-E. Thereafter, the Motion alleges that DER and Peles agreed to a settlement of those appeals and, as a part of that settlement, Peles withdrew those appeals. Beth says the appeals were withdrawn and the docket closed by a Board Order dated June 4, 1992 and that since that time, Peles and Beth have fully complied with the agreement between Peles and DER. It then asserts Beitels' appeal challenges the transfer for reasons unrelated to the permit transfer itself and thus Beitels' allegations fail to raise issues sufficient to confer standing on appellants to prosecute this appeal.

DER has advised us by letter dated December 30, 1992 that it has no objection to the Motion.

On January 5, 1993, Beitels filed their unverified Response To Beth Contracting Inc.'s Motion To Dismiss. While Beth's Motion was accompanied by a Brief and we afforded Beitels the opportunity to file same, no Brief has

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[1] Of course, insofar as this is an attempt to add new grounds for appeal, as opposed to fleshing out those raised in Beitels' Notice Of Appeal, that is barred under Commonwealth, Pennsylvania Game Commission v. Commonwealth, DER, et al., 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989).

been filed on Beitels' behalf. In their Response, Beitels respond on a paragraph by paragraph basis and ask for denial of the Motion.

As pointed out by Beth, not everyone may appeal actions taken by DER. To challenge a DER action one must have "standing" to do so, i.e., must have a substantial interest which was directly and immediately impacted by the permit transfer from Peles to Beth. In Roger Wirth v. DER, 1990 EHB 1643, 1645, we defined the terms used above as follows:

> In order to have standing to appeal, a person must have a substantial interest that is directly and immediately impacted by the agency action being challenged. William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269, 280-284 (1975) and Andrew Saul v. DER and Chester Solid Waste Associates, EHB Docket No. 88-436-F (Opinion issued March 21, 1990). A substantial interest is defined as one in which there is "some discernible adverse effect, some interest other than the abstract interest of all citizens in having others comply with the law." William Penn, 464 Pa. at 195, 346 A.2d at 282. "Direct" means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains. *Id.* "Immediate" means judgment, focusing on and in the nature of and proximity of the action and injury to the person challenging it. *Id.* at 197, 346 A.2d at 283. Skippack Com. Ambulance Ass'n v. Skippack Twp., 111 Pa. Comwlth [sic] 515, 534 A.2d 563 (1987).

We then analyzed the issues raised by Wirth's appeal, concluded that he lacked standing to appeal and granted DER's Motion To Dismiss. We will adopt the same procedure here. In so doing, we construe the motion in a light favorable to Beitels with all doubts resolved against Beth. Tri-County Industries, Inc. v. DER, et al., EHB Docket No. 92-063-E (Opinion issued September 2, 1992).

Beitels first assert that the mine is polluting their wells and the pollution is unabated. Assuming this is so, does this allegation state grounds for appeal by Beitels? Clearly Beitels' well is of substantial interest to Beitels, but is their well affected by the DER decision to allow

the permit's transfer to Beth or by the mining which occurred before the transfer decision was made?

There is no dispute between these parties that DER ordered Peles, as permittee, to provide Beitels a temporary water supply and implement a plan for permanent replacement or treatment. DER also denied Peles a Stage I bond release. Both the denial of bond release and DER's Order were appealed by Peles to this Board. Thereafter, DER and Peles settled that appeal in an agreement under which Peles withdrew his appeal. After the Board entered its June 4, 1991 Order closing the docket because of the appeal's withdrawal, Beitels twice sought to intervene therein (in August and again in November of 1992) via Petitions To Intervene. On both occasions these Petitions were returned to Beitels' counsel by this Board because there was no longer any proceeding pending at Docket No. 91-391-E in which to intervene. In both Petitions Beitels alleged the contamination of their wells by Peles' strip mine; thus, it is Peles' pre-transfer mining which is having a direct impact on Beitels, not the permit transfer.

This is so despite the Beitels' allegation that the permit's transfer occurred solely because Peles desired to escape liability thereon. Assuming Peles' mining of the strip mine site caused contamination of Beitels' well water, Peles is liable for the abatement of this pollution even if the discharges are post-mining. Commonwealth of Pennsylvania v. Barnes and Tucker Company, 455 Pa. 392, 319 A.2d 871 (1974); North Cambria Fuel Company v. DER, EHB Docket No. 85-297-G (Opinion issued March 31, 1992). A transfer of this permit to Beth does not diminish or eliminate Peles' liability. See 25 Pa.

Code §86.57. As Beth suggests, a permit transfer creates two parties liable to abate these conditions. See Winton Consolidated Companies v. DER, et al., 1990 EHB 860.

The fact that Peles and DER settled Peles' appeal to this Board before Beitels could object thereto also fails to change this conclusion. We do believe the better settlement approach would have been settlement before this Board via a Consent Adjudication since notice thereof is given by publication in the Pennsylvania Bulletin. See 25 Pa. Code §21.120. Such a Board-approved settlement could have benefited Peles and DER, since, absent a timely appeal therefrom, Beitels would have been barred from a subsequent challenge to it. Joseph Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). This was not the settlement route elected by Peles and DER however. Since that appeal was not resolved through the procedure outlined in 25 Pa. Code §21.120, if Beitels had sought to appeal in August of 1992 (when they first attempted to intervene) and alleged that they had just received notice of the settlement, we could have allowed the appeal. No such appeal was filed. Moreover, their Petitions To Intervene in the Peles versus DER appeal, show Beitels had notice of the Peles/DER settlement at that time. Accordingly, we cannot treat the instant appeal as a timely challenge to that settlement but must find such an appeal time barred under Rostosky, *supra*.[2]

Based upon the discussion above as to Peles' continuing liability for these discharges, we also find Beitels' allegation, to the effect that the

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[2] Beitels could also have timely appealed from DER's Stage I release of the Peles surface mining bonds, just as they may appeal any future bond releases for bonds on this site, but, now, Rostosky, *supra*, bars such an appeal of the 1991 bond release decision.

permit transfer was accomplished to limit Peles' liability for the discharge, does not confer standing to appeal on Beitels when it stands independently. Regardless of whether or not this may have been Peles' intent, the law appears clear that Peles remains liable (though now jointly with Beth) as to any discharge polluting the water in Beitels' well. To the extent Beitels are affected by the transfer, the impact on them is beneficial because it increases the pool of liable parties. Thus, it creates no ground to challenge the transfer.

Lastly, in the Notice Of Appeal Beitels assert a hearing was conducted by DER concerning the permit's transfer and they were not permitted to cross-examine the Beth representatives who attended the DER hearing. Again, assuming this is true, it does not establish standing to appeal. Beitels have not shown any right to cross-examine Beth's representatives at any DER hearing or asserted any way in which this "deprivation" of their "right" to cross-examine Beth's representatives was substantive, as opposed to procedural, with regard to a permit's transfer. They fail to even assert how DER's decision to transfer this permit to Beth pursuant to 25 Pa. Code §§86.52 through 86.57 and §86.167 was faulty as a result of their being denied the ability to conduct such an examination. Clearly, if such a denial of cross-examination occurred, Beitels could have remedied it by taking depositions in this appeal at some time over the last six months in which this appeal has been pending. Such depositions would have disclosed any substantive irregularity in DER's permit transfer decision and Beitels could now assert same. This has not occurred. Accordingly, we cannot find a "direct" impact as defined in Wirth *supra*, which creates standing because of Beitels' inability to cross-examine Beth's representatives at DER's hearing.

In their Notice Of Appeal Beitels also assert the mining operations at the site are conducted in violation of DER's regulations and DER has ignored these violations, refusing to cite Peles therefor. 25 Pa. Code §86.56(c)(2) allows DER to transfer a permit if the successor permittee assumes liability both for the site and compliance with the requirements of the mining program "from the date of original issuance of the permits." 25 Pa. Code §86.56(c)(3) states the new permittee assumes liability for violations on areas of the mine site affected by his predecessor. Thus, even if such violations exist, permit transfer is not barred by these regulations as long as Beth agrees to be liable in regard thereto. Beitels do not suggest Beth is unwilling to assume such liability, and Beth's Motion states that it has agreed to do so. Thus, this allegation also fails to generate standing to appeal for Beitels. In short, while they may be injured by the violations that they allege exist, that is not a ground for standing to challenge the permit's transfer where the transferee assumes responsibility for the violations.

Standing is also not created by the allegation that DER has ignored these mine site violations. DER decisions to prosecute any type of conduct of Peles or of Beth involves the exercise of its prosecutorial discretion. We cannot review DER failures to act or exercises of its prosecutorial discretion as that is beyond this Board's jurisdiction. Westtown Sewer Company v. DER, et al., EHB Docket No. 91-386-E (Adjudication issued July 30, 1992); Fern E. Smith v. DER, 1991 EHB 1116.

In their Pre-Hearing Memorandum, Beitels allege Peles failed to comply with the terms of his appeal's settlement with DER and that settlement has now been reopened. They also state the mine site is under investigation

for violations thereat by Peles. These allegations again deal with the exercise of DER's prosecutorial discretion, and no matter how meritorious they may be, this Board has only a limited jurisdiction which does not include review of DER's exercise of its prosecutorial discretion.

A further review of Beitels' Response to Beth's Motion does not reveal any other ground for the Motion's denial. The Response makes it clear that Beitels believe their water has been polluted by this mining and that thus far efforts to abate or remediate this situation have been "inadequate and unsuccessful." It is also clear they do not want to be further inconvenienced in this regard and believe DER has moved too slowly against Beth. The Board understands the personal aggravation such a situation creates for the appellants, but, while we can sympathize therewith, that sympathy does not create standing to appeal the permit's transfer where none otherwise, exists.[3] Accordingly, we enter the following Order.

ORDER

AND NOW, this 19th day of February, 1993, it is ordered that Beth's Motion To Dismiss is granted and Beitels' appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

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3 Beth's Brief advises us by footnote of litigation over this issue pending between these parties before the Court of Common Pleas of Indiana County. Based on this opinion that seems like the logical place for Beitels to resolve these allegations.

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

Board Member Joseph N. Mack did not participate in this decision.

DATED: February 19, 1992

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M. DIANE SMI
SECRETARY TO THE

REALTY ENGINEERING DEVELOPERS, INC.	:	
	:	
v.	:	**EHB Docket No. 88-351-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** February 22, 1993
and SCHUYLKILL TOWNSHIP, Intervenor	:	

OPINION AND ORDER SUR
MOTION TO DISMISS AS MOOT

Synopsis

An appeal of the Department's denial of an Act 537 Sewage Plan revision is dismissed as moot where, during the pendency of the appeal, the Department approves a subsequently-filed plan revision. The question of whether certain issues which could arise in the future are barred by *res judicata* or collateral estoppel will be addressed if and when these issues are raised in a future appeal.

OPINION

This appeal was filed on September 8, 1988 by Realty Engineering Developers, Inc. now Realen Homes (hereinafter the "Appellant"), from the August 5, 1988 denial by the Department of Environmental Resources ("Department") of an Act 537 Sewage Plan revision, 35 P.S. §750.1 *et seq.*, filed by Charlestown Township of Chester County. The basis for the Department's denial was that the plan revision was incomplete because Schuylkill Township, a neighboring township through which the sewer was

projected to flow, had not also filed for a plan revision. On June 2, 1989, Schuylkill Township was granted leave to intervene in the appeal.

On December 3, 1992, the Appellant filed a Motion for Summary Judgment which sought to establish that the August 5, 1988 denial by the Department was a violation of law and procedure. The Department and Schuylkill Township filed responses to the motion on December 31, 1992 and January 4, 1993, respectively. Along with its response, the Department filed a Motion to Dismiss the appeal on the basis of mootness. It is the Department's Motion to Dismiss which is the subject of this Opinion and Order.

In support of its motion, the Department points out that during the pendency of this appeal, Schuylkill Township approved a revision to its Act 537 plan, which was an alternative to Charlestown's earlier submission. The Schuylkill Township revision was approved by the Department on February 22, 1990. Charlestown also adopted the same revision to its Act 537 plan, and this, too, was approved by the Department on February 22, 1990. The Act 537 plan revisions of the two townships specifically provide for sewage facilities for the residential development which had been proposed by the Appellant. Neither of the plan revision approvals was appealed, and, therefore, they are final actions of the Department. The Department contends that the approval of the new plan revisions moots the Department's August 5, 1988 denial which is the subject of this appeal.

The Board sought responses from the parties to the Department's Motion to Dismiss. Schuylkill Township filed no response. On February 2, 1993, the Board received the Appellant's response which admits that the factual situation has changed, that the townships have submitted Act 537 plan revisions, and that these plan revisions have been approved by the Department. Because of these changed circumstances, the Appellant "concurs with the

Department that the appropriate course of action at this time is to dismiss the present appeal as moot."

Where an event occurs during the pendency of an appeal which deprives us of the ability to render meaningful or effective relief, we will dismiss the action as moot. Schuylkill Township Civic Association v. DER and Valley Forge Sewer Authority, 1991 EHB 483; New Hanover Corporation v. DER, 1991 EHB 1127.

The parties agree that the Department's approval of the new plan revisions renders the denial of the earlier plan revision moot. Thus, there is no meaningful relief which we can grant with respect to the appeal of the Department's denial. Moreover, Charlestown's adoption of the new plan revision effectively nullified and superseded the earlier proposal; thus, there no longer continues to be a case or controversy surrounding the earlier proposal. Because we find this matter to be moot and because there no longer exists a case or controversy surrounding the Department's denial of the earlier revision, this action shall be dismissed.

The Appellant, however, has expressed concern as to other actions which might arise in the future and whether such actions would be barred by *res judicata* or collateral estoppel. We are unable to address these issues at this time, not having a fact situation or a case or controversy before us. Rather, these issues will be dealt with at such time as they may come before the Board on appeal. If and when a new plan revision is submitted by either township and subsequently rejected by the Department, we will be in a position at that time to judge the merits of any challenge to the Department's action.

ORDER

AND NOW, this 22nd day of February, 1993, in consideration of the opinion herein, the appeal at 88-351-MJ is dismissed for the reasons set forth hereinabove.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: February 22, 1993

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M. DIANE SMITH
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EVERGREEN ASSOCIATION :
:
v. : EHB Docket No. 92-257-E
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES and :
NEW MORGAN LANDFILL COMPANY, INC., Permittee: Issued: February 23, 1993

OPINION AND ORDER
SUR MOTION TO STRIKE AND TO LIMIT ISSUES

By: Richard S. Ehmann, Member

Synopsis

Where appellants initially filed an appeal setting forth objections to DER's action which lacked the degree of detail required by the Board's rules and they subsequently filed more detailed objections, pursuant to this Board's order, and filed two additional Amendments to Appeal, without first seeking this Board's permission, we grant the permittee's motion to strike as to objections not raised in the appellants' initial notice of appeal, but we allow appellants to seek leave to amend their appeal. At this point, we deny the permittee's motion to limit issues without prejudice as to its being refiled after we have had an opportunity to rule on a petition for leave to amend appeal filed by appellants in accordance with this opinion.

OPINION

This matter was initiated on July 21, 1992 by Evergreen Association, Walter and Alma Ames, Wayne and Marie T. Schildt, and Steven and Holly Hartshone (collectively, Evergreen), seeking review of Solid Waste Disposal

and/or Processing Facility Permit No. 101509 issued by DER to New Morgan Landfill Company, Inc. (New Morgan) for its Morgantown Landfill, located in New Morgan Borough, Berks County, and National Pollutant Discharge Elimination System (NPDES) Industrial Permit No. PA0055328, authorizing discharges from New Morgan's facility into an unnamed tributary of the East Branch of the Conestoga River.[1] Evergreen's July 21, 1992 appeal objected to DER's action on three issues, i.e., "potential for groundwater contamination", "proximity to mine subsidence area", and "question of statement of need," and reserved the right to add other issues as would become evident through discovery.

New Morgan, on August 13, 1992, filed a Request That Appellant Be Directed To File An Appeal Which Conforms With 25 Pa. Code §21.51, asserting that the notice of appeal failed to identify objections to DER's action with the required specificity. The Board's Chairman Maxine Woelfling issued an order on August 19, 1992 directing Evergreen to file a specific statement of their objections to DER's action.

Evergreen responded to the Board's order on September 1, 1992, spelling out their objections as follows:

> 1. [DER] has exceeded its discretion by issuing a solid waste permit which will cause surface and or groundwater pollution, in contravention of 25 Pa. Code §271.201.
>
> 2. DER has failed to require [New Morgan] to provide sufficient information to evaluate the potential for mine subsidence, in contravention of 25 Pa. Code §273.115(a)(7), 25 Pa. Code §273.120(a)(1), (2), and 25 Pa. Code §273.131. DER has failed to recognize the potential for mine subsidence which will endanger the ability of [New Morgan]

---

[1]Following a praecipe for withdrawal of appeal filed on behalf of Wayne and Marie Schildt, the Board on October 19, 1992 ordered the appeal on their behalf only closed and discontinued and their names stricken from the caption. Similarly, on February 9, 1992, the Board dropped Walter Ames and Alma Ames from this appeal at their request.

> to operate in a manner that is consistent with [SWMA], the environmental protection acts, and which will endanger the environment, public health and safety in contravention of 25 Pa. Code §271.201.
>
> 3. DER exceeded its discretion because it did not require an adequate and sufficient statement of need in accordance with 25 Pa. Code §271.127(d) for a permit that will cause environmental harm.
>
> 4. DER issued a permit in contravention of the mandate of Article I, Section 27 of the Pennsylvania Constitution.
>
> 5. Appellant reserves the right to amend its appeal to reflect any such issues that become apparent during discovery.

On December 3, 1992, Evergreen filed an Amendment To Appeal purporting to add the objection that DER exceeded its discretion by issuing a solid waste permit that it should have denied under §503(c) of the SWMA, 35 P.S. §6018.503(c).[2] Subsequently, on December 17, 1992, the appellants filed yet another Amendment to Appeal purporting to add an objection that DER "committed an error of law by issuing the solid waste permit to New Morgan Landfill Company based on an incomplete application, in violation of 25 Pa. Code §271.201(2)."

Presently before the Board is New Morgan's Motion to Strike and to Limit Issues, in which DER joins.

Motion to Strike

---

[2]On January 5, 1993, we issued an order granting New Morgan's motion to strike this amendment to Evergreen's appeal, and we further ordered that our order would not bar Evergreen from subsequently bringing a petition for leave to amend its appeal to add this issue.

On February 4, 1993, we received from Evergreen a Petition For Leave to Amend Appeal to include this issue, which they assert was uncovered through the discovery process. As we are awaiting a response to Evergreen's petition, we do not rule on it in this opinion but will do so separately in the future.

Generally, appeals before the Board must comply with the requirements for commencement, form, and content set forth at 25 Pa. Code §21.51, including subsection (e), which provides in pertinent part:

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

Evergreen's July 21, 1992 appeal listed the following objections to DER's action:

1. potential for groundwater contamination
2. proximity to mine subsidence area
3. question of statement of need
4. other such issues as become evident through discovery

(Specifics to follow)

After receiving New Morgan's August 13, 1992 request, we issued our August 19, 1992 order directing the appellants to spell out their objections to DER's action with greater clarity. We did not, however, grant Evergreen any right to add additional objections to DER's action.

We have previously explained that the "right to amend" a notice of appeal is not conferred by an appellant upon itself, but, rather, it is at the discretion of the Board in accordance with applicable precedent. Envirotrol, Inc. v. DER, EHB Docket No. 91-388-W (Opinion and Order Sur Motion To Dismiss issued June 1, 1992); Raymark Industries, Inc., et al. v. DER, 1990 EHB 1775. The Commonwealth Court in its decision in Fuller v. DER, 143 Pa. Cmwlth. 392, 599 A.2d 248 (1991), in discussing its prior decision in Pennsylvania Game Commission v. DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989), stated:

> In Pennsylvania Game Commission this court held that an appeal from an action of the Department must set forth specific grounds for appeal and an amended appeal filed after the thirty day period has run is analogous to an appeal *nunc pro tunc*. Thus, this court held that the Board need not grant a petition to amend without a showing of fraud or breakdown in the court.

The Fuller court ruled that this Board did not err in striking Fuller's amended notice of appeal in that matter based upon Game Commission, *supra*. The Fuller court reasoned:

> In this case, [the appellants have] not alleged fraud or breakdown in the department's operation. Furthermore, the issues [the appellants raise] in [their] amended memorandum of law are outside the scope of this appeal. Therefore the board did not err in granting the department's motion to strike. ...

Id. at __, 599 A.2d at 252.

Insofar as Evergreen's December 3, 1992 and December 17, 1992 Amendments To Appeal raise new objections to DER's action which were not among the objections in their initial notice of appeal, they may not untimely amend their notice of appeal in this fashion under Game Commission, *supra*. We recognize, however, that the appellants here have reserved the right to amend their notice of appeal as to objections unknown when their appeal was filed but uncovered via discovery. As we pointed out in Steven Haydu v. DER, et al., EHB Docket No. 92-154-MJ (Opinion issued May 29, 1992),

> where it is alleged that discovery was necessary to formulate an issue and the right to amend was reserved in the notice of appeal, an opportunity to amend the notice of appeal is proper (though limited to add the grounds shown to have been "discovered") (quoting Raymark Industries, *supra*).

In light of Evergreen's reservation pertaining to objections uncovered through discovery here, they may petition for leave to amend appeal

as to any such grounds. None of the documents filed by Evergreen on September 1, December 3, and December 17, 1992 was a petition for leave to amend, but see footnote 2 above.

We next turn to the Article I, §27 and surface water issues raised by Evergreen's September 1, 1992 response to our August 19, 1992 order, requiring them to submit the type of detailed objections contemplated by the Board's rules. Our order was not leave for Evergreen to add new issues which their appeal had not initially raised. Insofar as Evergreen's Article I, §27 and surface water pollution issues were part of the objections raised in their July 21, 1992 appeal, these issues may be raised as part of this appeal. If the appellants' objections concerning Article I, §27 and pollution of surface water are new objections, separate from those initially raised in Evergreen's July 21, 1992 appeal, however, they have been untimely raised. Insofar as Evergreen is raising the Article I, §27 and surface water pollution issues independently of the objections in their initial notice of appeal, we are unable to determine at this time whether the Article I, §27 and surface water pollution issues were discerned by appellants as a result of discovery conducted between July 21, 1992 and September 1, 1992. We have no petition before us asserting that these "new" grounds for appeal were found via discovery and no verified or sworn factual assertion supporting Evergreen's desire to amend their appeal. We also lack any verified or sworn factual assertions responding to any such amendments. We therefore cannot rule on whether to allow the amendments to the appeal, under the court's rationale in Game Commission, based on what has been filed so far.

We thus grant New Morgan's motion to strike, but we will afford Evergreen an opportunity to file a petition for leave to amend their appeal,

setting forth factual support for their contentions. Upon receiving such a petition and extending an opportunity to New Morgan and DER to file responses, we will then rule on whether to allow these amendments.

Motion to Limit Issues

New Morgan's motion to limit issues asserts that the appellants are attempting to introduce into this appeal testimony pertaining to a number of new issues, as indicated by the expert report prepared by Evergreen's expert, Margaret Condon-Vance (which is attached as Exhibit 2 to New Morgan's supporting memorandum of law). New Morgan claims these new issues, *inter alia*, relate to diminution of local water supplies, regional aquifer recharge, run off, and effects on wetland areas caused by liner construction.

Depending upon our determination of any petition for leave to amend appeal filed by Evergreen in accordance with the order accompanying this opinion, some or all of these areas of proposed testimony may be relevant and allowable.

Accordingly, at this time we deny New Morgan's Motion to Limit issues without prejudice and with leave to refile it after we have ruled on any petition for leave to amend appeal filed by the appellants, and we enter the following order.

ORDER

AND NOW, this 23rd day of February, 1993, it is ordered that:

1. New Morgan's Motion to Strike is granted, but Evergreen shall have an opportunity, within 20 days of this order, to file a petition for leave to amend their appeal setting forth all of the factual support for the contentions set forth in their petition; and

2. New Morgan's Motion to Limit Issues is denied without prejudice and with leave to refile after this Board renders a decision on any petition for leave to amend appeal filed on behalf of Evergreen.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: February 23, 1993

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M. DIANE SMI
SECRETARY TO THE

LINN CORPORATION and L.T. CONTRACTING, INC.	:	
v.	:	**EHB Docket No. 92-413-E (Consolidated)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: February 23, 1993**

OPINION AND ORDER SUR DER'S MOTION TO STRIKE OBJECTIONS AND INADEQUATE RESPONSES AND TO COMPEL ANSWERS TO REQUESTS FOR ADMISSIONS

By: Richard S. Ehmann, Member

Synopsis

Where a party objects to a Request For Admissions as seeking irrelevant information and the information sought is only irrelevant if the objecting party's interpretation of a regulation is adopted prior to the merits hearing at which the regulation's interpretation is an issue, the objection will be denied and a response to the Request For Admissions compelled, with the objecting party's right to argue its theory of regulation interpretation preserved for it to argue in its Post-Hearing Brief.

The answers to a party's Requests For Admissions will not be struck as inadequate if they may be read as responding to what is asked.

OPINION

The instant consolidated appeal by Linn Corporation ("Linn") and L.T. Contracting, Inc. ("L.T.") initially arose on July 28, 1992 when DER wrote to Ronald Thompson, President of Linn, to deny Linn's application for Surface

Mining Permit No. 17910108. DER denied the permit application because of Linn's non-compliance with 25 Pa. Code §86.37(a)(8). DER asserts that Linn has failed to prove a party related to it had corrected or was making satisfactory progress to correct violations at the related party's mine site.

As to L.T., its appeal arose through a July 28, 1992 letter from DER denying L.T.'s application to bond a new area within an existing surface mining permit for the purpose of commencing mining thereon. DER's letter was sent to Leonard Thompson, President of L.T. DER denied this application for the same reason it denied Linn's application.

In a conference telephone call with the attorneys for the parties, the Board directed that DER spell out the related parties and violations for Linn and L.T. because its prior letters failed to do so. By letter dated September 4, 1992, DER identified the related party as Thompson Brothers Coal Company ("Thompson Brothers") and the violations as acid mine drainage discharges associated with Thompson Brothers' Surface Mining Permit No. 17803045. This letter also recites "Linn is in violation for failing to pay S.O.A.P. fees."

According to DER's Pre-Hearing Memorandum (filed with us on September 15, 1992), DER contends Leonard Thompson has been president and sole shareholder of L.T. since 1984 and at some time prior to 1981 became a vice president of Thompson Brothers. It contends Ronald Thompson is president and sole shareholder of Linn and was a vice president of Thompson Brothers since 1981. Thereafter, in 1982, DER contends Leonard Thompson became Thompson Brothers' secretary-treasurer, while Ronald Thompson became its president. Leonard and Ronald were also two of three members of Thompson Brothers' Board of Directors (along with Leroy Thompson). DER asserts Leroy, Ronald and

Leonard each owned 33 shares of Thompson Brothers' stock, but in June of 1989, Leonard Thompson and Ronald Thompson asked Thompson Brothers to repurchase their stock at a mutually agreeable price. This repurchase occurred in December of 1989 and neither brother received any consideration for the transfer of the stock back to the company. At the time of the stock sale DER contends that both Leonard and Ronald resigned as officers and directors of Thompson Brothers.

Next, DER asserts that in 1982 DER issued Thompson Brothers Surface Mining Permit 17803045, and from 1982 to 1984 Thompson Brothers mined the area covered by this permit. Thereafter and until the present, DER asserts Avery Coal ("Avery") mined this site under contract with Thompson Brothers. DER asserts that at two locations at this mine site covered by the Thompson Brothers' permit there is acid mine drainage and this drainage has existed at least since 1987.

DER further says it met with Leonard Thompson and Ronald Thompson, as representatives of Thompson Brothers, to discuss these discharges and that Thompson Brothers was told by DER that it was jointly liable with Avery for the discharge. Thereafter, DER says the parties (DER, Thompson Brothers and Avery) could not reach agreement on permanent treatment but Avery built and, until May of 1992, operated treatment facilities to treat this discharge. It also says that in 1990 DER issued an administrative compliance order C.O. No. 904079 to Avery and Thompson Brothers to treat this water, which order was not appealed by Thompson Brothers. DER says neither Thompson Brothers nor anyone else is currently treating these discharges. Obviously it concludes that these facts, if proven, show Thompson Brothers is a related party to Linn and L.T. as pertains to these untreated discharges.

Linn and L.T.'s joint Pre-Hearing Memorandum asserts that they are not related parties to Thompson Brothers and that DER's compliance order was not issued to Thompson Brothers until approximately six months after Leonard and Ronald Thompson were no longer shareholders, officers or directors of Thompson Brothers. They assert that as early as 1987 Leonard and Ronald had advised Thompson Brothers of their intent to no longer serve as officers or directors or to own stock therein.

With this essential background as to the parties' factual allegations laid out, we turn to DER's Request For Admissions And Interrogatory which number 63 in total and which were filed on December 1, 1992.[1] On January 7, 1993, Linn and L.T. filed their Responses To DER's Request For Admissions.

Motion To Strike Objections

As to thirty of DER's Requests for Admissions, Linn and L.T. responded by stating:

> This request for Admission is objected to as violative of Pa.R.C.P. 4003.1 in that it seeks information which would be inadmissible at trial and is not reasonably calculated to lead to the discovery of admissible evidence.

These thirty Requests for Admissions deal almost exclusively with facts of the relationship between Thompson Brothers, Ronald Thompson, Leonard Thompson and facts as to their dealings with DER on Thompson Brothers' behalf over the alleged discharge.

In response to these objections DER has filed its instant Motion To Strike Objections And Inadequate Responses and To Compel Answers To Requests

---

[1]This appeal was previously scheduled for hearing on several different dates but with the parties' concurrence is now rescheduled to occur on March 22 and 23 of 1993.

For Admission. From its Motion's caption, it is clear that Motion says these objections cannot stand and that Linn and L.T. must be compelled to file answers to these 30 Requests For Admissions. DER's Motion contends that its requests are proper and that the objections fail to state a reason why DER's Requests are objectionable, that Linn and L.T. bear the burden of supporting their objections and that the objections should be struck.

On February 8, 1993, counsel for Linn and L.T. transmitted to us Appellant's Answer To [DER's] Motion To Strike. While pointing out DER's allegedly inaccurate citations to cases in DER's Motion, the Answer asserts that DER's Requests For Admission seek to cause Linn and L.T. to admit matters which are irrelevant to this proceeding and thus are objectionable as beyond the scope of permissible discovery under Pa.R.C.P. 4003.1(a)(b).[2] In their Memorandum Of Law In Support Of Their Answer To DER's Motion, Linn and L.T. contend that DER cited them for their relationship with Thompson Brothers pursuant to 25 Pa. Code §86.37(a)(8). They argue that DER seeks admissions of matters, some of which occurred as long as 20 years before the DER actions challenged by this appeal. They then assert that Ronald and Leonard Thompson, as principals of Linn and L.T. severed their connection with Thompson Brothers in December of 1989, which is more than 2 years before the compliance order was issued to Thompson Brothers by DER. Finally, they conclude that 25 Pa. Code §86.37(a)(8) addresses whether or not Linn and L.T. are currently related to Thompson Brothers, not whether there was ever any relation prior to Linn's and L.T.'s submission of the application which DER denied to generate

---

[2]Linn and L.T. might better concentrate on the merits of the issues before this Board rather than allegations of incorrect case citations, particularly where two of the three alleged miscitations are indeed correct citations.

these appeals, so information of the type sought by DER is irrelevant to this appeal under Pa.R.C.P. 4003.1.

If we were to sustain the position taken by Linn and L.T. at this time, we would have to find that facts laid out by DER and summarized above are irrelevant in appeals challenging DER's interpretation of 25 Pa. Code §86.37(a)(8). If they are irrelevant as to DER's Requests For Admissions, those facts would also be irrelevant at the merits hearing on the issue of the relationship of Linn and L.T. to Thompson Brothers through Ronald Thompson and Leonard Thompson. DER's argument as to a "relationship" appears to be hinged on these facts, and a ruling in support of Linn and L.T. at this stage in this appeal would be premature.

Further, it is far from clear at this stage in this appeal that this argument by Linn and L.T. has merit. It may be that the Legislature and the Environmental Quality Board, in adopting the statute and the regulations, intend the interpretation advanced by appellants. An alternative is that no person should be able to mine within a string of corporate shells and leave acid mine drainage at his mine sites by periodically switching to a new corporate form while cutting ties with his old shell. Moreover, based on DER's allegations, the discharge appears to have been created while Ronald and Leonard Thompson had relationships both with Thompson Brothers and their current respective corporate identities, even though the discharge was treated until recently by Avery, and thus after the hearing is held we may be asked by DER to find Thompson Brothers' liability for the discharge relates back to that time (and to Linn and L.T. through this relationship). We are not sure how the evidence will develop or how the parties' counsel will be framing the issues in their Post-Hearing Briefs, but it is clear that those briefs have

not yet been filed and elimination of the evidence upon which the parties' arguments will stand or fall by a pre-trial ruling is not the best way for us to proceed.

In allowing DER to proceed, however, we decline to follow DER's alternative suggestion that we find each request for admissions to be admitted; answers making the factual record will be required. Moreover, in granting DER's Motion, we wish to make it clear that we are not simultaneously rejecting the argument by Linn and L.T. as to the intent of 25 Pa.Code §86.37(a)(8). They may raise this argument in their Post-Hearing Brief.

Motion To Strike Inadequate Answer's

DER has also moved to strike what it terms to be inadequate responses by Linn to Requests For Admissions Nos. 53 and 54. These Requests deal with the claims that Linn is in violation because it owes money to DER under its Small Operators Assistance Program ("SOAP"), which allegation first appeared in DER's letter of September 4, 1992.

The Request For Admissions and Linn's responses thereto state:

> 53. Linn's total liability to the Department's SOAP program is $23,071.
>
> ANSWER: Denied. No information has been presented to Linn to account for as [sic] cost of $23,071.00.
>
> 54. On or about April 16, 1992 Linn paid $2,000 toward its SOAP liability, reducing the amount owed to the Department to $21,071.
>
> ANSWER: Admitted in part. It is admitted that a $2,000 payment was made but denied that $21,071.00 is still owed.

From these Requests and DER's Pre-Hearing Memorandum, it is clear that DER contends Linn owed it $23,071 and now owes it $21,071 for expenditures under the SOAP program, having paid DER $2,000. In turn, Linn

admits paying the $2,000 referred to in No. 54 and does not seem to dispute liability to DER for some monies but apparently contends the $23,071 figure is only DER's claim and, until a breakdown of DER's actual expenditures is provided to Linn, it is unable to admit it owes this amount. Read in this fashion Linn's answers are adequate. If DER had been more careful in preparing these Requests For Admissions we might have concluded otherwise, but its Requests, as framed, are adequately answered. Accordingly, we enter the following Order.

ORDER

AND NOW, this 23rd day of February, 1993, it is ordered that DER's Motion To Strike Objections And Inadequate Responses And To Compel Answers To Requests For Admissions is granted as to Linn and L.T.'s objections and denied as to Linn's responses to DER's Requests Nos. 53 and 54. It is further ordered that Linn and L.T. shall file their responses to DER's Requests Nos. 6, 7, 8, 9, 10, 11, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 55, 56, 57, 58, and 63 by March 5, 1993.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: February 23, 1993

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M. DIANE SMI
SECRETARY TO THE

KEYSTONE CASTINGS CORPORATION	:	
	:	
v.	:	EHB Docket No. 92-517-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: February 25, 1993

OPINION AND ORDER SUR APPEALABILITY OF DER'S LETTER OF OCTOBER 21, 1992

By: Richard S. Ehmann, Member

Synopsis

Where in a November 20, 1992 Notice Of Appeal Keystone Castings Corporation seeks to challenge a previously unappealed DER Order issued more than two years earlier, the appeal must be dismissed as untimely. Insofar as DER's October 21, 1992 letter states that Keystone should now comply with that Order, it does not change or modify the obligations previously imposed on Keystone by the Order and thus is not an appealable action of DER. Insofar as DER's letter reflects DER's unwillingness to reconsider its position based upon information supplied by Keystone, this letter reflects no change in the *status quo* as to Keystone's obligations. DER's refusal to change its position does not make the otherwise unappealable letter appealable.

OPINION

Background

On November 23, 1992, Keystone Castings Corporation ("Keystone") filed an appeal with this Board from a letter dated October 21, 1992 from the

Department of Environmental Resources ("DER"). After setting forth DER's agreement with conclusions drawn from analysis of data gathered by Keystone showing that foundry sand on Keystone's facility in Cornplanter Township, Venango County is not the main cause of the elevated pH in leachate discharging from Keystone's property and concluding that something beneath the sand is the main cause, DER's letter continues and states:

> However, it does not change the fact that the leachate is emanating from the company's property and therefore is Keystone Castings Corporation's liability. Keystone Castings Corporation should therefore comply with paragraph no. 1 in the Department Order issued July 24, 1990.
>
> Keystone Castings has completed a determination of the waste foundry sand and found it to be non-hazardous. The corporation should now comply with paragraph 3 of the Department Order of July 24, 1990.
>
> Please notify the Department as soon as possible on how you plan to comply with the Order. If you should have any questions on this matter, please feel free to contact me.

The Order referenced in DER's letter is dated July 24, 1990 and is also attached to Keystone's Notice Of Appeal. DER's Order recites that it is issued under the authority of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* ("Clean Streams Law"), the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* ("Solid Waste Act"), Section 1917-A of The Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, and the regulations promulgated thereunder. The Order directs that within 30 days Keystone is to collect the leachate and transport it for treatment at an authorized waste treatment plant. In paragraph no. 2, it next requires that Keystone submit a representative hazardous waste determination as to the solid wastes disposed of at this Keystone site. Paragraph 3 of the Order then gives

Keystone 75 days to remove this solid waste and properly dispose of it. The Order next directs implementation of an Erosion and Sedimentation Control Plan during solid waste removal, and, in the next paragraph (no. 5) directs the recovering, grading and revegetation of the location from which the waste was removed. The Order's last paragraph gives Keystone notice of its right to appeal the Order's issuance to this Board.

Keystone's Notice Of Appeal says it appeals DER's letter, but says it does so because DER exceeded its legal authority in issuing this Order since the Order assumes that the foundry sand is subject to regulation under the Solid Waste Act, when it is not. Next, the Notice Of Appeal says the Order, as issued, exceeds DER's legal authority insofar as it asserts the foundry sand is a hazardous waste since DER's letter acknowledges it is not hazardous. It next asserts the Order exceeds DER's authority under the Clean Streams Law because either there is no longer any leachate or Keystone no longer owns the real estate generating the leachate but, rather, the Borough of Rouseville owns the land and created the leachate by installing water lines on its easement over Keystone's property. Alternatively, Keystone says the leachate is from a sewer line easement over its land which easement is owned by Penske Truck Leasing Co. Keystone's next argument is that paragraphs nos. 1 and 3 of the Order are an abuse of DER's discretion because: (1) direction to collect the leachate is erroneously based upon DER's assertion that the sand is a hazardous waste; and (2) the order directs Keystone to dispose of the solid waste off-site, mistakenly identifying this sand as hazardous when DER's own letter says it is non-hazardous. Keystone's sixth assertion is that the Order is arbitrary as based on erroneous findings of fact. Keystone's seventh argument is issuing such an Order or letter to it under Section 316 of the

Clean Streams Law is unconstitutional because it holds Keystone liable for contamination it did not create solely on the basis of ownership of the land and is thus an unconstitutional taking.

