Environmental Hearing Board

Adjudications and Opinions

2006
VOLUME I

COMMONWEALTH OF PENNSYLVANIA
Michael L. Krancer, Chairman

JUDGES

OF THE

ENVIRONMENTAL HEARING BOARD

2006

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Member	George J. Miller
Member	Thomas W. Renwand
Member	Michelle A. Coleman
Member	Bernard A. Labuskes, Jr.
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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2006.

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

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2006

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ENERGY RESOURCES, INC.	:	
	:	
v.	:	**EHB Docket No. 2005-054-R**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA: DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 9, 2006**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Department's motion to dismiss, treated as a motion for summary judgment, is granted. Although the Department's letter to a permit applicant appears to indicate that the permit will be denied if the bond requested by the Department is not submitted, a further review of the permitting process reveals that the bond calculation is not final at this stage and may still be revised. Therefore, we find that the Department's letter to the permit applicant was not an appealable action.

O P I N I O N

This matter involves a permit renewal application for Energy Resources, Inc. ("Energy Resources") coal refuse disposal area No. 1. Energy Resources filed an

appeal of the Pennsylvania Department of Environmental Protection's ("Department") bond request letter that requested that Energy Resources submit additional reclamation bond. A motion to dismiss the appeal was filed by the Department on May 23, 2005 and Energy Resources filed an answer. After a review of all papers, we find that the motion should be granted.

The background of this matter is as follows. On February 17, 2005, the Department notified Energy Resources that it had completed its technical review of the permit renewal application for the Refuse Disposal Area No. 1 and requested the company to submit a reclamation bond in the amount of $335,063.00. Energy Resources filed an appeal from the bond request.

In its motion to dismiss, the Department contended that the bond request is not a final action and, therefore, not appealable to the Board. The Department argues that the bond request is simply one step in the permit review process and that if the applicant fails to submit the bond as requested, the next step is for the Department to issue a "Notice of Intent to Deny" letter which states that the Department intends to deny the permit if the applicant fails to submit the bond and provides the applicant with an opportunity to meet and discuss the application and bond with representatives of the Department. Only after the Notice of Intent to Deny is sent and the applicant has had an opportunity to meet with Department personnel does the Department make what it considers to be its final decision on the application. If the Department's decision is to deny the permit, the Department then sends another letter stating that the Department

has completed its review of the application and has denied the permit. It is this letter that the Department considers to be a final, appealable action.

In response, Energy Resources points to the following language contained in the bond request letter:

> We have completed our technical review of your application for the Refuse Disposal Area No. 1. Before a permit can be issued you must provide the following:
>
> An additional Mining and Reclamation Bond in the amount of $335,063.00
>
> I have enclosed the following materials to help you complete the process: an instruction sheet, bond forms, a bond submittal form and any other forms that may apply.
>
> The completed bond submittal form and the completed bond forms are to be submitted to the Division of Licensing and Bonding by March 21, 2005. Failure to submit them by that date will result in permit denial.

(Exhibit A to Response, emphasis added)

Energy Resources contends that the language of the letter is clear – the permit renewal application will be denied if the bond is not submitted. Based on this language, it argues that the letter is a final, appealable action.

According to the Department's motion, which is supported by the affidavit of Hydrologist John D. Kernic, following the receipt of a Notice of Intent to Deny letter, an applicant has the opportunity to request an informal conference with Department representatives where it can dispute the bond amount required by the Department. If the Department agrees with the applicant's position, it will then request the applicant to

submit a revised bond calculation worksheet reflecting the changes agreed to by the Department. If the Department does not agree to change the bond amount and the applicant does not submit the bond in the amount originally determined by the Department, the Department will then issue a permit denial letter which is a final action. The Department, at this stage of the proceedings has not made a final determination concerning the revised bond calculation.

The Board will dismiss an appeal only where there are clearly no material factual disputes and the moving party is entitled to judgment as a matter of law. *Cooley v. DEP*, 2004 EHB 554, 558. The motion must be reviewed in the light most favorable to the non-moving party. Id.

We agree with Energy Resources that upon first glance, the language of the Department's February 10, 2005 letter appears to be a final action. However, based on our holdings in *Mon View Mining v. DEP*, EHB Docket No. 2005-049-R (Opinion and Order issued August 12, 2005) and *Maple Creek Mining Inc. v. DEP*, EHB Docket No. 2005-038-R (Opinion and Order issued December 22, 2005), it is, in fact, not a final action. There are additional steps in the permitting process during which the bond calculation may yet be revised. Once Energy Resources receives a Notice of Intent to Deny letter, it has the right to request an informal conference with the Department to discuss the amount of the bond and request revisions. Because the bond calculation is not final at this stage and may be revised at an informal conference requested by Energy Resources, we find that the matter is not yet final or appealable.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ENERGY RESOURCES, INC.	:	
	:	
v.	:	**EHB Docket No. 2005-054-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

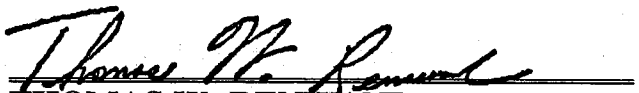
ORDER

AND NOW, this 9th day of January, 2006, the Department of Environmental Protection's motion to dismiss is ***granted*** and the appeal is ***dismissed***.

ENVIRONMENTAL HEARING BOARD

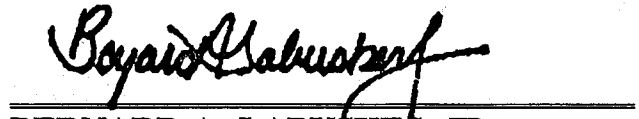
MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member



BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATE: January 9, 2006

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

FRED W. LANG, JR., JOYCE E. SCHUPING, DELORES HELQUIST and SHERRY L. WISSMAN	:	
v.	:	**EHB Docket No. 2003-145-R**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and MAPLE CREEK MINING, INC., Permittee	:	**Issued: January 12, 2006**

ADJUDICATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

An appeal by Landowners whose pond was diminished by underground mining is sustained in part and denied in part. We find there is insufficient basis for ordering a third set of repairs to the pond; nor have the Landowners established by a preponderance of the evidence that a carbon filtration dechlorination system is needed at the pond. We do, however, agree with the Department's conclusion that the natural recharge to the pond has not been restored and, therefore, the mine operator is liable for the increased cost of operating and maintaining the pond. While we agree with the Department and mine operator with regard to the average amount of water needed to be added to the pond annually, we agree with the Landowners' selection of interest rate in calculating present value. The present value of the operation and maintenance costs ordered by the Department are, therefore, adjusted to $406,125.36. We further find that the

Department acted in a timely manner in finding a resolution to the water loss problem, pursuant to 52 P.S. § 1406.5b (b) (2). Finally, the Landowners' motion to reopen the record to introduce evidence of water being added to the pond in 2005 is denied as being cumulative.

Background:

This matter involves the restoration of a pond (the Lang pond) located on property owned by Fred W. Lang, Jr. and his sisters, Joyce E. Schuping, Delores Helquist and Sherry L. Wissman (the Landowners). The property consists of 51 acres located in Nottingham Township, Washington County, Pennsylvania. The Lang family built the pond on the property for recreational use in 1967. Maple Creek Mining (Maple Creek) conducted longwall mining under a portion of the pond in August 1999. In April 2001, Mr. Lang filed a claim of water loss with the Department of Environmental Protection (Department). After investigation, the Department concluded that the Lang pond had been damaged by subsidence resulting from Maple Creek's mining and that the subsidence had decreased the pond's recharge.

By Administrative Order dated June 26, 2002, the Department ordered Maple Creek to restore or replace the pond in accordance with Section 5.1 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 – 1406.21, at § 1406.5a and 5b. Section 5.1 (a) requires that a mine operator who affects a public or private water supply as a result of underground mining operations must restore or replace the affected supply with an alternate source that adequately serves the pre-mining uses in quality and quantity. 52 P.S. § 1406.5a (a) (1).

Subsequently, on September 11, 2002, the Department and Maple Creek negotiated the terms of a Consent Order and Agreement requiring the completion of repairs to the pond and continued augmentation of the pond, as well as continued hydrologic monitoring. The Consent

Order and Agreement also set forth the amount of civil penalty to be paid by Maple Creek. Following the period of observation provided for in the Consent Order and Agreement, the Department could not conclude that adequate recharge to the pond had been reestablished. Therefore, the Department and Maple Creek negotiated the terms of a First Amendment to Consent Order and Agreement, dated June 4, 2003, which provided for additional hydrologic monitoring and required Maple Creek to provide to the Department a calculation of the increased operating and maintenance cost of maintaining the pond's uses, including the cost of supplemental water. The Landowners appealed the First Amendment to Consent Order and Agreement at Docket No. 2003-145-R.

On March 17, 2004, the Department sent a letter to Maple Creek setting forth operation and maintenance costs that the Department had determined Maple Creek was responsible for paying to the Landowners for restoration of the pond. Both the Landowners and Maple Creek appealed the Department's determination of operation and maintenance costs at Docket Nos. 2004-090-R and 2004-093-R, respectively. All of the appeals were consolidated at the earlier Docket No. of 2003-145-R.

The Environmental Hearing Board (Board) held a six-day trial commencing on March 1, 2005. Based on the evidence presented at the trial, the Board makes the following findings of fact:

FINDINGS OF FACT

1. The Landowners are the owners of real property located on Sundust Road in Nottingham Township, Washington County. (T. 8; Lang Ex. 1)[1]

[1] "T. __" refers to a page in the transcript of this proceeding. Exhibits introduced by the Landowners are identified as "Lang Ex. __", exhibits introduced by the Department as "Comm. Ex. __" and exhibits introduced by Maple Creek as "Permittee Ex. __."