Keystone next urges the Order is an abuse of DER's discretion because in directing the sand's removal, it exceeds what is necessary to abate the water pollution and is thus unduly oppressive. Keystone's ninth objection is that requiring removal of the sand in 75 days of receipt of the Order exceeds DER's authority because under 25 Pa. Code §287.111, Keystone has until July 4, 1993 to remove it and DER lacks authority to compel Keystone to remove it sooner. Keystone's next objection is that DER acted otherwise arbitrarily, capriciously and contrary to its statutory authority. Finally, Keystone's Notice Of Appeal says DER otherwise abused its discretion in issuing the Order as will be more fully set forth in Keystones' Pre-Hearing Memorandum.

Because a November 23, 1992 appeal is untimely under 25 Pa. Code §21.52 if it challenges a DER Order dated July 24, 1990, we issued Keystone a Rule To Show Cause why its appeal should not be dismissed as untimely.

In response to this Rule Keystone says its appeal from DER's October 21, 1992 letter was timely because it was filed within thirty days of Keystone's receipt of this letter. Keystone next asserts that letter is an appealable action of DER because it directs a specific course of conduct, i.e., collection of the leachate and removal of the sand within the time frames therefor set in DER's Order.

Upon receipt of Keystone's Response To Rule To Show Cause we advised DER to file its reply thereto. On December 31, 1992, DER filed its Answer To Appellant's Response To Rule To Show Cause. DER's Answer asserts that its October 21, 1992 letter is not appealable and only requests Keystone's

compliance with DER's prior Order (which DER states was appealable but was not timely appealed).

Thereafter, by letter dated January 4, 1993, Keystone's counsel wrote advising us that ever since Keystone received DER's Order in 1990, it had asserted to DER that DER was in error insofar as its Order concluded that the sand was a hazardous waste (even though the letter admits that Keystone did not appeal that Order to this Board). This letter also asserts that Keystone did not appeal the Order because it was trying to comply therewith. Finally, Keystone says that even though DER's letter acknowledges that the sand is not hazardous, DER's letter orders the sand's removal in accordance with the specifications of the 1990 Order and this is why Keystone appeals.

Discussion

One need only review the specification of objections set forth in Keystone's Notice Of Appeal to see that it is a direct challenge to DER's prior unappealed Order rather than DER's letter. Keystone's very first objection in paragraph 4A of the Notice Of Appeal challenges DER's authority to issue its Order. The same is unequivocally true of paragraphs 4B, 4C, 4D, 4E, 4F, 4G, 4H, and 4J, although in paragraph 4A Keystone asserts both the Order and the letter exceed DER's legal authority because they assume the foundry sand is a solid waste, and in paragraph 4F, Keystone asserts the Order and the letter and Section 316 are unconstitutional as applied since they impose liability on Keystone solely on the basis of its ownership of the property. Only paragraph 4I does not reference the Order explicitly and it asserts DER otherwise acted arbitrarily and capriciously and contrary to its statutory authority.

Insofar as this appeal challenges DER's July 24, 1990 Order but was not filed with this Board until November 23, 1992, it is untimely under 25 Pa. Code §21.52. It has also long been recognized that the untimeliness of an appeal deprives us of jurisdiction to hear same. Rostosky v. Department of Environmental Resources, 26 Pa. Cmwlth. 478, 364 A.2d, 761 (1976)[1] and Grand Central Sanitary Landfill, Inc. v. DER, EHB Docket No. 92-481-E (Opinion issued January 12, 1993). Even assuming that Keystone has asserted to DER that DER was in error in concluding this foundry sand was a hazardous waste, as stated in the letter to us from Keystone's counsel, this does not vest us with jurisdiction to hear this untimely challenge. The same is true as to allegations that Keystone failed to appeal because it was attempting to comply with the Order. These allegations do not rise to the level that they could be considered sufficient grounds under 25 Pa. Code §21.53 for leave to appeal *nunc pro tunc* from this order. Kirila Contractors, Inc. v. DER, 1991 EHB 13.

Once it is clear that this Order may no longer be challenged on appeal, the question arises as to what is the letter's impact on Keystone. Clearly, Keystone's allegations in paragraphs 4A, 4F and 4I could arguably be asserted as dealing, at least in part, with DER's letter. The same could be said of the assertion in the January 4, 1993 letter from counsel for Keystone that the letter orders Keystone to dispose of the foundry sand in accordance with the Order while acknowledging that the foundry sand is not hazardous.

For this letter to be appealable, it must be an adjudication within the meaning of the Administrative Agency Law, 2 Pa.C.S. §101, or an "action" as defined in 25 Pa. Code §21.(2)(a)(1). That is to say it must have some

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1 Incorrectly cited by DER as appearing at 37 Pa. Cmwlth. 479, 390 A.2d 1383 (1978).

impact on Keystone's then existing rights and duties. Lehigh Township, Wayne County v. DER, EHB Docket No. 91-090-W (Opinion issued May 22, 1992); Grand Central Sanitary Landfill, Inc. v. DER, *supra*. DER's letter of October 21, 1992 had no such impact. It did not require anything of Keystone which it is not already required to do as a result of the issuance of DER's Order. DER's letter says that Keystone should comply with paragraph no. 1 of the Order. It also says Keystone should now comply with paragraph no. 3 of the Order. Keystone already had these obligations by virtue of the Order's finality, thus no change in the *status quo ante* occurred as a result of DER's letter. Westtown Sewer Co. v. DER, EHB Docket No. 91-269-E (Opinion issued February 4, 1992); Borough of Bellefonte v. DER, 1990 EHB 521; Delta Excavating and Trucking Co. v. DER, 1987 EHB 319.

Finally, though it is not clear that Keystone is making this assertion, there arises the question of whether Keystone may challenge this letter to the extent that it represents a refusal by DER to reconsider or modify the terms of its Order. To the extent this is argued by Keystone the argument is rejected in accordance with Commonwealth, DER v. New Enterprise Stone & Lime Co., Inc., 25 Pa. Cmwlth. 389, 359 A.2d 845 (1976); Borough of Lewistown v. DER, 1985 EHB 903.

Accordingly, we enter the following Order.

O R D E R

AND NOW, this 25th day of February, 1993, the appeal of Keystone is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: February 25, 1993

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
David A. Gallogly, Esq.
Northwest Region
For Appellant:
Harry F. Klodowski, Jr., Esq.
Pittsburgh, PA

med

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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SUITES THREE-FIVE
HARRISBURG, PA 17101-0105
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BO

CRONER, INC. and FRANK POPOVICH	:	
	:	
v.	:	**EHB Docket No. 91-460-E**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 3, 1993**

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

By Richard S. Ehmann, Member

Synopsis

The Board dismisses two consolidated appeals challenging the Department of Environmental Resources' (DER) renewal of a permit for a coal preparation plant. Section 1396.4(a)(2)(F) of the Surface Mining Conservation and Reclamation Act (SMCRA), 52 P.S. §1396.4(a)(2)(F) requires the applicant for a permit to submit to DER the written consent of the landowner to the entry upon the land to be affected by the mining operator's activities. See 25 Pa. Code §86.64(c)(2). It is undisputed that the haulroad leading to the appellant/permittee's coal preparation facility traverses property to which record title is held by the appellant/record landowner. Several individuals claiming title by adverse possession to the property traversed by the haulroad have signed a landowner consent form, which the appellant/permittee submitted to DER. The appellant/record landowner disputes this adverse possession claim and has raised objections to DER concerning this purported landowner consent. While the Board cannot make determinations of title, it can examine the adverse possession issue to the extent necessary to determine whether DER

abused its discretion. Cooper v. DER, 1982 EHB 250. The Board concludes DER did not abuse its discretion in issuing a renewal permit containing Special Condition 12, which requires the permittee to obtain a court determination establishing the claim of title by adverse possession, to obtain the appellant/record landowner's agreement to its entry on the disputed property, or to reclaim and abandon the affected portions of the disputed property. The entry of a preliminary injunction by the common pleas court of Somerset County enjoining appellant/record landowner from interfering with appellant/permittee's access to the haulroad does not preclude this Board from reviewing these appeals.

Moreover, where the evidence established that trucks traveling to and from the permittee's facility track coal fines beyond the plant to the public road and kick up dust, despite the permittee's attempts to control this situation by wetting its haulroad, and that haulroad runoff containing black sedimentation enters an unnamed tributary to Buffalo Creek, DER did not abuse its discretion in imposing Special Conditions 13(a) and 13(b) in the renewal permit to address those problems by requiring the installation of a sump to collect this runoff and the installation of speed bumps on the asphalt haulroad to remove dust while the trucks are still at the preparation plant.

BACKGROUND

Before the Board for adjudication are two consolidated appeals, both involving DER's September 25, 1991 renewal of Croner, Inc.'s (Croner) Permit No. 56841605 for operation of its Goodtown coal preparation plant located in Brothersvalley Township, Somerset County. Croner's appeal (EHB Docket No. 91-460-E), filed on October 28, 1991, challenges DER's inclusion of Special Conditions 12, 13(a) and 13(b) in the renewal permit. Frank Popovich's appeal (EHB Docket No. 91-463-E), filed on October 29, 1991, challenges DER's

issuance of the renewal permit on the basis of his asserted ownership of a tract of land over which Croner's haulroad traverses.

A hearing on the merits of this consolidated appeal was held on June 8, 1992, before Board Member Richard S. Ehmann. The parties subsequently filed their respective post-hearing briefs.

After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

The Parties

1. Appellant Croner is a Pennsylvania corporation which has a principal business address of 204 Broadway Street, Berlin, PA 15530. (Board Exhibit 1 (B Ex.1); Notice of Appeal at Docket No. 91-460)[1]

2. Appellant Frank Popovich is an individual who has an address of R.D. 3, Box 341, Berlin, PA 15530. (Notice of Appeal at Docket No. 91-463)

3. Appellee is DER, the agency of the Commonwealth with the authority to administer and enforce the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.*; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; the Coal Refuse Disposal Control Act, Act of September 24, 1968, P.L. 1040, as amended, 52 P.S. §30.51 *et seq.*; the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 *et seq.*; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 (Administrative Code); and the rules and regulations promulgated thereunder. (B Ex.1)

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[1] "B Ex.1" indicates a reference to the parties' joint stipulation of fact which was admitted as a stipulated Board Exhibit at the merits hearing.

The Prep Plant Site

4. Croner's Goodtown Coal Preparation Plant is located in Brothersvalley Township, Somerset County (the prep plant). (B Ex.1)

5. The prep plant is located on land owned by Harold K. Croner, James E. Croner, Robert H. Croner, and Donald B. Croner. (B Ex.1)

6. A haulroad leading from Township Route 423 (T-423) provides access to the prep plant. The prep plant is located approximately 500 feet down the haulroad from the intersection of T-423 and the haulroad. (N.T. 48-50; B Ex.1; C Ex.7-B; Cmw. Ex.1)[2] This intersection of the haulroad and T-423 is indicated by a red circle on C Ex.7-A. (N.T. 89)

7. Frank Popovich resides in a home located at the intersection of State Route 2027 (SR-2027) and T-423, which is located approximately 900 feet from the intersection of T-423 and and the haulroad. (N.T. 65, 67, 90; C Ex.7-F)

Ownership of the Haulroad

8. Frank Popovich presently is the record titleholder of real estate located adjacent to the prep plant, including the property over which Croner's haulroad traverses. (N.T. 94; B Ex.1; Cmw. Ex.1)

9. Frank Popovich took title to the real estate adjacent to the prep plant in 1971 when his father, John Popovich, conveyed it to him by a deed dated August 6, 1971. (B Ex.1; Exhibit B to Notice of Appeal at Docket No. 91-463-E)

10. In his deed conveying the property to Frank Popovich, John Popovich reserved for himself the right to use the haulroad and to designate

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2 "N.T." followed by a page number indicates a reference to the transcript of the hearing on the merits. Exhibits for DER are denoted by "Cmw. Ex."; exhibits for Croner are indicated "C Ex."; and exhibits for Popovich are denoted "P Ex."

other persons who could use the haulroad during his lifetime. (N.T. 95-96; Exhibit B to Notice of Appeal at Docket No. 91-463-E)

11. The parties have stipulated that John Popovich first permitted Croner's predecessors and later Croner to use the haulroad in exchange for coal for his house. (N.T. 96; B Ex.1; C Ex.12) There is no evidence as to whether John Popovich ever terminated that permission during his lifetime or as to when Croner first acted to disavow John Popovich's or Frank Popovich's title.

12. John Popovich died in July of 1990. (N.T. 97)

Croner's Permit

13. Timothy Kuntz, a DER employee, formerly served as the hydrogeologist who was lead reviewer for Croner's Coal Preparation Plant permit application in 1985. (N.T. 162-164)

14. In his review of Croner's permit application, Kuntz determined Croner was attempting to have its permit include part of the property to which Frank Popovich held record title, as indicated in yellow on Cmw. Ex.1, insofar as Croner would be using the haulroad as an entrance and exit for its plant. (N.T. 167-168; Cmw. Ex.1)

15. DER requested Croner to submit a "Supplement C" landowner consent form so DER could continue to process Croner's application. (N.T. 170; Cmw. Ex.3-A)[3]

16. Croner attempted but failed to obtain from Frank Popovich a Supplement C form giving Croner permission to enter and exit the haulroad. (N.T. 170; B Ex.1)

17. On June 18, 1986, Harold K. Croner, Robert Croner, James Croner,

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[3] A Supplement C form would have given Croner the right to enter and exit Frank Popovich's property.

and Donald Croner (the Croner individuals) filed a Statement of Claim By Adverse Possession with the Somerset County Recorder of Deeds, claiming they owned the Popovich property traversed by the haulroad in fee by adverse possession. (B Ex.1; C Ex.5)[4] This Statement of Claim By Adverse Possession stated that Harold K. Croner first adversely entered the property on April 1, 1954 and continued to have possession until May 6, 1971, when he was succeeded in possession by the Croner individuals. (C Ex.5) This document further recited that at the time of Harold K. Croner's entry, John Popovich was the owner or reputed owner of the property, and that his interest was later conveyed to Frank Popovich, against whom the Croner individuals were claiming title by adverse possession. (C Ex.5)

18. Croner submitted this Statement of Claim By Adverse Possession to DER on August 12, 1986 along with a Supplement C form signed by Harold K. Croner, Robert H. Croner, Donald B. Croner, and James E. Croner. (N.T. 172; Cmw. Ex.3-I)

19. Croner's attorney told Mr. Kuntz that Frank Popovich would be notified of Croner's submission of the Statement of Claim By Adverse Possession. (N.T. 172-173, 176-177)

20. There was no evidence introduced at the merits hearing to suggest that Frank Popovich was notified in 1986 of Croner's Statement of Claim By Adverse Possession. (N.T. 179)

21. DER issued Coal Preparation Plant Permit No. 56841605 to Croner on September 3, 1986 (1986 Permit). (N.T. 174; B Ex.1) The 1986 permit was to expire at midnight on September 3, 1991. (N.T. 210; C Ex.3)

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4 A statement of claim for adverse possession is filed by a party who claims title to real estate by adverse possession; the statement is recorded and indexed as though it were a deed. Reed Road Associates v. Campbell, 400 Pa. Super. 119, 582 A.2d 1373 (1990).

22. Frank Popovich did not file objections to the 1986 permit as issued. (N.T. 173; B Ex.1)

23. Frank Popovich was employed by Croner from January 1, 1948 until his employment was terminated by Croner by letter dated September 21, 1990. (B Ex.1)

The Preliminary Injunction

24. Croner filed a Complaint for Injunction in the Somerset County Common Pleas Court sitting in equity on June 22, 1990, alleging that continued permissive use of the haulroad by Croner and its predecessors over a period from before 1950 through the time of the complaint provided Croner with the right to use the haulroad in the nature of an irrevocable license. (B Ex.1; C Ex.12)

25. A preliminary injunction restraining Frank Popovich and all persons acting in concert with him from obstructing Croner's access to the haulroad was issued by the Somerset County Common Pleas Court on June 22, 1990. (B Ex.1; C Ex.13)

26. On June 25, 1990, the Somerset County Common Pleas Court ordered that the hearing on whether the preliminary injunction should remain in effect was continued until Frank Popovich retained counsel and requested a hearing and that the preliminary injunction would remain in effect pending the hearing. (B Ex.1; C Ex. 13) This order presently remains in effect. (B Ex.1)

27. There has been no final determination on the merits of Croner's June 22, 1990 Complaint for Injunction. (B Ex.1)

Croner's Permit Renewal Application

28. William S. Plassio, a District Mining Manager within DER's Bureau of Mining and Reclamation, was formerly chief of the coal refuse preparation

plant section at DER's Knox District Mining Office in 1991; it was Plassio who requested Croner to submit its renewal application. (N.T. 180, 182-183)

29. Plassio was not responsible for reviewing the 1986 permit application. (N.T. 183)

30. Jeffrey R. Smith was a hydrogeologist in DER's coal preparation plant section at the time Croner's renewal application was submitted and was the only reviewer for Croner's application. (N.T. 184, 214-215)

31. Notice of Croner's application for renewal of the 1986 permit was published in the Meyersdale Republic on February 14, 21, and 28, 1991, and March 7, 1991. (B Ex.1)

32. Frank Popovich submitted objections to DER regarding the renewal of Croner's permit in letters dated March 29, 1991, April 1, 1991, and April 4, 1991. (N.T. 185; B Ex.1; Cmw. Exs. 10A, 10B, 10C). These objections concerned noise, dust, and Frank Popovich's ownership of the land subject to the adverse possession claim. (N.T. 216, 218; B Ex.1)

33. Frank Popovich's objection letters made DER aware for the first time that there was a dispute between Frank Popovich and Croner over the use of the haulroad. (N.T. 185, 218-219) The portion of the haulroad over which ownership of the land is disputed is a 110 foot long piece running from T-437 toward the prep plant. (N.T. 49)

34. Frank Drabish resides in a home located on the side of T-423 opposite the prep plant, as indicated on Cmw. Ex.1. (N.T. 144; Cmw. Ex.1)

35. Other residents of the area near the site, including Mr. Drabish, submitted objections concerning Croner's permit renewal and requested a public hearing. (N.T. 217)

Conditions Near the Prep Plant

36. Croner's coal trucks track mud and coal fines onto the haulroad

and onto T-437 and Legislative Route (LR) 55027 from the prep plant area. (N.T. 80, 104, 131, 134; P Exs. 3, 6, 8)

37. Trucks travelling on the haulroad kick up dust near Frank Popovich's home. (N.T. 123, 128, 130, 133-134, P Exs. 1, 2, 4, 5)

38. Black material, similar to coal settling Frank Popovich observed when he worked at coal plants, runs off the haulroad and enters the unnamed tributary to Buffalo Creek. (N.T. 107, 116-122, 148-149, P Exs. 9, 10, 11, 12)

39. This black-colored runoff runs down to the home owned by the Bluebaughs (as indicated on Cmw. Ex.1) near to where the Bluebaughs' well is located and saturates the Bluebaughs' yard with black water. (N.T. 118, 150-151)

40. In early May of 1991, Smith and DER mine conservation inspector John Wilk visited the site to familiarize themselves with it. (N.T. 219) During their visit, Smith and Wilk observed a truck at the T-437 end of the haulroad washing or spraying water onto the haulroad; this water ran onto the haulroad and T-437 and eventually entered the unnamed tributary to Buffalo Creek as indicated in blue on Cmw. Ex.1. (N.T. 195, 219-220)

Informal Public Conference

41. An informal public conference was held on May 14, 1991 to discuss the objections to the renewal of Croner's permit. (N.T. 187; B Ex.1)

42. Mr. Plassio presided over the May 14, 1991 informal conference, which DER tape recorded. Both Plassio and Smith took notes on what transpired at the conference. (N.T. 187, 189; Cmw. Ex. 6)

43. Both Frank Popovich and Frank Drabish were present at the informal conference. (N.T. 105, 144, 187, 218)

44. The issues raised at the informal conference were dust, noise, truck traffic and spillage of coal associated with trucks entering and exiting

the site and traveling along the haulroad and T-437. (N.T. 104-105, 219)

45. Frank Popovich and Frank Drabish also raised concerns at the conference about runoff of coal fines from the haulroad and T-437 into the unnamed tributary. (N.T. 218-219)

46. A representative of the Pennsylvania Fish Commission recommended at the informal conference that a sump be installed at the end of the haulroad to address the concerns about runoff into the unnamed tributary. (N.T. 229, 241)

Croner's Attempt to Address the Conditions

47. Prior to 1985, the haulroad was an unpaved dirt road and Croner attempted to minimize dust created by its trucks by using road oil and water spreads. (N.T. 53, 56) During dry times, Croner used "heavy washing" of the road to control the dust problem and collected the water runoff from the haulroad by means of a sump which was located along the first 100 feet of the haulroad, as indicated by a red circle on C Ex.7-B. (N.T. 52, 53, 56; C Ex.7-B)

48. Frank Popovich filled in this sump one week prior to the preliminary injunction action in June of 1990. (N.T. 55-56, 73-74)

49. Croner paved a 25 foot long area of the haulroad near the intersection of T-437 in 1986; it later paved an additional 180 feet long area of the haulroad in 1987 and an additional area in 1991. (N.T. 54-56) The paved haulroad is presently 16 feet wide. (N.T. 54)

50. In May of 1991, Croner voluntarily changed its procedure from washing the road to watering or wetting the road but did not inform DER of this change. (N.T. 57-58, 255) Under this more recent procedure, Croner has a water spray system located on the portion of the haulroad which is at the prep plant. (N.T. 58-59) Water is sprayed from a truck onto the haulroad pavement. (N.T. 58) Coal trucks leaving Croner's facility pass through water

coming from the spray nozzles; this water strikes the trucks' tires and is supposed to wash beneath the trucks' bodies and break coal material loose from the trucks. (N.T. 63) The water from this spray system is then collected from the haulroad and diverted to a sump located in an area nearer the prep plant than the disputed portion of the haulroad. (N.T. 58, 59)

51. Frank Drabish has observed the words "Croner, Incorporated" on the coal trucks which enter and exit the haulroad. (N.T. 158)

52. Frank Drabish has observed Croner's process of wetting the haulroad and its process of washing the trucks both before and after May of 1991. (N.T. 152)

53. Croner fills a tank truck with water; this water continuously streams out of the tank truck through holes in a sprinkler fashion until it is empty. (N.T. 147-148) This spray system does not spray the underside of the trucks' bodies; rather, the trucks drive over a wet road. (N.T. 152)

Issuance of Croner's Renewal Permit

54. On June 11, 1991, Kenneth Countryman, who is General Superintendent of Croner, met with Smith and Plassio to discuss erosion and sedimentation (E&S) controls which DER was considering adding to Croner's permit. (N.T. 46, 81, 86, 193) At this meeting, the installation of a sump at the T-437 end of the haulroad (as indicated by an "X" on Cmw. Ex.1) to control the runoff of black sedimentation into the unnamed tributary was discussed. (N.T. 193, 195, 223) Additionally, the installation of speed bumps or rumble strips to cause excess water to drop off Croner's trucks so it would not be carried onto T-437 and SR-2027 was also discussed. (N.T. 193, 223) Spraying the haulroad with water was also discussed at the meeting. (N.T. 193) The land ownership issue was not raised at this meeting, however. (N.T. 196)

55. In mid-June of 1991, Plassio prepared a formal summary of the informal conference, based upon DER's tape recording and his notes, as well as Smith's notes, and mailed it to Croner. (N.T. 190-191; Cmw. Ex.7)

56. Croner based its right to enter Frank Popovich's property on the Croner individuals' June 18, 1986 Statement of Claim of Adverse Possession and Supplement C form. (N.T. 228; B Ex.1)

57. Plassio requested guidance from DER's Harold Miller, who is chief of DER's underground mine permitting section in Harrisburg, regarding the land ownership issue raised by Frank Popovich's objections. (N.T. 185-186)

58. Miller provided language to be included in Croner's renewal permit to address the land ownership issue. (N.T. 186)

59. When DER issued the renewal permit to Croner on September 25, 1991, it included Special Condition 12, which incorporated the language suggested by Miller, as follows:

> 12. Pursuant to [25 Pa. Code] 86.64 and the terms of this special condition, the permittee shall demonstrate that it has title to all parts of the property claimed to be owned by Frank Popovich on which a claim of adverse possession has been filed by Howard [*sic*] K. Croner, Robert Croner, James Croner, and Donald Croner ("disputed tract") which has been affected by operations under this permit, or reclaim and abandon all such areas. Within 45 days of the date of this permit, the permittee shall provide the Department with a copy of a valid title insurance policy from a reputable title insurance company for the disputed tract, or evidence that a quiet title action has been initiated in the court of common pleas for the disputed tract. If a quiet title action is pursued, the permittee shall notify the Department in writing of the status of that proceeding every 45 days from the date of initiation and shall provide the Department with a copy of the final decision within 10 days of the date the decision is issued. The permittee shall immediately commence reclamation activities on the disputed tract

> and shall complete reclamation as described in the approved application if it fails to submit a valid title insurance policy for the disputed tract or other information required under this condition in accordance with the specified time frames, fails to diligently pursue a quiet title action, or in the event that a court rules against the permittee's claim of ownership. The permittee may also satisfy this permit condition by demonstrating to the Department within 45 days of the issuance of this permit, that it has reached an agreement with Frank Popovich regarding right of entry to the disputed tract for the purposes of 86.64. A copy of the agreement shall be submitted to the Department.

(N.T. 186; Cmw. Ex.9)

60. DER also included in the renewal permit Special Conditions 13(a) and 13(b), which provided:

> 13. Within thirty (30) days of the date of this permit, the permittee shall install a) an additional sump at the end of the haulroad to control untreated runoff from entering the unnamed tributary to Buffalo Creek and b) speed bumps along the haulroad as an additional dust control measure, as requested pursuant to this renewal application.

61. The parties have stipulated that cutting grooves into the asphalt on the haulroad will satisfy Special Condition 13(b). (N.T. 92)

62. DER's reason for imposing the requirement that Croner install a sump at the T-437 end of the haulroad was to control runoff of the sedimentation from the haulroad into the unnamed tributary. (N.T. 193-195)

63. DER's reason for imposing the requirement that Croner install rumble strips or speed bumps was to cause the excess water to come off of the trucks passing through its spray system and dislodge coal fine material on the underside of the trucks' bodies and on the trucks' wheels. (N.T. 193, 223)

Current Conditions at the Prep Plant

64. During the month preceding the merits hearing, Frank Popovich and Frank Drabish observed the black water running off the disputed portion of the haulroad. (N.T. 140-141, 152)

65. After hearing testimony that Croner has changed its watering procedure, Smith would still recommend a sump be installed to control black water running down the haulroad into the unnamed tributary. (N.T. 255)

66. Had DER not renewed Croner's permit, Croner's facility would have had to shut down. (N.T. 210)

DISCUSSION

Initially we must examine who bears the burden of proof in this matter. As to Croner's appeal, it is Croner which bears the burden because it is challenging the renewal permit as permittee and is arguing that DER erred in inserting Special Conditions 12, 13(a) and 13(b) in its renewal permit. Western Pennsylvania Water Company v. DER, 1991 EHB 287; 25 Pa. Code §21.101(a) and (c)(1). As to Frank Popovich's appeal, it is Frank Popovich who bears the burden, since he is a third party challenging DER's decision to issue this permit. Western Pennsylvania Water Company, *supra*; 25 Pa. Code §21.101(c)(3). In order to sustain their respective burdens, both Croner and Frank Popovich must prove that DER's action was contrary to law or an abuse of its discretion. Warren Sand and Gravel Company, Inc. v. Commonwealth, DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). As our review of DER's action is *de novo*, we are empowered to determine whether DER's action can be sustained or supported by the evidence put before the Board. Willowbrook Mining Company v. DER, EHB Docket No. 90-346-E (Adjudication issued March 20, 1992); Robert L. and Jesse M. Snyder v. DER, 1990 EHB 428, affirmed in part and reversed in part, 138 Pa. Cmwlth. 534, 588 A.2d 1001 (1991). Any contentions not raised in the parties' post-hearing briefs are deemed to be abandoned. Commonwealth,

DER v. Lucky Strike Coal Company, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

In its post-hearing brief, Croner first contends DER's imposition of Special Condition 12, and consequently our review thereof, impermissibly challenges the equitable power of the Somerset Common Pleas Court, which entered a preliminary injunction on June 22, 1990, enjoining Frank Popovich and all other persons acting in concert with him from obstructing Croner's access to the haulroad. See C Ex.13. Croner further argues that its right to enter the disputed portion of the haulroad has been established via this injunction, and that through the injunction, it has satisfied Special Condition 12 "in spirit." Croner also contends Special Condition 12 goes beyond the requirements of 25 Pa. Code §86.64 by requiring Croner to obtain title for the disputed piece of property when Croner, Inc. has never claimed to have title to that property.

While urging the preliminary injunction issued by the common pleas court is not a final decision on the merits and does not preclude our consideration of the land ownership issue, Frank Popovich asserts that DER has effectively abdicated its responsibility to determine ownership prior to issuance of a coal preparation plant permit by leaving the ownership matter to be resolved until after the issuance of the renewal permit.

In its post-hearing brief, DER asserts that the preliminary injunction is not a final decree which deprives the Board of jurisdiction in this matter and that Croner has waived any argument that its complaint for injunctive relief constitutes compliance with Special Condition 12 by its failure to raise that issue in its notice of appeal. Moreover, DER claims that its imposition of Special Condition 12 was an equitable resolution of the Croner-Popovich property dispute.

The Common Pleas Court, acting on Croner's Complaint for Injunction

which asserted Croner had the right to use the haulroad in the nature of an irrevocable license, entered a preliminary injunction on June 22, 1990, restraining Frank Popovich and all persons acting in concert with him from obstructing Croner's access to the haulroad. On June 25, 1990, the common pleas court ordered the preliminary injunction to remain in effect pending a hearing. The common pleas court has not yet held a hearing on Croner's Complaint for Injunction.[5]

While the preliminary injunction allowing Croner to use the haulroad remains in effect at the present time, it is a temporary remedy granted by the common pleas court until the time when the dispute between Croner and Popovich concerning Croner's right to the disputed portion of the haulroad can be completely resolved. See Consolidation Coal Company v. District 5, United Mine Workers of America, 336 Pa. Super. 354, 485 A.2d 1118 (1984). We acknowledge that an equity court remains empowered to enforce its orders, such as the preliminary injunction (see Armstrong School District v. Armstrong Education Association, 528 Pa. 170, 595 A.2d 1139 (1991)), as is advanced by Croner. However, we cannot say that the temporary right the preliminary injunction gives Croner to use the haulroad, which may be terminated by the common pleas court at some future time, is sufficient to satisfy the requirements of Section 1396.4(a)(2)(F) of SMCRA and 25 Pa. Code §86.64(c)(2) for purposes of DER's issuance of Croner's renewal permit. At this time there has been no final determination on the merits by the common pleas court

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5 On January 8, 1993, we received from counsel for Popovich a copy of a memorandum opinion of the Common Please Court of Somerset County regarding Croner's motion for entry of default judgment and permanent injunction in the injunction matter pending before that court. The common pleas court denied the motion, reasoning that Popovich, the defendant in that matter, had taken action after the complaint for injunction was filed, with his counsel filing preliminary objections on June 2, 1992 which appeared to have merit, and citing the pending action before this Board.

regarding Croner's right to the haulroad which either DER or this Board could be said to be collaterally attacking with regard to Croner's satisfaction of DER's permitting requirements. See Commonwealth v. City of Philadelphia, 5 Pa. Cmwlth. 358, 290 A.2d 734 (1972); Consolidation Coal Company, *supra* (preliminary injunction cannot serve as judgment on the merits for purposes of *res judicata*); In Interest of Perry, 313 Pa. Super. 162, 459 A.2d 789 (1983) (collateral estoppel should not be applied where there has been no valid and final judgment). Moreover, we reject Croner's suggestion that we should defer our ruling on the propriety of Special Condition 12 until the Somerset Common Pleas Court has made a final decision in the injunction action.

We now turn to the merits of the appellants' attacks on Special Condition 12.

Special Condition 12

DER based its imposition of Special Condition 12 in Croner's renewal permit on Section 1396.4(a)(2)(F) of SMCRA, 52 P.S. §1396.4(a)(2)(F) of SMCRA, 52 P.S. §1396.4(a)(2)(F), and 25 Pa. Code §86.64(c)(2). Section 1396.4(a)(2)(F) requires that an application for a permit to conduct surface mining operations must include, upon a form prepared and furnished by DER, the written consent of the landowner to entry upon any land to be affected by the operation. Section 86.64(c)(2) states that in the case of a permit for coal preparation facilities not situated on a surface mining permit area, the applicant shall describe the documents upon which the applicant bases the right to enter upon the land and conduct coal mining activities.

In connection with its 1986 application for a coal preparation plant permit, Croner initially attempted to obtain a signed landowner consent form from Frank Popovich giving Croner permission to enter and exit the haulroad, but was unsuccessful. Croner then submitted a Statement of Claim By Adverse

Possession signed by the Croner individuals, in which they claimed ownership of the haulroad, along with a landowner consent form signed by the Croner individuals to DER. DER found this information to be sufficient and issued the 1986 permit to Croner on September 3, 1986, which was to expire on September 3, 1991. In the instant appeal Frank Popovich does not make any attempt to collaterally attack DER's issuance of the 1986 permit, which he failed to timely appeal, but is only challenging DER's issuance of the renewal permit in September of 1991. Moreover, there is no evidence that DER was aware of the instant dispute between Croner and Popovich when it issued the 1986 permit, nor even that there was a dispute at that time. In its renewal application, Croner based its right to enter the haulroad on the Supplement C form which the Croner individuals had signed in conjunction with the 1986 permit's issuance. Once DER became aware that there was a dispute between Croner and Frank Popovich over the ownership of the property traversed by the haulroad through Frank Popovich's objections to the renewal permit in the spring of 1991, it was faced with the decision of whether to deny Croner's renewal permit because of the land ownership dispute, despite Croner's submission of a Supplement C form signed by the purported property owners, or to issue the permit, conditioning it to provide that Croner must promptly establish that it truly had the landowner's consent. DER chose the latter option and issued the renewal permit containing Special Condition 12. This special condition requires Croner to within 45 days demonstrate, through either a valid title insurance policy covering the disputed tract or evidence that a quiet title action has been instituted in a court of common pleas, the validity of the title by adverse possession. Croner also has the option of reaching an agreement with Frank Popovich over the disputed tract; otherwise, Croner must reclaim and abandon the affected portions of the disputed

property.

While this Board is not empowered to make a determination of title to a piece of property, we have previously held that we may examine a land ownership question to the extent that is necessary for us to rule on whether DER has properly discharged its statutory obligation. Cooper v. DER, 1982 EHB 250; Ruth S. Body v. DER, et al., EHB Docket No. 88-498-F (Opinion issued June 23, 1992). Thus, we will examine the adverse possession issue to the extent necessary to review DER's action here.

Under Pennsylvania law, it is well-established that one claiming title to real property by adverse possession must affirmatively prove that he had actual, continuous, exclusive, visible, notorious, distinct, and hostile possession of the land for twenty-one years. Tioga Coal v. Supermarkets General Corporation, 519 Pa. 66, 546 A.2d (1988); Conneaut Lake Park, Inc. v. Klingensmith, 362 Pa. 592, 66 A.2d 828 (1949); Glenn v. Shuey, 407 Pa. Super. 213, 595 A.2d 606 (1991). In order for the possession to confer title, each of these elements must exist. *Id.* As an element of adverse possession, the word "hostile" does not mean "ill-will" or "hostility," but implies an intent to hold title against the record titleholder. Tioga Coal, *supra*, at ___, 546 A.2d at 3.

The parties have stipulated that John Popovich was the record title holder of this property until August 6, 1971, when he conveyed it to his son, appellant Frank Popovich. In this deed, however, John Popovich reserved for himself the right to use the haulroad and to designate other persons who could use the haulroad during his lifetime. John Popovich died in July of 1990. The parties have further stipulated that John Popovich permitted Croner's predecessors and later Croner to use the haulroad in exchange for coal for John Popovich's house. Our Supreme Court explained in Roman v. Roman, 458 Pa.

196, 401 A.2d 361 (1979), that even when the initial possession of property begins with permission, an adverse possession claim can be made out. However, where the possession is permissive at its inception, adverse possession "will not begin to run against the real owner until there has been some subsequent act of disseizen or open disavowal of the true owner's title." *Id.* at ___, 401 A.2d at 363. We were offered no evidence to establish whether John Popovich ever terminated his permission for Croner to use the haulroad during his lifetime or at what point the Croner individuals first disavowed John or Frank Popovich's title.

We are not, however, passing on the Croner individuals' adverse possession claim here, but on whether DER's issuance of the renewal permit and imposition of Special Condition 12 was an abuse of DER's discretion. Under §1396.4(a)(2)(F) and 25 Pa. Code §86.64(c)(2), Croner was required to provide proof that it had the landowner's consent. Although Croner submitted a landowner consent form in which it purported to have the landowner's consent to its use of the haulroad, the company's authority was not clearly established thereby. At the same time, had DER refused to issue Croner's renewal permit, Croner's facility would have had to shut down because of a lack of access to it. Our careful examination of Special Condition 12 leads us to conclude that this condition allows for a prompt resolution of the title dispute while allowing Croner's facility to continue to operate. In the event Popovich prevails by establishing his title to the property in quiet title action before the Common Pleas Court, he may also be able to recover monetary damages for the time Croner uses this haulroad. See Tioga Coal, *supra*. In this circumstance, considering the potential impact on Croner's operations and on Frank Popovich, DER has attempted to strike a reasonable balance. We find DER's decision to issue the renewal permit to Croner with the inclusion of

Special Condition 12 was not an abuse of DER's discretion even if it is not how any individual member of this Board might have elected to proceed. See Sussex, Inc. v. DER, 1984 EHB 355 (DER abuse of discretion exists where it has exercised manifestly unreasonable judgment, partiality, prejudice, bias, ill-will, misapplication of the law, or other similar egregious transgressions).[6]

We recognize that it was not Croner itself but the individual Croners who filed the Statement of Claim By Adverse Possession claiming to have title to the disputed portion of the haulroad. However, as Croner based its right to enter and exit the haulroad on the Supplement C form signed by the individual Croners, Croner's alleged right to traverse the haulroad is intertwined with the individual Croners' claim of title. Since it was Croner's renewal application which was before DER for decision, DER appropriately directed Croner, as opposed to the individual Croners or Frank Popovich, to establish the title to the property so DER can determine whether the individual Croners' Supplement C form is valid. While the language of Special Condition 12 states that Croner shall demonstrate that "it" has title to the disputed tract of property, we interpret this to mean that the Condition will be satisfied if Croner shows in the manner set forth in the Condition that the individual Croners have the title to the property, so that the Supplement C form these individuals signed will be of unquestionable validity.