2. None of the Landowners reside on the property; rather, it is used for recreational purposes. (T. 6, 8, 11)

3. The property was purchased by the Landowners' father in 1967 and consists of approximately 50 acres. (T. 9, 11)

4. There is a pond on the property (referred to as the Lang pond) that is approximately 2.3 acres in size. (T. 11)

5. The recreational uses of the pond are fishing, boating, swimming and ice skating. (T. 12)

6. Historically, the sources of water for the pond have been two tributaries and two springs. (T. 14, 219) Additionally, the pond is fed by precipitation and runoff. (T. 219)

7. Prior to mining, the combined flow to the pond from the two tributaries averaged 655 gallons per minute, and in the drier months was approximately 39.3 gallons per minute. (T. 220, 252-53) This is based on only six months of monitoring data. (T. 792-93)

8. The tributaries feeding the Lang pond are intermittent streams. (T. 806) Dry periods were recorded in the summer months of 1998, prior to mining. (T. 809-10)

9. The size of the watershed for the pond is approximately 284 acres. (T. 265)

10. The pond has decanted regularly from 1967 to 1999.[2] (T. 15, 122-24, 134-35)

11. Mr. Lang has lived in Richmond, Virginia since 1990. From 1990 to 1995, he visited the property every six to eight weeks and from 1995 to August 1999 approximately three times a year. (T. 7, 17)

12. Maple Creek conducted underground mining in the area of the Lang pond in August 1999 and undermined a significant portion of the pond. (T. 94, 226)

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[2] "Decant" is defined as "1. to draw off without disturbing the sediment or the lower liquid layers 2. to pour from one vessel into another." Webster's Ninth New Collegiate Dictionary 329 (1989). In this proceeding, "decant" was simply used to discuss flow out of the pond.

13. The post mining flow to the pond from the two tributaries is significantly lower than 655 gallons per minute, and during certain periods there has been little or no flow. (T. 228-29, 248)

14. Mr. Lang first learned of water loss in the pond in the Spring of 2001, when he was told by a neighbor that the pond had begun to go dry in the summer. (T. 21-22)

15. Mr. Lang filed a claim of subsidence damage with the Department in April 2001. (T. 558, 827; Lang Ex. 6)

16. There was water loss in the pond in July 2001, which Mr. Lang observed. (T. 24)

17. Diminished flow or loss of flow to a pond can cause the pond to stagnate and starve the aquatic life of oxygen. (T. 223)

18. After receiving Mr. Lang's subsidence damage claim, the Department conducted an investigation and released a Water Supply Investigation Report on November 14, 2001. (T. 26, Lang Ex. 12)

19. By letter dated November 27, 2001, the Department informed Maple Creek that its investigation had determined that the water loss at the Lang pond was due to Maple Creek's mining in August 1999. (T. 25-26, 728; Comm. Ex. 11)

20. Maple Creek submitted to the Department a proposal for repairing the pond; the Department reviewed and approved the proposal in one month. (T. 829)

21. The pond again went dry in the Summer of 2002. (T. 27)

22. In an administrative order issued on June 26, 2002, the Department ordered Maple Creek to conduct repair work on the pond; Maple Creek undertook repairs in the Spring and Summer of 2002, which required draining the pond, performing the repair work and then refilling the pond. (T. 29-38, 663-65, 689-90; Lang Ex. 13)

23. The Department was not satisfied with the first set of repairs done by Maple Creek and ordered them to be redone. (T. 664)

24. Bentonite, which is a manufactured clay, was used to repair the pond. When applied, bentonite should be incorporated into the surrounding soil; if it is merely applied to the surface it can wash away. (T. 234, 304)

25. The bentonite was properly applied during the second set of repairs conducted by Maple Creek. (T. 667-68)

26. The Department and Maple Creek entered into a Consent Order and Agreement on September 11, 2002 that required Maple Creek to reestablish the uses of the Lang pond by October 15, 2002. (T. 40, 691; Lang Ex. 14)

27. Mr. Lang was not permitted to participate in the negotiations of the Consent Order and Agreement. (T. 771)

28. It is possible for pre-mining hydrology to be restored for streams such as those feeding the Lang pond and for the streams to return to near pre-mining levels. (T. 853)

29. At the end of 2002, the Department concluded that the uses of the Lang pond had been reestablished through augmentation but did not conclude that the hydrologic conditions of the pond had been reestablished. (T. 692)

30. Water loss again occurred in the Spring and Summer of 2003. (T. 41, 60)

31. The Department and Maple Creek entered into a First Amendment to Consent Order and Agreement on June 4, 2003 that established a monitoring plan and required Maple Creek to augment the pond with supplemental water so as to keep the pond at a level no lower than ¼ inch below decant. (T. 46, 56, 505, 692-93; Lang Ex. 15)

32. The First Amendment to Consent Order and Agreement also required Maple Creek to provide to the Department a calculation of increased operating and maintenance costs for maintaining the uses of the Lang pond if supplementation were necessary. (Lang Ex. 15)

33. As a practical matter, Maple Creek instructed its contractor to keep the water level at a constant decant of at least one to three gallons per minute. (T. 150-51)

34. In 2003, 759,000 gallons of water were added to the Lang pond; in 2004, 1,020,010 gallons were added. (T. 271)

35. In 2004, Maple Creek installed a one-inch tap from the public water line and a dechlorination ditch in order to supplement the Lang pond. (T. 60)

36. The water that Maple Creek uses to supplement the pond is tap water which is chlorinated. (T. 58)

37. Augmentation with water from the public water line has allowed the Landowners to continue the recreational uses of the property. (T. 76, 520)

38. Both the Department and the United States Environmental Protection Agency recommend not discharging chlorinated water to surface waters. (T. 272-73)

39. Chlorine concentrations of .019 mg/liter have been shown to be toxic to fish. (T. 273)

40. Chlorine can combine with other naturally occurring chemicals to form byproducts that are even more toxic than the chlorine itself. (T. 373-74)

41. Chlorine is a volatile compound; it can volatize and dissipate in the presence of sunlight and turbulence. (T. 510, 515-16)

42. A carbon filtration dechlorination system would cost approximately $14,000 to 17,000 to acquire and install and approximately $4,000 per year to operate. (T. 275-76)

43. The dechlorination system installed by Maple Creek for the water being added to the Lang pond is not a carbon filtration system but, rather, a dechlorination ditch that contains a series of nozzles that spray the water onto a rock table that runs approximately 70 feet to the pond. (T. 279, 514)

44. The Department conducted no chlorine testing at the pond and has never ordered Maple Creek to conduct any long-term chlorine testing at the pond. (T. 521, 526-27)

45. Civil & Environmental Consultants (CEC) conducted chlorine sampling at the pond in August 2004. (T. 987)

46. CEC collected its samples from the pond surface. Colder water being added to the pond would sink to the bottom. (T. 280-81)

47. The concentration of chlorine at the spray nozzle where it entered the raceway was 4.4 mg/liter, at the discharge point to the pond it was .3 to .4 mg/liter, and in the pond itself it was less than .01 mg/liter. (T. 379-80, 991)

48. The maximum contaminant level for trihalomethanes, a byproduct of chlorine, is .08 mg/liter; above this level, trihalomethanes can have potential adverse carcinogenic effects on humans. (T. 996-97)

49. One of the CEC samples in the pond showed trihalomethanes at a level of .004 mg/liter and the rest at .002 mg/liter, all below the toxic level for humans. (T. 997)

50. CEC did not test for haloacidic acids, a toxic byproduct of chlorine. (T. 378, 1010)

51. CEC's testing was done a short period of time after the chlorinated tap water had first been introduced to the pond. (T. 379)

52. The raceway removes only 25% of the chlorine from the tap water being used to augment the pond. (T. 1019)

53. After repairs were made to the pond, the pond was restocked approximately 93 days after being refilled. This would have been sufficient time for the chlorine to dissipate. (T. 527-28)

54. There is high organic content in the pond, which helps to use up the chlorine. (T. 1036)

55. No fish kills have been observed at the pond since the addition of the public water. (T. 163, 286)

56. When the water line to the pond was installed, it was the end of the public water line. Since that time, additional households and businesses have been added to the line, which could lead to a greater concentration of chlorine in the water. (T. 282-84)

57. By letter dated March 17, 2004, the Department set forth what it determined to be the increased cost of operating and maintaining the uses of the Lang pond for which it considered Maple Creek to be responsible. (Lang Ex. 44)

58. This is the first occasion on which the Department had been required to calculate the operation and maintenance costs for a pond whose water supply has been affected due to mining. (T. 780)

59. The Department used a multiplier of "36" in calculating the present value of the future increased costs of maintaining the Lang pond. This multiplier resulted from a settlement entered into by the Department in the case of *Carlson Mining Co. v. DER*, Docket No. 91-547-E, and has been used since that time. (T. 455-57, 781, Comm. Ex. 11)

60. A multiplier of "36" is meant to be a minimum in calculating present value. (T. 475-76, 800)

61. The cost of water added to the pond in 2003 was $3,374.85. (T. 578, 581)

62. There was 27% above average rainfall in 2003. (T. 582)

63. Adjusting the cost of water for the 27% above average rainfall in 2003 results in a real cost of $4,286.06. (T. 583)

64. The real cost of water added to the pond in 2004, adjusting for above average rainfall of 40%, was $6,995.20. (T. 583-84)