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6 To the extent that Croner's post-hearing brief asserts it has satisfied Special Condition 12 in spirit by instituting the preliminary injunction action, this argument has been waived because it was not raised in Croner's Notice of Appeal. Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989).

Special Conditions 13(a) and 13(b)

Special Condition 13(a) requires Croner to install an additional sump at the end of the haulroad to control untreated runoff from entering the unnamed tributary to Buffalo Creek. Croner challenges this condition, arguing DER had no reasonable basis for imposing this requirement. We disagree.

The evidence at the hearing established that Croner's trucks track mud and coal fines onto the haulroad and T-437. Prior to May of 1991, Croner washed the haulroad to try to control the dust generated by its trucks. In early May of 1991, DER's Jeffrey Smith and John Wilk observed a truck at the T-437 end of the haulroad washing or spraying water onto the haulroad. The DER employees observed this water ran onto the haulroad and T-437 and eventually entered the unnamed tributary to Buffalo Creek. At the May 14, 1991 informal conference, a representative of the Pennsylvania Fish Commission recommended that a sump be installed at the end of the haulroad to collect this runoff before it reached the unnamed tributary. Although Croner has changed its method of washing the road to a "wetting system" following the May 14, 1991 informal conference, both Mr. Popovich and Mr. Drabish testified at the merits hearing that during the month preceding the merits hearing, they had continued to observe the runoff of black sedimentation from the haulroad. Further, Mr. Drabish testified there is no noticeable difference in the procedures Croner used for washing versus wetting the haulroad before and after May of 1991. Croner's post-hearing brief argues that the testimony given by Mr. Popovich and Mr. Drabish is exaggerated and self-serving. This assertion is belied, however, by the photographs of the site which were admitted into evidence as P-Exhibits 2, 3, 4, 5, 6, 7, and 8, which were taken after May of 1991 and depict the conditions at the site to be as described by Mr. Popovich and Mr. Drabish in their testimony. Moreover, while Frank

Popovich clearly has an interest in the outcome of this appeal, there is no reason for us to view Frank Drabish's testimony as biased, especially where it was supported by the photographic evidence. Accordingly, we do not find DER abused its discretion in imposing Special Condition 13(a) in Croner's renewal permit to address the runoff problem.

As to Special Condition 13(b), we likewise find DER did not abuse its discretion by requiring Croner to install speed bumps, which the parties have stipulated may be grooves cut into the asphalt along the haulroad, as an additional dust control measure. Croner's trucks clearly create a dust condition at the prep plant in dry weather periods, as evidenced in photographs P-Exhibits 2, 3, 4, 5, 6, 7, and 8, and Special Conditions 13(a) and 13(b) are mechanisms to control this dust problem and prevent the black coal dust from being washed into the unnamed tributary.

In accordance with the foregoing discussion, we sustain DER's imposition of Special Conditions 12, 13(a), and 13(b) in Croner's renewal permit and dismiss the appeals of both Croner and Frank Popovich by the following order.[7]

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties to this appeal.

2. The Board has jurisdiction over the subject matter of this appeal.

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[7] The Board recognizes that in light of the landownership problem addressed by Special Condition 12, the requirement in Special Condition 13(a) that Croner install a sump at the end of the haulroad presents an additional potential problem if the ownership of this land rests with Frank Popovich and not Croner because DER would be directing Croner to install a sump on Frank Popovich's land. As this issue was not raised in either appellant's post-hearing brief, however, it has been waived under Lucky Strike Coal Company, *supra*, and we thus make no ruling on it. We nevertheless recommend that the parties reach an agreement regarding Croner's installation of this sump.

3. Croner, as permittee, bears the burden of proving DER abused its discretion by imposing Special Conditions 12, 13(a), and 13(b) in Croner's renewal permit for its coal preparation facility. Western Pennsylvania Water Company v. DER, 1991 EHB 287; 25 Pa. Code §21.101(a) and (c)(1).

4. Frank Popovich, as a third party challenging DER's decision to issue Croner's renewal permit alleging he is the titleholder of land which is traversed by Croner's haulroad and he did not consent to Croner's entry on his land, bears the burden of proving DER abused its discretion in issuing the permit. Western Pennsylvania Water Company, *supra*; 25 Pa. Code §21.101(c)(3).

5. Any contentions not raised in the parties' post-hearing briefs are deemed to be abandoned. Commonwealth, DER v. Lucky Strike Coal Company, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

6. In order for the Board to review whether Croner has submitted sufficient information to meet the requirements of Section 1396.4(a)(2)(F) of SMCRA, 52 P.S. §1396.4(a)(2)(F), and 25 Pa. Code §86.64(c)(2), the Board may examine the land ownership question to the extent necessary to rule on whether DER abused its discretion in issuing the renewal permit. Ruth S. Body v. DER, *et al.*, EHB Docket No. 88-498-F (Opinion issued June 23, 1992); Cooper v. DER, 1982 EHB 250.

7. The preliminary injunction entered by the Common Pleas Court of Somerset County on June 22, 1990 upon consideration of Croner's Complaint for Injunction filed with that court on June 22, 1990, which allows Croner continued use of the disputed haulroad until a hearing can be held by that court on whether to make the preliminary injunction permanent, does not preclude the Board from considering the challenge to DER's imposition of Special Condition 12 of Croner's renewal permit in this appeal. This preliminary injunction is a temporary remedy and cannot serve as a final

judgment on the merits for purposes of *res judicata* or collateral estoppel. Consolidation Coal Company v. District 5, United Mine Workers of America, 336 Pa. Super. 354, 485 A.2d 1118 (1984); In Interest of Perry, 313 Pa. Super. 162, 459 A.2d 789 (1983).

8. DER did not abuse its discretion in issuing Croner's renewal permit with Special Condition 12 where Croner submitted a landowner consent form to DER but the title of purported landowners by adverse possession was not clear.

9. Since, as the evidence at the merits hearing established, Croner's trucks track mud and coal fines onto the haulroad and T-437 and Croner's truck washing and road wetting procedure contributes to the runoff of black sedimentation into an unnamed tributary to the Buffalo Creek near the haulroad, DER did not abuse its discretion in imposing Special Conditions 13(a) and 13(b) in Croner's renewal permit.

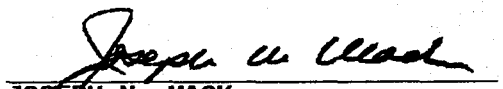
ORDER

AND NOW, this 3rd day of March, 1993, it is ordered that the appeals of Croner, Inc., at EHB Docket No. 91-460-E, and Frank Popovich, at EHB Docket No. 91-463-E, consolidated at Docket No. 91-460-E are dismissed and DER's imposition of Special Conditions 12, 13(a), and 13(b) in Croner's renewal permit is sustained.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

* Board Chairman Maxine Woelfling has a dissenting opinion which is attached.

DATED: March 3, 1993

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M. DIANE SMITH
SECRETARY TO THE E

CRONER, INC. and FRANK POPOVICH	:	
	:	
v.	:	**EHB Docket No. 91-460-E**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 3, 1993**

DISSENTING OPINION OF
BOARD CHAIRMAN MAXINE WOELFLING

I must dissent from the adjudication as it concerns Condition 12 of the renewal permit issued to Croner and, as a result, would reverse DER's issuance of the renewal permit. While my fellow Board Members have crafted a practical compromise in a difficult situation, I cannot agree that either §4(a)(2)(F) of SMCRA or 25 Pa. Code §86.64 allows such a compromise. The language of both the statute and regulation, as well as a related regulation at 25 Pa. Code §86.37, mandate that written landowner consent be submitted by the applicant prior to the issuance of a mining activity permit. To read these provisions as authorizing an exception to this requirement where a disputed property right is being litigated ignores the clear and unambiguous language of the provisions, forcing the Board not to merely interpret, but to legislate. See, e.g. Reese Brothers Coal and Clay Company v. Department of Environmental Resources, 54 Pa. Cmwlth. 210, ___, 420 A.2d 780, 783 (1980). Such interpretation can only exacerbate the problems §4(a)(2)(F) of SMCRA was intended to avoid - issuing permits where the operator did not have a clear

right to conduct mining activity and perpetuating private property disputes by giving the appearance of a regulatory endorsement to one of the parties.

The consequences of denying the permit may well be loss of employment to a number of individuals, but the consequences of granting the permit are interference with the rights of an individual property owner. The fact that DER could reclaim the disputed haulroad or that Croner has the obligation to do so under its permit does not negate the property dispute. The Department should not have issued the renewal permit until Croner and Popovich resolved their dispute.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: March 3, 1993

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JAMES E. WOOD :
:
v. : EHB Docket No. 90-280-E
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES and :
M & S SANITARY SEWAGE DISPOSAL, INC. :
Permittee : Issued: March 4, 1993

OPINION AND ORDER
SUR MOTION TO LIMIT ISSUES

By: Richard S. Ehmann, Member

Synopsis

Where an appellant alleges in his Pre-Hearing Memorandum that the Department of Environmental Resources' ("DER") decision to issue a permit is in violation of its regulations and fails to specify the regulations violated, despite his having been ordered to specify his legal contentions and having filed an amendment to the Pre-Hearing Memorandum, a Motion To Strike such a contention will be granted. Where an amended Pre-Hearing Memorandum sets forth a party's legal contentions and concludes by stating: "Other contentions set forth in the Notice Of Appeal", without reference to what they are or any legal authority therefor, a Motion To Strike such an unspecific contention will be granted.

A Motion To Strike certain of a party's factual contentions based upon an alleged lack of standing will be denied where in response to the Motion, respondent's Memorandum recites unverified factual allegations showing standing, but proof of these allegations will be required at the merits

hearing. Where a person avers injury to the general populace from DER's decisions, he will not be permitted to act as a private attorney general but will be permitted to show standing through proof of an impact on himself from DER's action.

A Motion To Strike will be denied where from the Motion and the response thereto and a *pro se* Notice Of Appeal, it is not clear that the issue in the amended Pre-Hearing Memorandum was not timely raised in the Notice Of Appeal.

OPINION

James E. Wood ("Wood") has appealed from DER's issuance of a National Pollutant Discharge Elimination System ("NPDES") permit to M&S Sanitary Sewage Disposal, Inc. ("M&S") for a discharge to the Delaware River from M&S' facility in Pike County. In this appeal we have already prepared and issued two opinions to which the reader is referred for further background.[1] We have also issued numerous other orders including our Order dated October 4, 1991 which, in part, granted a portion of M&S' initial Motion To Limit Issues.

Before us in the appeal is a second Motion To Limit Issues filed on behalf of M&S. As background in regard thereto, we observe that on October 4, 1991 we ordered Wood to file an amended Pre-Hearing Memorandum because what had previously been filed as a Pre-Hearing Memorandum on his behalf was not reasonably close to what is required by Pre-Hearing Order No. 1. Apparently M&S has filed this second Motion To Limit Issues as an attempt to eliminate issues which Wood is trying to raise in his amended Pre-Hearing Memorandum.

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[1]See 1991 EHB 1156 and James E. Wood v. DER, et al., EHB Docket No. 90-280-E (Opinion issued October 23, 1992).

M&S' Motion seeks to strike certain factual assertions and all of the remaining legal contentions set forth in Wood's amended Pre-Hearing Memorandum for a series of reasons. M&S' Motion raises Wood's lack of standing to raise some assertions, the untimeliness of Wood's assertion of another contention and the lack of specificity in yet other portions of his amended Pre-Hearing Memorandum.

In response, Wood filed a Memorandum which suggests that M&S' series of motions to limit Wood's appeal is contrary to the rules of pleading because the Rules were promulgated to promote justice. Wood next suggests, without citation to authority therefor, that M&S' challenge to Wood's standing to raise certain arguments is waived by not having been raised earlier. Thereafter, Wood asserts he has standing. Wood next argues that his assertion as to the consideration by DER of an alternative to a discharge is not untimely under Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989).[2] As to M&S' suggestion of a lack of specificity in Wood's assertions, Wood strings together series of citations to specific regulations and asserts he has been specific enough. Thereafter, the Memorandum ceases to be completely coherent and contains a statement:

> 3. See answer to numbers 1 and 2 and A 10 and 12. In addition, this specific regulation citation is same as 1.2.

Finally, Wood claims he need not be more specific and is not required to narrow his claims as sought by M&S because he has the same rights as other

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[2]It would be helpful to this Board if Wood's counsel would cite cases referenced in documents filed on Wood's behalf in the accepted fashion. None of the case "citations" in Wood's Memorandum is complete and most contain errors or omissions.

citizens and his Pre-Hearing Memorandum conforms with the practice before this Board according to his counsel's twenty years of experience.

Insofar as Wood argues the adequacy of his Pre-Hearing Memorandum based upon his counsel's experience, we flatly reject this assertion. If his counsel has been submitting Pre-Hearing Memoranda of this type for twenty years as this Memorandum says, and we have not reviewed our records to confirm that this is so, then those Pre-Hearing Memoranda have been inadequate for that period.

In Midway Sewerage Authority v. DER, 1991 EHB 1445, we described the pre-hearing procedures before this Board as a winnowing process which narrows the issues before us in each appeal. From the filing of a Notice Of Appeal through discovery, the disposition of pre-hearing motions, the filing of Pre-Hearing Memoranda, preparation for hearing as directed by Pre-Hearing Order No. 2, and the hearing itself, the parties and the Board narrow, refine and clarify the issues until we distill them to those which must be adjudicated. A portion of this process is Pre-Hearing Order No. 1, which requires the filing by each party of a Pre-Hearing Memorandum setting forth the party's legal contentions and factual assertions. Paragraph 3B of Pre-Hearing Order No. 1, as issued in this appeal on August 9, 1990, spells out that as to Wood's legal contentions, he has to set forth detailed citations to the legal authorities supporting same. Wood is aware of this requirement not only as a result of Pre-Hearing Order No. 1, but also as a

result of our Order of October 4, 1991. There, the sitting Board Member granted, in part, M&S' Motion To Compel Compliance With Pre-Hearing Order No. 1.[3] In that Order we specifically provided:

> 3) The motion to compel compliance with pre-hearing order number 1 is granted to the extent that Wood is ordered to file an amended pre-hearing memorandum within 30 days of the date of the Order. The amended pre-hearing memorandum shall provide citations to regulations, statutes, or case law in support of the remaining Contentions of Law, and shall include a summary of the testimony of expert witnesses.

Instead of complying with either of these Orders, Wood failed to identify each legal contention he advances and as to it provide a detailed citation to the legal authorities supporting that contention. Indeed, after having barely escaped dismissal of appeal as sought previously by M&S (see James E. Wood v. DER, 1991 EHB 1156) and having had M&S' Motion To Limit Issues and Compel Compliance with Pre-Hearing Order No. 1 granted in part on October 4, 1991, one would expect Wood to take pains to timely comply in full with our rules of procedure and our orders. Instead, to comply with our Order of October 4, 1991, as quoted above, Wood submitted the following statement as a supplement to his Pre-Hearing Memorandum:

> Appellant will rely on Article 1, Section 27 of the Pennsylvania Constitution, Payne vs. Kassab, the Clean Streams law, 35 P.S. §671; the Federal Clean Water Act, 33 U.S.C., Titles 1 and 3, and the Clean Stream Regulations at 25 Pa. Code Chapters, 90, 93 and 96 (specifically Chapter 93 and Chapter 96.) Appellant also relies upon Community College of Delaware County vs. Foxx, 342 A.2d 468; Delaware Unlimited, Inc., vs. DER, 508 A.2d 348; Pems vs. DER, 503 A.2d 477; Concerned Citizens vs. DER, 387 A.2d 949 and Appeal of Gaster, 556 A.2d 473. Also, plaintiffs rely on

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[3]At the time of that order's entrance, this appeal was assigned to former Board Member Terrance J. Fitzpatrick. It was reassigned to Board Member Richard S. Ehmann on September 22, 1992 following Judge Fitzpatrick's resignation from the Board.

> the Regulations of the Counsel of Environmental Quality, at 40 C.F.R. §1500. Appellant requests and reserves the right to expand on the legal authorities.

This "supplement" was an inadequate response to our Order of October 4, 1991. What was required was a legal contention-by-legal contention statement of the statutory, regulatory, or case law citations (if they exist) which are authority for each contention.

Now M&S seeks to strike Wood's Contention Of Law No. 5 which provides: "The regulations invalidly fail to protect the existing uses at the discharge point and in the surrounding area." Wood's amended Pre-Hearing Memorandum fails to specify which regulations this contention references. Wood's Memorandum in response to M&S' instant motion contains a citation to regulations, stating:

> "...the citations are 92.57, 92.58, 93.5, 93.6, 93.3, 93.2, 93.7, 94.32, 94.61, 95.1, 95.2, 95.8, 95.9"

It fails to state which of the cited regulations deal with each of his legal contentions.

The hearing on the merits of this appeal is scheduled to begin on April 6, 1993. While we have repeatedly indicated great reluctance in imposing sanctions or otherwise limiting a party's ability to present his position, we can no longer ignore Wood's continuing failure to do less than the minimum necessary to comply with our directives. To continue to do so would be to fail to recognize that, like Wood, the other parties before us also have "rights", including the right to know where Wood is coming from as to the contentions he advances, so that they may prepare their defense thereto. Wood's failure to comply with our Orders has thwarted our efforts to assure all parties that they may come before us expecting equal opportunity to

be heard on the issues to be adjudicated. Since Wood has not provided the specificity required, with the hearing just slightly more than a month away, we must grant M&S' request as to Wood's Contention Of Law No. 5.

Based on our prior Order of October 4, 1991 and this conclusion, we have already struck all but two of Wood's specific legal contentions. Insofar as Wood's Contention Of Law No. 8 is general, as opposed to being specific, and states: "Other contentions set forth in the Appeal", it too must be struck. The specific legal contentions of a party cannot be left open-ended and indefinite right up to the hearing date to be sprung without either warning or without specification in the Pre-Hearing Memorandum. Such a vague general reference thwarts the procedure discussed above and in Midway Sewerage Authority, *supra*. Thus, all of Wood's specific legal contentions and this one generalized reference are struck except for contentions Nos. 1 and 2.

If we were to strike Wood's Contentions Nos. 1 and 2 as sought in M&S' Motion, we might produce a scenario where Wood could make no assertions of legally improper conduct by DER. As Wood's Memorandum suggests, the net effect of striking all of Wood's legal contentions might be the granting of a *de facto* summary judgment (or perhaps more likely a judgment on the "pleadings"). This is not sought by M&S and we are not ready to give M&S a judgment in its favor in this fashion. Nevertheless, Wood must now get down to specifics as to his remaining legal contentions. Insofar as contentions Nos. 1 and 2 are based on conclusions that specific sections of statute or regulations are violated, he must separately set forth what sections of which statute or regulation apply to each separate contention.

What applies to Wood's Contentions Nos. 1 and 2 also applies to Wood's factual assertions. Factual assertion No. 12 does not specify any

regulations or statutes applicable thereto and neither do Wood's remaining Contentions Of Law. To assert, as does Factual Assertion No. 12, that DER's regulations ignore the mandate of Article I Section 27, is to make a general assertion about DER's regulations. As to this permit issued to M&S, Wood must now set forth the specific sections of specific regulations with knowledge that he will not be permitted at the hearing to amend such a list.

M&S' Motion also seeks to strike Wood's Factual Assertion No. 9, which states:

> Alternatives to the proposed discharge are available, but neither permittee nor DER have made any effort to adopt such alternatives.

M&S contends this issue was not raised in Wood's Notice Of Appeal but first appeared in the Pre-Hearing Memorandum and thus it is time barred under Game Commission. In response, Wood does not assert this issue was raised in his Notice Of Appeal and our review thereof suggests it does not appear there. Instead, Wood asserts that Game Commission does not stand for the proposition that this issue must be raised in his Notice Of Appeal; rather, he says that evaluation of alternatives is "required by Article I Section 27 of the Pennsylvania Constitution, which is cited in a Pre-Hearing Memorandum, as well as Payne v. Kassab, 11 Cmwlth. 11." This statement makes it clear that Wood does not understand Game Commission. It makes no difference under that opinion if Article I Section 27 is mentioned in Wood's Pre-Hearing Memorandum or not. What matters under Game Commission is whether this issue was mentioned in Wood's Notice Of Appeal. Wood's *pro se* Notice Of Appeal, though somewhat inarticulate, clearly mentions Article I Section 27, but without saying anything about alternatives. However, as this Notice Of Appeal was filed *pro se* and this is the theory for Wood's "alternatives" allegation, we

will not grant this Motion, but we do advise Wood that he will be limited in the evidence he may offer at the hearing as to the need for consideration of alternatives to that arising from this Article I Section 27 contention.

Finally, M&S seeks to strike Wood's Factual Assertions Nos. 6, 7 and 8 based on his lack of standing to raise same. No. 6 relates to the quality of the receiving stream as a natural resource which must be protected simply because it is a natural resource and to protect the local natural resource-dependent economy. No. 7 deals with potential adverse impacts on the fishery within the Delaware River from the discharge from M&S' proposed plant. No. 8 relates to possible impact on human health from the plant's discharge.

In response to M&S' standing argument, Wood first asserts standing arguments are waived because they were not raised earlier. This is not so. Standing goes to our jurisdiction to hear this appeal, and jurisdictional issues are never waived but may be raised at any time. Solomon Run Community Action Committee v. DER, et al., EHB Docket No. 90-483-E (Opinion issued January 24, 1992), and Del-Aware Unlimited, Inc. v. DER, et al., 1990 EHB 759.

Wood also asserts he has standing. Wood makes his assertions as to standing in this memorandum and submits neither a verification of the allegations therein nor an affidavit as to the facts allegedly showing that he has standing. While the history of Wood's performance in this appeal may make it painful for us to continue to bend over backward for him, we will again do so as to the assertions in his memorandum and hold that they are sufficient, even though unverified, to allow us to deny this Motion as to these issues at this time. Insofar as Wood has appealed because he is concerned as to the discharge's health impact on himself, because as a fisherman he is concerned about impact on the fishery resource he uses, and as a businessman and

property owner he is concerned about the impact of this discharge on his natural resources-dependent businesses or his property, he may have standing to raise these issues. Roger Wirth v. DER, 1990 EHB 1643. Wood appealed on his own behalf, however. He is not a citizens group appealing on behalf of its members or a municipality appealing on behalf of its residents, so we do not deal with representational standing issues as to this Motion. Accordingly, to the extent he can show standing he may pursue these allegations as they relate to him, but he may not act as a private attorney general protecting the general public's interests by alleging, as he does, that he is a steward of clean water in Pennsylvania. Marion Marcon v. DER, et al., 1988 EHB 1246; Betty Simpson v. DER, 1985 EHB 759.

Based on these conclusions we issue the following Order.

ORDER

AND NOW, this 4th day of March, 1993, it is ordered that M&S' Motion To Strike is denied as to Wood's factual allegations Nos. 6, 7 and 8, but that at the commencement of the hearing on the merits of Wood's appeal, Wood shall put on the record his evidence in support of his allegations as to his standing which are set forth in the Memorandum filed on his behalf and M&S, after cross-examination in regard thereto, is granted leave to reassert any or all of its Motion To Strike as it pertains to standing. Further, as to Wood's legal contentions Nos. 1 and 2 and his factual assertion No. 12, it is ordered that within ten days of the date of this Order, Wood shall file an amendment to his Pre-Hearing Memorandum setting forth separately as to each of Contentions Nos. 1 and 2 and Assertion No. 12 all statute and regulation sections he believes apply thereto and Wood shall not modify any of these lists thereafter unless granted leave to do so by this Board. Additionally,

it is ordered that Wood's Contentions Nos. 5 and 8 are struck from his Pre-Hearing Memorandum. Finally, it is ordered that M&S' Motion is denied as to Wood's factual assertion No. 9.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: March 4, 1993

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SECRETARY TO THE

SCOTT TOWNSHIP, ALLEGHENY COUNTY	:	
	:	
v.	:	EHB Docket No. 92-548-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: March 4, 1993

OPINION AND ORDER
SUR DER'S MOTION TO DISMISS

By: Richard S. Ehmann, Member

Synopsis

When the Department of Environmental Resources ("DER") moves to dismiss an appeal asserting that its letter to Scott Township, Allegheny County ("Scott") captioned Notice Of Violation is not an action or adjudication of the type appealable to this Board, it has the burden of convincing us that its letter is not of a type appealable to us. Where DER's letter states that certain violations should be abated in one of two specific fashions and sets a deadline for doing so, it is not clear that DER's letter is not appealable and the Motion must be denied.

OPINION

On November 17, 1992, DER's Stephen Sales wrote to Scott after inspecting Scott's leaf composting facility. Sales' letter, on behalf of DER, reports that the inspection disclosed six enumerated violations at Scott's facility (but does not say whether they are violations of a policy, guidelines, regulations or statutes). Sales' letter then goes on to say:

In order to abate the above listed violations you should:

1. Comply with the Department's Guidelines for Leaf Composting Facilities by November 20, 1992; or

2. Remove all yard waste to a compost site that is operating according to the Department's Guidelines for Leaf Composting Facilities by November 20, 1992.

On December 17, 1992, Scott filed an appeal from this letter with this Board.

On February 5, 1993, DER filed a Motion To Dismiss Scott's appeal. The Motion says the appeal should be dismissed because DER's letter does not mandate any action on Scott's behalf but merely suggests two alternative courses of action for it to take. As such, DER contends this letter, while clearly an action of DER, is not an appealable action and thus we lack jurisdiction over any appeal therefrom.

Scott's Answer To Appellee DER's Motion To Dismiss was received by the Board on February 25, 1993. It takes the position that DER's letter is less than clear as to whether it mandates specific conduct by Scott and can be read as doing so. Accordingly, Scott says the Motion should be denied. Both parties have had counsel submit briefs this issue.

As movant, DER is seeking an order granting it dismissal of Scott's appeal. Because it is making this motion, DER must convince us that it is entitled thereto. Since granting this motion puts Scott "out of court," we must view the motion in a light most favorable to Scott and resolve doubts in its favor. John and Sharon Klay, d/b/a Fayette Springs Farms v. DER, EHB Docket No. 92-280-E (Opinion issued February 4, 1993).

In their briefs both parties agree, as stated in Scott's brief:

> Actions of the Department are appealable only if they are adjudications within the meaning of Administrative Agency Law, 2 Pa.C.S.A. §101 or "actions" under §1921A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21 and 25 Pa. Code §21.2A(1). Adjudications are defined as those actions which affect the

> personal or property rights, privileges, immunities, duties, liabilities or obligations of the party. Chester County Solid Waste Authority v. DER, 1987 EHB 523.

Each party then cites prior Board decisions allegedly supporting its position on appealability. Both sides' briefs cite us to Robert H. Glessner v. DER, 1988 EHB 773, M.C. Arnoni Co. v. DER, 1989 EHB 27, and Chester County Solid Waste Authority v. DER, 1988 EHB 1173, in addition to other cases.

Here, DER's Notice Of Violation recites violations, sets a date by which they should be abated and gives two alternative abatement options. It thus suggests some obligation for Scott to act in response thereto. However, DER's letter does not explicitly mandate Scott to adopt one of the two DER options, nor does it say the violations must be abated by that date. Further, the directory words "shall", "must", or "cease" are not present in the letter. In turn, this suggests merit to DER's motion.

It is because the letter's intent is far from clear that DER's Motion must be denied. Meadville Forging Company v. DER, 1987 EHB 782. If DER's intent had been clear we could have avoided having to consider this motion and perhaps even the filing of this appeal.[1]

---

[1]Considering the cost in time and money to make such motions and defend against same, we are at a loss to understand why DER and its opponents (here Scott) do not resolve these questions between themselves whenever possible. Here the issue could quickly and simply be resolved by DER's issuance of a new Notice Of Violation spelling out whether obligations or actions are mandated of Scott or not and indicating that any prior unclear Notice Of Violation is rescinded. Such a practice might allow DER's legal staff to devote its limited time to other more substantive matters (not to mention the time saved by opposing parties, their counsels and this Board).

ORDER

AND NOW, this 4th day of March, 1993, it is ordered that DER's Motion To Dismiss is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: March 4, 1993

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M. DIANE SMITH
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KEPHART TRUCKING COMPANY	:	
	:	
v.	:	**EHB Docket No. 92-537-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** March 8, 1993

OPINION AND ORDER SUR PETITION FOR SUPERSEDEAS

By Joseph N. Mack, Member

Synopsis

The appellant's request for a supersedeas is granted where it has raised a constitutional challenge to 25 Pa. Code §285.212(d) as interfering with interstate commerce and has raised a challenge to the Department's interpretation of what constitutes a solid waste transfer facility within the meaning of the Solid Waste Management Act. The appellant has demonstrated a likelihood of success on the merits, that it will suffer irreparable harm by complying with the Department's order, and that the grant of a supersedeas will pose no threat of injury to the public.

OPINION

On December 7, 1992, Kephart Trucking Company ("Kephart Trucking") filed a notice of appeal from a November 20, 1992 order of the Department of Environmental Resources ("Department") charging Kephart Trucking with illegally operating a transfer facility without a permit in violation of the Solid Waste Management Act ("SWMA"), Act of July 7, 1980, P.L. 380, as

amended, 35 P.S. §6018.101 *et seq.* The order directed Kephart Trucking, *inter alia*, to cease using its trucking facility or any other unpermitted site as a transfer facility and to comply with 25 Pa. Code §285.212(d) by moving vehicles loaded with municipal waste through the state within a period not exceeding 24 hours after loading.

Simultaneously with the filing of its notice of appeal, Kephart Trucking filed a petition for supersedeas, which it subsequently amended on December 28, 1992; a pre-hearing brief in support of the petition was filed on January 8, 1993. On or about January 11, 1993, the Department submitted a memorandum in opposition to the petition for supersedeas.

A hearing on the request for supersedeas was held in Indiana, Pennsylvania on January 14, 1993, at which both parties were represented by legal counsel and presented evidence. The background summary which follows is based upon the evidence presented by the parties at the hearing.

Kephart Trucking operates a trucking facility in Bigler, Pennsylvania, which is primarily engaged in providing specialized service to a broad range of industries in the northeastern area of the United States. A significant portion of Kephart Trucking's business involves the transport of municipal waste. Approximately 95 percent of the municipal waste shipments move in interstate commerce, principally from points of origin in New York, Connecticut, and New Jersey to Pennsylvania or through Pennsylvania to landfills in Ohio.

Kephart Trucking's drivers are subject to limitations on the number of hours which they are allowed to drive and to be on-duty which are imposed by the Federal Motor Carrier Safety Regulations at 49 C.F.R. §395.3. In addition, Kephart Trucking's ability to make deliveries of municipal waste to landfills or processing facilities is limited to the hours of operation of

those facilities, which are normally closed from Saturday afternoon to Monday morning.

In order to accommodate municipal waste shipments which cannot be delivered over the weekend and drivers who are scheduled to go off-duty, Kephart Trucking arranges for its drivers to park the tractor trailer units at the company's facility in Bigler while the driver goes home for the weekend. This also provides an opportunity for Kephart Trucking to perform maintenance work on the vehicles during that time.

After receiving a complaint from a neighbor regarding the odor of garbage emanating from the site, Kephart Trucking began to apply additional deodorants and masking agents. After taking this action, Kephart Trucking received no further complaints.

The Department also received some complaints of a bad odor emanating from the site, causing James Greene, a solid waste specialist with the Department, to visit the Kephart Trucking facility on certain occasions in 1991 and 1992. Following a complaint made in May 1992 by William and Jaimy Buck, who reside on property located west of the Kephart Trucking facility, Mr. Greene conducted an inspection of the site on November 14 and 15, 1992. When Mr. Greene arrived at the Kephart Trucking site on November 14, 1992, a Saturday, he detected the odor of garbage. In the trailer storage area, he identified six trailers as containing bales of municipal waste and recorded their license numbers. The bales of waste were wrapped and covered with rubberized tarp. Mr. Greene returned to the Kephart Trucking facility on the following day, November 15, 1992, a Sunday. At that time, the trailers containing the baled municipal waste were no longer at the Kephart Trucking site. On that same day, Mr. Greene located trailers with baled garbage parked on property owned by James Walker, in the vicinity of the Kephart Trucking

facility. Mr. Greene identified these as the same six trailers he had observed at the Kephart Trucking site on the previous day, as well as a seventh trailer containing municipal waste. Following that inspection, Mr. Greene prepared the order which is the subject of this appeal.

Kephart Trucking seeks an immediate stay of paragraphs 1 and 2 of the order which read as follows:

> 1. Kephart immediately shall cease from using the Kephart facility, the Walker property, or any other unpermitted site as a solid waste transfer facility.
>
> 2. Kephart immediately shall comply with 25 Pa. Code §285.212(d) by moving all municipal waste collection or transportation vehicles owned, operated, or otherwise controlled by Kephart to their unloading destinations within twenty-four (24) hours after they are loaded with municipal waste. Kephart is specifically prohibited from allowing any collection or transportation vehicle carrying a particular load of municipal waste to remain within the Commonwealth of Pennsylvania for more than twenty-four (24) hours unless that vehicle has arrived at its unloading destination within twenty-four hours after being loaded.

Grounds for Supersedeas

Although the Department will carry the burden of proof at the hearing on the merits as to whether its order was lawful and not an abuse of discretion, 25 Pa. Code §21.101(b)(3), the party requesting a supersedeas, in this case Kephart Trucking, bears the burden at this stage of the proceeding of showing (a) that it is likely to prevail on the merits of its appeal; (b) that it will suffer irreparable harm if the supersedeas is not granted; and (c) that the public is not likely to be harmed if the supersedeas is granted. 25 Pa. Code §21.78(a); BethEnergy Mines, Inc. v. DER, EHB Docket Nos. 92-252-MJ and 92-253-MJ (Opinion and Order Sur Petition for Supersedeas issued September 15, 1992), *slip op.* at 5; F.A.W. Associates v. DER, 1990 EHB 1791.

If the petitioner shows that the Department lacked the authority to issue the order or that the Department's action was unlawful, then a supersedeas is appropriate. BethEnergy, *supra*; NY-TREX, Inc. v. DER, 1980 EHB 355.

I. LIKELIHOOD OF SUCCESS ON THE MERITS

A. Twenty Four Hour Rule - 25 Pa. Code §285.212(d)

Section 285.212(d) of the municipal waste regulations reads as follows:

> (d) Except for infectious waste that is collected in compliance with §285.222(g) (relating to transportation of infectious and chemotherapeutic waste; general provisions), collection or transportation vehicles shall be moved to unloading destinations within 24 hours after being loaded.
>
> 25 Pa. Code §285.212(d)

Kephart Trucking challenges the validity of this regulation on two grounds: first, that it imposes an unconstitutional burden on interstate commerce and, secondly, that it was not property promulgated. We shall address the constitutional challenge first.

Paragraph 2 of the Department's order directs Kephart Trucking to comply with 25 Pa. Code §285.212(d) "by moving [its vehicles carrying municipal waste] to their unloading destinations within twenty-four (24) hours after they are loaded with municipal waste." The order then specifically prohibits Kephart Trucking from allowing any vehicles carrying municipal waste "to remain within the Commonwealth of Pennsylvania for more than twenty-four (24) hours unless that vehicle has arrived at its unloading destination within twenty-four hours after being loaded."

Kephart Trucking asserts that the twenty-four hour time limitation of §285.212(d) violates the Commerce Clause of the United States Constitution because it constitutes a discriminatory barrier to interstate commerce. The

Department disputes Kephart Trucking's contention that the twenty-four hour rule discriminates against interstate commerce.

Before turning to a discussion of the effect of §285.212(d) on interstate commerce, we note that the Department's order contains conflicting directives with respect to what is required by §285.212(d). The first sentence of paragraph 2 of the order requires that municipal waste be delivered to its destination within twenty-four hours after it has been loaded. Thus, the twenty-four hour time limit would begin to run at the point of loading, whether that be Pennsylvania, New York, New Jersey, or any other location, and would prohibit any municipal waste which had been loaded more than twenty-four hours earlier to pass through Pennsylvania. This was the position expressed at the supersedeas hearing by the Department's solid waste specialist, James Greene, who testified that "the regulations [§285.212(d)] say [that the twenty-four hour time frame runs] from the time of pickup to the time of deposition." (T. 231-234)[1]

The second sentence of paragraph 2 of the order, however, seems to express a different view, that is, that the twenty-four hour limitation begins to run only when the municipal waste enters Pennsylvania and that the municipal waste may not remain in Pennsylvania for more than twenty-four hours unless it has reached its unloading destination within that time frame. This appears to be the position expressed by the Department in its post-hearing brief.

However, the language of §285.212(d) clearly states that a transportation vehicle carrying municipal waste must be moved to its unloading destination "within twenty-four hours after being loaded." (Emphasis added)

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[1] "T. ___" refers to a page in the transcript.

Thus, the Department's conflicting interpretations aside, the clear language of §285.212(d) requires that municipal waste which is being transported through Pennsylvania may not have been loaded more than twenty-four hours earlier.

Kephart Trucking asserts that this restriction imposes an unfair burden on interstate commerce because any vehicles transporting municipal waste which, because of travel time, hours of operation of waste disposal and processing facilities, or limitations imposed on drivers' driving time by the Federal Motor Carrier safety regulations, would be passing through Pennsylvania at some point which exceeded twenty-four hours from the point of pick-up, would be required to bypass Pennsylvania on their delivery route.

The Supreme Court, in City of Philadelphia v. New Jersey, 437 U.S. 617, (1978), at 622-623, has expressly held that the interstate movement of solid and liquid waste is commerce, and the states are prevented by the Commerce Clause from erecting barriers to the free flow of interstate commerce. See Empire Sanitary Landfill, Inc. v. DER, EHB Docket No. 90-467-W (Opinion and Order Sur Motion for Summary Judgment issued July 10, 1992). In determining whether a state has overstepped its role in regulating interstate commerce, courts distinguish between state laws which affirmatively and facially discriminate against interstate transactions and those which only incidentally burden such transactions. Empire, *supra*. Under the former, a state must demonstrate both that the regulation serves a legitimate local purpose and that the purpose could not be served as well by non-discriminatory means. Hughes v. Oklahoma, 441 U.S. 322 at 336 (1979); Empire, *supra* at 10-11. Those which fall into the second group violate the Commerce Clause only if the burden imposed on interstate commerce is clearly excessive in relation to the local benefits sought to be achieved by the law. Pike v.

Bruce Church, Inc., 397 U.S. 137 (1970). See also Empire, *supra* at 10. The Court in Pike further held that a state law which incidentally burdens interstate commerce may be deemed unconstitutional if the putative local benefits to be derived thereby are not effectuated or if the state's objectives could be accomplished by less discriminatory means. Pike, 397 U.S. at 142.

The twenty-four hour limitation contained in 25 Pa. Code §285.212(d), although not discriminatory on its face, nonetheless, imposes an incidental burden on interstate commerce because it has the effect of discriminating against shipments of municipal waste which originate outside Pennsylvania, and which, while enroute to their point of unloading, would pass through Pennsylvania more than twenty-four hours after having been loaded. Because §285.212(d) imposes an incidental burden on interstate commerce, it is subject to scrutiny under the Pike test stated above.