65. The rate of interest and rate of inflation tend to move together. In general, the rate of interest is slightly higher than the rate of inflation, but there are exceptions to this. (T. 601, 603)

66. Dr. Kenkel's testimony regarding the appropriate rate of interest to employ in calculating present value was more credible than the testimony presented by the Department and Maple Creek. (T. 574 – 652)

67. The rate of inflation tends to be 1-2 percentage points lower than the rate of interest for a safe and risk-free investment. (T. 638)

68. A realistic rate of return for a safe and risk-free investment is 4.38%. (T. 609)

69. The historical rate of inflation is approximately 3%. (T. 944)

70. The multiplier for calculating present value is 1 divided by the difference between the rate of interest and rate of inflation. (T. 605-06)

71. With a rate of interest of 4.38% and an inflation rate of 3%, the difference is 1.38, resulting in a multiplier of 72. (F.F. 68-70)

DISCUSSION

Standard of Review, Burden of Proof and Issues on Appeal:

The Board's review of Department actions is *de novo*. That is, we make our factual findings based on the evidence of record before us. *Warren Sand & Gravel Co. v. DEP,* 341 A.2d 556, 565 (Pa. Cmwlth. 1978); *Shuey v. DEP,* EHB Docket No. 2002002-269-R (Adjudication issued August 10, 2005), p. 33; *Smedley v. DEP*, 2001 EHB 131.

The burden of proof rests with the party asserting the affirmative of an issue. In the consolidated appeals of the Landowners, the Landowners bear the burden of proving that the requirements set forth in the First Amendment to Consent Order and Agreement and the operation and maintenance calculations set forth in the Department's March 17, 2004 letter are inadequate. 25 Pa. Code § 1021.122 (c) (2). In Maple Creek's appeal, Maple Creek bears the burden of proving that the operation and maintenance costs calculated by the Department are too high. 25 Pa. Code § 1021.122 (a).

The issues involved in this appeal can be summarized as follows:

1) Whether the timeframe set forth in the Mine Subsidence Act for restoring a water supply affected by mining was complied with.

2) Whether Maple Creek provided adequate repairs to the Lang pond.

3) Whether Maple Creek should be required to install a dechlorination system for the water being used to augment the pond.

4) Whether the present value of the operation and maintenance costs computed by the Department as Maple Creek's responsibility is appropriate.

Mootness:

The Department contends that the Landowners' appeal of the First Amendment to Consent Order and Agreement is moot and there is no relief the Board can grant in that matter. The purpose of the First Amendment to Consent Order and Agreement was to determine whether the pond's hydrology had been naturally restored or if artificial measures would need to be employed to maintain the pond's level. There is no dispute among the parties that the pond's hydrology has not been naturally restored, though Maple Creek does argue that it is not unlikely that the pond's hydrology could be restored at some point in the future. Nonetheless, there is no

dispute that at least at the present time the pond must be supplemented with water in order to maintain its uses. There is no concrete evidence in the record to indicate that this will change at any point in the foreseeable future.

The Department agrees that the amount of the operation and maintenance costs for supplementing the pond is in dispute, but points out that this matter is a part of the Landowners' appeal of the Department's March 17, 2004 letter and not the First Amendment to Consent Order and Agreement. As to the issue of the adequacy of the repairs to the pond, the Department asserts that this issue is outside the scope of these appeals since the repairs were completed prior to the parties entering into the First Amendment to Consent Order and Agreement. We disagree, since at the time the Department and Maple Creek entered into the First Amendment to Consent Order and Agreement, the adequacy of the repairs to the pond had not been fully tested. Nonetheless, for the reasons set forth later in this Adjudication, we have not ordered any further repairs to the pond.

The Department also argues that the terms of the First Amendment to Consent Order and Agreement cannot be modified by the Board. As noted earlier, the First Amendment to Consent Order and Agreement required monitoring of the Lang pond and supplementation whenever the pond level dropped more than ¼ inch below the decant elevation. It further provided that if no augmentation of the Lang pond were required before November 30, 2003, the requirements of the agreement would be deemed satisfied, but if supplemental water were needed during the terms of the agreement then Maple Creek was to provide to the Department a calculation of the increased cost of operating and maintaining the uses of the Lang pond, including but not limited to the cost of the supplemental water.

As noted in the findings of fact herein, the pond did require supplemental water in 2003

following the signing of the First Amendment to Consent Order and Agreement; therefore, that portion of the agreement requiring Maple Creek to provide the Department with a calculation of the increased cost of operating and maintaining the uses of the Lang pond was triggered. According to the Department, Maple Creek submitted an estimate of increased operation and maintenance costs to the Department, as did Mr. Lang. (Lang Ex. 44) On March 17, 2004, the Department sent a letter to Maple Creek's chief engineer setting forth its determination of the increased operation and maintenance costs for which it considered Maple Creek to be responsible.