The local benefit which the Department sets forth as being the aim of §285.212(d) is to reduce the problems associated with transportation of municipal waste, such as malodors, vectors, and leakage of leachate, by minimizing the amount of time that municipal waste is contained in transportation vehicles.

However, the burden which is imposed on the interstate shipment of municipal waste by this regulation, that is, eliminating the shipment of any municipal waste through Pennsylvania where it was loaded more than twenty-four hours earlier, far exceeds the benefit which the regulation aims to accomplish. Moreover, as Kephart Trucking points out, the minimization of odor and vector problems and the prevention of leachate leakage could be

accomplished by other less discriminatory means. Finally, there is no indication that a twenty-four hour limitation, as opposed to a shorter or longer time limitation, would accomplish these goals.

Kephart Trucking has raised a serious question as to the constitutionality of the twenty-four hour rule contained in §285.212(d) and the Department's interpretation thereof, and has demonstrated a sufficient likelihood of success on the merits of its challenge as to warrant a granting of supersedeas. Because Kephart Trucking has demonstrated a likelihood of success on its constitutional challenge to §285.212(d), we need not address Kephart Trucking's second contention, that §285.212(d) was not properly promulgated.

B. Transfer Facility

Paragraph 1 of the Department's order directs Kephart Trucking to cease using its Bigler facility, James Walker's property, "or any other unpermitted" site as a solid waste transfer facility.

Pursuant to 25 Pa. Code §279.201(a), no person may operate a transfer facility without having first obtained a permit from the Department. The term "transfer facility" is defined in §103 of the SWMA as the following:

> **"Transfer facility."** A facility which receives and processes or temporarily stores municipal or residual waste at a location other than the generation site, and which facilitates the transportation or transfer of municipal or residual waste to a processing or disposal facility. The term includes a facility that uses a method or technology to convert part or all of such waste materials for offsite reuse. The term does not include a collection or processing center that is only for source-separated recyclable materials, including clear glass, colored glass, aluminum, steel and bimetallic cans, high-grade office paper, newsprint, corrugated paper and plastics.
>
> 35 P.S. §6018.103.

It is that portion of the definition involving a facility which "temporarily stores municipal...waste" on which the Department's argument centers. It is the Department's contention that Kephart Trucking is operating a solid waste transfer facility by routinely parking its trailers carrying municipal waste at its facility or other property including the James Walker site over a part of a weekend until delivery can be made on Monday morning.

The Department relies on the Board's decision in Frank Colombo d/b/a Colombo Transportation Services and Northeast Truck Center, Inc. v. DER, 1989 EHB 1319, as giving the concept of "temporary storage" of waste a broad reach. In that case, Colombo opened his property for use as a drop-off point for long haul waste transportation. Tractor trailers loaded with municipal solid waste from New Jersey would enter Colombo's property where the loaded trailers would be detached, and the truck tractors would be connected to empty trailers for the return trip to New Jersey. Colombo would then tow the trailers loaded with municipal waste to a landfill where they would be unloaded and returned to Colombo's property. Colombo's business hours ran from 7:00 a.m. to 5:00 p.m. on weekdays and from 6:30 a.m. to noon on Saturday. Loaded trailers that arrived too late on weekdays to be taken to the landfill were parked on the property overnight, and those arriving after noon on Saturday were parked on Colombo's property until they could be taken to the landfill on Monday. Between 70 and 90 loaded trailers were handled daily, and anywhere from 20 to 35 would be parked overnight. The loaded trailers were covered with only a mesh tarp which allowed rain to enter and odors to escape.

When two representatives of the Department visited the Colombo property, they found 66 trailers loaded with municipal solid waste and disagreeable garbage odor which was detectable beyond the property boundaries even though an odor-masking agent was being used. They also observed several

trailers which were leaking the product of decomposing waste. On another visit to the Colombo facility, a city official observed 45 loaded trailers, many of which were leaking, and thousands of maggots on the lower parking level. The Department issued an order which, *inter alia*, required Colombo to apply for a permit to operate a municipal waste transfer facility.

In ruling on Colombo's petition for supersedeas, the presiding Board Member determined that, although Colombo's activity amounted to temporary storage and transportation of municipal waste, a permit was not required for such activity under the provisions of the SWMA in effect at that time.[2]

The Department contends that Kephart Trucking's routine parking of trailers loaded with municipal waste at its site in Bigler, like the activity in question in Colombo, constitutes temporary storage of municipal waste and, thus, requires a permit for a transfer facility. Kephart Trucking, on the other hand, disputes that the temporary parking of some of its vehicles carrying municipal waste at its site amounts to the operation of a transfer facility.

We disagree with the Department that the fact situation presented in Colombo is the same as that presented here. Colombo clearly was operating his facility as a drop off point for trailers carrying municipal waste, handling between 70 to 90 trailers a day, and its operation, as described above, clearly posed a threat to public health.

Kephart Trucking further argues that the language of paragraph 1 of the Department's order is so broad that any time one of Kephart Trucking's drivers stops at the company's trucking terminal for any reason, or stops for

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[2] Act 109, enacted on July 11, 1990, six months after the Colombo decision, incorporated into the SWMA a definition of "transfer facility" which included a facility which "temporarily stores municipal...waste." Act of July 11, 1990, P.L. 450.

any length of time for maintenance, refueling, food, or to comply with the maximum hours of driving imposed by the Federal Motor Carrier Safety regulations, that will constitute a violation of the Department's order.

The Department states in its post-hearing brief that it "did not intend, by adding [the] phrase ["any unpermitted site"], to address short stops for food, fuel, or maintenance...or even longer stops for rest breaks." (Emphasis in original) However, the testimony given at the supersedeas hearing by the Department's solid waste specialist, James Greene, one of the individuals who would be charged with enforcing the order, raised serious questions as to what the Department would consider to be a violation of its order. Though most of Mr. Greene's responses on this subject were unclear and convoluted, his testimony was to the effect that any time a vehicle loaded with municipal waste is parked in a "residential area", according to the definition of "residential" in Webster's Dictionary, for four hours or more, that would constitute the operation of a transfer facility. We doubt that this was the intent of the Legislature.

Nor do we find that it was the Legislature's intent that every trucking terminal which deals with the hauling of municipal waste is required to apply for a transfer facility permit.

Kephart Trucking has raised a sufficient challenge to the Department's order as to demonstrate a likelihood of success on the merits of this issue.

II. IRREPARABLE HARM

Kephart Trucking's route of shipments follows an east/west lane involving the transport of general commodities from west to east. Because there is a more limited traffic of goods flowing from east to west, Kephart Trucking's trucks would normally have to return empty, at a loss to the

company. The backhaul of municipal waste on the return trips has allowed Kephart Trucking to remain competitive. (T. 126-127) This east/west shipment including the hauling of municipal waste on return trips from east to west, accounts for approximately 70 percent of the revenue generated by Kephart Trucking. Without the ability to haul municipal waste on trucks returning from the east, Kephart Trucking would not be able to continue competitively hauling other commodities from west to east and would also lose much of this portion of its revenue. Prior to Kephart Trucking increasing its ratio of loaded miles to empty miles, it operated at a loss. (T. 40)

As articulated in The Helen Mining Co. v. DER, EHB Docket No. 92-259-E (Opinion and Order Sur Petition for Supersedeas), earlier Board decisions took the position that monetary loss, in itself, is not irreparable harm; however, more recent cases have held that financial loss to the petitioner may be considered as irreparable harm. *Id.* at 6.

Kephart Trucking has demonstrated that it will suffer substantial financial loss, up to 70 percent of its revenue, by complying with the Department's order. This, coupled with the determination that the Department's order was improper, amounts to a showing of irreparable harm.

III. INJURY TO PUBLIC

Other than complaints from a couple residing on property located west of the Bigler facility as to bad odors emanating from the site, primarily during the spring and summer, there is no evidence of injury which will result to the public if the supersedeas is granted. This does not mean that Kephart Trucking shall not be required to abate any malodors at its site which create a public nuisance. However, this may be accomplished by means other than those set forth in the Department's order.

Moreover, the potential for interfering with the required breaks in driving imposed on drivers by the Federal Motor Carrier Safety regulations, which may result from attempting to comply with the Department's order, could pose a safety threat to Kephart Trucking's drivers and to other vehicles on the road.

Therefore, we find that granting the supersedeas will not pose a likelihood of injury to the public and, in fact, may reduce the likelihood of such injury.

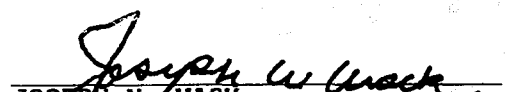
IV. CONCLUSIONS

In conclusion, we find that Kephart Trucking has met its burden of proving that it is entitled to a supersedeas and, therefore, the following order is entered:

O R D E R

AND NOW, this 8th day of March, 1993, it is hereby ordered that the petition for supersedeas is granted, and paragraphs 1 and 2 of the Department's order of November 20, 1992 are superseded.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 8, 1993

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M. DIANE SMITH
SECRETARY TO THE BOA

AL HAMILTON CONTRACTING COMPANY	:	
	:	
v.	:	**EHB Docket No. 92-467-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 11, 1993**

OPINION AND ORDER
SUR PETITION FOR SUPERSEDEAS

Maxine Woelfling, Chairman

Synopsis

Petition for supersedeas is denied where the Appellant has failed to establish that it will suffer irreparable harm and that it has a likelihood of success on the merits.

OPINION

This matter was initiated with the October 13, 1992, filing of a notice of appeal by Al Hamilton Contracting Company (Hamilton) challenging the Department of Environmental Resources' September 17, 1992, issuance of a compliance order to Hamilton. The compliance order, which was issued pursuant to the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. and the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq. (Clean Streams Law), directed Hamilton to submit a permanent treatment plan for an area of seepage, allegedly hydrogeologically connected to Hamilton's Brenda Gayle #1 mine site in Rush Township, Centre County. Upon approval of

the treatment plan, Hamilton was to initiate treatment of the seepage area. Hamilton disputes the existence of the hydrogeologic connection and challenges the order on a number of other grounds. Concurrent with the filing of its notice of appeal, Hamilton filed a petition for supersedeas. A hearing on the petition for supersedeas was held on November 9 and 10, 1992, and the parties filed memoranda of law in support of their respective positions. The petition for supersedeas was denied by order dated December 22, 1992. This opinion confirms that order.

The Board is authorized by §4(d) of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7514(d), to supersede an action of the Department's pending adjudication of an appeal on the merits. To be entitled to a supersedeas a petitioner must demonstrate that it will suffer irreparable harm, that there is little likelihood of injury to the public or third parties, and that it has a likelihood of success on the merits. Where a petitioner fails to establish any one of these factors, the Board cannot grant a supersedeas. Bethayres Reclamation Corporation v. DER et al., 1991 EHB 816.

The hearing on the petition for supersedeas was devoted primarily to the issue of whether there was a hydrogeologic connection between the Brenda Gayle #1 mine and the seepage area and what analytical technique established such a connection. In particular, Hamilton attacked conductivity and resistivity studies performed by the Department on the area between the Brenda Gayle mine and Mountain Branch and disputed whether there was sufficient data to establish a hydrogeologic connection between the Brenda Gayle mine and the seepage area. It is Hamilton's burden to demonstrate a likelihood of success on its claim that there is no hydrogeologic connection between the Brenda Gayle and the seepage area. At best, Hamilton's evidence establishes that it

would like to have more data, preferably from piezometers, to establish such a connection. That does not rise to the level of a likelihood of success on the merits.

While Hamilton's failure to establish a likelihood of success on the merits would, in and of itself, constitute grounds for denial of its petition for supersedeas, Hamilton has also failed to substantiate its claim of irreparable harm. There is no evidence on the record of the supersedeas hearing concerning irreparable harm which Hamilton will suffer if it must go forward and comply with the Department's order. At most, there is speculation on the part of Hamilton's consultant as to the possible consequences of complying with the Department's order. This, again, is not a sufficient basis for the Board to conclude that Hamilton will suffer irreparable harm.

ORDER

AND NOW, this 11th day of March, 1993, it is ordered that the Board's December 22, 1992, order denying Al Hamilton Contracting Company's petition for supersedeas is confirmed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: March 11, 1993

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M. DIANE SMITH
SECRETARY TO THE BOAI

THE OXFORD CORPORATION	:	
	:	
v.	:	**EHB Docket No. 92-338-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: March 17, 1993**

OPINION AND ORDER
SUR
MOTION TO DISMISS FOR LACK OF JURISDICTION

Robert D. Myers, Member

Synopsis

An appeal filed after the close of the 30-day appeal period will be dismissed as untimely. Appellant's request to accept the appeal *nunc pro tunc* because of alleged statements by a DER employee that no appeal procedure existed will be denied because the Notice of Violation from which the appeal was taken is not appealable.

OPINION

This appeal, filed initially on August 12, 1992 and perfected on August 31, 1992, seeks Board review of a Notice of Violation (NOV) dated May 4, 1992, issued by the Department of Environmental Resources (DER) under provisions of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, and the regulations at 25 Pa. Code §101.3(a). The NOV concerned a small amount of oil spilled on the ground at Appellant's premises in Oxford Borough, Chester County.

On September 17, 1992 DER filed a Motion to Dismiss for Lack of Jurisdiction to which Appellant filed a letter response on December 7, 1992. In its motion, DER contends (1) that the NOV is not appealable and (2) that the appeal is untimely. We will deal with the latter contention first.

In its Notice of Appeal, Appellants acknowledge receipt of the NOV on May 12, 1992. Pursuant to our procedural rules (25 Pa. Code §21.52(a)) an appeal from the NOV had to be taken within 30 days after that date - that is, by June 11, 1992. The appeal was not, in fact, taken until August 12, 1992. Compliance with the 30-day appeal period is jurisdictional: *Rostosky v. Commonwealth, Department of Environmental Resources*, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976), and cannot be waived. The only exception is found the narrowly-confined parameters of an appeal *nunc pro tunc*.

While not formally petitioning for such an appeal, Appellant does indicate that it allowed the 30 days to go by because the DER inspector, Richard K. Breitenstein, indicated that no appeal procedure existed. These representations are unsworn. They have not been answered by DER, since no formal petition was filed. We are unable to assess their truth or falsity. If, as DER contends, the NOV was not appealable, then no harm could have resulted from any DER representations about appeal procedures.

Whether an NOV constitutes a DER action from which an appeal will lie depends on its language. A mere listing of violations is not an appealable action: *Sunbeam Coal Corporation v. Commonwealth, Department of Environmental Resources*, 8 Pa. Cmwlth. 622, 304 A.2d 169 (1973); *Fiore v. Commonwealth, Department of Environmental Resources*, 98 Pa. Cmwlth. 35, 510 A.2d 880 (1986). Nor is the mention of the possibility of future enforcement action: *Chester County Solid Waste Authority v. DER*, 1986 EHB 1169; or the procedures necessary to achieve compliance: *Chester County Solid Waste Authority v. DER*,

1987 EHB 523. But if the NOV orders action to be taken, it is appealable: *Robert H. Glessner, Jr. v. DER*, 1988 EHB 773; *M.C. Arnoni Company v. DER*, 1989 EHB 27; *S. H. Bell Company v. DER*, 1991 EHB 587.

The NOV issued to Appellant is not appealable. It notifies Appellant of the violations found during an inspection and informs Appellant of its responsibilities as a landowner. It goes on to comment on Appellant's removal of some of the contaminated soil and advises that the "soil will need to be disposed of properly. Please provide documentation of this." That sentence is followed by -

> Notify this office in writing no later than May 27, 1992 of the action you have taken to comply, the date compliance was accomplished and the steps you have taken to prevent a recurrence of the violation.

While the quoted language sets forth instructions Appellant is expected to follow, it is advisory and not imperative in its nature. Besides, it concerns notification to DER of actions taken by Appellant. It does not compel the taking of action.

Since the NOV was not appealable, Appellant could not have been harmed by any statements of Breitenstein, even if they were misleading. The procedure for appeal *nunc pro tunc* cannot serve to convert an unappealable action into an appealable one.

For these reasons, the appeal must be dismissed.

ORDER

AND NOW, this 17th day of March, 1993, it is ordered as follows:

1. DER's Motion to Dismiss for Lack of Jurisdiction is granted.

2. The appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 17, 1993

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M. DIANE SMITH
SECRETARY TO THE BOA

SMITH, et al.	:	
	:	
v.	:	EHB Docket No. 92-479-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and STEWARTSTOWN BOROUGH AUTHORITY, Permittee	: : : :	Issued: March 22, 1993

OPINION AND ORDER SUR PETITION FOR SUPERSEDEAS

By Joseph N. Mack, Member

Synopsis

Where the petitioners fail to demonstrate a likelihood of prevailing on the merits, irreparable harm, and the likelihood of injury to the public, a petition for supersedeas will be denied.

OPINION

This matter arises as an appeal from the September 23, 1992 issuance of a permit under the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, to the Stewartstown Borough Authority (Authority) by the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) for the agricultural utilization of sewage sludge at Wolf Farms, Hopewell Township, York County (the Wolf site). The appeal was timely filed by a number of residents (Appellants) of the area near

the permit site. The appeal alleges that the permit application was incomplete and that DER ignored the Authority's compliance history . The Appellants also allege several violations of state and federal regulations.

On December 8, 1992, the Appellants filed a Petition for Supersedeas restating the allegations contained in the original appeal. The petition further alleges that the Appellants are likely to prevail on the merits of their appeal and that the application of the sewage sludge to the Wolf site will endanger the health of the public and cause irreparable harm to the Appellants.

A supersedeas hearing was held on February 8, 1993, in the Borough Council Chambers in Indiana, Pennsylvania. The Appellants called three witnesses: Dr. Stanford L. Tackett, a chemist and former professor of chemistry; Stephen Socash, of DER's Municipal and Residual Waste Permit Section; and Betty Smith, an adjacent landowner to the permitted site and one of the appellants herein. The Authority did not call any witnesses; nor did DER. The Authority and the Appellants filed post-hearing briefs on March 1, 1993 and reply briefs on March 4, 1993 and March 8, 1993, respectively. DER filed a reply brief on March 12, 1993, responding to a limited issue raised in the Appellants' post-hearing brief.

Among the factors to be considered by the Board in determining whether to grant a supersedeas are the following: 1) irreparable harm to the petitioner, 2) the likelihood of the petitioner prevailing on the merits, 3) the likelihood of injury to the public or other parties, such as the permittee in third appeals. 25 Pa. Code §21.78(a) The burden lies with the petitioner to prove by a preponderance of the evidence that a supersedeas is warranted. Commonwealth, Pennsylvania Fish Commission v. DER, 1989 EHB 619, 620.

The Appellants allege that the application of the Stewartstown Borough sewage sludge to the Wolf site will cause them to suffer irreparable economic harm and will pose a health threat to them and to the public.

With regard to the allegation of economic harm, the Appellants contend that their property values will diminish if the Authority is allowed to spread sewage sludge on nearby fields. Other than Mrs. Smith's testimony that it was her belief that the value of her home would be lowered by the application of sludge to adjacent land, the Appellants presented no evidence in support of this claim. Moreover, even if the Appellants had succeeded in proving this claim, there is nothing in the SWMA or the regulations promulgated thereunder which requires the Department, in issuing a permit, to examine the effect of that permit issuance on the values of surrounding properties. Nor is there any provision in the SWMA or the regulations which would require the Department to deny a permit application on the basis that the activity covered by the permit may lower the value of surrounding properties. Larry D. Heasley et al. v. DER, 1991 EHB 1758, 1767. See also Robert Kwalwasser v. DER, 1986 EHB 24. Therefore, even if the Appellants were able to establish that their properties will suffer a loss in economic value as a result of the issuance of the permit, that does not constitute a demonstration of irreparable harm.

The Appellants' second allegation centers on the health risks posed by the leaching of lead and other heavy metals from the sludge into the soil and groundwater.

In support of this contention, the Appellants presented the testimony of Dr. Stanford L. Tackett, an analytical chemist and former professor of chemistry at Indiana University of Pennsylvania. Dr. Tackett has conducted a considerable amount of research on lead in the environment, including an

examination of the levels of lead and other heavy metals in sewage sludge and an ongoing study for EPA on reducing lead in drinking water.

Dr. Tackett testified that his research shows that most sewage sludge contains elevated levels of heavy metals, particularly lead. According to Dr. Tackett, when the sewage sludge is applied to the land, the lead leaches into the soil and groundwater and is either breathed in as dust or consumed in drinking water and food crops. It is Dr. Tackett's conclusion that even a single application of sewage sludge will elevate the levels of heavy metals in the soil.

Although Dr. Tackett was well-qualified to testify on the subject of lead in the environment, his research with respect to sewage sludge did not involve the particular agricultural utilization at issue in this matter. His conclusions with respect to the leaching of lead found in sewage sludge were drawn primarily from a study of three former strip mine sites in Somerset County which had been reclaimed using sludge from the Philadelphia area. Although Dr. Tackett stated that similar conclusions could be drawn with respect to both sites, differences in the soil and composition of the sludge had to be taken into account. In particular, the pH level of the soil at the mine sites was more acidic which would cause a higher rate of leaching. Secondly, Dr. Tackett admitted that the composition of sewage sludge from the Philadelphia area could differ from sludge generated in Stewartstown Borough due to different industrial activity of both regions.

Dr. Tackett did not dispute that analysis reports of the Stewartstown Borough sewage sludge showed levels of heavy metals, including lead, to be within the state and federal guidelines for land application. However, it is his opinion that those standards are not stringent enough to prevent a risk to human health.

Where there exists a duly promulgated regulatory scheme, there is a presumption that the regulatory scheme meets the objectives of the underlying statute, in this case, the SWMA. See Township of Indiana v. DER, 1984 EHB 1, 17-18; Coolspring Township v. DER, 1983 EHB 151, 174. The burden of proof lies with the Appellants to demonstrate that the regulations governing the land application of sewage sludge are insufficient to protect the public health, safety, and welfare. *Id.*

The Appellants called DER's Stephen Socash, section chief for the municipal and residual waste permit section, who was involved in drafting the regulations governing the agricultural utilization of sewage sludge. Mr. Socash testified that, in drafting the regulations, he reviewed a variety of data, including federal regulations, other state regulations, existing research on sewage sludge land application, and input from DER's staff of chemists, hydrogeologists, and engineers. He then submitted the information to the EPA and to others across the Commonwealth for comment. Finally, after a period of public comment, the regulations were promulgated by the Environmental Quality Board.

Mr. Socash's testimony supports the presumption that the regulations were drafted to ensure the protection of the public health, safety, and welfare, and the Appellants are bound by his testimony.

Finally, the Appellants did not demonstrate by a preponderance of the evidence that they will suffer immediate irreparable harm or that there is an immediate threat of harm to the public. When asked on cross-examination about the immediacy of the effects of the application of sewage sludge to the Wolf site, Dr. Tackett stated that he could not put a timeframe on it. Rather, it was his conclusion that it will pose a future health threat. Although Dr. Tackett's testimony indicates that there may be a need for further research

into the allowable levels of lead being introduced to the environment, the evidence presented at the hearing does not clearly establish such an immediate threat of harm to the Appellants or the public as to warrant a supersedeas.

Because the Appellants did not demonstrate by a preponderance of the evidence a likelihood of success on the merits of the claims made at the supersedeas hearing and did not demonstrate a clear showing of irreparable harm or threat of harm to the public, the petition for supersedeas must be denied.

O R D E R

AND NOW, this 22nd day of March, 1993, it is hereby ordered that the Appellants' petition for supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 22, 1993

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M. DIANE SMI
SECRETARY TO THE

FRANK GREENWOOD	:	
	:	
v.	:	EHB Docket No. 92-410-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES and	:	
NEW WARWICK MINING CO., Permittee	:	Issued: March 24, 1993

OPINION AND ORDER SUR
MOTION IN LIMINE

By: Richard S. Ehmann, Member

Synopsis

The Board grants the Department of Environmental Resources' (DER) and the permittee's joint motion *in limine* insofar as these parties will be prejudiced by the appellant's presentation of evidence at the merits hearing concerning his dwelling's use of pre-1966 wells or septic system to prove his dwelling's eligibility for protection from mine subsidence damage under Section 4 of the Mine Subsidence Act, 52 P.S. §1406.4.

The Board further treats the joint motion *in limine* as a motion to strike and grants the motion insofar as it seeks to preclude the appellant from arguing at the merits hearing that his wells, water lines, or sewerage lines are protected under 25 Pa. Code §§89.143(c)(1) and 89.145.

OPINION

Appellant Frank Greenwood (Greenwood) commenced this appeal on August 26, 1992 seeking our review of a letter dated July 24, 1992 from DER to him informing him that the New Warwick Mining Company (New Warwick) was not

responsible under the Bituminous Mine Subsidence and Land Conservation Act (Mine Subsidence Act), Act of April 27, 1966, P.L. 31, as amended, 52 P.S. §1406.1 *et seq.*, for preventing, repairing or compensating Greenwood for mine subsidence damage to his dwelling (which overlies a section of New Warwick's proposed Warwick No. 3 Mine). DER's letter stated, "... your home is classified as a post-1966 dwelling, and is not eligible for protection under Section 4 of the [Mine Subsidence] Act.[1]

Greenwood's notice of appeal states:

> 1. [DER] denied protection for a pre-April 27, 1966 structure under Section 4 of the Bituminous Mine Subsidence and Land Conservation Act, (the "Act").
>
> 2. Appellant's structure was in place prior to April 27, 1966. The structure burned and was replaced on the same location. Under such facts, the structure should continue to be protected under the Act.

By an order issued on January 8, 1993, we denied DER's motion for summary judgment because of certain potentially material factual disputes and unresolved legal issues. Among these matters was Greenwood's allegation that his existing dwelling's use of pre-1966 wells and septic system is sufficient to bring the replacement dwelling within the protection of the Mine Subsidence Act. We also pointed out that the parties had not addressed whether any protection of water wells, water lines, and sewerage lines owned by Greenwood is afforded by 25 Pa. Code §89.143(c)(1) and New Warwick's duties to Greenwood

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[1] Section 4 of the Mine Subsidence Act, 52 P.S. §1406.4, provides that no miner shall mine bituminous coal so as to cause damage, as a result of the caving-in, collapse or subsidence, of any dwelling in place on April 27, 1966 overlying or in the proximity of the mine. Pursuant to section 6 of the Mine Subsidence Act, 52 P.S. §1406.6, if the removal of coal or other mining operations by a permit holder causes damages to a structure set forth in section 4, the permittee is required to submit evidence to DER that the damage has been repaired or that all claims arising therefrom have been satisfied.

under 25 Pa. Code §89.145 in the event his well, water lines, or sewerage lines are damaged.[2]

Presently before us is DER's motion *in limine* and supporting brief, in which New Warwick has joined. It must be kept in mind that a hearing on the merits of Greenwood's appeal is scheduled to occur on March 29, 1993.

The joint motion seeks to prevent Greenwood from presenting evidence at the March 29th merits hearing concerning his existing dwelling's use of pre-1966 wells or septic system to prove protection for his current dwelling under section 4 of the Mine Subsidence Act, 52 P.S. §1406.4, arguing that Greenwood waived this contention by failing to raise it in his notice of appeal. DER and New Warwick further contend that they will now be prejudiced by Greenwood's presentation of this evidence, pointing out that Greenwood did not reveal this contention regarding his dwelling's use of the pre-1966 wells or septic system until his response to DER's motion for summary judgment. The joint motion also seeks to preclude Greenwood from arguing at the hearing that his wells, water lines, or sewerage lines are protected under 25 Pa. Code §§89.143(c)(1) and 89.145. DER and New Warwick contend DER has taken no action regarding these regulations and, thus, this issue is not before the Board.

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[2] Section 89.143(c)(1) of 25 Pa. Code provides that underground mining activities shall be planned and conducted in a manner which minimizes damage, destruction or disruption in services provided by, *inter alia*, water wells and water and sewerage lines which pass under, over or through the permit area unless otherwise approved by the owner of the facilities and DER. Section 89.145(a) of 25 Pa. Code requires the operator to correct material damage resulting from subsidence caused to surface lands including perennial streams. Section 89.145(b) of 25 Pa. Code mandates the responsibilities of the operator after a claim of subsidence damage to a structure or surface feature under either 25 Pa. Code §89.145(a) or section 6(a) of the Mine Subsidence Act has been filed.

In response, Greenwood claims his pre-hearing memorandum stated that his existing dwelling used "some pre-existing parts of the destroyed structure," and he urges his opponents have known about his argument regarding his dwelling's use of the pre-1966 well and septic system since December 28, 1992 and will not be prejudiced by his evidence. Greenwood also contends that 25 Pa. Code §§89.143(c)(1) and 89.145 "flow out of" the Mine Subsidence Act and are applicable to "a review of all protections available" under the Mine Subsidence Act and DER's regulations.

As we explained in County of Schuylkill, et al. v. DER, et al., 1990 EHB 1347:

> A motion *in limine* is a pre-trial motion designed to exclude evidence which is potentially inflammatory, prejudicial, without probative value, or irrelevant. Iannelli and Iannelli, Trial Handbook for Pennsylvania Lawyers, §2.15 (2d ed. 1990). The judge has wide discretion to make or refuse to make advance rulings, Cleary, McCormick on Evidence §52 (3d ed. 1984)....

See also Kennametal, Inc. v. DER, 1990 EHB 1453.

Insofar as DER and New Warwick seek to preclude evidence concerning Greenwood's use of pre-1966 wells or septic system by Greenwood's current dwelling to prove protection under section 4 of the Mine Subsidence Act, we grant their motion. Greenwood's notice of appeal says the burned house was replaced. Even though his pre-hearing memorandum states that some pre-existing parts of the destroyed structure were used for the trailer, it does not detail what these parts included. In his response to New Warwick's First Set of Interrogatories, Greenwood makes no mention of his current dwelling's use of the pre-1966 well and septic system. Greenwood replied that no part of the farmhouse still exists except the cement footer under the rear of the former house. (Answers to Interrogatories Nos. 19 and 20) Greenwood

waited until after the close of the discovery period to make his argument in his response to DER's motion for summary judgment that his existing dwelling's use of the pre-1966 well and septic system was sufficient to entitle his dwelling to protection under section 4 of the Mine Subsidence Act.

As we explained in Midway Sewerage Authority v. DER, 1990 EHB 1554, when we issue our Pre-Hearing Order No. 1, it directs both parties to engage in and complete discovery and then file their respective Pre-Hearing Memoranda. Compliance with Pre-Hearing Order No. 1 gives the parties the opportunity to discover the strengths and weaknesses of their position and that of their opponent, a chance to abandon or reinforce contentions which have become weaker or stronger in discovery, and a vehicle to pull their trial preparation efforts together (the pre-hearing memoranda). Here, Greenwood waited until after the discovery period closed and the merits hearing was only three months off to make this disclosure. Moreover, in the period from the filing of this appeal in August of 1992 until December of 1992, Greenwood affirmatively misled New Warwick and DER through his answers to New Warwick's Interrogatories. Thus, with time running out before the merits hearing and discovery closed, Greenwood says New Warwick and DER are to ignore his prior interrogatory answers, deal with new contentions advanced by Greenwood, and prepare evidence to rebut same because Greenwood's actions are not prejudicial to them. We disagree. A level playing surface for all parties requires full and fair disclosure of these contentions early in the proceeding. That did not occur here. We thus can not allow Greenwood to present evidence concerning his existing dwelling's use of pre-1966 wells or septic system and we grant the motion *in limine* on this basis.

Regarding the other request made by the joint motion, it does not appear to be a true motion *in limine* but rather seems to be a motion to strike the issue of whether Greenwood's wells, water lines, or sewerage lines are protected under 25 Pa. Code §§89.143 (c)(1) and 89.145. This Board has, in the past, ruled on motions to strike legal contentions which are allegedly not properly before us. See, e.g., Edgewater Municipal Utilities Authority v. DER, 1991 EHB 1600. We will, thus, treat this portion of the joint motion as a motion to strike.

Under DER and New Warwick's argument, section 4 of the Mine Subsidence Act provides protection from mine subsidence for dwelling structures which is separate and distinct from the protection which might be afforded by 25 Pa. Code §§89.143(c)(1) or 89.145 for Greenwood's wells, water lines, or sewerage lines. DER has only made a determination on the protection for Greenwood's dwelling structure under section 4 of the Mine Subsidence Act, not on the protection for his wells, water lines, or sewerage lines. According to its motion, DER has rendered no decision on the impact of §§89.143(c)(1) and 89.145. This leaves Greenwood the option of seeking protection for his wells, water lines, or sewerage lines at some future time. Upon a determination from DER on the question of whether to afford him that protection, Greenwood may then ask for our review of the issue of whether his wells, water lines, or sewerage lines are protected from mine subsidence damage under these sections of DER's regulations. However until then, the issue is not before this Board. Having reached this conclusion, we grant the joint motion to strike and enter the following order.

O R D E R

AND NOW, this 24th day of March, 1993, it is ordered that DER and New Warwick's motion *in limine* is granted in part, and Frank Greenwood is precluded from presenting any evidence at the merits hearing concerning his dwelling's use of pre-1966 wells or septic system dwelling to prove it is protected under section 4 of the Mine Subsidence Act. It is further ordered that the joint motion *in limine* is treated as a motion to strike the issue of protection for Greenwood's wells, water lines and sewerage lines under 25 Pa. Code §§89.143(c)(1) and 89.145 and is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
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ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 24, 1993

cc: **Bureau of Litigation**
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M. DIANE SMI
SECRETARY TO THE I

EVERGREEN ASSOCIATION and STEVEN and HOLLY HARTSHONE	:	
v.	:	**EHB Docket No. 92-257-E**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and NEW MORGAN LANDFILL COMPANY, INC., Permittee:	:	**Issued: March 25, 1993**

OPINION AND ORDER SUR
SUR EVERGREEN ASSOCIATION'S
PETITION FOR LEAVE TO AMEND APPEAL

By: Richard S. Ehmann, Member

Synopsis

Where an appellant seeks leave to amend its Notice Of Appeal to add a new ground for appeal after the time period for the filing of an appeal has expired, claiming this new ground was only discovered through pre-hearing discovery proceedings, leave to amend will be denied where it is clear that the Petitioner/Appellant had extensive knowledge of this "new ground" for appeal well before filing its appeal.

OPINION

The instant proceeding arises from a challenge to the Department of Environmental Resources' ("DER") issuance of permits to New Morgan Landfill Company, Inc. ("New Morgan") for both a landfill and a leachate treatment plant which discharges effluent to a tributary of the Conestoga River. The

appellants are Steven and Holly Hartshone and Evergreen Association (collectively "Evergreen").

By order dated January 5, 1993, this Board granted New Morgan's Motion To Strike Amendment To Appeal. We struck a document filed by Evergreen captioned Amendment To Appeal, which sought to add DER's alleged non-compliance with "Section 503 of the Solid Waste Management Act, 35 P.S. §6018.503" as a ground for appeal. Section 503(c) deals with denials of permits because the applicant and its affiliates have a bad record for compliance with environmental and other statutes. While the order granted New Morgan's motion based on the untimeliness of the amendment, it recognized that under Commonwealth, Pennsylvania Game Commission v. Commonwealth, Department of Environmental Resources, et al., 92 Pa. Cmwlth. 78, 509 A.2d 877 (1986) affirmed on other grounds, 521 Pa. 121, 555 A.2d 812 (1989) ("Game Commission"), a petition for leave to amend might be filed which could assert valid grounds for amendment and indicated the order was not a bar to Evergreen's presentation of such a petition.[1]

On February 4, 1993, Evergreen filed a Petition For Leave To Amend Appeal. It asserts that Evergreen's initial Notice Of Appeal was a "Skeleton Appeal" and contained a reservation of right to add "such issues as become evident through discovery." Thereafter, the Petition contends that Evergreen reviewed DER's files pertaining to New Morgan "and became aware of New Morgan's parent company's (Browning-Ferris Industries, Inc. ["BFI"]) deficient performance at other landfill sites" as to which it was previously unaware and

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1 Also see our opinion in this appeal dated February 23, 1993 with regard to other attempted amendments by Evergreen and New Morgan's Motion To Strike same.

that this constitutes good cause to be allowed to add this Section 503 issue to those raised initially in its Notice Of Appeal.

New Morgan delivered us its response to Evergreen's Petition on February 19, 1993. In it, New Morgan renews its Motion To Limit Issues. In its response, New Morgan contends Evergreen was aware of the issue of BFI's compliance history for over a year before the permit was issued and received a summary of the compliance record of New Morgan's affiliates months before the appeal was filed.

In a conference telephone call with the attorneys for all parties, it became clear that there was a serious factual dispute between the parties on the issue of when Evergreen acquired this knowledge. Accordingly, by Order dated February 23, 1993, we scheduled a hearing for March 2, 1993 to secure the evidence necessary to resolve this factual dispute.

As a result of this hearing certain facts became clear. Elizabeth Giordano ("Giordano") is President of Evergreen and helped draft its Notice Of Appeal. She reviewed the documents in Evergreen's possession prior to helping draft its Notice Of Appeal. One of these documents was a version of "Form C"[2] which details the compliance history of New Morgan and its affiliates, including BFI. According to Giordano, because Evergreen felt it lacked adequate information about New Morgan's compliance history, it elected not to raise this issue when it initially filed its Notice Of Appeal.

Giordano and another Evergreen representative reviewed a portion of DER Records on this permit application and after the appeal's filing, DER produced still other records during discovery. As a result, Giordano became

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2 An identical or nearly identical copy of Form C is New Morgan's Exhibit 8.

aware of an additional "violation" by BFI. This violation occurred at a solid waste transfer station in West Goshen Township, Chester County, where wastes were being processed without DER's approval. Evergreen Exhibit 1 is a group of DER documents dealing therewith. However, Evergreen's Exhibit 1 also shows that BFI brought the solid waste transfer station into compliance with DER's requirements prior to the permit's issuance (although the question of civil penalties liability was not resolved). Through discovery, Giordano has also become aware of an alleged illegal ash dump located at BFI's Imperial Landfill in Allegheny County but, as of the hearing's date, she was unaware of its current status. Form C recited 269 violations of various sorts and severities in the last ten years at New Morgan's affiliates throughout the United States. These include misdemeanors, felonies, civil penalty assessments and administrative orders.[3] These two new violations would make that total 271.

It is also clear from New Morgan's exhibits and Giordano's testimony on cross-examination that Evergreen had concerns about BFI's compliance history long before the permit was issued and its appeal was filed. New Morgan's Exhibit 1 is a pamphlet put out by Evergreen referencing its soon to be filed appeal (the instant proceeding) which states:

> Browning-Ferris Industries has a history of documented contaminated practices at other landfill sites.

New Morgan's Exhibit 3 was identified by Giordano (the only witness to testify) as minutes of Evergreen's meeting of September 12, 1990. It evidences discussion of BFI's past record. Obviously, Evergreen was aware of

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[3] A number of the violations identified in Form C arose at facilities operated by BFI and its subsidiaries in Pennsylvania.

issues as to BFI's compliance history at that time. New Morgan's Exhibit 4 is a list of issues to be raised by Evergreen at a meeting with DER to occur on September 21, 1990. This list is typed on Evergreen letterhead. New Morgan's Exhibit 2 is a portion of an Evergreen letter from November 22, 1991 to the CBS television program "60 Minutes." Both raise concerns over BFI's past compliance history.