The Department argues that the Board may not modify the terms of the First Amendment to Consent Order and Agreement. We need not reach this issue since our adjudication does not modify any of the terms of the First Amendment to Consent Order and Agreement. Rather, the only item we have modified is the amount of operation and maintenance costs for which Maple Creek is responsible, as set forth by the Department in its letter of March 17, 2004 and as separately appealed by both Maple Creek and the Landowners at EHB Docket Nos. 2004-090-R and 2004-093-R and consolidated at EHB Docket No. 2003-145-R.

Timeliness:

The Landowners assert that the Department failed to comply with Section 5.2 (b) (2) of the Mine Subsidence Act by failing to require that a permanent solution to the problem of the Lang pond be in place within three years from the date of water loss.

Section 5.2 of the Mine Subsidence Act sets forth the Department's duties with regard to securing restoration or replacement of water supplies affected by mining. Under subsection (a), a landowner who believes his water supply has been affected by mining is required to notify the mine operator, who must then conduct an investigation. Pursuant to subsection (b), if the

operator does not restore the water supply or provide an alternate source, the landowner may contact the Department and request an investigation. Within 10 days of such notification, the Department must investigate the claim and make a determination within 45 days of such notification as to whether the diminution in water supply was caused by the underground mining operation. If the Department finds that the diminution in water supply was caused by the underground mining operation, Section 5.2 (b) (2) says the Department:

> . . .shall issue such orders to the mine operator as are necessary to assure compliance with this section. Such orders may include. . .orders requiring the provision of a permanent alternate source where the contamination, diminution or interruption does not abate within three years of the date on which the supply was adversely affected.

52 P.S. § 1406.5b (b) (2).

It is the Landowners' contention that the First Amendment to Consent Order and Agreement and the Department's March 17, 2004 letter setting forth operation and maintenance costs were untimely because they occurred more than three years after the date on which the supply was affected.

The property on which the Lang pond sits has been in the Lang family since 1967 when the Landowners' father purchased it for recreational use on weekends. As children and adults, the Landowners have used the pond for fishing, swimming, boating and ice skating. The lead appellant in this matter, Fred Lang, has lived in Richmond, Virginia since 1990. From 1967 until the time of his move in 1990, Mr. Lang never witnessed a time when the pond did not decant. Following his move to Richmond in 1990, and until 1995, he visited the property often, every six weeks to two months, and from 1995 to 1999, approximately three times a year. During that time, he was not aware of any water loss in the pond. He first learned of water loss in the pond in the winter or spring of 2001, when a neighbor told him the pond had gone dry in the summer.

Mr. Lang personally observed water loss in the pond in the summers of 2001 and 2002.

Neighbors of the Lang property testified that the water level in the pond was affected following mining in 1999. Donald Welsbacher lives 300 yards from the Lang pond. He observed the pond daily from the mid-1980's to 1999 and noted there was no loss of water until after mining had occurred. He recalled one occasion that occurred after the mining when the pond level was so low it caused a stench in the neighboring valley. Another neighbor, Andrew Tumicki, lives approximately 100 feet from the Lang property. He began construction of his home in the mid-1980's and moved onto his property in 1988. From that time period until 1999, he recalls the Lang pond decanting every time he went past it. The first time he witnessed the Lang pond without water was in the fall of 1999.

Based on the observations of his neighbors, Mr. Lang filed a claim of water loss with the Department in April 2001. Following the filing of the claim, the Department took immediate action to conduct an investigation and on November 14, 2001 completed a Water Supply Investigation Report. (Lang Ex. 12) On November 27, 2001, the Department notified Maple Creek that it had determined the water loss of the Lang pond was due to Maple Creek's mining in August 1999.

Following this determination, the Department took a series of steps in an attempt to resolve the problem. Both Mark Frederick, who manages the compliance and monitoring section at the Department's California, Pennsylvania District Office, and Joel Koricich, a senior civil engineer supervisor at the same office, testified extensively as to the measures required by the Department in an attempt to restore the pond. Following the Department's investigation, it required Maple Creek to make repairs to the pond. Implementation of the repairs was delayed because at the time the repair plan was approved, the pond was again naturally maintaining its

uses. An administrative order was issued by the Department on June 26, 2002 ordering Maple Creek to repair the material damage to the pond. The repairs were undertaken in 2002. When the first set of repairs were determined to be inadequate, the Department required the repair work to be redone. When efforts to refill the pond naturally after the repair work was completed were unsuccessful, the Department determined that Maple Creek would need to find an alternate means to restore the pond's uses and to ensure that the uses would be maintained.