New Morgan's Exhibits 5 and 6 refer to a DER public meeting about the landfill permit application submitted by New Morgan which was attended by numerous members of Evergreen including Giordano. According to Exhibit 5, (a DER response to comments made there), this compliance history issue was raised at that meeting. Nine of the seventeen citizens identified as presenting comments at this meeting in Exhibit 6 were admittedly members of Evergreen (although they did not all speak on behalf of Evergreen). Finally, New Morgan's Exhibit 7 is a video tape of this 1990 public meeting indicating citizen opposition to the landfill in part based upon the compliance history of New Morgan/BFI and it shows Giordano's presence at the hearing when these concerns were voiced.

The sum of the evidence shows that Evergreen knew of the concerns about New Morgan/BFI's compliance history well before DER issued the permits to New Morgan in June of 1992. Apparently, the only evidence turned up subsequently in discovery by Evergreen dealt with the two additional violations identified above. According to the evidence at the hearing, one of these (the transfer station violation) was brought into compliance a month prior to the permit's issuance and did not involve a landfill, which thus puts it outside of Evergreen's Petition (it talks of BFI's performance at landfill sites only). As to the other, it is not clear what its status was when DER

issued the permits or what it is now. We do not even know if the violation post-dated the issuance of the permits.

Clearly, under Game Commission, amendment adding new grounds for appeal after the 30 day appeal period has run is allowable only in very limited circumstances. Bobbi L. Fuller v. DER, 143 Pa. Cmwlth. 392, 599 A.2d 248 (1991). While one of those circumstances allowing amendment may be where the new ground is discovered after an appeal's commencement as a result of an appellant's pre-hearing discovery activities, an appellant cannot have as much pre-appeal and prediscovery knowledge of the subject matter of the proposed new grounds for appeal as Evergreen had here and still claim the issue became apparent only through discovery. To come to any other conclusion on the record before us would be for the Board to effectively reverse the Commonwealth Court's Game Commission decision.

Accordingly, we enter the following Order.

O R D E R

AND NOW, this 25th day of March, 1993, it is ordered that Evergreen's Petition For Leave To Amend Appeal is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
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DATED: March 25, 1993

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M. DIANE SMITH
SECRETARY TO THE BC

GRAND CENTRAL SANITARY LANDFILL, INC.	:	
	:	
v.	:	EHB Docket No. 92-111-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: March 29, 1993

ADJUDICATION

By Richard S. Ehmann, Member

Synopsis

The Board dismisses a municipal waste landfill operator's appeal of the Department of Environmental Resources' (DER) denial of its application for a minor modification of its solid waste management permit to allow the operator to remove the preceding day's six inches of daily cover each morning, stockpile it, and reuse it as daily cover at the end of that day. The Board finds no abuse of DER's discretion in interpreting its regulations at 25 Pa. Code §273.232(a) as not providing for the procedure proposed by the operator. We also perceive no abuse of DER's discretion in finding that such a process does not comply with 25 Pa. Code §273.232(b)(1), which requires that the daily cover must prevent vectors, odors, blowing litter, and other nuisances. Further, DER did not abuse its discretion in finding that the operator's proposal changed the amount or application method of daily cover material

contained in the operator's solid waste management permit and thus must be submitted as an application for a major permit modification pursuant to 25 Pa. Code §271.144(a)(8).

The Board further rejects the operator's assertions that DER failed to timely process its application, so as to violate the operator's due process and equal protection guarantees and giving rise to a "deemed approval" of its application.

BACKGROUND

This appeal was commenced on March 20, 1992, by Grand Central Sanitary Landfill, Inc. (Grand Central), seeking to challenge DER's denial of its application for a minor modification to its Solid Waste Management Permit (SWMP) No. 100265. In its minor permit modification application Grand Central had requested DER to approve its reuse of daily cover soil at its landfill facility located in Plainfield Township, Northampton County. DER denied Grand Central's request in a letter dated February 20, 1992, and Grand Central then filed this appeal.

A hearing on the merits in this matter was held on October 8, 1992 before Board Member Richard S. Ehmann. Following our receipt of the transcript of the merits hearing, we ordered the parties to file their respective post-hearing briefs. Grand Central filed its post-hearing brief on November 30, 1992 and filed an amended post-hearing brief on December 3, 1992. DER filed its post-hearing brief on December 16, 1992 and later filed an amended post-hearing brief on January 4, 1993.

Upon a full and thorough review of the record in this appeal, we make the following findings of fact.

FINDINGS OF FACT

The Parties

1. Grand Central Sanitary Landfill, Inc., is a corporation doing business in Pennsylvania and has an address of 1963 Pen Argyl Road, Pen Argyl, PA 18072. (B Ex.1)[1]

2. DER is the agency of the Commonwealth with the authority and duty to administer and enforce the Clean Streams Law (Clean Streams Law), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*; the Air Pollution Control Act (Air Pollution Control Act), Act of January 8, 1960, P.L. 2119, as amended, 35 P.S. §4001 *et seq.*; Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations promulgated thereunder. (B Ex.1)

Grand Central's Permit

3. On November 13, 1989, DER issued to Grand Central SWMP No. 100265 for the operation of a solid waste disposal facility, i.e., the Grand Central Sanitary Landfill, for municipal waste. (B Ex.1) The Grand Central Sanitary Landfill is located in Plainfield Township, Northampton County, and is owned and operated by Grand Central. (B Ex.1)

4. On September 21, 1990, DER issued an amended SWMP No. 100265. (N.T. 50)

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1 "B Ex.1" is the Joint Stipulation of the Parties and attached documents which was admitted as Board Exhibit 1 in this matter. It is the only exhibit admitted into evidence.

5. DER issued this amendment of SWMP No. 100265 to Grand Central for the expansion of the solid waste disposal operations onto the portion of the landfill facility known as the "Northern Expansion." (N.T. 50; B Ex.1)[2]

Grand Central's Daily Landfill Operations

6. Nolan Perin is one of the owners of Grand Central, which is a family-owned business. (N.T. 57) Mr. Perin has been the Chairman of Grand Central since 1988 and has had the lead role in dealing with Grand Central's consulting engineers with regard to the preparation of Grand Central's permit applications. (N.T. 58)

7. Thomas Pullar is a professional engineer and is a vice-president and director of environmental engineering with American Resource Consultants (ARC), the firm which is the consulting engineer for Grand Central. (N.T. 9) Mr. Pullar was the engineer of record for Grand Central in connection with its SWMP No. 100265 application and it was Mr. Pullar who certified Grand Central's application for the amended permit (Northern Expansion). (N.T. 11)

8. Waste is brought to the landfill in trucks and dumped into the cell area. (N.T. 56) The waste is then spread and compacted. (N.T. 56) This is accomplished by front end loaders pushing the dumped waste up the slope, bringing it up to the eight foot "lift" elevation, and then landfill compactors compacting the waste in place. (N.T. 71)[3]

9. The size of the area which Grand Central proposes to uncover and recover each day would be approximately 150 feet in length and, 150 feet in width. (N.T. 52, 86)

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2 "N.T." is a reference to the notes of testimony of the October 8, 1992 merits hearing.

3 Once all of the cells at a specified elevation or "lift" are filled with waste, an intermediate cover is applied and Grand Central begins to fill the cells on the next lift. (N.T. 114)

10. The compacted waste does not have a uniform surface because some items, such as tires and foam rubber mattresses, do not compact well and have a tendency to protrude. (N.T. 44, 99-100)

11. Form 14 of Grand Central's original permit application (which DER approved) had specified that Grand Central would apply, at the end of the working day, a cover over the solid waste which had been disposed of that day. (N.T. 12-13) There has been no change in the landfill's operating plan regarding daily cover since DER issued the amended permit. (N.T. 50)

12. As daily cover, Grand Central dumps six inches of soil directly over the exposed waste in a specific cell and spreads it with a Caterpillar D-6, D-5, or D-4 type bulldozer. (N.T. 47, 53, 67-68, 76) This same piece of equipment is also used for clean-up purposes. (N.T. 68)

13. Larry Sattler is a Solid Waste Specialist with DER's Bureau of Solid Waste Management, Wilkes-Barre Region. (N.T. 93-94)

14. Mr. Sattler is responsible for inspecting landfills and is familiar with daily landfill operations. (N.T. 94-98) He has conducted over 1,000 inspections of operating landfills for DER. (N.T. 95)

15. Mr. Sattler has inspected the Grand Central Sanitary Landfill since July of 1990, averaging one inspection there each month. (N.T. 95)

16. In conducting his inspections, Mr. Sattler evaluates daily cover for its effectiveness, i.e., daily cover should be compacted so as to have a regular surface with no exposure of the waste. (N.T. 99)

17. Because the surface of the waste (over which the daily cover is spread) is not necessarily uniform, Grand Central's daily cover may not be a uniform six inches in thickness in all places. (N.T. 99)

18. Throughout the day, the previous day's six inches of daily cover soil is eroded by the clean-up process following the disposal of new waste,

and, by the end of the day, there is sometimes only one or two inches of cover remaining from the previous day. (N.T. 71, 88)

19. Approximately 20 per cent of the waste disposed of at the Grand Central Sanitary Landfill is sewage sludge. (N.T. 47) Although this sewage sludge is dewatered, it is still 80 percent liquid, with 20 percent solids. (N.T. 55) As a result, when the sewage sludge is dumped, it mounds up in a pile and is incorporated with the other non-sludge wastes. (N.T. 55)

20. Although Grand Central's permit does not require it to do so, Grand Central presently requests sewage sludge haulers to dump their sewage sludge early in the day, so the sludge is dumped in the lower elevation of the daily cell and other waste is on the top surface of the cell. (N.T. 74-75, 110)

21. Odors have been a problem at the Grand Central Sanitary Landfill in the past. (N.T. 107-108) Mr. Sattler has detected malodors coming from two sources on the landfill site, i.e., odors relating to the daily working phase and to the build-up of landfill gases. (N.T. 102, 109) In general landfill gas has an odor which is distinct from the working phase odor. (N.T. 108)

22. Grand Central has been working to correct the odor problems at its landfill. (N.T. 109)

23. Although the sewage sludge is generally at the bottom of the landfill's waste pile, loads of sewage sludge that are disposed of toward the end of the day sometimes are near a cell's top surface. (N.T. 110)

24. Because the daily cover is applied directly over the waste and gases generated by the landfill wastes travel upward, there is a potential for the cover to absorb the odors of the waste beneath it. (N.T. 47, 100-101)

Grand Central's Reuse of Daily Cover

25. Prior to July of 1991, Grand Central reused the preceding day's daily cover soil as daily cover for the following day on a now-closed portion of its landfill. (N.T. 62)

26. Although Mr. Sattler was present at the landfill site on one occasion when the cover material had been stripped, he does not remember how much cover material remained in place that day. (N.T. 110) He did not observe the cover material being reused. (N.T. 109)

27. Grand Central never discussed the fact that it was reusing its daily cover with DER's Norristown office staff. (N.T. 85)

28. There is no evidence that DER knew of Grand Central's reuse of the daily cover. (N.T. 85)

29. Mr. Sattler advised Grand Central's personnel that the proposal to reuse cover material was not part of their operating plan and that he did not believe it to be a feasible operating activity, and he noted this on an inspection report. (N.T. 62, 107)

30. After discussing the reuse of daily cover issue with Mr. Pullar and other ARC personnel, Grand Central decided to seek DER approval of what it believed to be a minor permit modification. (N.T. 65)

Grand Central's Request for a Minor Permit Modification

31. On July 19, 1991, Grand Central submitted to DER its application for a minor modification of its SWMP No. 100265. (N.T. 13, 77; Exhibit 2 to B Ex.1)

32. This minor modification application was submitted by Grand Central because it believed Form 14 of its DER-approved permit would not allow Grand Central to remove the preceding day's daily cover at the beginning of the subsequent day. (N.T. 20)

33. In Grand Central's minor modification application, it sought to modify its operating plan to state that instead of placing the following day's waste on top of the preceding day's daily cover, Grand Central would remove and stockpile all but a thin layer of the preceding day's daily cover in the area in which waste would be disposed of on that day. At the end of that day, the stockpiled cover material would be used as that day's six inch daily cover, in effect "reusing" the daily cover material. (N.T. 13, 21, 33-34, 36, 38, 51, Exhibit 2 to B Ex.1)

34. Grand Central believes that reusing the daily cover material would reduce the amount of cover material needed, resulting in additional volume in the cell for disposal of more waste, better drainage of leachate through the waste material, and would reduce the number of trucks travelling to the landfill site to dump cover material. (N.T. 21-22, 75-76, 80)

35. Grand Central's minor modification application did not specify how much of the preceding day's daily cover would be removed. (N.T. 44-45)

36. At the hearing, Mr. Pullar testified that Grand Central would remove the preceding day's daily cover until it reached a point where its equipment was exposing waste. (N.T. 45) Perin acknowledged that the equipment might mix waste with the removed cover. (N.T. 46)

37. Grand Central's minor modification application explained that if the cover removal process resulted in a great quantity of waste being removed, Grand Central would replace and cover the waste in the current day's cell. (N.T. 46)

38. Grand Central's minor modification application did not discuss the type of equipment it would use to remove the daily cover, nor did it state that sewage sludge is generally disposed of at the bottom of a day's work area. (N.T. 81, 83)

39. Although Grand Central's minor modification application did not so indicate, on some days Grand Central would not remove the preceding day's cover material, depending upon the type of waste coming into the landfill on a particular day or the weather conditions, since that would have an impact on the cover material. (N.T. 82-89)

Pullar's Letter to DER

40. On January 6, 1992, Pullar, who was the primary person dealing with DER on Grand Central's minor permit modification application, received a monthly status report from DER which stated that DER had received Grand Central's application. (N.T. 14, 23-24)

41. In a letter to DER dated February 5, 1992 regarding DER's monthly status report, Pullar indicated, *inter alia*, that Grand Central had not received a response on its application or a reason for DER's delay in its decision, so Pullar was requesting either approval or an explanation. (N.T. 10, 25; Exhibit 4 to B Ex.1)

DER's Denial of Grand Central's Application

42. By a letter dated February 20, 1992, DER denied Grand Central's minor modification application and returned the submission, stating that pursuant to 25 Pa. Code §271.144(a)(8), any change in the amount or application method of cover material would be required to be submitted as a major permit modification request. DER's letter further stated:

> It is stated under Item 17 of the permit modification application that GCS intends to change the thickness of daily cover as addressed in the operational plan. This request is in non-compliance with 25 Pa. Code Section 273.232(a) which requires at least 6" of daily cover material. Also, the Department has the opinion that the 6" of required daily cover material cannot be removed on the working face without waste being mixed in during the removal

process which would create nuisances and not prevent odors, vectors, and blowing litter as required by 25 Pa. Code Section 273.232(b)(1).

(N.T. 25; Exhibit 3 to B. Ex.1)

Pullar's Letter to Attorney Zito

43. After receiving DER's February 20, 1992 letter, Mr. Pullar wrote Attorney Leonard Zito a letter dated March 18, 1992, in which he stated his opinion regarding DER's denial of Grand Central's application. (N.T. 25; Exhibit 5 to B Ex.1) It was Mr. Pullar's opinion that Grand Central's proposal did not change the type, amount, origin or application of cover at the landfill; that 25 Pa. Code §273.232(a) would not be violated because the disposal of waste would be covered by six inches of cover material at the end of the day; and that proposal adequately dealt with the problems of preventing odors, vectors, blowing litter, and other nuisances. (N.T. 28-33, 37)

Problems With Grand Central's Proposal

44. The drawings attached to Exhibit 2 which is a part of B Ex. 1 hypothetically depict how Mr. Pullar believes the reduction of the amount of daily cover at the landfill would reduce leachate seeps and ponding by enhancing drainage of leachate from waste and preventing it from seeping out the sides of the landfill. (N.T. 22, 39)[4] These drawings were part of the minor permit modification application. (N.T. 22)

45. Mr. Pullar intended for these drawings to show that leachate may be held on a thick daily cover layer and build up to a point that it seeps out of the side of the landfill, but where there is a reduction in the layer of compacted cover soil, this leachate build up is reduced. (N.T. 40-42)

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4 Section 271.1 of 25 Pa. Code defines leachate as a liquid that has permeated through or drained from solid waste.

46. There was no evidence of the existence of any study which would support Mr. Pullar's opinion that Grand Central's proposal would enhance leachate drainage. (N.T. 53)

47. Mr. Sattler testified that a daily cover is more likely to be applied in a diagonal manner on the slope of a working phase than in a horizontal manner as is depicted in Grand Central's drawings. (N.T. 103)

48. Mr. Pullar acknowledges that daily cover is sometimes applied in a diagonal fashion, so the leachate would flow diagonally through the waste, to the extent it does not infiltrate the cover material. (N.T. 40-42)

49. In Mr. Sattler's opinion, if the daily cover material is applied to a diagonal slope, it is not likely that there will be a reduction of leachate ponding and seeping. (N.T. 103)

50. Mr. Perin believes his equipment operator could strip off a controlled layer of daily cover material at the start of the following day. (N.T. 68, 83)

51. Mr. Sattler opined that six inches of cover material is the minimum amount of cover which can be applied in order to achieve a fairly uniform cover without waste material protruding through the daily cover. (N.T. 115)

52. Mr. Sattler opined that it would be difficult, if not impossible, for Grand Central to remove only a thin layer of daily cover or to remove the cover material without causing a mixture of the cover material and waste because once the cover material is compacted, its lower layers become incorporated with the waste, and the disposed wastes are not uniform in size so they do not provide a uniform flat base upon which to apply the daily cover. (N.T. 98-99)

53. Mr. Pullar opined that while Grand Central's proposal raises the potential for odors to escape from the landfill, the thin layer of daily cover left in place will be effective in reducing the odor problem. (N.T. 48)

54. In Mr. Sattler's opinion, it would be difficult, if not impossible, for Grand Central to remove the daily cover without causing malodors. (N.T. 98) He testified that the stockpiles of stripped cover material will have a malodor, especially on hot summer days, because odors from the sewage sludge and other landfill gases will migrate upward and permeate the daily cover material before it is removed. (N.T. 101)

55. It is Mr. Perin's understanding that DER has granted temporary approval to the Pottstown landfill to use a type of blanket as cover on an experimental basis. (N.T. 87-89)

56. Mr. Perin testified that he knows of no other landfills which have either proposed or are conducting reuse of their daily cover in the manner Grand Central proposed in its application. (N.T. 87-88)

DISCUSSION

The first matter we must address is which party bears the burden of proof. Here, Grand Central bears the burden of proving by a preponderance of the evidence that DER abused its discretion or acted arbitrarily, capriciously, or contrary to law when it denied Grand Central's minor permit modification application. 25 Pa. Code §§21.101(a),(c)(1). Warren Sand and Gravel Co., Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). Grand Central, moreover, must prove it is clearly entitled to the permit before the Board will order DER to issue it. Al Hamilton Contracting Co. v. DER, EHB Docket No. 85-392-W (Adjudication issued November 6, 1992); Sanner Brothers Coal Co. v. DER, 1987 EHB 202.

As we explained in our decision in Al Hamilton, *supra*:

> The Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7511 *et seq.*, ... empower[s] the Board to conduct a *de novo* review of the Department's actions. The Commonwealth Court interpreted the nature of that *de novo* review in Warren Sand and Gravel v. [DER], 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975), as imposing a duty upon the Board to determine whether the Department's action can be sustained or supported by the evidence taken by the Board. [footnote omitted.] The Board's decisions have been consistent with the concept of review set forth in Warren Sand and Gravel. In Township of Salford *et al.* v. DER and Mignatti Construction Company, 1978 EHB 62, 77, we held that in reviewing a Department action we were not restricted to a review of the Department's determination on an application for a surface mining permit and allowed expert testimony not developed prior to the Department's action.

Id. at 30 (quoting Robert L. Snyder and Jessie M. Snyder v. DER, 1990 EHB 428). We have repeatedly held that we are not limited to considering information available to DER at the time DER acted. Thus, we will treat this appeal in a like manner.

Section 271.222(a) of 25 Pa. Code requires a permittee of a municipal waste disposal or processing facility (such as Grand Central) to file with DER an application for permit modification prior to making a change in the design or operational plans in the application upon which its permit was issued. Pursuant to 25 Pa. Code §271.222(b), an application for permit modification is required to be complete and to contain, in addition to the permittee's name, address and permit number, a description of the proposed modifications (including appropriate maps, plans and applications to demonstrate that the proposed modification complies with the SWMA, the environmental protection

acts defined at 25 Pa. Code §271.1, and the regulations at Title 25 of the Pa. Code).

As to daily cover, Section 273.232 of 25 Pa. Code[5] pertinent part:

> (a) A uniform and compacted cover of the approved daily cover material at least 6 inches in thickness shall be placed on exposed solid waste at the end of each working day, at the end of every 24 hours or at the completion of every lift, whichever interval is less. ...
> (b) The composition of the daily cover material shall meet the following performance standards. The daily cover shall:
> (1) Prevent vectors, odors, blowing litter and other nuisances.

Where an application for a permit modification for a municipal waste landfill involves a change in the approved type, amount, origin or application of daily cover material, section 271.144(a)(8) of 25 Pa. Code requires that DER shall consider the application as one for a major permit modification under §§271.141-271.143 (relating to public notice by applicant, public notice by DER, and public comments).

Grand Central's minor permit modification application states that the thickness of the approved daily cover will be altered by its proposal such that immediately prior to landfilling in the current day's cell, cover thickness will be reduced from six inches to a thin layer completely covering the waste, but, at the end of each day or completion of a cell, all areas will be covered by at least a six inch layer of approved daily cover soil. Grand Central reads §273.232(a) as allowing for the removal of the six inches of daily cover between layers of exposed solid waste, emphasizing the language in the regulation which requires the six inches of daily cover material to be placed on the exposed waste at the <u>end</u> of the working day, <u>end</u> of every 24

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5 We note that 25 Pa. Code §273.232 has been amended subsequent to DER's denial of Grand Central's application here. See 22 Pa.B. 5105.

hour period, or completion of every lift (whichever interval is less). Grand Central thus believes its proposal complies with the regulation's requirements according to its interpretation of 25 Pa. Code §273.232(a). Additionally, Grand Central contends that it is proposing to take precautions to prevent vectors, odors, blowing litter and other nuisances from arising out of a change in its daily cover procedure and it contends that its evidence should be viewed as more credible than that of DER regarding Grand Central's ability to comply with 25 Pa. Code §273.232(b)(1).

Grand Central asserts that its existing landfill operation often reduces the previous day's six inches of daily cover, sometimes to one or two inches, through landfilling activity, and that this supports its proposal to use only a thin daily cover from the start. DER, on the other hand, contends that this reduction of daily cover is all the more reason for Grand Central to apply and retain in place six inches of daily cover.

It is clear from DER's post-hearing brief and the testimony of its witness, Mr. Sattler, that DER interprets §273.232(a) of its regulations as providing that the uniform and compacted six inches of approved daily cover material, once placed on the exposed solid waste, shall stay in place and that the next waste to be disposed of shall be placed on top of that six inches of daily cover material.

As we have explained in previous decisions, it is within DER's power to interpret its regulation and, once it has done so, that interpretation is entitled to controlling authority unless it is plainly erroneous or inconsistent with the authorizing statute. Morton Kise, et al. v. DER, et al., EHB Docket No. 90-457-MR (Adjudication issued December 8, 1992; Orth v. Department of Labor and Industry, 138 Pa. Cmwlth. 443, 588 A.2d 113 (1991), allocatur denied, ___ Pa. ___, 596 A.2d 801 (1991). The legislative

authorization for §273.232 and §271.144 (a)(8), *inter alia*, is §105(a) of the SWMA, 35 P.S. §6018.105(a), which authorized the Environmental Quality Board to promulgate regulations for DER to carry out the provisions of the SWMA to protect the safety, health, welfare and property of the public and the air, water and other natural resources of the Commonwealth.

As DER's expert Mr. Sattler pointed out, it would be difficult for Grand Central to remove the daily cover and leave only a thin layer in place, since the waste items are not uniform in size and become compacted with the lower layers of daily cover soil, and the potential for waste to be mixed in with the removed cover material clearly exists. In Sattler's opinion six inches of daily cover is the minimum amount of cover that Grand Central can apply to achieve a fairly uniform cover surface without waste items protruding through the cover. Additionally, as Mr. Sattler testified, odors from the landfill gases will rise and permeate the daily cover material. The result will be that when it is removed and stockpiled, the daily cover material will create malodor problems, especially in the summer. While Grand Central's engineering expert Mr. Pullar testified that the thin layer of daily cover soil which would be left in place under Grand Central's proposal will prevent odors from escaping, we place more weight on Mr. Sattler's testimony, since he was qualified as an expert on whether Grand Central's proposal can be carried out without causing a likelihood of malodors and mixing of wastes by virtue of his experience of conducting over 1,000 inspections of operating landfills. Although Mr. Pullar testified that Grand Central's proposal would help reduce leachate seeping and ponding by aiding leachate drainage, Mr. Sattler testified on DER's behalf that a reduction in the thickness of daily cover layers between the layers of disposed waste would not aid in leachate drainage as suggested by Mr. Pullar. As Grand Central did not put before the Board any

evidence, such as studies, which would support Mr. Pullar's opinion, we cannot say that Grand Central has proven its proposal would aid leachate drainage. Thus, Grand Central has not sustained its burden of proving DER's interpretation of 25 Pa. Code §§273.232(a) and (b)(1) is plainly erroneous or inconsistent with the authorizing legislation for these regulations.

Next, we examine Grand Central's assertion that DER is erroneously interpreting 25 Pa. Code §271.144(a)(8) to include Grand Central's permit modification application as one for a major permit modification. Grand Central claims that the same amount of daily cover material, i.e., six inches, will be applied on a day-to-day basis and its method of applying the daily cover will not be changed because it will use the same method of applying the daily cover at the end of each day as it currently uses and will utilize the same equipment.

DER, on the other hand, is interpreting the change in the approved amount or application of daily cover material to which §271.144(a)(8) refers as including the reuse of daily cover material Grand Central is proposing. DER views Grand Central's proposal as one with a net reduction in the amount of daily cover. While Mr. Pullar testified that the approved six inches of daily cover material would not be changed under the proposal, he acknowledged that the effect of Grand Central's reuse of daily cover would be an overall reduction in the amount of daily cover. Applying the standard in Morton Kise, *supra*, Grand Central has not shown that DER's interpretation of the "change in amount" of daily cover at §271.144(a)(8) as including a change in the amount of daily cover left remaining at the beginning of the following day's landfilling operations to be plainly erroneous or inconsistent with the regulation's enabling legislation.

Last, Grand Central contends DER failed to comply with the time requirements placed on its review of permit applications under 25 Pa. Code §§271.202(c) and 271.203(a)(2).[6] It claims that DER's alleged failure to comply with these time limits in reviewing Grand Central's application resulted in a denial of Grand Central's rights to equal protection and due process as well as a "deemed approval" of Grand Central's application.

The parties do not dispute that DER received Grand Central's application in July of 1991 and denied it in February of 1992. Grand Central claims DER either failed to conduct a completeness review of the application or did not notify Grand Central of its completeness review, in violation of 25 Pa. Code §271.202(c). Grand Central further asserts that DER's denial of its application seven months after having received it violated the six month time constraints set forth in 25 Pa. Code §271.203(a)(2). DER, on the other hand, contends in its post-hearing brief that any failure on DER's part to conduct a review for administrative completeness within the required time would amount to harmless error here and that its denial of Grand Central's application fell within the nine month time period for DER's decision found at 53 P.S. §4000.512(b). DER further argues that no deemed approval occurred here.

We need not decide whether there was any failure by DER to abide by its regulations here because it is clear that no deemed approval of Grand Central's application would have occurred because of DER delay in processing it. A deemed approval does not occur where there is no provision for a deemed approval of an application because of DER delay contained in either 25 Pa. Code §271.202 or §271.203, the enabling statutes for those regulations, or the Municipal Waste Planning, Recycling and Waste Reduction Act (Act 101), Act of

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6 Sections,271.202 and 271.203 of 25 Pa. Code were amended subsequent to DER's denial of Grand Central's application. See 22 Pa.B. 5105.

July 28, 1988, P.L. 566, 53 P.S. §4000.101 *et seq.* Washington County v. DER, EHB 91-168-MJ (Opinion issued April 2, 1992); D'Amico v. Board of Supervisors, Township of Alsace, 106 Pa. Cmwlth. 411, 526 A.2d 479 (1987).[7]

Insofar as Grand Central is arguing that DER has violated its equal protection right, it has failed to carry its burden. We explained in Al Hamilton, *supra*, that the equal protection clause of the Fourteenth Amendment of the United States Constitution[8] provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This means that a state's laws must treat all persons equally. *Id.* We further explained:

> The [equal protection] clause announces a fundamental principle: the State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction comply with this principle. Only when a governmental unit adopts a rule that has a special impact on less than all persons subject to its jurisdiction does the question whether this principle is violated arise.

Id. at 49, (quoting New York City Transit Authority v. Beazer, 440 U.S. 568, at 587-588 (1979)).

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7 We point out that DER's denial unquestionably occurred within eight months of its receipt of Grand Central's application. As the parties have stipulated that Grand Central's permit is for a municipal waste landfill, we are at a loss to understand why Grand Central is contending that DER had to abide by the review period set forth at 25 Pa. Code §271.203(a)(2), which deals with DER's review of permit applications other than those for municipal waste and demolition waste landfills and gives DER a six month time limitation.

8 We point out that although it is unclear from Grand Central's post-hearing brief whether it is alleging a violation of its rights under the United States or Pennsylvania Constitution, the protection afforded by the equal protection clause of the federal constitution and the prohibition against special laws in the Pennsylvania Constitution are substantially the same. Commonwealth v. Kramer, 474 Pa. 341, 378 A.2d 824 (1977).

Here, Grand Central urges that DER treated its application in a "distinct" manner which had no legitimate basis, while all other landfill operators are entitled to review of their applications within the time limits imposed by the regulations. Grand Central not only failed to offer any evidence to support such an argument, but it failed to offer any evidence into the record which would suggest that DER has violated the equal protection guarantee in any way.

Grand Central further asserts that as a result of DER's alleged neglect in handling its application, it was left uncertain of its rights and that DER's delay in handling its application resulted in a denial of Grand Central's due process rights.[9] From these assertions, Grand Central contends DER "has so abused its authority and neglected its duties and responsibilities under the regulations and has prejudiced [Grand Central] that a deemed approval should be granted." As we noted in Al Hamilton, *supra*, "procedural due process has as its essential element notice and an opportunity to be heard and defend in an orderly proceeding before an impartial tribunal of competent jurisdiction." *Id.* at 49 (quoting Soja v. Pennsylvania State Police, 500 Pa. 188, 455 A.2d 613 (1982) (plurality opinion as to other issues and outcome of the case). Substantive due process protects certain "fundamental values." Al Hamilton, at 49. While it is somewhat unclear as to just how Grand Central is claiming DER violated its due process rights, especially since its post-hearing brief lacks any citations to case law

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[9] Although it is unclear from Grand Central's post-hearing brief as to whether it is asserting a violation of the due process guarantee of the United States Constitution or the Pennsylvania Constitution, we note that due process guarantees under the State Constitution are no greater than those afforded by the Federal Constitution. Empire Sanitary Landfill, Inc. v. DER, 1991 EHB 102; Coades v. Commonwealth, Bd. of Probation and Parole, 84 Pa. Cmwlth. 484, 480 A.2d 1298 (1984).

regarding due process guarantees, we are unable to detect any evidence in the record here which suggests Grand Central's procedural or substantive due process rights were violated.

Insofar as DER delayed in its handling of Grand Central's application, there is no penalty to be imposed upon DER prescribed in the SWMA, Act 101, or the regulations, such as a deemed approval of Grand Central's application, and, as we have previously explained in this Adjudication, this Board may not order a deemed approval of Grand Central's application in this appeal where DER's regulations and their enabling statutes do not provide for a deemed approval.[10]

Finding no abuse of DER's discretion occurred in this matter, we accordingly make the following conclusions of law and enter the following order dismissing Grand Central's appeal.

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[10] To the extent that Grand Central claims DER's delay prevented it from knowing how to proceed in this matter, we point out that it could have sought mandamus relief from the Commonwealth Court to order DER to act on its application in a timely fashion if it believed DER had failed to do so. See County of Allegheny v. Commonwealth, 507 Pa. 360, 490 A.2d 402 (1985) (mandamus is an extraordinary remedy designed to compel official performance of a ministerial act or mandatory duty under appropriate circumstances).

CONCLUSIONS OF LAW

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

2. The party appealing DER's denial of its application for a minor modification to its SWMP bears the burden of proving by a preponderance of the evidence that DER abused its discretion. 25 Pa. Code §§21.101 (a), (c)(1).

3. The Board may consider post-denial evidence when determining whether DER abused its discretion by denying a permit.

4. DER's interpretation of its regulations is entitled to controlling authority unless it is plainly erroneous or inconsistent with the regulation's authorizing statute. Morton Kise, et al. v. DER, et al., EHB Docket No. 90-457-MR (Adjudication issued December 8, 1992); Orth v. Department of Labor and Industry, 138 Pa. Cmwlth. 443, 588 A.2d 113 (1991), allocatur denied, ___ Pa. ___, 596 A.2d 801 (1991).

5. DER did not abuse its discretion in finding that Grand Central's proposal should have been submitted as one for a major permit modification pursuant to 25 Pa. Code §271.144(a)(8).

6. DER did not abuse its discretion in finding that Grand Central's proposal was not in accordance with 25 Pa. Code §§273.232(a) and (b)(1).

7. No deemed approval of Grand Central's application could occur here by way of DER's delay in handling the application, since there is no provision for a deemed approval of an application occasioned by DER delay contained in either 25 Pa. Code §271.202 or §271.203, the enabling statutes for those regulations, or Act 101. Washington County v. DER, EHB 91-168-MJ (Opinion issued April 2, 1992); D'Amico v. Board of Supervisors, Township of Alsace, 106 Pa. Cmwlth. 411, 526 A.2d 479 (1987).

8. DER's handling of Grand Central's application did not violate Grand Central's constitutional guarantees to equal protection of laws or due process. See Al Hamilton Contracting Company v. DER, EHB Docket No. 85-392 (Adjudication issued November 6, 1992).

ORDER

AND NOW, this 29th day of March, 1993, it is ordered that Grand Central Sanitary Landfill, Inc.'s appeal at EHB Docket No. 92-111-E is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 29, 1993

cc: **Bureau of Litigation, DER:**
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M. DIANE SMITH
SECRETARY TO THE BOAI

WESLEY H. and CAROLE O. YOUNG and JAMES AU	:	
v.	:	**EHB Docket No. 91-120-E**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and HARRIS TOWNSHIP, Intervenor	:	**Issued: March 31, 1993**

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

By Richard S. Ehmann, Member

Synopsis

The Board dismisses an appeal by landowners challenging DER's denial of their request for a private revision of a municipality's official sewage plan where the evidence shows DER complied with its regulation regarding private requests (25 Pa. Code §71.14) and the appellants have not proven any abuse of DER's discretion.

BACKGROUND

Appellants Wesley H. and Carole O. Young (the Youngs) and James Au commenced this appeal on March 22, 1991 challenging DER's February 21, 1991 denial of their request that DER order Harris Township, Centre County to revise its official sewage facilities plan (Act 537 Plan) to include their property in the plan's municipal sewage service area.[1]

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1 An "Act 537 Plan" is the official sewage service plan which Harris Township is required to submit to DER pursuant to §5(a) of the Sewage Facilities Act, (SFA), Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.5(a).

On May 28, 1991, we received two petitions to intervene in this appeal, the first by Harris Township and the second by the Centre Region Planning Commission for the Centre Region of Centre County (CRPC).[2] By an Opinion and Order dated August 1, 1991 (1991 EHB 1323), we granted Harris Township intervention but not CRPC. Following the resignation of former Board Hearing Examiner Thomas M. Ballaron, to whom this matter had been assigned for primary handling, the appeal was transferred to Board Member Richard S. Ehmann and the docket number changed to 91-120-E.

Hearings on the merits of this appeal were held on June 17, June 18, June 19, and July 24 of 1992 before Board Member Ehmann. The parties then submitted their post-hearing briefs, with the Youngs and Au filing their brief on September 14, and DER and Harris Township both filing their briefs on September 28, 1992.

Upon a full and complete review of the record, we make the following findings of fact.[3]

FINDINGS OF FACT

The Parties

1. Appellants are Wesley H. and Carole O. Young, who have an address of R.D. #1, Centre Hall, PA 16828, and James Au, who has an address of 1800 Earlystown Road, Boalsburg, PA 16827. (Notice of Appeal; Joint Stipulation of Facts (Board Exhibit 1 or B Ex.1))

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2 The CRPC is the planning agency for the Centre Region of Governments (CRCG). (Notes of Testimony at 497) The CRCG is comprised of elected officials from each of the six municipalities in the Centre Region, which includes Harris Township. (Notes of Testimony at 437)

3 While we note that DER has raised the issue of whether the facts asserted by the appellants' in their post-hearing brief are accurate, we confine our review to the facts of record and view those asserted in Appellants' brief as the rhetoric of a passionate advocate.

2. Appellee is DER, the agency of the Commonwealth with the duty and authority to administer and enforce the Clean Streams Law (Clean Streams Law), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; the SFA; Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations promulgated thereunder. (B Ex.1)

3. Intervenor is Harris Township, Centre County, which township's Board of Supervisors have an address of P.O. Box 20, 224 East Main Street, Boalsburg, PA 16827. (Petition to intervene; B Ex.1)

4. Appellants are owners of land located in Harris Township. (B Ex.1)

The Site

5. The Youngs purchased a 140 acre piece of property (Young property) in November of 1985; at that time, it was a non-operating dairy farm. (N.T. 19, 69, 104)[4]

6. The northern end of the Young property is bounded by State Route 45 (Rt. 45). (N.T. 48; I Ex. 47) North of Rt. 45 is a subdivision known as the Fuller-Taylor subdivision, which uses on-lot sewage disposal for its eight to ten lots. (N.T. 246-247)

7. The southern end of the Young property is bounded by U.S. Rt. 322 (Rt. 322). (N.T. 47; I Ex. 47) South of Rt. 322 lies vacant land on which it is proposed that a residential subdivision will be developed in the future. (N.T. 48)

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4 "N.T." followed by a page number is a reference to a page in the transcript of the hearing held on June 17, June 18, June 19, and July 24 of 1992. "A Ex." represents a reference to an exhibit of the appellants. "C Ex." represents a reference to an exhibit of DER; and "I Ex." represents a reference to an exhibit of Harris Township.

8. The Young property is bounded on the east by property owned by Galen Dreibelbis, which is a farm that has been placed into a conservancy to maintain its rural and undeveloped character. (N.T. 48, 248-249, 539; I Ex. 47)

9. On the western border of the Young property lies the Elks Club Golf Course, which consists of approximately 150 acres. (N.T. 48, 249-250; I Ex. 47)

The 1970 Act 537 Plan

10. An Act 537 Plan lays out how, when, and through what means sewage service will be provided to areas of a municipality. (N.T. 306) It also generally sets forth projections for 5-year, 10-year, and 20-year future service areas, areas where future development is expected which are used to guide how sewage service is to be provided in the municipality. (N.T. 306)

11. When the Youngs purchased their property, the Act 537 Plan for Harris Township was the 1970 Act 537 Plan adopted by Harris Township and other municipalities in the Centre Region. (N.T. 702) The Young's property was located outside the boundaries of the 1970 Act 537 Plan's municipal sewage service area. (C Ex.6)

The Sewer Authorities

12. The University Area Joint Authority (UAJA) is a municipal authority created by the Borough of State College and four townships surrounding that Borough to provide sewage treatment for the Centre Region. (N.T. 654) The UAJA sewage treatment plant (STP) is located in Benner Township adjacent to Spring Creek. (N.T. 142)

13. The College-Harris Joint Authority (CHJA) is a municipal authority incorporated by the townships of College and Harris to operate the sanitary sewers serving those townships. (N.T. 655) The CHJA operates the

sanitary sewer system, which conveys the collected sewage to the UAJA sewage treatment plant. (N.T. 142)

14. The Patton-Ferguson Joint Authority (PFJA) was incorporated by the townships of Patton and Ferguson for the purpose of providing sewage collection service to those townships. (N.T. 654) The PFJA operates a sanitary sewer system, collecting sewage within the two townships, and conveys the collected sewage to the UAJA sewage treatment plant for treatment. (N.T. 657)

15. The Pennsylvania State University (PSU) also operates a sewage treatment plant. (N.T. 143, 656) The wastewater treated at PSU's sewage treatment plant comes from the PSU University Park campus, a section of the Borough of State College, and a residential area west of the Borough's business section. (N.T. 668)

16. The UAJA discharges sewage to Spring Creek, which is a high quality trout stream. (N.T. 159, 201) Additionally, a private sewage disposal package system for Rockview Correctional Institution and a community-type sewage disposal system for the Al-Mar Acres mobile home park also discharge waste to Spring Creek. (N.T. 201-202)

Capacity of the UAJA Facility

17. The existing UAJA sewage treatment plant (STP) has the capacity to treat 3.84 million gallons per day (mgd) of sewage. (N.T. 491) As of 1988, the UAJA STP was treating 3.78 mgd. (N.T. 300) In July of 1992, the UAJA STP reached its capacity of 3.84 mgd. (N.T. 731)

18. As of the merits hearing date, the UAJA STP was being expanded to have a capacity of 6 mgd, and the construction of this expanded facility was to be completed by September of 1992. (N.T. 303-304)

19. In addition to the sewage flow which the UAJA was already treating, an additional 5,000 equivalent dwelling units (EDU) within the Centre Regions' Act 537 Plan sewage service area had already been approved for connection to the sewerage system but had not yet been connected. (N.T. 460-463) Each of these EDU's was allowed a baseline figure of 175 gallons per day (gpd), for a total of an additional approved 875,000 gpd not yet on line. (N.T. 460-463)

20. Additionally, between 1 mgd and 1.5 mgd of sewage from the PSU facility is expected to be treated by the UAJA. (N.T. 461,491)

21. As of the merits hearing, the capacity of the expanded 6 mgd UAJA facility may already be exceeded by commitments for sewage service to the properties approved to discharge sewage to the expanded STP. (N.T. 492)

The Youngs' First Subdivision Attempt

22. In 1987, the Youngs submitted to Harris Township a subdivision plan for 40 acres on the northern end of their property. (N.T. 21, 77)

23. Harris Township requested an investigation of the suitability of the soil on the Youngs' property for the use of on-lot sewage disposal systems. (N.T. 21-22, 77)

24. The Harris Township Sewage Enforcement Officer (SEO), along with DER's Regional Soil Scientist Robert Hawley, investigated the soil types and concluded that none of the seven test holes on the northern end of the Young property showed conditions suitable for on-lot sewage disposal. (N.T. 22, 77, 377, 387)

25. The Youngs subsequently withdrew their 1987 subdivision proposal. (N.T. 23, 77)

26. In September of 1987, DER advised the Centre Region municipalities that it would not approve any additional modules for land development which would discharge sewage to the UAJA because DER was concerned that the municipalities were approving more land development proposals than the UAJA plant had capacity to handle. (N.T. 281, 283, 317; I Ex. 2)

27. The UAJA facility had the capacity to treat 3.84 mgd of sewage when DER curtailed new land development. (N.T. 300)

28. At the time of this curtailment, the sewage being conveyed to the UAJA facility from new land development was consuming the UAJA plant's capacity and the need for sewage disposal via this sewerage system for existing homes in the service area was not being addressed. (N.T. 300)

29. DER ordered the Centre Region municipalities to update their 1970 Act 537 Plan. (N.T. 282)

30. DER also curtailed the issuance of on-lot sewage disposal permits by the municipalities' SEO's in an attempt to get the municipalities to address the need for an Act 537 Plan update. (N.T. 299, 366)

The Youngs' Second Subdivision Attempt

31. The Youngs' second subdivision proposal for three 10-acre lots with on-lot sewage disposal, including James Au's lot, was submitted to Harris Township in 1989 but was later withdrawn by the Youngs. (N.T. 23-24, 78, 81)

The Youngs' Third Subdivision Attempt

32. The Youngs submitted a third subdivision proposed for a single 10 acre lot located along Rt. 45, which was James Au's lot. (N.T. 27, 84)

33. The Harris Township SEO and DER's Hawley found the soils on this 10 acre parcel to be suitable for on-lot sewage disposal. (N.T. 28, 84)

34. Upon receiving approval for the third subdivision plan, the Youngs conveyed the 10 acre parcel to James Au in April of 1989. (N.T. 28, 84) Au's lot uses an on-lot sand mound sewage disposal system. (N.T. 139)

The Youngs' First Request to Harris Township for Sewage Service

35. By letter dated December 17, 1988, the Youngs wrote to the Harris Township Manager Thomas Miller requesting that their property be included in the Centre Region's Act 537 Plan's Sewage Service Area, since Harris Township was then involved in updating the 1970 Act 537 Plan. (N.T. 24, 26, 91; A Ex. 2; B Ex. 1)

36. The Youngs did not receive a response to their December 17, 1988 letter. (N.T. 27)

37. After the December 17, 1988 letter, Mr. Young attended public hearings concerning the Act 537 Plan update to be adopted by Harris Township and presented testimony supporting their request for sewage service. (N.T. 35-36)

The Youngs' Fourth Subdivision Attempt

38. In 1989, the Youngs submitted a fourth subdivision plan proposing 65 one-acre lots, including Au's, and a large 47-acre "farmette," to Harris Township. (N.T. 29, 84; A Ex.1) Under this fourth subdivision proposal, sewage was to be disposed of through the municipal sewage system. (N.T. 31)

39. Prior to this submission, the Youngs, through their consulting engineer Thomas F. Songer, had contacted David Allison, who is the Executive Secretary of the CHJA and requested that the CHJA provide sewage service to the Youngs' property. (N.T. 116, 141, 650)

40. On May 30, 1989, the CHJA agreed to provide service to the Youngs' property if CHJA had sufficient capacity when the service was to be

required. (N.T. 141, 197) The CHJA's agreement to service the subdivision was also contingent on Harris Township's approval of the proposed subdivision. (N.T. 198, 662; I Ex. 35)

41. On October 9, 1989, Harris Township rejected the Youngs' fourth subdivision proposal. (N.T. 29-32, 66, 144; B Ex.1; C Ex. 6)

42. The Youngs appealed Harris Township's denial of their subdivision proposal to the court of common pleas of Centre County. (N.T. 67-68)

Proposed Act 537 Plan Update

43. In the summer of 1989, and as part of the CRPC's Act 537 Plan Update, Harris Township submitted to DER an Act 537 Plan update for the entire township. (N.T. 96, 107)

44. DER rejected the CRPC's proposed Act 537 Update in the early fall of 1989. (N.T. 96, 107, 312, 320-321; I Exs. 16, 49) Among DER's reasons for disapproving the Plan Update was that it proposed flows which exceeded the 6 mgd capacity planned for the expansion of the UAJA facility. (N.T. 312-314)

The Youngs' Private Request to DER for Sewage Service

45. Based upon Harris Township's rejection of the Youngs' planning module for land development, the Youngs' counsel submitted a private request to DER by a letter dated November 1, 1989, asking that DER order Harris Township to revise its official plan in order to incorporate the Youngs' property within the sewage service area. (N.T. 41, B Ex.1)

46. By letter dated November 13, 1989, DER advised Attorney Williams that DER would not act on the Youngs' private request until all zoning issues had been resolved. (N.T. 42; A Ex.6; B Ex.1)

The Youngs' Second Request to Harris Township for Sewage Service

47. By a letter dated December 12, 1989, the Youngs wrote to Harris Township Manager Miller to again ask that their property be included in the updated Act 537 plan's municipal sewage service area. (N.T. 32; A Ex.7)

48. The Youngs' consulting engineer Thomas Songer also wrote to DER's Regional Water Quality Manager, William Parsons, in a letter dated December 13, 1989 seeking to have DER persuade Harris Township and the CRPC to include the Youngs' property in the sewage service area. (N.T. 146-148, 179, 263-265; A Ex.8; B Ex.1)

49. Mr. Parsons responded to Mr. Songer's request in a letter dated January 4, 1990, in which he advised that where a developer requests a township to include his property in an Act 537 Plan, DER only becomes involved to make sure the township is aware of the development. (N.T. 149, 265-268; A Ex.9) A copy of DER's letter was sent to the CRPC and the Harris Township Board of Supervisors. (N.T. 268)

50. The Youngs received a response to their second request for sewage service in a letter dated January 19, 1990 from Mr. Miller which denied their request. (N.T. 33, 100; A Ex. 11)

The Youngs' Fifth Subdivision Attempt

51. After modifying their fourth subdivision proposal by, *inter alia*, eliminating 25 per cent of the lots, the Youngs submitted the modified proposal to Harris Township as a fifth proposed single family residential subdivision called "Huntridge Manor." (N.T. 29-34, 681; A Ex.17)

52. On June 20, 1990, Harris Township conditionally approved the Youngs' fifth subdivision proposal. (N.T. 34; I Ex.40) One of the conditions attached to the approval was that the Youngs explore and find acceptable

on-site sewage for their 48 lot subdivision. (N.T. 35, 55) The Youngs did not appeal these conditions to any court. (N.T. 90)

53. The Youngs contacted DER and arranged for an on-site examination of the proposed Huntridge Manor site to determine whether a community-type on-lot disposal system could be utilized. (N.T. 36-37, 168)

54. The Youngs' consulting engineer believed a community system's collector could later be used for municipal sewage disposal; he further believed there was no possibility that individual on-lot sewage disposal systems would be approved for each of the 48 lots. (N.T. 167-168)

55. At the on-site investigation as to on-lot sewage disposal possibilities in the summer of 1990, representatives of Harris Township, DER, the Youngs' consulting engineering firm, as well as Mr. Young and Mr. Au, were present. (N.T. 37, 390; A-12)

56. Based on his knowledge of the soil types on the property, DER's Hawley advised the Youngs and Mr. Au that further soil testing would be redundant and that the site could only accommodate 10 lots, so he would not approve the site as suitable for the number of lots they were proposing. (N.T. 38, 394-395)

57. In a letter dated August 19, 1990, Hawley wrote Harris Township's SEO, describing his site investigation and stating that one obvious and perhaps the most appropriate solution to sewage disposal for the Youngs' property would be municipal sewage service. (N.T. 39-40; A Ex.12)

58. When Hawley wrote his August 19, 1990 letter, he was unaware of the existing sewage service areas for Harris Township and he did not consider

the impact extending sewage service to the Young property would have on the Act 537 Plan. (N.T. 397) Hawley was also unaware of the extent of the wastewater treatment constraints faced by the UAJA. (N.T. 397)

59. In his August 19, 1990 letter, Hawley also stated that DER would expect alternatives to on-lot sewage disposal to be considered for the Young property. (N.T. 397; A Ex.12)

60. The point in the CHJA where Huntridge Manor could connect to the sewer system is located 1,900 feet west of the proposed subdivision, along Rt. 322 on the side of the Elks Club Golf Course opposite the Youngs' property. (N.T. 220, 225, 340)

The Youngs' Third Request to Harris Township for Sewage Service

61. After Hawley's letter to the Harris Township SEO, the Youngs believed they had complied with Harris Township's condition on its approval of their proposed subdivision and again requested Harris Township to approve municipal sewage service for their property. (N.T. 44) Harris Township denied this request. (N.T. 44)

The 1990 Act 537 Plan Update

62. The sewage service area designated by the 1970 Act 537 Plan is indicated by a dotted line on I Exs. 45 and 46. (N.T. 512)

63. A modified version of the Act 537 Plan Update which DER had rejected in 1989 was submitted to DER and approved on March 12, 1990 (1990 Plan Update). (N.T. 322, 326; I Ex.50)

64. The Centre Region municipalities drew the sewage service boundary line in the 1990 Act 537 Plan Update near the Youngs' property, through the middle of the Elks Club Golf Course, which is indicated in green on I Exs. 46 and 47. (N.T. 511-512, 519; I Exs. 46 and 47)

65. The 1990 Act 537 Plan Update map shows a cross-hatched area which represents property included in the 5-year future sewage service area. (N.T. 150-152; A Ex.22 map)

66. The 1990 Act 537 Plan Update's 5-year future sewage service area is indicated in red on I Exs. 45 and 46, while the 10-year future sewage service area is indicated in blue. (N.T. 510) Included in the 10-year future service area of the 1990 Act 537 Update is property owned by the Rockey family which is presently a farm. (N.T. 597-598) The Young and Au properties are located outside the 5-year and 10-year future sewage service areas contained in the 1990 Act 537 Plan Update (N.T. 279)

67. Two residential subdivisions, Aspen Heights (formerly known as Club View Estates) and Bear Meadows, are included in the 1990 Plan Update's 5-year future sewage service area. (N.T. 155, 208, 480) The planning modules for Bear Meadows were approved in early 1987, while the planning modules for Aspen Heights were approved in the spring of 1990. (N.T. 170-171, 185) These subdivisions were not within the sewage service area in the 1970 Act 537 Plan. (N.T. 480, 485)

68. During the Act 537 Plan updating process, DER ordered Harris Township to address two "problem areas", i.e., areas with a history of on-lot system malfunctioning. (N.T. 513) These areas were the Tussey Ski Area, which is located south of Bear Meadows, and Linden Hall, a residential area of about 20 homes north of Aspen Heights. (N.T. 513-514; I Exs. 46, 47)

69. DER's recommended solution for the problem areas was that municipal sewage service be extended to those areas. (N.T. 515)

70. The Centre Region municipalities extended the sewage service line contained in the 1970 Act 537 plan to include Bear Meadows and Aspen Heights

in the 1990 Act 537 Plan Update so that the sewer lines would be located closer to Tussey Ski Area and Linden Hall and would be set up for extension to those problem areas at some point in the future. (N.T. 516-519)

71. Both Bear Meadows and Aspen Heights are to be serviced by the CHJA. (N.T. 158)

72. The Youngs did not appeal DER's approval of the 1990 Act 537 Plan Update. (N.T. 107)

Harris Township's Comprehensive Development Plan

73. The 1976 Harris Township Comprehensive Development Plan (which was developed with the Centre Region municipalities) designated the area where the Youngs' property is located as a rural area for future development purposes. (N.T. 545-546; I Ex.52) At the time of the Youngs' private request, the Centre Region municipalities were in the process of developing a new comprehensive plan, which also showed the Young property to be outside Harris Township's growth area and assigned it to the category of proposed open space. (N.T. 553-561) The revised Comprehensive Plan was eventually adopted by Harris Township in the summer of 1991. (N.T. 558-561)

DER's Consideration of the Youngs' Private Request

74. In a letter dated August 23, 1990, Attorney Williams requested DER to review the private request for the Young and Au property because all zoning issues had been resolved. (N.T. 270; B Ex.1; C Ex.14) DER then proceeded to review the request. (N.T. 424)

75. After receiving Attorney Williams' August 23, 1990 letter, DER requested comments on the private request from Harris Township Board of Supervisors, the CRPC, Harris Township Planning Commission, and the CRCG. (N.T. 423-426; C Ex.15)

76. In a letter dated October 26, 1990 to DER, Joseph Miller, Chairman of the CRPC, strongly recommended that DER deny the private request because the Huntridge Manor proposal was for property located outside the 5 and 10 year future service areas in the 1990 Act 537 Plan Update and expressed concern that the effectiveness of the 1990 Plan Update could be jeopardized by approval of the private request. (N.T. 427; C Ex.16)

77. In a letter dated October 26, 1990, Robert Crum, Senior Regional Planner for the CRPC, urged DER to deny the request for a number of reasons, including the efforts which had been involved in updating the Act 537 Plan to accommodate the capacity of the UAJA sewage treatment plant, and that Harris Township's 1976 comprehensive plan showed Huntridge Manor to be outside the township's primary growth area. (N.T. 428; C Ex.17)

78. The CRCG wrote DER a letter dated November 1, 1990, in which it stated that the efforts involved in updating the Act 537 Plan would be undermined by approving sewage service to a development outside the service area outlined in the 1990 Plan Update and that DER should disapprove the private request. (N.T. 436-438; C Ex.18)

79. Harris Township responded to DER in a letter dated November 2, 1990, urging DER to disapprove the private request for many of the same reasons advanced by the CRPC and CRCG and also because of the "newness" of the 1990 Act 537 Plan Update. (N.T. 439-440; C Ex. 19)

80. The Harris Township Planning Commission responded to DER in a letter dated November 5, 1990, also urging DER to disapprove the private request and citing concerns about the capacity of the UAJA facility. (N.T. 440-441; C Ex.20)

81. Mr. Songer wrote DER on behalf of the Youngs to respond to the CRPC's comments regarding the private request in a letter dated November 9, 1990. (N.T. 442-443; C Ex.21)

82. DER held an internal staff meeting in November of 1990 to discuss the private request. (N.T. 272-273) At this internal staff meeting, the number of lots and type of uses (i.e., residential) the location of the proposed subdivision, the proximity of the proposed municipal sewage service, and alternatives to on-lot sewage were topics of discussion. (N.T. 273, 339)

83. DER subsequently received a letter dated January 17, 1991 from Robert Bini, Director of the CRPC, responding to Mr. Songer's November 9, 1990 letter. (N.T. 444; C Ex. 22)

84. DER then asked the CRPC to provide additional information on the Centre Region Comprehensive Plan. (N.T. 445) The CRPC provided this additional information in a letter dated February 15, 1991. (N.T. 444-445; C Ex.23)

85. The Youngs and Au advanced as their reasons for making the private request that their proposed land development was located near to the existing municipal sewer line and their engineer had advised them that the best method of providing sewage service to their property would be via the municipal sewage system. (N.T. 455-456) The Youngs and Au also advanced that their property should have been included in the updated Act 537 Plan's sewage service area because they had requested to have their property included before the updated plan was finalized. (N.T. 456)

86. Harris Township's reasons for denying the Youngs' and Au's request to have their property included in the municipal sewage service area were, *inter alia*, that the property was located outside the 5- and 10-year

future growth areas in the updated Act 537 Plan, that the property was included in the Centre Region Comprehensive Plan as a proposed open space area, and that the proposed land development was not consistent with municipal land use plans and the comprehensive sewerage programs of the municipality. (N.T. 434-435, 456; C Ex.19)

87. DER considered the reasons advanced by the Youngs and Au against Harris Township's reasons for denying the request. (N.T. 435, 456)

88. In evaluating the private request, DER considered the comments submitted by the Harris Township Board of Supervisors, the CRPC, the Harris Township Planning Commission, and the CRCG. (N.T. 427, 433-441)

89. DER assigned weight to the CRPC's comment that the Centre Region municipalities had just developed their new Act 537 plan, which had entailed a great amount of time, money, and effort, and that they had intentionally delineated a sewage service area in that plan which they believed their STP would have the capacity to accommodate. (N.T. 434)

90. DER also assigned weight to the CRPC's comment that both the Comprehensive Plan for Harris Township which was in place at the time DER was reviewing the private request and the revision of that plan which was being devised at that time both showed the property involved in the private request to be outside the primary growth area for Harris Township. (N.T. 435)

91. DER also noted the CRCG's comments stated that both their records and those of the Bureau of Census indicated that Harris Township had been rapidly growing in the preceding 10 to 20 years and that Harris Township was not assuming a "no-growth" stance as was alleged by the appellants. (N.T. 436)

92. DER found it significant that the CRCG commented that the approval of the private request would negate the value of the newly adopted

Act 537 update plan as a planning tool for sewage facilities in the Centre Region. (N.T. 438)

93. DER considered the 1990 Act 537 Plan Update in reviewing the private request. (N.T. 335)

DER's Denial of the Private Request

94. By letter dated February 21, 1991, DER denied Appellants' private request, discussing in detail the reasons for the denial, pursuant to 25 Pa. Code §71.14(f). These reasons included the following: (1) Huntridge Manor was not within the sewer service areas in Harris Township's Act 537 Plan; (2) the proposed subdivision was not within the primary growth area as identified in the Township's Comprehensive Plan; (3) there was ongoing concern about the capacity of the UAJA sewage treatment facility to handle flows from outside the 5- and 10-year sewer service areas; (4) Harris Township apparently had not adopted a "no-growth" posture; (5) the decision on whether to amend the 537 Plan was the Township's, not the sewage collection or treatment authority's; and (6) sanitary sewer service is not the only environmentally-sound sewage disposal alternative. (B Ex.1) In reaching this decision, DER took into account the CHJA's agreement to provide service to the proposed Huntridge Manor subdivision but was concerned about the number of connections to the system that had already been approved, the capacity of the UAJA facility to treat additional sewage, the quality of the wastewater discharging to Spring Creek, and the precedent which would be set by approving the appellants' private request. (N.T. 273-281, 339, 446-447)

95. As of the time of DER's denial of the appellants' private request, the CHJA and the UAJA had sufficient capacity to collect and treat

the sewage which would be discharged from the proposed Huntridge Manor subdivision. (N.T. 681)

96. At the time of the merits hearing, there existed sufficient capacity in the CHJA and UAJA facilities to treat all of the sewage which would be discharged from Huntridge Manor. (N.T. 682)

97. In addition to Huntridge Manor, Laurel Hills, a proposed single family residential subdivision which is located on property south of Huntridge Manor (on the opposite side of Rt. 322), as indicated in brown on I Ex. 46, also requested Harris Township to extend sewage service to include that subdivision. (N.T. 511, 522)

98. Harris Township denied Laurel Hills' request. (N.T. 522)

99. DER examined assertions by the Youngs that Harris Township was treating the proposed Huntridge Manor subdivision differently from Aspen Heights and Bear Meadows, but found no evidence that Harris Township had treated the developments in an uneven fashion. (N.T. 454)

The Current Status of the Youngs Property

100. In the summer of 1991, Hawley determined that there were six lots in the southern end of the Youngs' property which were suitable for individual on-lot sewage disposal. (N.T. 398, 402-403)

101. In December of 1991, the Youngs sold 31 acres of their property pursuant to a sixth subdivision plan and retained ownership of all of the property shown in the Huntridge Manor subdivision proposal. (N.T. 45-46, 105)

102. Aside from Hawley's investigation in 1987, there has been no extensive testing of the proposed Huntridge Manor site to determine the number of lots which could be suitable for individual on-lot sewage disposal. (N.T. 180, 225)

103. After Hawley's summer of 1990 site visit, the Youngs ceased any investigation of the suitability of their property for on-lot sewage disposal. (N.T. 99, 169) They instead decided to pursue their private request with DER. (N.T. 170)

104. It may be possible for the Youngs to utilize an alternate means of sewage disposal to on-lot sewage disposal or connection to the municipal sewage system. (N.T. 451)

105. One alternative might be the use of a package sewage treatment plant serving only their subdivision and using different technological means of providing treatment. (N.T. 205)

106. The Youngs did not provide any technical or economic information to DER indicating that their property could not be developed in any way other than by connection to the municipal sewage system. (N.T. 450-451)

107. The Youngs have not investigated whether spray irrigation technology can be used for their subdivision. (N.T. 99, 192)

The Current Status of the Centre Region Act 537 Plan

108. Although the UAJA treatment plant was to be expanded from 3.84 mgd to 6 mgd, the expanded capacity will be used to service areas included in the 1990 Act 537 Plan Update. (N.T. 281-282)

109. The Centre Region Act 537 1990 Plan Update is being further studied, and other options, including additional future expansion of the UAJA and smaller sewage treatment plants, are being explored. (N.T. 292) This study is to be completed in 1993. (N.T. 292, 349)

Use of On-lot Systems

110. Properly designed and located on-lot sewage systems will renovate wastewater so as not to be a threat to the groundwater or public health. (N.T. 263, 351)

DISCUSSION

The Youngs and Au bear the burden of proof in this appeal since they are appealing DER's refusal to order Harris Township to revise its sewage facilities plan. 25 Pa. Code §21.101(a). In order to sustain their burden, the Youngs and Au must show that DER's decision was arbitrary or an abuse of discretion. Warren Sand & Gravel Co. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975); Edward J. and Patricia B. Lynch v. DER, 1990 EHB 388.

In their post-hearing brief, the Youngs and Au contend DER's denial of their private request was arbitrary and an abuse of DER's discretion for a number of reasons. They claim DER's decision was made on a political basis and that DER has improperly involved itself in local land use and effectively precluded them from utilizing their property. They further claim DER improperly failed to investigate the impact that the granting of their private request would have on the capacity of the UAJA facility or to seek comment on the private request from the CHJA or UAJA. The appellants also argue DER failed to base its decision on the Act 537 plan which was in existence at the time they made their private request. Moreover, they assert DER has failed to consider what is best for protecting Spring Creek and the groundwater, alleging on-lot sewage disposal is not as environmentally sound as a municipal sewage system.

In response, DER's post-hearing brief contends that the appellants have failed to show the 1990 Act 537 Plan Update is inadequate to meet their

sewage disposal needs. DER claims that it considered the information it was required by 25 Pa. Code §71.14 to review in connection with the appellants' private request. DER also contends that contrary to the appellants' assertions, on-lot sewage disposal is as environmentally sound as a municipal sewage system. Additionally, DER argues that it has not deprived the appellants of their use of their land.

The intervenor, Harris Township, also argues in its post-hearing brief that DER's decision was in accordance with DER's regulations.

The parties are deemed to have abandoned any issues which are not raised in their post-hearing briefs. Lucky Strike Coal Co., et al. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

The central issue in this appeal is whether DER properly refused to order Harris Township to revise its official sewage plan to include the appellants' property in the municipal sewage service area where the township's official plan had been updated only five months prior to DER's consideration of the appellants' private request. In considering this issue, it is necessary to discuss DER's responsibility under the SFA regarding such private requests.

As we explained in our recent decision in Morton Kise, et al. v. DER, et al., EHB Docket No. 90-457-MR (Adjudication issued December 8, 1992), municipalities are required by the SFA to adopt an official plan designating the methods of sewage disposal to be available in specified areas of the municipality, necessarily considering zoning, population projections and economics, (SFA Section 5, 35 P.S. §750.5). The plan has to be reviewed by

local planning agencies and the municipalities are required to submit the plan as well as revisions to the plan to DER as required by DER's rules and regulations or by order of DER (SFA, section 5, 35 P.S. §750.5).

DER is statutorily charged with the role of making sure that the municipalities submit plans and revisions, to approve or disapprove these plans, and to see that these plans are implemented (SFA, section 10, 35 P.S. §750.10). Moreover, DER is statutorily charged with promoting intermunicipal cooperation, and coordinated and comprehensive planning (SFA, section 3, 35 P.S. §750.3).

Pursuant to 25 Pa. Code §71.14, a property owner may request that DER order a municipality to revise its official sewage plan. The property owner must show that the existing plan is not being implemented or is inadequate even if implemented to meet the property owner's needs (assuming there has been a prior unsuccessful demand by the owner on the municipality to revise its plan to meet the owner's needs, to which demand the municipality does not favorably respond.) See South Huntingdon Township Board of Supervisors v. DER, 1990 EHB 197, 205. When DER receives such a request, it is required by §71.14(d) to notify the municipality and appropriate official planning agencies within the municipality, including a planning agency with areawide jurisdiction if one exists, and to request that these entities submit written comments which must include a discussion of the compatibility of the proposed subdivision with municipal or county planning codes being implemented through the Pennsylvania Municipalities Planning Code. (53 P.S. §§10601-10619). In making its decision on the private request, DER must consider, at least, the reasons why the property owner is making his request *vis à vis* the municipality's comments and reasons for denial: whether the

proposed land use is consistent with §71.21(a)(5)(i)-(iii) (relating to content of official plans); comments submitted pursuant to §71.14(d); and the municipality's existing official plan. 25 Pa. Code §71.14(e).

The evidence before us shows that in reviewing the appellants' private request, DER did consider the factors enumerated under §71.14(e).[5] In arriving at its decision, DER placed great weight on the fact that the Centre Region municipalities (including Harris Township) had just developed their new official plan and had intentionally delineated a sewage service area which the municipalities believed their STP would have the capacity to serve. DER took into consideration the fact that the Centre Region municipalities had decided to draw their updated plan's sewage service line so as to exclude the appellants' property from the sewage service area and that the Comprehensive Plan for Harris Township showed the property to be outside the primary growth area. DER also placed weight on the precedential effect that granting the private request, effectively redrawing the sewage service boundary line which the Centre Region municipalities had only recently devised, would have on other land developers who might seek to similarly bring their property within the boundary line. Although DER was aware that the CHJA and UAJA facilities had sufficient available capacity to service the appellants' property at the time the private request was reviewed by DER, DER was concerned about the previously-approved connections to the municipal sewage system and their effect on the facilities' capacities.

We do not find DER's decision to deny the appellants' private request to be arbitrary or an abuse of discretion.

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5 We note that alternatives to municipal sewage service for the appellants' property were not before DER for approval.

We find no merit to the appellants' assertion that they are the victims of a "political war that is raging over sewer serivce in the Centre Region." Where the Act 537 Plan which covers multiple municipalities is being revised, it would not be unusual that the Centre Region municipalities, PSU, the regional sewer authorities, and land developers would express competing views during the official plan update process. This does not show that a "political war" exists in the Centre Region, however. Rather, the evidence shows that eventually, all of the Centre Region municipalities came together and adopted the 1990 Act 537 Plan Update. Moreover, the evidence does not bear out the appellants' assertion that DER based its decision here on political grounds.

Further, the evidence runs contrary to the assertion that DER failed to take into consideration information regarding the proposed Huntridge Manor subdivision. DER requested comments from the appropriate agencies, as required by 25 Pa. Code §75.14(d). It was not required to seek comments from the CHJA or the UAJA, so its failure to do so shows no abuse of its discretion.

DER did consider the impact that approval of the appellants' private request would have on the capacity of the UAJA, but this consideration did not lead to the result the appellants desired. According to their argument, since the CHJA had agreed to provide service to the proposed subdivision if it had sufficient capacity when the service was to be required, and the CHJA and the UAJA had some existing available capacity at the time their private request was made and reviewed, DER should have approved their private request. This theory contradicts the SFA and the efforts of the Centre Region municipalities and planning commissions and DER in delineating a sewage service area in the

updated official plan for the Centre Region which their STP would have the capacity to serve.

Even though Mr. Allison, the Executive Director of the CHJA and UAJA, testified the CHJA and the UAJA had sufficient capacity to service the appellants' proposed subdivision at the time of DER's review of the private request and at the time of the merits hearing, this consideration is not controlling of DER's decision on the private request. The sewer authorities approach the planning process differently from municipalities, with the authorities often interested in accepting more flows and generating additional revenues (assuming capacity exists at the facility). (N.T. 733) The UAJA does not keep track of the planning modules which have been approved for development on the property to be serviced by the collecting systems, such as the CHJA. (N.T. 696) Rather, the UAJA determines whether it has adequate capacity to serve a proposed development by examining the flow it is currently treating and projecting the anticipated future flow based only on historical flow increase data or statistics. (N.T. 692, 696)

The appellants' argument, that DER's approval of a private request should be granted where the sewage collection and treatment facilities have existing capacity, is flawed where the additional capacity of those facilities has been committed for use in previously-approved Act 537 plan revisions and committed to construction of sewers in certain areas delineated in the Act 537 plan which may currently be open, undeveloped land, or committed to eliminate sewage problems created by existing malfunctioning on-lot systems. Such commitments take up existing capacity with the collecting and treating facilities, preventing its utilization elsewhere. The SFA places the responsibility for sewage planning in the municipality, not in the municipal

or regional sewer authority. Thus, it is the Centre Region's Act 537 Plan, which was devised and adopted by the Centre Region municipalities and approved by DER, which DER properly accorded weight, and not the comments of Mr. Allison.

DER properly reviewed the private request against the 1990 Act 537 Plan Update. Although DER had received the private request while the 1970 Act 537 Plan was in effect for Harris Township, DER did not consider the request until after it received the appellants' August 23, 1990 letter, and, by that time, Harris Township had adopted and DER had approved the 1990 Act 537 Plan Update. This situation is analogous to the circumstance where revised regulations take effect between the request for DER's action and DER's decision on the request. Where there is such a change in DER's regulations, DER's decision must comport with the revised regulations. See Franconia Township v. DER, et al., 1991 EHB 1290; Borough of Glendon v. DER, ___ Pa. Cmwlth. ____, 603 A.2d 226 (1992), allocatur denied, ___ Pa. ___, 608 A.2d 32 (1992).

Here, the Youngs asked Harris Township to include their property in the area to be serviced by municipal sewers when the municipalities' 1970 Act 537 Plan was being updated. Harris Township considered and rejected their request and their property was delineated outside the area to be served by municipal sewers. Neither the Youngs nor Mr. Au appealed DER's approval of the 1990 Act 537 Plan Update. Thus, they are precluded from now challenging DER's approval of that plan update. Arthur Richards, Jr., V.M.D. v. DER, et al. 1990 EHB 382. For that reason, we do not address the appellants' challenge to the location of the sewage service line drawn by that plan update.

Further, we reject the appellants' contention that DER has impermissibly engaged in local land use matters and has acted in such a way as to use the SFA as a "super zoning ordinance." We recognize that the Youngs represented to DER that they had secured the proper zoning approvals for their proposed subdivision here. We further acknowledge that it is not a proper function of DER "to second-guess the propriety of decisions properly made by individual local agencies in the areas of planning, zoning, and such other concerns of local agencies." Morton Kise, *supra* at 29 (quoting Community College of Delaware County v. Fox, 20 Pa. Cmwlth. 335, 342 A.2d 468 (1975), appeal dismissed as moot, 475 Pa. 623, 381 A.2d 448 (1977)). However, we do not find an impermissible incursion into the province of the local agencies by DER here. DER is permitted to examine the current water quality conditions of watersheds surrounding a municipality, the current Act 537 plan, and the cumulative impact of growth and development, but DER may not examine the appropriateness of particular existing or proposed land uses or designs. Morton Kise, *supra* at 28. There is absolutely no evidence that DER did anything here beyond what it is permitted to do by the sewage planning legislation. Insofar as DER's decision impacts on whether the appellants' property will be developed now using municipal sewers versus a yet-to-be proposed alternative disposal method, that is a decision which the legislature has specifically placed with DER and the municipality.

To the extent that the Youngs are arguing DER has effectively denied their right to use their property because they must "wait until the current study which deals with the development of future treatment capacity beyond the currently planned 6 million gallon[s] per day is completed," citing Commonwealth v. Trautner, 19 Pa. Cmwlth. 116, 338 A.2d 718 (1975), we find no

merit to this argument. Since appellants have elected not to even evaluate alternative means of sewage disposal for their property they have effectively decided to await municipal sewer service.[6] Trautner is not applicable to such a situation.

Further, the appellants have not shown us how DER's decision adversely affects Spring Creek and the groundwater. DER's William Parsons, who is assistant regional director of DER's North Central Region Office, testified that a properly designed and located on-lot system will renovate wastewater so as not to be a threat to the groundwater or the public health. Thus, we cannot agree with the appellants' argument that DER's denial of their private request for municipal sewage will necessarily have an adverse impact on the groundwater or Spring Creek.

Regarding the appellants' assertion that DER abused its discretion here because other properties have been included in the municipal sewage service area but the appellants' property has been excluded from the service area, we find no merit to the appellants' claims of discrimination against their property. The evidence shows the proposed Laurel Hills subdivision, which is located adjacent to but outside of the sewage service boundary line, also requested municipal sewage service and, like Huntridge Manor, its request was rejected.

Here, DER has basis for its decision which comport with its regulations. Even though DER reached a decision contrary to what the

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6 We note that we do not find Council of Middletown Township v. Benham, 514 Pa. 176, 523 A.2d 311 (1987), cited by the appellants, to be on point in this matter, as that case involved a municipality which was refusing to provide municipal sewage service and preventing the property owners involved from providing their own sewage service.

appellants sought, the appellants have not shown where DER abused its discretion.[7]

CONCLUSIONS OF LAW

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

2. Appellants have the burden of proof in this appeal.

3. To sustain the burden of proof, the appellants must show by a preponderance of the evidence that DER acted unlawfully or abused its discretion in denying their private request for a revision to Harris Township's Act 537 Plan.

4. The evidence shows DER properly reviewed the appellants' private request under the requirements of 25 Pa. Code §71.14.

5. Appellants have failed to prove their assertion that DER did not consider the Huntridge Manor subdivision, but, rather based its decision on "politics."

---

[7] We note that the sitting Board Member at the merits hearing raised the applicability of 25 Pa. Code §91.32 and advised the parties that the Board would consider that regulation in its preparation of this Adjudication. We reject DER's argument that this issue was not raised in the appellants' appeal and that the Board should not examine it and should "discipline itself." The appellants' notice of appeal is generally phrased and alleges in general terms DER's abuse of discretion, which prompted the Board Member to question the applicability of §91.32, which deals with applications for sewerage permits for private sewage projects to be located within the built-up parts of cities, boroughs and first and second class townships.

After examining the facts here and §91.32, however, we are satisfied that DER's admitted failure to consider this section of its regulations was not error here.

DER's gratuitous suggestion of self-discipline by the Board is likewise rejected, and DER is advised that self-discipline might best begin at home in DER's briefs since this Board may raise issues *sua sponte*.

6. DER's regulations at 25 Pa. Code §71.14 do not require DER to contact the collecting or treating sewer authorities for their input when reviewing a private request.

7. The evidence does not support the appellants' claim that DER has improperly become involved in local planning in this matter. See Morton Kise, et al. v. DER, et al., EHB Docket No. 90-457-MR (Adjudication issued December 8, 1992).

8. There is no evidence to support the appellants' claim that DER has effectively precluded their right to use their property.