During the summer and fall of 2002, Mr. Frederick was in contact with Mr. Lang nearly daily, at times late in the evening from his home, in an attempt to find a resolution to the water problem. (T. 500, 503) Mr. Frederick offered a number of suggestions for augmenting the water in the pond, many of which were rejected by either Maple Creek or Mr. Lang. The record shows that he worked diligently to find a solution to the water loss problem. Ultimately, the Department negotiated a Consent Order and Agreement with Maple Creek that required the company to re-establish the uses of the Lang pond by October 15, 2002 and to conduct monitoring for one year to evaluate the adequacy of the restoration methods.

At the end of 2002, the Department was able to conclude that Maple Creek had temporarily re-established the uses of the Lang pond through augmentation with public water, but it could not conclude that the hydrologic conditions of the pond had been re-established. This led to further negotiations between Maple Creek and the Department, resulting in a June 4, 2003 amendment to the Consent Order and Agreement that required Maple Creek to monitor the pond and to maintain a level no lower than ¼ inch below the decant pipe. Ultimately, Maple Creek simply chose to maintain a constant decant out of the pipe because it was easier to monitor. Following a period of monitoring, the Department calculated the operation and maintenance costs for augmenting the pond that would be borne by Maple Creek and issued its

letter of March 17, 2004.

The Landowners assert that the Department acted in an untimely manner by not requiring a permanent restoration or replacement of the Lang pond water supply within three years of the date on which the water supply was affected, which the evidence shows was August 1999.

We do not read Section 5.2 (b) (2) as requiring that a permanent alternate source be in place within three years of the date the water supply was affected, but, rather, as requiring the Department to take action to require a permanent alternate source where the diminution or contamination to a water supply has not abated within three years. This, the Department has done by ordering Maple Creek to restore or replace the water supply for the Lang pond both in its Consent Order and Agreement and amendment thereto and in its March 17, 2004 letter requiring the payment of operation and maintenance costs to the Landowners.

Moreover, a review of the actions taken by the Department leads us to conclude that the Department acted promptly and efficiently in investigating the Landowners' claim of water loss and attempting to find a permanent solution to the problem. The testimony of Mr. Frederick and Mr. Koricich demonstrates the extraordinary lengths to which the Department went in attempting to find a resolution to the problem. The Department ordered repair work; the repairs were not adequate. The Department ordered the repairs to be re-done; the repairs did not prevent further water loss. The Department ordered that water be added to the pond, and there was dispute among all the parties as to the best means to accomplish this. Finally, a means of supplementing the pond was agreed upon by the Department and Maple Creek, and the Department ordered Maple Creek to pay the increased cost of operation and maintenance resulting from the need to augment the pond. The testimony of Mr. Frederick and Mr. Koricich shows that they are two very hard-working individuals at the Department who put an extraordinary amount of time and

effort into resolving a problem that appeared to have no solution. The fact that they were able to arrive at a workable solution in the timeframe in which they accomplished it is commendable.

This case is especially difficult because there are competing interests, all of which have merit. Landowners whose water supply is affected by mining are entitled to the replacement or restoration of the water supply and should not bear the burden of any increased cost of operating or maintaining it. By the same token, a mining company is entitled to conduct its mining operations where it is legally authorized to do so. When subsidence occurs as a result of the mining, the Mine Subsidence Act provides remedies that must be followed in order to make landowners whole. It is the role of the Department to enforce the provisions of the Mine Subsidence Act and ensure that the remedies it provides are followed.

We understand the Landowners' frustration. They simply want the matter resolved. That is understandable and it is also a requirement of the statute. However, we do not find that the Department failed to comply with Section 5.2 (b) (2). As outlined above, we find that the Department acted promptly and efficiently in trying to seek a permanent solution to the Landowners' water loss. Moreover, the Department could not be required to take any action until it learned of the claim of water loss, which was not until April 2001, more than one and one-half years after the water supply was affected.

Finally, the Landowners assert that they should have been allowed to be a part of the negotiation process for the Consent Order and Agreement and its amendment. The Department acknowledged that its negotiations were solely with Maple Creek and that is the customary procedure for conducting negotiations in the case of a claim of water loss due to mining. The Landowners' contention that they should have been allowed to participate in the negotiations involving the future of their pond seems to be a reasonable request, and we encourage the

Department to consider including landowners in the negotiation process in future water loss cases.

Reopening of Record

The Landowners seek to reopen the record to add evidence that water had to be added to the pond during the Summer of 2005. This evidence could not have been presented at the trial which took place in March of 2005. Maple Creek and the Department oppose a reopening of the record, arguing that the standards for reopening the record have not been met.