9. DER properly reviewed the appellants' private request against the Act 537 Plan for Harris Township which was approved during the time between the appellants' submission of their private request and the time of DER's review, i.e., the 1990 Act 537 Update Plan. See Franconia Township v. DER, et al., 1991 EHB 1290; Borough of Glendon v. DER, ___ Pa. Cmwlth. ___, 603 A.2d 226 (1992), allocatur denied, ___ Pa. ___, 608 A.2d 32 (1992).

10. The appellants did not appeal DER's approval of the 1990 Act 537 Plan Update and thus are precluded from now challenging DER's approval of the placement of the sewage service boundary line contained in that updated plan. Arthur Richards, Jr., V.M.D. v. DER, et al., 1990 EHB 382.

11. DER did not commit an abuse of discretion in denying the appellants' private request.

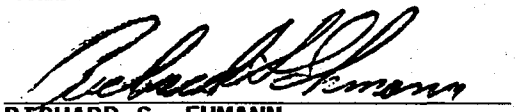
ORDER

AND NOW, this 31st day of March, 1993, it is ordered that the appeal at EHB Docket No. 91-120-E is dismissed.

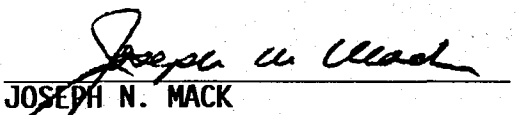
ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 31, 1993

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M. DIANE SMIT
SECRETARY TO THE B

MICHAEL STRONGOSKY	:	
	:	
v.	:	EHB Docket No. 92-263-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and RESOURCE CONSERVATION CORP., Permittee:		Issued: March 31, 1993

OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT

By Joseph N. Mack, Member

Synopsis

Summary judgment is entered in favor of the Permittee where the Appellant's notice of appeal fails to raise any objections to the permit modification which is the subject of the appeal but, rather, attempts to raise issues concerning the original issuance of the permit. Because the Appellant did not appeal the issuance of the permit, he is barred by the doctrine of administrative finality from challenging it in this appeal.

OPINION

This matter originated with the filing of a notice of appeal by Michael Strongosky on July 17, 1992 from the Department of Environmental Resources' ("Department's") June 18, 1992 approval of a minor modification ("the permit modification") to Solid Waste Permit No. 101421 held by Resource Conservation Corporation ("RCC"). Permit No. 101421 ("the permit") was issued

to RCC on August 26, 1991 for the operation of a municipal waste landfill in Shade Township, Somerset County. The permit modification modifies only two sections of the permit: the Quality Assurance Plan and Condition No. 68 (dealing with soil compaction standards).

On November 13, 1992, RCC filed a Motion for Judgment on the Pleadings asserting that Mr. Strongosky's pleadings failed to state grounds for reversal of the Department's action. In an Order issued on December 23, 1992, the Board Member to whom this appeal was assigned, denied the motion on the grounds that it could not be determined on the basis of the pleadings alone whether the objections stated in Mr. Strongosky's appeal did, in fact, deal with the revisions contained in the permit modification.

The matter now before the Board is a Motion for Summary Judgment and supporting brief filed by RCC on February 5, 1993. Mr. Strongosky, acting *pro se*, filed a Motion to Deny Permittee's Motion for Summary Judgment on February 25, 1993. The Department filed no response.

In its motion, RCC contends that, rather than addressing the two revisions made by the permit modification, Mr. Strongosky's notice of appeal, pre-hearing memorandum, answers to discovery, and other pleadings filed in this matter focus on the issuance of the permit, which was not appealed by Mr. Strongosky and which is outside the scope of this appeal.

Mr. Strongosky's response to RCC's motion states that he did not file an appeal from the issuance of the permit because he believed that his township supervisors were going to appeal the permit issuance, and that when he learned that they had not done so, an appeal by him at that point would have been untimely. Mr. Strongosky asserts, "I do not believe that my appeal should be lost, because I had faith in my Supervisors and an Attorney who did

not follow thru [sic] with our expectations." Rather than addressing the arguments raised in RCC's summary judgment motion, Mr. Strongosky's response then launches into a discussion of his complaints concerning the landfill.

Summary judgment may be granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035(b); City of Harrisburg v. DER, EHB Docket No. 91-250-MJ (Opinion and Order Sur Second Motion for Partial Summary Judgment issued January 29, 1993). In ruling on a motion for summary judgment, we must view the evidence in a light most favorable to the non-moving party, in this case Mr. Strongosky. Keystone Chemical Co. v. DER, EHB Docket No. 91-186-E (Opinion and Order Sur Motion for Summary Judgment issued December 4, 1992). For the reasons set forth below, we find that there is no genuine issue of material fact and that, even if the evidence is viewed in the light most favorable to Mr. Strongosky, RCC is entitled to summary judgment.

Mr. Strongosky admits in his response to RCC's motion that he did not file an appeal of the Department's issuance of the permit to RCC on August 26, 1991. Failure to file a timely appeal of the permit issuance renders that action final, and it may not be attacked by Mr. Strongosky in this appeal. See Commonwealth, Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corp., 473 Pa 432, 375 A.2d 320 (1977), cert. denied, 434 U.S. 969; Polar/Bek, Inc. v. DER, EHB Docket No. 91-387-MJ (Opinion and Order Sur Motion for Summary Judgment issued April 29, 1992); Kennametal, Inc. v. DER, 1990 EHB 1453, 1456. Mr. Strongosky's belief that his township supervisors would appeal the permit issuance does not excuse his own failure to do so. See

Eleanor Jean Thomas v. DER, EHB Docket No. 91-526-E (Amended Opinion and Order Sur Permittee's Petition to Dismiss issued March 19, 1992). If Mr. Strongosky objected to the Department's issuance of the permit to RCC, he should have challenged it at that time. He cannot wait until the modification of the permit to raise objections which should have been raised in an appeal of the permit issuance.

Because Mr. Strongosky's appeal is from the permit modification and not the issuance of the permit, the scope of his appeal is limited to contesting only those revisions made by the permit modification, that is, revisions to the Quality Assurance Plan and to Condition No. 68. See, e.g., Richards v. DER, 1990 EHB 382. These revisions deal solely with soil compaction standards. (Affidavit of Brian W. Gracey, Vice President and General Manager of RCC)

Mr. Strongosky's notice of appeal alleges the following: the site of the proposed landfill is located less than one mile from a school which draws its water from an aquifer underneath the proposed site; the proposed landfill will contaminate the aquifer, and no provision has been made for an alternate water supply; the proposed site of the landfill has been surface-mined and deep-mined, making the base unstable, and the landfill's liner is not guaranteed to work on an unstable base; the roads leading to the proposed landfill are not capable of handling the increased traffic which is likely to result from the landfill's operation; the access road runs between two ditches with acid mine drainage; the proposed site is a wetland.

None of Mr. Strongosky's objections deal with the revised soil compaction standards which the permit modification addressed. Rather, as RCC argues, Mr. Strongosky is attempting by this appeal to challenge the issuance

of the permit. As we have already noted, that action is final due to Mr. Strongosky's failure to appeal it.

Because we find that there are no genuine issues of material fact an that Mr. Strongosky's appeal fails to state any grounds challenging the permi modification which is the subject of this appeal, summary judgment is rendere to RCC.

O R D E R

AND NOW, this 31st day of March, 1993, it is hereby ordered that Resource Conservation Corporation's Motion for Summary Judgment is granted. Summary Judgment is entered in favor of Resource Conservation Corporation, and the appeal of Michael Strongosky at EHB Docket No. 92-263-MJ is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: March 31, 1993

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For Permittee:
Patricia Campolongo, Esq.
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Pittsburgh, PA

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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOA

AL HAMILTON CONTRACTING COMPANY,	:	
	:	
v.	:	EHB Docket No. 88-113-W
	:	(Consolidated)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 1, 1993

OPINION AND ORDER SUR
DEPARTMENT OF ENVIRONMENTAL RESOURCES'
APPLICATION FOR RECONSIDERATION

By Maxine Woelfling, Chairman

Synopsis:

The Board adopts interlocutory evidentiary rulings by the presiding Board Member in this matter and affirms its prior opinion granting, in part, a motion to sustain appeal.

OPINION

The procedural history of this matter is set forth in detail in the Board's August 27, 1992, opinion sur Al Hamilton Contracting Company's (Hamilton) motion to exclude expert testimony. The Board's December 24, 1992, opinion granted, in part, Hamilton's motion to sustain its appeal on the grounds that the Department of Environmental Resources failed to establish a *prima facie* case in support of the orders at issue herein.

On January 12, 1993, the Department filed a timely application for reconsideration of the December 24, 1992, opinion. The essence of the Department's application was that the opinion was predicated on the exclusion of Exhibit C-10, a photocopy of a permit map, which exclusion was the result

of an October 29, 1992, interlocutory ruling of the presiding Board Member. The Department contends that the exclusion of Exhibit C-10 was erroneous, that it involved questions of first impression which should be considered by the entire Board, and that such evidence, if admitted and coupled with other evidence presented by the Department, established a *prima facie* case.

Hamilton responded to the Department's application for reconsideration on January 21, 1993, objecting to a grant of reconsideration. While Hamilton asserted that reconsideration was improper because no final order in the matter had been issued by the Board, it argued in the alternative that the Department had failed to meet the standards for reconsideration articulated in 25 Pa. Code §122.22. More specifically, Hamilton contended that the Department "had ample and sufficient opportunity at the time of hearing to sustain its burden of proof" and that reconsideration would give the Department "a second opportunity to present evidence which has already been ruled inadmissible."

The Board, by order dated January 22, 1993, granted the Department's application. We now adopt Board Chairman Woelfling's interlocutory orders, as set forth in her August 27 and October 29, 1992, opinions and affirm our December 24, 1992, opinion granting, in part, Hamilton's motion to sustain appeal.

ORDER

AND NOW, this 1st day of April, 1993, it is ordered that the Board's December 24, 1992, opinion in this matter is affirmed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 1, 1993

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For Appellant:
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M. DIANE SMITH
SECRETARY TO THE BOAF

CONCORD RESOURCES GROUP OF PENNSYLVANIA, INC.	:	
v.	:	**EHB Docket No. 92-416-W**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and COUNTY OF CLARION, Intervenor	:	**Issued: April 2, 1993**

OPINION AND ORDER SUR MOTION FOR CLARIFICATION

By Maxine Woelfling

Synopsis

Opinion regarding reconsideration is clarified to eliminate any confusion regarding the scope of the issues in the appeal.

OPINION

The factual background and procedural history of this matter are set forth in the Board's February 1, 1993, opinion denying Concord Resources Group of Pennsylvania's (Concord Resources) motion to reconsider, or in the alternative, to certify the Board's December 16, 1992, order for interlocutory review. Presently before the Board for disposition is the County of Clarion's February 22, 1993, motion for clarification of the subject matter of this appeal. The County argues that language in the February 1, 1993, opinion may be construed to expand the subject matter of the appeal to all wetlands on the site proposed for a hazardous waste disposal facility, and, if so, then additional discovery must be undertaken by the parties.

Concord Resources, in its March 1, 1993, response to the County's motion, asserts that the subject matter of the appeal is circumscribed by Concord Resources' notice of appeal, and, as a result, is limited to the issue of whether Area 4 is a wetland. The Department of Environmental Resources advances the position in its March 16, 1993, response to the County's motion that the relevant subject matter of the appeal is whether Area 4 is a wetland and therefore, requests that the February 1, 1993, order be clarified accordingly.

The passage of the February 1, 1993, opinion which precipitated the County's request for clarification is:

> Our only task is to review the correctness of the determination regarding the presence of wetlands. If the Department's determination is correct, the Board must affirm the Department's denial. If it is not correct and the Board finds there are no wetlands on the site, the Department's action must be reversed ....

Read in a vacuum the passage conveys the impression that the issue of wetlands in this appeal is broad and general and not confined to a particular area.

But, as Concord Resources correctly points out in its response to the County's motion, the passage must be read in the context of the Board's October 27, 1992, order concerning the County's petition to intervene. That order clearly relates the scope of the County's intervention to the scope of Concord Resources' notice of appeal:

> AND NOW, this 27th day of October, 1992, upon consideration of the County of Clarion's petition to intervene and Concord Resources Group's response thereto, it is ordered that the petition is granted. However, the scope of the County's intervention will be limited to issues raised in Concord Resources' notice of appeal ....

Paragraph 3.1 of Concord Resources' notice of appeal states:

> The sole basis of the Phase I denial is the Department's erroneous and unsubstantiated

> characterization of an 800 square foot area in a mowed field as a wetland. (see attached denial letter)

This "800 square foot area in a mowed field" is referred to by the Department as "Area 4." (see, e.g., the Commonwealth's First Request for Admissions)

Thus, to the extent that the cited language in the February 1, 1993, opinion regarding reconsideration is causing confusion among the parties, it is clarified to encompass only wetlands in Area 4, the only wetland area at issue in Concord Resources' appeal.

ORDER

AND NOW, this 2nd day of April, 1993, upon consideration of the County's motion for clarification, it is ordered that the scope of this appeal is limited to wetlands in Area 4.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATE: April 2, 1993

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For Intervenor:
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Pittsburgh, PA

jm

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TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOA

LORETTA FISHER	:	
	:	
v.	:	**EHB Docket No. 91-374-W**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: April 5, 1993**

OPINION AND ORDER SUR
MOTION TO DISMISS

By Maxine Woelfling

Synopsis

The Department of Environmental Resources' (Department) motion to dismiss an appeal of the denial of a mine subsidence insurance claim as untimely is denied. Appellant is entitled to have her appeal heard *nunc pro tunc* because the language of the mine subsidence insurance agreement relating to the appeal period was misleading and erroneous.

OPINION

Presently before the Board for disposition is the Department's motion to dismiss the appeal of Loretta Fisher.

Ms. Fisher received a certificate of insurance, No. 4023133, on November 3, 1981, for a residential property at 74-76 Wilson Street, Larksville, Luzerne County, under the Coal and Clay Mine Subsidence Insurance Fund (Fund), which was established by the Act of August 23, 1961, P.L. 1068, as amended, 52 P.S. §3201 *et seq.* (Subsidence Insurance Act). She filed a claim with the Department against the Fund, claim number A1444, on March 30,

1987, for losses arising from mine subsidence. On January 7, 1988, the Department's Supervisor of Mine Subsidence Insurance sent her a letter stating:

> I have reviewed the attached report by our engineer, Edward S. Motycki, and concur with his findings regarding the above captioned claim.

Attached to this letter was the engineer's report, which, for various reasons, recommended that the Fisher claim be denied.

Ms. Fisher responded on February 16, 1988, with a letter asking the Department to re-evaluate its decision to deny her claim. Department counsel responded, in a letter dated May 6, 1988, that the Department was still unable to pay the claim for the reasons outlined in the engineer's report attached to the January 7, 1988, denial letter. Then, on October 31, 1988, Ms. Fisher submitted additional information to the Department and again asked the Department to reconsider its denial of her claim. The Department reiterated in a letter dated November 9, 1988, that Appellant's claim was denied on January 7, 1988, but the information would be forwarded to the Department's engineering staff anyways.

A claim against the Fund was filed by Ms. Fisher in the Board of Claims on January 17, 1989 (Docket No. 1335). By order dated September 11, 1991, the Board of Claims granted her March 13, 1991, motion for transfer and transferred the claim to this Board, where it was assigned its current docket number.[1]

A hearing on the merits of this matter was scheduled for July 13 and 14, 1992, but was continued on June 30, 1992, pending resolution of a motion

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[1] The Commonwealth Court's holding in Department of Environmental Resources v. Ronald Burr *et al.*, 125 Pa. Cmwlth 475, 557 A.2d 462 (1989), that the Board of Claims had no jurisdiction over mine subsidence insurance claims, mandated the transfer.

to dismiss for lack of jurisdiction filed by the Department.

Both parties agree the Board has subject matter jurisdiction to hear Ms. Fisher's appeal of the Department's denial of her claim. They both also agree that the date on which she filed her complaint with the Board of Claims is the date used to determine whether Appellant's appeal to this Board was timely.

The Department argues in its motion to dismiss that the Board is without jurisdiction to hear Ms. Fisher's appeal because she did not file her complaint in the Board of Claims within 30 days of the Department's action, as required by the Board's rules of practice and procedure, 25 Pa. Code §21.52(a).

On the other hand, Ms. Fisher contends her appeal was timely because it was filed within the two year period stated in paragraph six of her insurance agreement with the Department.[2] She further contends she is entitled to an appeal *nunc pro tunc* since the Department, through the language of paragraph six of the insurance agreement, misled her into believing she had two years to appeal the Department's denial of her claim.

The Board's jurisdiction is limited to appeals that are filed with the Board within 30 days of receipt of notice of a Department action. 25 Pa. Code §21.52(a); Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). When an appellant erroneously files a complaint with the Board of Claims and that action is subsequently transferred to this Board, the date on which the

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2 Paragraph six states: "If the Fund does not exercise the option to repair, it will pay the amount due under Paragraph 3 or deny your claim, within forty-five (45) days of receiving the sworn statement of loss referred to in Paragraph 4. You may not bring an action for a LOSS covered by this policy unless you have complied with all of its provisions and have filed the action in court within two (2) years of the date on which the LOSS occurs. The fund may raise, in this action, any defenses to which it is entitled under this policy."

complaint was filed is the date this Board uses to determine whether the transferred appeal is timely. 42 Pa. C.S. §5103(a); Cummings, *et al.* v. DER, EHB Docket No. 91-494-E (Opinion issued June 10, 1992).

Based on the timetable outlined in our brief recitation of the facts, the Board is without jurisdiction to hear this appeal. Ms. Fisher did not file her complaint in the Board of Claims until January 17, 1989, over one year after the Department's January 7, 1988, denial of her claim for loss. Even assuming for the sake of argument we find that the Department did not deny Appellant's claim until its last letter on November 9, 1988, Ms. Fisher's appeal would still be untimely. But, although Ms. Fisher's appeal was not timely under Cummings, she is entitled to file her appeal *nunc pro tunc* because of the misleading language in the insurance agreement.

The Board will hear an appeal *nunc pro tunc* "only where there is a showing of fraud, breakdown in the administrative process or unique and compelling factual circumstances establishing a non-negligent failure to file a timely appeal." Falcon Oil Co. v. Commonwealth, Department of Environmental Resources, ___ Pa. Cmwlth. ___, ___, 609 A.2d 876, 878 (1992).

Generally, the Board and the appellate courts have had little sympathy for litigants who disavowed knowledge of the applicable statutory requirements, or expected the Department to advise them of appeal rights and procedures. Cadogan Township Board of Supervisors v. Department of Environmental Resources, 121 Pa. Cmwlth. 18, 549 A.2d 1363 (1988); Quaker State Oil Refining v. Department of Environmental Resources, 108 Pa. Cmwlth. 610, 530 A.2d 942 (1987). However, the Commonwealth Court, in Tarlo v. University of Pittsburgh, 66 Pa. Cmwlth. 149, 443 A.2d 879 (1982), held that unique and compelling factual circumstances establishing a non-negligent failure to file a timely appeal include a situation where a litigant is misled

about the proper appellate procedure. In Tarlo, the appellant filed a sex discrimination suit before the Pittsburgh Commission on Human Relations. The commission dismissed appellant's suit and in its order stated that an appeal could be filed in the Court of Common Pleas within 30 days of receipt of the order. 66 Pa. Cmwlth. at ___, 443 A.2d at 879-880. The Judicial Code, 42 Pa. C.S. §§5571(b) and 5572, however, stated that such appeals must be filed within 30 days of entry of the order. The Commonwealth Court held it was proper for the Court of Common Pleas to hear the appeal *nunc pro tunc* because the commission misled the appellant and appellant's failure to comply with the 30 day time limit in the Judicial Code was, therefore, not the result of negligence. 66 Pa. Cmwlth. at ___, 443 A.2d at 880.

The situation here is similar to the situation faced by the Commonwealth Court in Tarlo. The insurance agreement between Ms. Fisher and the Department expressly states that an action for a loss must be filed within two years of the date of that loss. Any reasonable person who is party to such an agreement would believe that any challenge to the Department's denial of claim for loss under the Fund could be filed within two years of the denial. Further confusing an insured is the language in paragraph six stating appeals are to be filed "in court," despite the requirement in §24.1 of the Subsidence Insurance Act that appeals are to be brought before this Board.[3]

Because the Department misled Ms. Fisher into believing she had two years to appeal its denial of her claim, her failure to comply with the 30 day time limit of 25 Pa. Code §21.52(a) was not negligent and resulted from unique

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3 The result here is opposite that reached by the Board in Cummings. The issue of the language of the insurance agreement regarding the period of limitations was not raised by appellants in Cummings.

and compelling circumstances. Accordingly, the Board will hear Ms. Fisher's appeal *nunc pro tunc*.[4]

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[4] Obviously, the language in the insurance agreements must be modified to correctly inform the insured of their rights to pursue claims against the Fund.

ORDER

AND NOW, this 5th day of April, 1993, it is ordered that the Department's motion to dismiss is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: April 5, 1993

cc: Bureau of Litigation, DER:
Library, Brenda Houck
For the Commonwealth, DER:
Michael D. Bedrin, Esq.
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jm

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M. DIANE SMITH
SECRETARY TO THE BO

HRIVNAK MOTOR COMPANY	:	
	:	
v.	:	EHB Docket No. 88-473-F
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 6, 1993

OPINION AND ORDER SUR MOTION FOR RECONSIDERATION

By: Richard S. Ehmann, Member

Synopsis

The Board reconsiders its November 18, 1991 adjudication in this appeal by a landowner challenging the Department of Environmental Resources' (DER) October 18, 1988 order issued pursuant to §316 of the Clean Streams Law, 35 P.S. §691.316, which required it to take various steps to abate groundwater contamination. Upon reconsideration, we affirm our decision that the results of water sampling conducted by DER in 1987 show the appellant was responsible for the groundwater contamination. We also affirm our substitution of our discretion for that of DER as to the remedial measures imposed by DER's order in light of section 502(c) of the Storage Tank Act, 35 P.S. §6021.502(c), and the results of water sampling conducted in 1990 which showed no contamination off-site and greatly reduced contamination on the appellant's property. Because our November 18, 1991 order did not properly effectuate our decision, however, that order is superseded by an order which accompanies this Opinion.

OPINION

On November 18, 1991, the Board issued an adjudication of an appeal filed by Hrivnak Motor Company (Hrivnak) which sought our review of an order dated October 18, 1988 issued to Hrivnak by DER. Hrivnak Motor Company v. DER, 1991 EHB 1811. Hrivnak's activities on its site located in East Pikeland Township, Chester County, included automobile sales, retail petroleum sales (including gasoline, diesel fuel, and home heating oil), and a car wash, in addition to maintaining a small automobile junkyard. DER's order asserted that the results of sampling DER had conducted in 1987 showed the groundwater at the Hrivnak property and in the vicinity of the Hrivnak property was contaminated with gasoline-type hydrocarbons. DER's order directed Hrivnak, pursuant to section 316 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.316, to precision test all underground storage tanks on the Hrivnak property, to provide potable water to affected well owners, to submit a work plan aimed at abating the groundwater contamination, and to implement the work plan after approval by DER.

At the July 23 and 24, 1990 merits hearing, we were presented with evidence which included the results of DER sampling of wells in homes and businesses in the vicinity of the Hrivnak property conducted in 1987, and the results of DER sampling of wells in homes and businesses in the vicinity of the Hrivnak property conducted in 1990. While the 1987 sample results showed groundwater contamination in the vicinity of Hrivnak's property, the 1990 sampling results showed no contamination off-site and greatly diminished contamination on the Hrivnak property. The evidence also showed that at the time of the hearing there were fourteen underground storage tanks on the Hrivnak property, all of which had been used at some point to store either

gasoline, diesel fuel, or home heating oil. Although Hrivnak had registered all of these underground storage tanks with DER in January of 1990 as in use (N.T. 189-190), Mr. Hrivnak testified that not all of the larger tanks behind Hrivnak's building were in use, and some of them had not held any type of product since 1985 or 1986. While some of Hrivnak's underground storage tanks were still in use at the time of the merits hearing, Mr. Hrivnak left as uncertain the question of exactly which tanks were in use and which were not in use.

Based upon DER's 1987 sampling results, we found DER had sustained its burden of proving Hrivnak was responsible for the groundwater contamination shown in the 1987 sample results. We then reviewed the propriety of the remedial measures imposed by DER's order in light of the evidence before us. Addressing DER's direction to Hrivnak to precision test all of its storage tanks, we decided to remand this requirement to DER in light of the Storage Tank and Spill Prevention Act (Storage Tank Act), Act of July 6, 1989, P.L. 169, 35 P.S. §6021.101 *et seq.*, which took effect after DER's order, and the regulations thereunder. We pointed out that §502(c) of this act, 35 P.S. §6021.502(c), requires that tanks which are no longer in use must be either sealed or removed and that this requirement appeared to apply to abandoned tanks on Hrivnak's property. We explained that since Hrivnak was required to remove any of its tanks which were not in use, there would be no purpose in testing them.

Examining DER's requirement that Hrivnak provide potable water supplies to affected well owners, we indicated this requirement's continuing propriety was questionable in view of the 1990 sample results. We explained that further sample results would be needed in order to determine whether this

requirement was still necessary and we further instructed that Hrivnak should be responsible for conducting this testing. We then effectively stayed DER's requirement that Hrivnak provide potable water supplies to affected well owners pending the results of this further sampling to be conducted in accordance with our adjudication.

Regarding DER's requirement that Hrivnak submit and implement a work plan for abating the groundwater contamination, in view of the dramatic reduction in benzene levels between the 1987 sample results and the 1990 sample results, we indicated that should this downward trend continue there might be no pollution for Hrivnak to abate by the time the abatement plan could be implemented. We thus decided a remand of these requirements to DER was appropriate.

Following our Findings of Fact, Discussion, and Conclusions of Law, we entered an order which stated:

> AND NOW, this 18th day of November, 1991, it is ordered that:
>
> 1) DER's order dated October 18, 1988 is reversed and remanded.
>
> 2) Upon remand, DER shall reevaluate its requirement that Hrivnak precision test all underground storage tanks on the property in light of the provisions of the Storage Tank Act and regulations.
>
> 3) Upon remand, DER shall order Hrivnak to collect and test additional water samples from the Hrivnak well and other wells (including, specifically, the Kulp well) in the area. DER shall review the results of such tests.
>
> 4) After conducting the reevaluation required by paragraph two and reviewing the test results as provided in paragraph three, DER may impose such additional requirements upon Hrivnak as warranted by the law and the evidence.

On December 9, 1991, DER filed a motion and supporting brief requesting the Board to reconsider our November 18, 1991 order. Hrivnak filed a response and supporting brief urging us to deny DER's motion. We issued an order on January 15, 1993 granting DER's motion pursuant to 25 Pa. Code §21.122 and directing the parties to submit briefs. DER and Hrivnak have both filed briefs in support of their respective positions.

DER does not challenge the findings contained in our adjudication but rather points out problems it perceives with our order and challenges the appropriateness of our order in view of our findings. Hrivnak, on the other hand, urges us to retain our November 18, 1991 order.

Upon reconsideration, we affirm our decision that DER's issuance of its October 18, 1988 order to Hrivnak was appropriate based on the evidence DER gathered in 1987. We also affirm our substitution of our discretion for that of DER as to the remedial measures imposed by DER's order.

We reject DER's contention that the Commonwealth Court's decision in Starr v. DER, ___ Pa. Cmwlth. ___, 607 A.2d 321 (1992), and our decision in Sunshine Hills Water Company v. DER, EHB Docket No. 88-538-E (Adjudication issued January 27, 1993), limit our ability to consider "after-the-fact" evidence. Starr involved a challenge to DER's issuance of an order, pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq., to the appellant, who was illegally retaining millions of tires at his property. See 1991 EHB 494. When the appellant in Starr attempted to put evidence before the Board regarding his efforts after the issuance of DER's order to obtain a tire shredder, we ruled that such evidence was irrelevant to whether DER had lawfully issued the challenged order. On appeal, the Commonwealth Court affirmed our decision.

DER's citation to Sunshine Hills is also inapposite here. In Sunshine Hills we ruled that assertions by the appellant that it had diligently proceeded to comply with DER's order to it were irrelevant to the issue of whether DER should have issued the order in the first place. Our rulings in both Starr and Sunshine Hills involved compliance attempts by the appellant. That is not the situation here. In the instant matter, we are reviewing the remedy selected by DER in light of changed circumstances.

DER obviously recognizes that we cannot consider DER's action in a "snapshot", based only on the circumstances as they existed when DER took its action. As we have explained in our decisions in the past, both the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7511 *et seq.*, and its predecessor statute, §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21, empower the Board to conduct a *de novo* review of DER's actions. Willowbrook Mining Company v. DER, EHB Docket No. 90-346-E (Adjudication issued March 20, 1992); Robert L. Snyder, et al. v. DER, 1990 EHB 428, affirmed in part and reversed in part, 138 Pa. Cmwlth. 534, 588 A.2d 1001 (1991), allocatur granted, ___Pa. ___, 606 A.2d 904 (1992). In Warren Sand and Gravel Co., Inc. v. Commonwealth, DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975), the Commonwealth Court interpreted the nature of our review power and instructed that the Board is under a duty to determine whether DER's action can be sustained or supported by the evidence put before the Board. Even where evidence was not previously available to DER, we have stated that we have wide latitude in hearing evidence in a *de novo* proceeding on the basis of Warren Sand and

Gravel. Croner, Inc. and Frank Popovich v. DER, EHB Docket No. 91-460-E (consolidated) (Adjudication issued March 3, 1993); Township of Middle Paxton, et al. v. DER 1981 EHB 315.[1]

Where there is a long delay between the initiation of DER's action and a hearing on the merits as we had in this matter, it is not surprising that evidence arises showing a change in circumstances more favorable to the appellant than the data upon which DER based its decision to act in the first place. When DER has initiated an action via an order, it may, in an exercise of its discretion, withdraw its order or issue an amended order to the appellant before we adjudicate the appeal. See Gordon and Janet Back v. DER, 1991 EHB 1667 (where circumstances change after issuance of DER's order, it is appropriate for DER to issue another order). When we are adjudicating an appeal, it is our responsibility to review DER's action based on the evidence put before the Board. Warren Sand and Gravel, *supra*. If the evidence before us in our *de novo* review shows DER's action was appropriate when taken but that circumstances have since changed, we cannot merely ignore this more recent evidence and affirm DER's remedial measures on the basis of less than all the evidence where the remedial measures imposed in DER's order are inappropriate in light of current circumstances. Rather, we must conduct our review of the remedial measures imposed on the appellant by DER against this more recent evidence.

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[1] In fact, in Spang & Company v. Department of Environmental Resources, 140 Pa. Cmwlth. 306, 592 A.2d 815 (1991), the Commonwealth Court ruled that we should have granted the appellant's pre-adjudication petition to reopen the record, pursuant to 1 Pa. Code §35.231(a), which sought to introduce into the record material changes of fact which occurred after the conclusion of the merits hearing.

We reject DER's suggestion that we should affirm its issuance of the order to Hrivnak but stay the remedial portions of DER's order and allow DER to decide how to exercise its prosecutorial discretion based on the more recent evidence.[2] If we were to follow this suggestion, we would be abdicating our *de novo* review responsibility under Warren Sand and Gravel and the Environmental Hearing Board Act, *supra*. Moreover, DER exercised its prosecutorial discretion in issuing the Order which generated the instant appeal. Now we are merely addressing the details implementing that exercise of prosecutorial discretion by DER which is hardly the same thing. Further, we point out that DER may appeal our decision to substitute our discretion for that of DER if it believes we have erred. DER may also elect to be more lenient as to Hrivnak's remaining obligations if it believes our substitution of our discretion to be unduly harsh on the appellant.

Here, because the evidence before us showed changes in circumstances since the issuance of DER's order to Hrivnak, we decided substitution of our discretion for that of DER as to the remedial portions of DER's order was necessary. Upon reconsideration, we affirm our substitution of our discretion for that of DER as to the remedial measures imposed on Hrivnak for the reasons discussed in our adjudication. Nevertheless, upon reconsideration, we have determined we must modify the order we issued based on our evaluation of the

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[2] We point out that DER's exercise of its prosecutorial discretion is not reviewable by this Board, John and Sharon Klay, d/b/a Fayette Springs Farms v. DER, EHB Docket No. 92-280-E (Opinion issued February 4, 1993), Ralph D. Edney v. DER, 1989 EHB 1356, so DER's failure to exercise its prosecutorial discretion would not be reviewable by the Board.

enactment of the Storage Tank Act and the 1990 sampling results. We should have sustained DER's order as to Hrivnak's liability and stayed and remanded only portions of DER's order.

DER concedes in its brief that it sees no need to precision test any underground storage tanks which Hrivnak will be removing. Any tank removal today must be in accordance with the Storage Tank Act and the regulations thereunder. It is unclear whether or not Hrivnak wishes to abandon some of its tanks under the Storage Tank Act. We thus stay the tank testing requirement contained in DER's order for 150 days to allow Hrivnak to remove the tanks which it no longer intends to use and require testing only be conducted on any of Hrivnak's tanks remaining at the expiration of this 150 day period.

Insofar as Hrivnak has contaminated the groundwater as we concluded in our adjudication's discussion, Hrivnak must prepare and submit to DER for approval a work plan for remediating the contamination. This work plan should define the current scope of the contamination and include resampling of existing wells. Since the only well which the 1990 data shows as having significant contamination is the Hrivnak well, requiring replacement wells elsewhere is unwarranted unless the resampling conducted in conjunction with the work plan shows it to be necessary.

Regarding DER's requirement that Hrivnak provide potable water supplies to affected well owners, this requirement is stayed pending the results of the sampling which Hrivnak is to conduct in connection with this adjudication to show the extent of the contamination. This resampling will

show whether there are currently any affected wells. Upon determining who are the affected well owners, if any, Hrivnak shall provide these persons with potable water.

We accordingly modify our November 18, 1991 adjudication by entering the following order which supersedes our November 18, 1991 order.

O R D E R

AND NOW, this 6th day of April, 1993, it is ordered that:

1. The Board's November 18, 1991 adjudication in this matter is modified consistent with this opinion and this order supersedes our November 18, 1991 order;

2. Hrivnak's appeal is dismissed, in part, as to liability;

3. The underground storage tank testing requirement contained in DER's October 18, 1988 order is stayed for 150 days, during which time Hrivnak shall determine which of its storage tanks it will be removing pursuant to §502(c) of the Storage Tank Act, 35 P.S. §6021.502(c).

4. Hrivnak shall prepare and submit to DER for approval a work plan for remediating the groundwater contamination within thirty days as specified in DER's initial order. This work plan shall include resampling of the existing wells on and in the vicinity of Hrivnak's property and shall be sufficient to define the current scope of the contamination.

5. The requirement contained in DER's October 18, 1988 order that Hrivnak supply potable water to affected well owners is stayed pending submission of proof through the results of the resampling to be conducted by Hrivnak that there are no longer any affected wells. Upon failure to submit such proof, Hrivnak shall supply these affected well owners with potable water.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 6, 1993

cc: **Bureau of Litigation**
Library: Brenda Houck
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M. DIANE SMITH
SECRETARY TO THE BOA

EVERGREEN ASSOCIATION and STEVEN and HOLLY HARTSHONE	:	
v.	:	EHB Docket No. 92-257-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and NEW MORGAN LANDFILL COMPANY, INC., Permittee	:	Issued: April 6, 1993

OPINION AND ORDER SUR
EVERGREEN ASSOCIATION'S SECOND
PETITION FOR LEAVE TO AMEND APPEAL

By: Richard S. Ehmann, Member

Synopsis

When an appellant seeks leave to amend its Notice Of Appeal to add a new ground for appeal after the period for the timely filing of an appeal has expired, claiming the new ground was only discovered by experts retained after the appeal was filed, leave to amend is denied. Where there is no showing that fraud or breakdown in the Board's operation or that discovery caused Appellant's delayed recognition of the grounds for appeal, and there is no allegation that these experts could not have been retained prior to the appeal's issuance, good cause to allow amendment is not shown.

OPINION

Appellants commenced this appeal on July 21, 1992, and, on July 24, 1992 this Board issued its standard Pre-Hearing Order No. 1 directing discovery's completion by October 7, 1992. By Order dated October 19, 1992, we granted the Motion For Continuance filed on behalf of Evergreen Association

and Steven and Holly Hartshone (collectively "Evergreen") over the objections of New Morgan Landfill Company, Inc. ("New Morgan"), extending the deadline for completion of discovery and the filing of Evergreen's Pre-Hearing Memorandum until December 22, 1992.

On December 17, 1992, without filing a Petition For Leave To Amend its Notice Of Appeal, Evergreen filed a document captioned "Amendment Of Appeal", alleging as a new ground for appeal that the Department of Environmental Resources ("DER") erred by issuing New Morgan's permit based on an incomplete application, contrary to 25 Pa. Code §271.201(2).

Prior to the December 17th filing of this Amendment, and in response to an earlier Board order requiring Evergreen to file a specific statement of its objections to DER's actions, Evergreen went from alleging a "potential for groundwater contamination" in its Notice Of Appeal, to stating that DER:

> has exceeded its discretion by issuing a solid waste permit which will cause surface and or groundwater pollution, in contravention of 25 Pa. Code §271.201 (emphasis added).

New Morgan filed a Motion To Strike the addition of this surface water pollution contention in September and the December allegation of violation of 25 Pa. Code §271.201(2) as violative of Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), affirmed on other grounds, 521 Pa. 121, 555 A.2d 812 (1989) ("Game Commission"). In an Opinion and Order dated February 23, 1993, we sustained New Morgan's motion but allowed Evergreen to petition for leave to amend.

On February 4, 1993, Evergreen filed its first Petition For Leave To Amend Appeal. That petition dealt with yet another "Amendment Of Appeal",

which we had also previously rejected by Order dated January 5, 1993. In an Opinion and Order dated March 25, 1993, we denied Evergreen's first Petition For Leave To Amend.

Evergreen's pending Petition For Leave To Amend is thus its second such Petition. It was timely filed on March 16, 1993.[1] In its Petition Evergreen admits its initial Amendment raising these grounds was not proper. It then asserts that its arguments as to surface water pollution and violation of §271.201(2) were the result of technical review by Evergreen's expert witnesses of New Morgan's application for permit. Evergreen asserts that recognition of the absence of scientific information in New Morgan's application was of such a technical nature that it could only be perceived by experts.

Finally, Evergreen asserts it did not retain its experts until after the filing of both its Notice Of Appeal and its first Amendment Of Appeal. Based on these allegations, Evergreen asserts good cause is shown to grant its Petition and allow these amendments to its grounds for appeal. In Evergreen's accompanying Memorandum In Support Of Petition For Leave To Amend Appeal, it argues good cause to be granted leave to amend an appeal should not be limited to the grounds therefor set forth in Game Commission and Bobbi L. Fuller, et al. v. DER, 143 Pa. Cmwlth. 392, 599 A.2d 248 (1991) ("Fuller"), but should be allowed to insure the appeal process is fair to appellants such as Evergreen, permittees and DER. It then asserts that all parties should have an opportunity to prepare for hearing without prejudice to them from issues of

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[1] It would have been untimely filed but for this Board's office having been closed on March 15, 1993 as a result of the storm popularly labeled "The Blizzard of 93".

which they are not apprised before hearing. Evergreen asserts that since DER and New Morgan were apprised of these two issues before hearing, they are not prejudiced by allowing amendment, even if they were not issues which were disclosed via the discovery process.

In response, New Morgan first attacks Evergreen's assertion that it filed a skeletal appeal, asserting Evergreen's appeal is not skeletal under Raymark Industries, Inc., et al. v. DER, 1991 EHB 186. It then suggests good cause to grant Evergreen's Petition is not shown under the existing case law and that Evergreen had extensive knowledge of the issues raised in its second Petition before filing its appeal. New Morgan then argues that all Evergreen's experts did during the discovery period was review evidence which was available prior thereto and that Evergreen is trying to assert a new ground for "good cause".[2]

As to Evergreen's argument that a "lack of prejudice" to parties should be the standard on which we judge its second Petition, it appears that Evergreen confuses pleadings practice under the rules of civil procedure in a Common Pleas court, where liberal amendment of pending pleadings is allowed, with proceedings before this Board, where this is not so. As discussed in Game Commission, unlike civil suit situations:

> ... the failure to file specific grounds for appeal within the thirty-day period [for timely appeals found in 25 Pa. Code §21.53] is a defect going to jurisdiction, and the time period cannot be extended *nunc pro tunc* in the absence of a showing of fraud or breakdown in the court's operation.

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[2] Attached to New Morgan's Objections to Evergreen's Second Petition are seven exhibits which make a strong case in support of this argument. This is particularly true since the evidence gathered in the March 2, 1993 hearing on Evergreen's first Petition makes it clear that Evergreen had access to New Morgan's application for permit before it filed the instant appeal.

97 Pa. Cmwlth. at ___, 509 A.2d at 886. Clearly under Game Commission and Fuller, civil proceedings' "liberal amendment" is not the norm before this Board.

In Game Commission and Fuller three causes to allow amendment are recognized. As in the not uncommon appeal *nunc pro tunc* scenario, two are fraud or a breakdown in the Board's operation. These are not alleged here by Evergreen. The third cause according to Game Commission is the circumstance where discovery by the petitioner during the preliminary stages of an appeal proceeding reveals a ground for appeal theretofore unknown to petitioner. While Evergreen alleged this to be the ground for its first Petition, it is not alleged by Evergreen as cause to allow this second Petition. As New Morgan suggests, Evergreen does not assert these are "discovered" new grounds for appeal, but only that they are newly revealed by expert evaluation.

We are not willing as a Board to interpret Game Commission and Fuller as setting forth the exclusive list of grounds for allowance of amendment of appeal. As with appeals *nunc pro tunc*, there may be other circumstances where cause for amendment exists such as the occurrence of the non-negligent happenstance. Guat Gnoh Ho v. Unemployment Compensation Board Of Review, 106 Pa. Cmwlth. 154, 525 A.2d 874 (1987); Petromax Ltd. v. DER, Docket No. 92-083-E (Opinion issued April 23, 1992). However, Petitioner does not ever aver that those types of circumstances have occurred here.

Even if it could be suggested by Petitioner that the facts asserted in this Petition rise to the level of such an argument and we should overlook the omission of such a suggestion, we would reject this Petition. Petitioner asserts the DER violations could only have been discovered by its experts and it hired those experts after filing this appeal. However, the record before

us in this appeal, as made in connection with Evergreen's first petition, shows that Evergreen has been battling against issuance of these permits to New Morgan at least since 1990. It did not come upon this cause recently. That this is true is reinforced by the Exhibits attached to New Morgan's Objection as referenced in footnote No. 2. Its failure to retain these experts to work with it in regard to this three year struggle until after the appeal was filed and to fail to seek amendment until almost six months after the commencement of the appeal is not explained by Evergreen. Clearly, waiting to amend until five days before expiration of the extended discovery period hardly constitutes a prompt disclosure of Evergreen's intent to raise these issues.[3]

Accordingly, we enter the following Order.

O R D E R

AND NOW, this 6th day of April, 1993, it is ordered that Evergreen's second Petition For Leave To Amend Appeal is denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

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3 Exhibit 7 to New Morgan's Objections to Evergreen's second Petition is one set of expert comments dated April 18, 1992 by a Pamela E. Clark, Ph.D., who is an Assistant Professor of Chemistry at Albright College. Its existence suggests Evergreen had expert help prior to the appeal's commencement and by inference, could thus have either included these issues in its initial Notice Of Appeal or attempted amendment much sooner.

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 6, 1993

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Melanie G. Cook, Esq.
Central Region
For Appellant:
Wendy E. Carr, Esq.
Philadelphia, PA
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med

COMMONWEALTH OF PENNSYLVANIA
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M. DIANE SMITH
SECRETARY TO THE BOA

PINE CREEK VALLEY WATERSHED ASSOCIATION, INC. and RICHARD J. BLAIR	:	
v.	:	EHB Docket No. 92-287-MR
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and ROCKLAND TOWNSHIP, Permittee and ROMAC INVESTMENTS, a PENNSYLVANIA PARTNERSHIP, Intervenor	:	Issued: April 6, 1993

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Robert D. Myers, Member

Synopsis

Summary judgment is denied where there are genuine issues of material fact.

OPINION

This appeal was instituted on August 3, 1992 challenging the approval by the Department of Environmental Resources (DER) on July 2, 1992 of the Ancestral Acres Subdivision as an exception to the requirements to revise the Official Sewage Facilities Plan (Act 537 Plan) of Rockland Township, Berks County. Romac Investments, the proposed developer, was permitted to intervene on November 10, 1992. Neither DER nor Rockland Township has taken an active role in the appeal, deferring to Appellants and the Intervenor as the real parties in interest.

On December 4, 1992 Appellants filed a Motion for Summary Judgment and accompanying brief. The Intervenor's Response and accompanying brief were filed on January 6, 1993. Appellants' reply brief was filed on January 19, 1993. On February 10, 1993 the Board stayed the proceedings pending disposition of Appellants' Motion.

In their Motion Appellants allege that, in reviewing the Ancestral Acres Subdivision, DER failed to make its own determination on the elements set forth in 25 Pa. Code §71.55 but, instead, relied solely on representations of Rockland Township. This, they submit, is an abuse of discretion as found by this Board in *Baney Road Association v. DER et al.*, Board Docket No. 91-137-E (Opinion and Order issued April 10, 1992). In support of their Motion, Appellants have filed an affidavit of Ingrid E. Morning, the Sewage Facilities Planning Module, excerpts of depositions of Timothy J. Finnegan and Kathleen Meridionale, a letter written to DER on behalf of Appellants and a statement of DER policy. In its Response, the Intervenor has submitted a copy of the subdivision plan, the affidavit of Roger D. Lehmann, the Sewage Facilities Planning Module and its own excerpts from the Finnegan and Meridionale depositions.

After carefully considering these documents, viewing them in a light most favorable to the non-moving party, we are satisfied that there are genuine issues as to the material facts - exactly what DER did in reviewing this Planning Module. Accordingly, we must deny the Motion: Pa. R.C.P. 1035 (b).

In preparing for a hearing on the merits, the parties are directed to consider the Board's December 8, 1992 Adjudication in *Morton Kise et al. v. DER et al.*, Board Docket No. 90-457-MR.

ORDER

AND NOW, this 6th day of April, 1993, it is ordered as follows:

1. Appellants' Motion for Summary Judgment is denied.

2. Appellants shall file their pre-hearing memorandum on or before April 30, 1993.

3. The Intervenor shall file its pre-hearing memorandum within fifteen (15) days after the filing by Appellants.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: April 6, 1993

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BC

PAUL F. AND MADELINE R. KERRIGAN	:	
	:	
v.	:	EHB Docket No. 90-188-MR
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 8, 1993

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

By Robert D. Myers, Member

Synopsis

A storage battery recovery operation was conducted on Appellants' land by successive tenants, resulting in the lead contamination of the soil and of waste material deposited on the soil. DER issued an order directing Appellants and the tenants to cease operations and to remediate the site, relying on provisions of the Solid Waste Management Act, the Clean Streams Law, the Administrative Code and the regulations. The Board finds that the evidence of lead contamination is overwhelming and constitutes a danger of pollution to the waters of the Commonwealth. This is sufficient, under §316 of the Clean Streams Law, to warrant DER to order the landowners to remediate the site. The Board also finds that Appellants are the landowners. An agreement of lease is construed to be a lease with an option to purchase rather than as a lease purchase agreement or agreement of sale which would have endowed the tenants with equitable title. Finally, the Board concludes that Appellants can be ordered to clean up the site under §316 of the Clean

Streams Law whether or not they had any responsibility for creating the condition.

Procedural History

On May 9, 1990 Paul F. and Madeline R. Kerrigan (Appellants) filed a Notice of Appeal seeking review of an Order issued by the Department of Environmental Resources (DER) on April 9, 1990. The Order, addressed to Appellants, Giordano Waste Material Company (Giordano) and Broad Mountain Metals, Inc., t/d/b/a Ashland Metal Company (Broad Mountain), involved the unpermitted storage and/or disposal of solid and hazardous waste on a tract of land in Butler Township, Schuylkill County.

Broad Mountain filed its own Notice of Appeal at Board Docket No. 90-190-MR. This appeal was consolidated into Appellants' appeal at Board Docket No. 90-188-MR on October 15, 1990. When Broad Mountain filed a Motion to Withdraw its Appeal, the appeal was unconsolidated and closed on March 19, 1991.

Giordano did not appeal DER's Order.

A hearing was held in Harrisburg on June 16 and 17, 1992 before Administrative Law Judge Robert D. Myers, a Member of the Board. Both parties were represented by legal counsel and presented evidence in support of their positions. DER filed its post-hearing brief on July 31, 1992; Appellants filed theirs on August 31, 1992. DER, the party having the burden of proof, was permitted to file a reply brief and did so on September 14, 1992. Appellants' request to file a reply brief was denied on September 29, 1992.

The record consists of the pleadings, a hearing transcript of 367 pages and 42 exhibits. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. Appellants are husband and wife residing at Third and Chestnut Streets, Frackville (Schuylkill County), PA 17931 (Notice of Appeal).

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*; the Hazardous Sites Cleanup Act (HSCA), Act of October 18, 1988, P.L. 756, 35 P.S. §6020.101 *et seq.*; section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations adopted pursuant to said statutes.

3. By a deed dated June 22, 1970 and recorded in the Office of the Recorder of Deeds of Schuylkill County in Deed Book 1147 page 942, Margaret C. Kotch and Millersville Collieries Company granted and conveyed to Appellants five tracts of land in Butler Township, Schuylkill County. Tract No. 3 (13.2 acres) and Tract No. 5 (23.4 acres) were bounded on the west by the right-of-way of the Reading Railroad Company and on the east by Mahanoy Creek. These two tracts were divided by Butler Township Road T-417 (known locally as the Germanville Road), Tract No. 3 lying north of it and Tract No. 5 lying south of it (Exhibit C-1).

4. From 1970 to 1974 Appellant Paul F. Kerrigan, under the name Ashland Metal Company, conducted a scrap metal processing and recovery business on Tracts Nos. 3 and 5. Scrap material was acquired and brought to the Tracts where the metal was recovered and processed for sale (N.T. 318-319; Paul F. Kerrigan deposition, pp 9-10).

5. On Tract No. 3 were an office, a scale house, and processing and storage facilities. On Tract No. 5 was a smelter (N.T. 319-320).

6. Appellant Madeline R. Kerrigan assisted her husband in the business of Ashland Metal Company by doing the bookkeeping and by substituting for her husband when he was ill (N.T. 350).

7. A heart condition forced Appellant Paul F. Kerrigan to cease the operations of Ashland Metal Company in 1974 (N.T. 322-323).

8. Beginning in 1977 Appellants leased Tract No. 5 to Giordano, a corporation headquartered in New Jersey with scrap yards in Camden and Trenton (N.T. 323-324).

9. On September 1, 1979 Appellants entered into two agreements with Giordano, one pertaining to Tract No. 3 and the other pertaining to Tract No. 5. The agreement pertaining to Tract No. 3, entitled Agreement of Lease, provided, *inter alia*,

(a) for an initial term of five years, automatically renewable for three successive five-year terms, unless terminated by Tenant at the end of a term;

(b) for rent in the following specified amounts:

first five-year term - $3600 per annum

second five-year term - $4560 per annum

third five-year term - $5520 per annum

fourth five-year term - $6480 per annum;

(c) for the conveyance of title to Giordano at the end of the 20-year period (if the lease continues for that long) in consideration of the additional payment of $1.00;

(d) for Giordano to bear the cost of insurance, utilities and taxes (to the extent they exceed those levied in 1978); and

(e) for the reservation of a right in Appellants to remove culm and silt and to use a storage building

(Exhibit C-2).

10. The agreement pertaining to Tract No. 5 was entitled Agreement of Sale (N.T. 343).

11. Apparently, Giordano also obtained the use of the name Ashland Metal Company (Exhibit C-3).

12. Giordano began a storage battery recovery operation on Tracts Nos. 3 and 5. A plant building housing a battery processing machine and an acid recovery system were installed on Tract No. 3. The precise nature of the activities conducted on Tract No. 5 is unclear, but the tract became contaminated with battery casings, ash residue and a slag-like material that were cleaned up by DER in 1989-1990 under the provisions of the HSCA (N.T. 117, 268-270; Exhibit C-3).

13. On October 16, 1986 Giordano entered into an agreement with Herbert Eisenstadter of Fair Lawn, New Jersey. The agreement provided, *inter alia*,

(a) for the lease of Tract No. 3 and the personal property situated thereon to Eisenstadter;

(b) for an initial term of three months from October 16, 1986, automatically renewable for an additional term of three months by holding over beyond January 15, 1987;

(c) for specified rentals of $1800 per month during the initial term and $2000 per month during the additional term;

(d) for conversion of the lease to an agreement of sale by Eisenstadter electing to do so during either term of the lease and by paying additional rent of $2500 per month for 12 months beginning April 16, 1987 and

$3500 per month for 24 months beginning April 16, 1988, of which latter amount $1000 per month was to be credited toward the purchase price of $250,000;

(e) for the purchase price to be apportioned as follows:

land and building interest	$140,000
machinery and equipment	100,000
furniture, fixtures, etc.	10,000
	$250,000

(f) for the personal property to consist of the plant building, battery processing machine, acid recovery system, truck scale, office building, maintenance shed and five pieces of equipment (front end loaders, payloader, tractor and forklift); and

(g) for the assignment to Eisenstadter of the name Ashland Metal Company

(Exhibit C-3).

14. Also on October 16, 1986

(a) Eisenstadter assigned the agreement with Giordano to Broad Mountain, a Pennsylvania corporation; and

(b) Appellants approved of the assignment to Broad Mountain and declared that they had no setoffs against Giordano

(Exhibits C-4 and C-5).

15. Broad Mountain conducted a storage battery recovery operation on Tract No. 3 under the name Ashland Metal Company but the evidence does not show whether it was the same operation as that conducted previously by Giordano. Under Broad Mountain's operation,

(a) batteries were brought by truck to Tract No. 3, unloaded and stored;

(b) acid was drained from the batteries and collected for disposal off-site;

(c) the batteries were placed on a conveyor belt and the tops were sawed off;

(d) the contents of the battery casing (plates and sludge) were dumped onto another conveyor belt which took them to a collection point for shipment off-site;

(e) the empty casings were run through a hammermill which broke them into small pieces that were piled inside the plant building; and

(f) liquids collected during the operation were drawn off into three inside storage containers where the solvents containing lead were allowed to settle to the bottom for later shipment to a secondary lead smelter (N.T. 28-30).

16. The northern part of Tract No. 3 contains a terrace that is about 30 feet higher than the southern part. It extends from Mahanoy Creek on the east (where it is about 8 feet high) to the railroad right-of-way on the west (where it is 15-20 feet high). The office, scale house and storage building were located on the southern part of the Tract. All other facilities associated with the storage battery recovery operation were located on the terrace several hundred feet to the north (N.T. 103-108, 204-205, 223-224).

17. John J. Leskosky, while an Environmental Protection Compliance Specialist in DER's Wilkes-Barre Regional office, visited Tract No. 3 in August 1987 for the purpose of reviewing Broad Mountain's activities, in conjunction with the U.S. Environmental Protection Agency (EPA). He concluded that the operation qualified as a recycling facility and needed no permits (including hazardous waste permits) (N.T. 267-269, 285-286; Exhibit C-41),

18. During a visit to Tract No. 3 in March 1988 Leskosky observed on the terrace a pile of waste material covered with plastic and was uncertain whether it constituted hazardous waste or residual waste. Broad Mountain

officials informed him that the material had come from Giordano's operations on Tract No. 5 and was to be recycled. On the basis of this representation, Leskosky refrained from issuing a notice of violation (NOV) or an order for removal of the material (N.T. 286-288, 364-365).

19. Leskosky observed the waste pile on each of the five site visits made by him after March 1988 and before April 1990. The plastic cover had numerous holes in it and the material was exposed to the weather. No liner or other underlayment separated the pile from the ground surface. No NOVs were issued to Broad Mountain for this condition (N.T. 271-272, 293-295).

20. Either in August 1987 or March 1988 Leskosky also observed a leaking semi-trailer on the terrace near the plant building. The condition was brought to the attention of Broad Mountain officials who took corrective action. No NOV was issued for this condition (N.T. 288-289).

21. In response to complaints alleging the unlawful disposing of battery casings, Gerald F. Olenick, a Solid Waste Specialist in DER's Bureau of Waste Management, went to Tract No. 3 on September 18, 1989 for the purpose of taking soil samples (N.T. 11, 31).

22. Broad Mountain's storage battery recovery business was in operation that day and Olenick secured permission to examine the site and collect the samples. While examining the site, he

(a) walked the entire perimeter of Tract No. 3 looking for areas indicating disposal activities;

(b) observed the waste pile (which he estimated to be 8 to 10 feet high and to have a circumference of 300 feet) covered with plastic sheeting held down by automobile tires; and

(c) observed 6 to 8 semi-trailers and roll-off containers parked on the terrace

(N.T. 31-35).

23. Olenick collected soil samples at four locations on Tract No. 3. Three of the locations were on the western boundary of the site near the railroad right-of-way at the base of the terrace. The fourth was about 50 feet west of the bank of Mahanoy Creek, below the terrace, in a drainage area leading to the Creek. Olenick chose the locations because he found pieces of battery casings scattered about the surface of the ground (N.T. 47-53, 131; Exhibit C-24).

24. Olenick

(a) collected two soil samples at each location under the mistaken belief that the laboratory needed two samples to do the desired analysis;

(b) followed DER's standard procedures for collecting soil samples and shipping them to a laboratory;

(c) collected the samples at a depth ranging up to 6 inches;

(d) collected no composite samples; and

(e) identified the samples by the following numbers;

2210002 and 2210003 - along railroad right-of-way
2210004 and 2210005 - along railroad right-of-way
2210006 and 2210007 - along railroad right-of-way
2210008 and 2210009 - drainage area to creek

(N.T. 39-55; Exhibits C-6, C-8, C-10, C-12 and C-24).

25. The soil samples were sent to DER's Erie Soil Testing Laboratory where

(a) only one of each set of two samples was analyzed because all of the analyses could be performed on one sample;

(b) they were handled and analyzed in accordance with DER's standard procedures;

(c) they were subjected to the EP toxicity test (measuring the potential for the waste material to leach certain toxic heavy metals) and the total lead test (measuring the amount of lead potentially emissible into the environment);

(d) the EP toxicity and total lead were found to be the following:

sample no.	EP toxicity	total lead
2210002	17.0 mg/l[1]	69,735 mg/k[2]
2210004	.2 mg/l[3]	1,837 mg/k
2210006	13.1 mg/l	748 mg/k
2210008	18.2 mg/l	18,215 mg/k

(N.T. 43-54, 119, 141-147, 158-165; Exhibits C-7, C-9, C-11 and C-13).

26. DER considers measurements of EP toxicity for lead to be hazardous if they exceed 5.0 mg/l; and considers measurements of total lead to be hazardous if they exceed 500 mg/k in residential areas and 1000 mg/k in industrial areas (N.T. 73).

27. Lead contamination affects the kidneys and central nervous system and is a probable carcinogen (N.T. 74).

28. Olenick performed hazardous waste inspections of Tract No. 3 on November 13, 1989 and March 27, 1990 pursuant to duties imposed on DER by the Resource Conservation and Recovery Act (RCRA), Public Law 94-580, 90 Stat. 2796, 42 U.S.C.A. §6901 *et seq.* The inspection reports prepared with respect to those inspections found only one violation - a leaking semi-trailer

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[1] milligrams per liter

[2] milligrams per kilogram

[3] = less than

partially filled with battery casing fragments on March 27, 1990 located on the terrace near the semi-trailers observed on September 18, 1989 (N.T. 56-59; Exhibits C-26 and C-27).

29. Olenick also observed on March 27, 1990 that Broad Mountain was still engaged in its storage battery recovery business and that the waste pile was still in place but with the plastic sheeting partially blown off (N.T. 59).

30. Olenick returned to Tract No. 3 on March 29, 1990 to obtain additional soil samples. He

(a) examined the waste pile and observed battery casing fragments, pieces of lead and mine rock;

(b) took 4 samples of the materials in the waste pipe (sample numbers 2210018, 2210019, 2210020 and 2210021) at different locations and at a depth ranging up to 12 inches, one of which (2210021) was a composite sample;

(c) took a composite sample (2210022) of the discolored soil beneath the leaking semi-trailer observed on March 27, 1990, at a depth ranging up to 3 inches; and

(d) followed DER's standard procedure for collecting soil samples and shipping them to a laboratory

(N.T. 61-72; Exhibits C-14, C-16, C-18, C-20, C-22 and C-24).

31. The soil samples were sent to DER's Erie Soil Testing Laboratory where

(a) they were handled and analyzed in accordance with DER's standard procedures;

(b) they were subjected to the EP toxicity test and the total lead test; and

(c) the test results revealed the following:

sample no.	EP toxicity	total lead
2210018	470.0 mg/l	27,700 mg/k
2210019	57.4 mg/l	9,170 mg/k
2210020	61.5 mg/l	115,000 mg/k
2210021	142.0 mg/l	383,000 mg/k
2210022	12.5 mg/l	2,920 mg/k

(N.T. 64-73, 100-101, 149-152; Exhibits C-15, C-17, C-19, C-21 and C-23).

32. Because of the EP toxicity and total lead levels disclosed by the soil samples taken on September 18, 1989 and on March 29, 1990, DER issued the Order forming the basis of the appeal on April 9, 1990. The Order recited violations of the SWMA and its regulations, the CSL and section 1917-A of the Administrative Code. The Order directed Appellants, Giordano and Broad Mountain to cease the unlawful activities and to propose and carry out a comprehensive program of remediation (N.T. 272-274).

33. Prior to issuing the April 9, 1990 Order, DER had issued no prior orders or NOVs to Appellants or to Giordano with respect to Tract No. 3. NOVs had been issued to Broad Mountain for the leaking semi-trailer and for certain technical violations but no prior orders had been issued to it (N.T. 122, 294).

34. During the Spring of 1990 Broad Mountain, in obedience to an order issued by the Court of Common Pleas of Schuylkill County, removed about 50% of the fragmented battery casings inside the plant building. Scrap metal also was removed from Tract No. 3 during the same period (N.T. 127-129).

35. Olenick went to Tract No. 3 on July 31, 1990 and found that no operations were going on. He took a series of photographs showing

(a) the waste pile to be essentially the same as in September 18, 1989 with no indication of any liner or other underlayment beneath it;

(b) piles of scrap metal near the plant building;

(c) semi-trailers loaded with battery casings;

(d) roll-off containers filled with battery casings;

(e) the battery acid storage tank which had some liquid in it;

(f) piles of fragmented casings inside the plant building; and

(g) stacks of empty 55-gallon steel drums

(N.T. 76-95; Exhibits C-25A through C-25W).

36. When Olenick made his most recent visit to Tract No. 3 on March 5, 1992, he found the gate locked. From the perimeter of the Tract, he was able to observe that conditions were unchanged from those photographed on July 31, 1990 (N.T. 74-77).

37. Patricia J. Peck, a Soils Scientist in DER's Bureau of Waste Management (accompanied by Alexander J. Zdzinski, a Hydrogeologist, and Tom Buchan, a Solid Waste Specialist), went to Tract No. 3 on July 11, 1991. While there, she

(a) walked over the entire site;

(b) selected 3 locations on the terrace for soil sampling;

(c) took 2 soil samples at each location, digging to a depth ranging from 6 to 12 inches;

(d) followed DER's standard procedure for collecting soil samples and shipping them to a laboratory;

(e) sent one set of samples to DER's Erie Soil Testing Laboratory for textural classification analysis and;

(f) sent the other set of samples to the Merkle Soil Testing Laboratory at Pennsylvania State University for determination of pH and cation exchange capacity (CEC), tests that the Erie Laboratory does not perform (N.T. 173-176, 182-189, 192-193; Exhibits C-28, C-31, C-34, C-37 and C-39).

38. The analyses requested by Peck are useful in determining the metal retention ability of the soil - the physical and chemical properties that allow the soil to adsorb metals. A soil with low metal retention ability will leach metals such as lead (N.T. 176-179).

39. A textural classification analysis divides the soil into particle sizes. The larger the pore spaces between particles the greater the capacity for infiltration and leaching (N.T. 181)

40. A CEC analysis measures the negative sites on a soil particle available for metal adsorbtion. The lower the CEC value the greater the tendency for leaching metals (N.T. 179-180).

41. pH measures the acidity of the soil. The lower the pH the easier metals are leached through the soil (N.T. 178-179).

42. The soil samples sent by Peck to the Erie Testing Laboratory

(a) were handled and analyzed in accordance with DER's standard procedures; and

(b) revealed that sample no. 2232019 was gravelly sand, that sample no. 2232020 was gravelly sand and that sample no. 2232021 was sandy gravel

(N.T. 152-156, 193-195, 197-198, 199-200; Exhibits C-29, C-32 and C-35).

43. Peck concluded from the textural classification analysis of the 3 samples, showing little clay or organic matter, that the soils have a great potential to leach metals (N.T. 195, 197-198, 199-200, 201).

44. The soil samples sent by Peck to the Merkle Laboratory

(a) were handled and analyzed in accordance with standard procedures;

(b) revealed that the pH levels and CEC levels were as follows:

sample no.	pH	CEC
2232019	4.7	5.5
2232020	6.4	6.5
2232021	4.3	7.3

(N.T. 195-197, 198-199, 200, 296-308; Exhibits C-30, C-33 and C-36).

45. Peck concluded from the pH analysis of the 3 samples, showing that 2 of the samples were extremely acid and that the third was borderline, that the soils have a great potential to leach metals (N.T. 196-197, 198-201).

46. Peck concluded from the CEC analysis of the 3 samples, showing that the CEC values are well below the average value of 17, that the soils have little capacity to adsorb metals and a great potential for leaching (N.T. 197, 199, 200-202).

47. While he was at Tract No. 3 on July 11, 1991, Zdzinski

(a) walked the entire site;

(b) found evidence of seeps only along the southern boundary near a drainage ditch that parallels Butler Township Road T-417;

(c) observed that Mahanoy Creek is the low point topographically with hillsides rising on both sides of it;

(d) observed that the terrace appeared to be composed of mine spoil, which was at least 8 feet thick near the Creek but was of uncertain thickness further west; and

(e) took no water samples

(N.T. 215-224, 255, 259).

48. Zdzinski concluded that

(a) the groundwater elevation on the east side of Tract No. 3 is at or about the elevation of Mahanoy Creek;

(b) the groundwater elevation would rise with the surface topography toward the west;

(c) the groundwater flow would be from west to east;

(d) the seeps on the southern boundary could represent either the regional groundwater or a perched water zone; and

(e) the groundwater elevation beneath most of the terrace is uncertain except to the extent that it is higher than the elevation of Mahanoy Creek

(N.T. 209-215, 224-247; Exhibit C-40).

49. Water samples of the seeps along the southern boundary of Tract No. 3 would not be conclusive evidence of whether groundwater contamination has occurred, because the seeps may not represent the regional groundwater and because, even if they did, they would not reflect groundwater beneath the terrace which flows from west to east (N.T. 248-249).

50. Olenick took water samples from Mahanoy Creek, upstream and downstream of Tract No. 3, in April 1991, the analyses of which had been shared with Zdzinski after he had made his site inspection on July 11, 1991. The results of these samplings were not presented as evidence by either party (N.T. 130, 259-260).

51. During the time when Appellant Paul F. Kerrigan was carrying on business on Tract No. 3, he handled automobile storage batteries but never drained them or subjected them to processing or recovery operations (N.T. 320-321).

52. During the time when Giordano and Broad Mountain conducted operations on Tract No. 3, Appellants claim that they

(a) had no information on the nature of the operations being conducted;

(b) went on the site only about 10 to 12 times for the purpose of picking up rent checks at the office;

(c) never entered the rest of the site, including the terrace;

(d) never saw any waste piles, leaking semi-trailers or discolored soil;

(e) had no financial interest either in Giordano or Broad Mountain or the personal property of either;

(f) took no part in the management of Giordano or Broad Mountain or their business activities;

(g) never tried to limit or restrict Giordano or Broad Mountain in their use of the site; and

(h) never exercised their reserved right to use the storage building and to remove culm and silt.

(N.T. 325, 331-340, 350-354).

53. During 1988 and 1989 Appellant Madeline R. Kerrigan became aware, through newspaper articles and individuals in the vicinity, that there were complaints about the use of Tract No. 3, specifically the noise, the battery recovery operation and fires. She did not give credence to these complaints since she had not received any complaints from DER (N.T. 352-354, 355-358).

54. Neither Giordano nor Broad Mountain had ever given notice of intention to terminate the Agreement of Lease with respect to Tract No. 3. All rentals were paid until April 1990 when they ceased. Rentals have not resumed. Neither Giordano nor Broad Mountain occupy the site, although they have not been ejected and Appellants have not repossessed it. The title remains in Appellants and they pay the taxes on Tract No. 3 (N.T. 18, 23, 327-328, 341).

55. The remedial action directed in DER's April 9, 1990 Order has not been taken. No enforcement action is pending against Giordano or Broad Mountain (N.T. 283, 292).

56. Prior to issuance of the April 9, 1990 Order, DER dealt only with officials of Giordano and Broad Mountain. They had no contact at all with Appellants. Subsequent to issuance of the order, DER has kept Appellants fully informed of developments with respect to Tract No. 3 and has secured their prior permission for every entry onto the site (N.T. 108, 122, 137, 288-295, 334, 339).

57. Residences, an elementary school and a hospital are in the vicinity of Tract No. 3 but are upgradient. DER has not sampled any public or private water supplies in the vicinity (N.T. 18, 109-111, 130, 251).

DISCUSSION

DER has the burden of proof: 25 Pa. Code §21.101(b)(3). To carry the burden DER must prove by a preponderance of the evidence that its April 9, 1990 Order was lawful and an appropriate exercise of its discretion: 25 Pa. Code §21.101(a).

The Order was issued pursuant to specific provisions of the SWMA, the CSL, the HSCA, the Administrative Code and the regulations. If it can be sustained under any one of these authorities, that will be sufficient. In its post-hearing brief, DER first argues the applicability of §316 of the CSL, 35 P.S. §691.316, which provides, in part, as follows:

> Whenever [DER] finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth [DER] may order the landowner or occupier to correct the condition in a manner satisfactory to [DER]....For the purpose of this section, "landowner" includes any person holding title to or having a proprietary interest in either the surface or subsurface rights.

The elements of proof under §316 are (1) the existence of pollution or a danger of pollution resulting from a condition on Tract No. 3 and (2) Appellants' status as landowners of Tract No. 3.

Evidence of lead contamination in the soil on Tract No. 3 is overwhelming. The total lead found in the soil samples, while not as high as that found in the waste pile, exceeded acceptable levels by a wide margin. The lead content of the waste pile and the discolored soil beneath the leaking trailer both point to the storage battery recovery operation as the source of the contamination. Since the operation necessarily dealt with lead components of storage batteries, it is not surprising that the casing fragments and waste materials had lead in them.

The EP toxicity test results demonstrate the waste material's high potential for leaching the lead into the environment. The results of the textural classification, pH and CEC analyses show that the soil into which the lead leaches from the waste material has little capacity for holding on to it. The lead will readily pass through this medium into whatever lies below it.

Soil samples measured only the top 12 inches of soil. There is no evidence of the nature of the material below that depth and there is no satisfactory evidence of the precise groundwater elevation beneath the terrace where most of the contamination exists. Nonetheless, there is groundwater at some depth (probably about 20 feet) flowing east to Mahanoy Creek. There is at least a danger that the lead contamination will reach it.

"Pollution", as defined in §1 of the CSL, 35 P.S. §691.1, encompasses the contamination of any waters of the Commonwealth (which also is defined in §1 to include groundwater) so as to render the waters harmful to public health. Certainly, lead contamination (with its effect upon the kidneys and the central nervous system and with its threat as a probable carcinogen) falls within this definition. We are satisfied that DER has established by a preponderance of the evidence that the lead contamination on Tract No. 3 poses a danger of pollution to the waters of the Commonwealth.

In reaching this conclusion, we reject Appellants' argument that DER has not presented the requisite expert testimony on which the conclusion must rest. Expert testimony, provided by two hydrogeologists, a soil scientist, an agronomist and a chemist, established the presence of great quantities of lead on or near the surface of the ground in soils through which it would readily leach toward the groundwater below. The expert testimony did not establish the precise nature of the soils deeper than 12 inches or the exact contours of the groundwater. Appellants seize on this lack of evidence to argue that DER has not proved causation.

This argument might have some merit if DER had undertaken to prove that lead actually had entered the groundwater. This is not the case, however. DER alleged only that the lead posed a "danger of pollution" to the groundwater. The expert testimony presented in support of this allegation was sufficient to make out a *prima facie* case, shifting to Appellants the burden of going forward with the evidence to show, if possible, that no danger existed. They did not do so.

The second element of proof under §316 of the CSL is Appellants' status as landowners of Tract No. 3. Appellants concede that they are the grantees in the last deed of record for the site, but argue that the Agreement of Lease, dated September 1, 1979, entered into initially with Giordano and later assigned to Broad Mountain, was in reality a lease purchase agreement or agreement of sale, conferring equitable title upon Giordano/Broad Mountain and converting Appellants' base legal title to personalty. Such an interest, they argue, is not sufficient to make them landowners under §316 of the CSL.

"For purposes of this section," §316 states, landowner includes "any person holding title to or having a proprietary interest in either surface or

subsurface rights." The Legislature obviously intended that even a partial ownership interest would qualify: *Western Pennsylvania Water Company v. DER*, 1988 EHB 715, affirmed 127 Pa. Cmwlth. 26, 560 A.2d 905 (1989). The ownership of surface or subsurface "rights" is enough. Surely, Appellants' proprietary interest in Tract No. 3 exceeds this minimal test.

The Agreement of Lease, as pointed out in DER's post-hearing brief, cannot be construed as a lease purchase agreement or agreement of sale because it does not compel the tenant to buy the land. While it calls for a conveyance of title at the end of 20 years without the payment of any additional consideration, the Agreement of Lease does not require the tenant to continue for that period of time. The tenant can leave *without further obligation* at the end of 5 years, 10 years or 15 years. Only if the tenancy lasts for a full 20 years does it ripen into a right of title.

Under an agreement of sale or lease purchase agreement, the tenant is obligated to buy and can be held liable for the purchase money. Under a lease with an option to purchase, the obligation to buy is absent. The tenant has the unilateral choice to buy or not to buy. Only when that option is properly exercised does an equitable estate come into existence. *Ladner on Conveyancing in Pennsyvlania*, §6:02 (Revised 4th Ed. 1979). P.L.E. Sales of Realty §2, §11, §31, §111, §173. The September 1, 1979 Agreement of Lease between Appellants and Giordano falls into the option category. As such, it conferred no equitable estate on Giordano[4]. In fact, it was incapable of conferring such an estate on anyone until August 31, 1999 and then only if there was no default on the part of the tenant.

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[4] Even if, as Appellants argue, DER admitted in its pre-hearing memorandum that Broad Mountain has an "equitable ownership interest" in Tract No. 3, that admission is not binding on the Board, especially when the documents lead to a contrary conclusion.

The October 16, 1986 Agreement between Giordano and Eisenstadter bestowed on the latter an option to acquire title to the real estate or Giordano's rights under the Agreement of Lease with Appellants. The option had to be exercised by April 15, 1987 with performance set for April 15, 1990, if Eisenstadter was not in default. There is no evidence indicating whether Eisenstadter or Broad Mountain, his assignee, exercised the option. While it is clear that Broad Mountain still occupied Tract No. 3 on April 15, 1990, we know nothing of the terms under which that occupancy existed. We do know that Broad Mountain stopped paying rent to Appellants in April 1990, committing a default under the terms of the Agreement of Lease dated September 1, 1979. That default apparently remains uncorrected and has been followed by similar defaults in all the succeeding months. Neither Giordano nor Broad Mountain are in a position to exercise options for the acquisition of Tract No. 3.

Considering all of the foregoing, we are satisfied that Appellants are landowners within the scope of §316 of the CSL. As such, they can be required to comply with DER's April 9, 1990 Order whether or not they had any responsibility for creating the condition: *National Wood Preservers, Inc. v. Commonwealth, Dept. of Environmental Resources*, 489 Pa. 221, 414 A.2d 37 (1980), appeal dismissed, 449 U.S. 803, 101 S.Ct. 47, 66 L.Ed. 2d. 7 (1980); *Bonzer v. Commonwealth, Dept. of Environmental Resources*, 69 Pa. Cmwlth. 633, 452 A.2d 280 (1982); *Western Pennsylvania Water Company, supra.*

Appellants have not challenged the reasonableness of what the April 9, 1990 Order requires. Consequently, we conclude that the Order was lawful under the CSL and an appropriate exercise of DER's discretion.

Since we sustain DER's April 9, 1990 Order under the CSL, we will not discuss the applicability of the other statutes cited in the Order.

CONCLUSIONS OF LAW

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

2. DER has the burden of proving by a preponderance of the evidence that its April 9, 1990 Order was lawful and an appropriate exercise of its discretion.

3. The lead contamination on Tract No. 3 poses a danger of pollution to the waters of the Commonwealth.

4. The Agreement of Lease, dated September 1, 1979, between Appellants and Giordano cannot be construed as a lease purchase agreement or agreement of sale, bestowing equitable title on the tenant.

5. The Agreement of Lease, *supra*, is a lease with an option to purchase, which has not been exercised by the tenant and which cannot now be exercised because the tenant is in default.

6. Appellants are landowners of Tract No. 3 within the meaning of §316 of the CSL.

7. As landowners, Appellants can be required to comply with DER's April 9, 1990 Order whether or not they had any responsibility for creating the condition.

8. DER's April 9, 1990 Order was lawful under §316 of the CSL and an appropriate exercise of DER's discretion.

ORDER

AND NOW, this 8th day of April, 1993, it is ordered that the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
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DATED: April 8, 1993

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