The criteria for reopening the record in a Board proceeding are set forth at 25 Pa. Code § 1021.133. The record may be reopened upon the basis of recently discovered evidence when *all* of the following criteria are met:

> (1) Evidence has been discovered which would conclusively establish a material fact of the case or would contradict a material fact which had been assumed or stipulated by the parties to be true.
>
> (2) The evidence is discovered after the close of the record and could not have been discovered earlier with the exercise of due diligence.
>
> (3) The evidence is not cumulative.

25 Pa. Code § 1021.133 (b).

The record may also be reopened to consider evidence that has become material as a result of a change in legal authority. 25 Pa. Code § 1021.133 (c).

We find that the evidence the Landowners seek to add to the record is simply cumulative. The record already contains evidence of the amount of water that was needed to augment the pond in 2003 and 2004. None of the proferred new evidence will establish a material fact of the case, nor will it contradict a material fact that had been assumed or stipulated to be true. It simply provides us with more data. As both the Department and Maple Creek point out, the

condition that was the subject of the appeal continues to exist after the trial closes, and additional data can continue to be collected. This is not automatically grounds for reopening the record. By its very nature, such data is likely to vary somewhat from day to day, month to month or year to year. Our rule allows the record to be reopened to remedy mistakes, not simply to add more evidence. In a case such as this, were we to allow the record to be reopened simply to add more data as it continued to be collected, we could never reach a conclusion.

Therefore, we must deny the Landowners' petition to reopen the record.

Damage to Pond:

A portion of the Lang pond was damaged due to subsidence. Maple Creek's first effort at repairing the pond was rejected by the Department, and the Department directed Maple Creek to drain the pond a second time and re-do the repair work. According to the Landowners, the second set of repairs also was not adequate. According to the Landowners' expert, Troy Scott, a civil engineer with American Geosciences, Inc., the repair work done by Maple Creek's contractor did not adequately restore the pond. In his opinion, the work performed by Maple Creek's contractor did not repair a large enough portion of the dam to reduce permeability and leakage. He also criticized the manner in which the contractor applied bentonite to the bottom of the pond. Rather than incorporating the bentonite into the soil, Mr. Scott testified that the contractor merely applied it to the surface, thereby allowing it to wash away. He also felt that a certain portion of the pond should have been excavated and soil added and that repairs should have been integrated into the undamaged portion of the dam breastwork.

According to the Department's geologic specialist, Joseph Matyus, the second set of repairs to the pond were done properly. According to Mr. Matyus, the repairs to the breastwork were "keyed in," i.e., some of the new material was placed into the existing breastwork. Mr.

Matyus also testified that the bentonite was correctly applied. He explained that bentonite acts as a "bandage," applying an impermeable layer so the damaged area can heal itself. In response to cross examination, he agreed that the pond is leaking, but later pointed out that it took a long time to drain the pond to do the repair work, which means the pond is not acting like a sieve. He felt that the fact the pond needs water during the drier summer months may simply be due to diminished stream flow. He also testified that pond leakage is a natural phenomenon.

While the record indicates that Maple Creek's contractor performed inadequate repairs to the pond when it first undertook the task, we are satisfied that the Department adequately supervised the second set of repair work. The Department was not hesitant to ask the contractor to drain the pond a second time and do an entirely new set of repairs when it felt the work was not done properly the first time. Although the evidence indicates that the pond is still leaking, we are not convinced that requiring the draining of the pond yet a third time to re-do the repairs will resolve the problem. While the testimony of the Landowner's expert suggests that the repair work performed by Maple Creek's contractor could have been more extensive, there is no assurance that the additional work would prevent the need for continued augmentation of the pond. Therefore, we find there is insufficient basis for ordering that the pond be drained and repairs performed a third time.

Chlorination:

In order to maintain the level of the pond at no lower than ¼ inch below the decant pipe, Maple Creek has had to supplement the pond with water during certain months. The water that it uses to supplement the pond is potable water obtained through a one-inch tap and is distributed by the Pennsylvania American Water Company. The water is discharged to a rock table through a series of spray nozzles and travels approximately 70 feet to the pond. Because it is tap water,

the water contains a certain level of chlorine. It is the contention of the Landowners that Maple Creek should be required to install a dechlorination system in order to remove the chlorine from the water before it is added to the pond. The Landowners are concerned about the effect of chlorine on the fish in the pond, as well as its effect on human use of the pond.

There is no dispute that chlorine can be toxic to fish and other organic life. In addition, according to the testimony of the Landowners' expert, Harold Brundage, an environmental biologist, chlorine can combine with other naturally occurring chemicals to form byproducts that are more toxic than the chlorine itself. In his opinion, the testing done by Civil & Environmental Consultants (CEC) on behalf of Maple Creek was not sufficient because it did not analyze for byproducts of chlorine. He was also critical of CEC's testing because samples were not taken from the bottom of the pond or in the morning, when he would expect chlorine levels to be highest. In addition, the testing was done only after chlorine had been added for a short period of time. He feels that the system currently in place is not effective at sufficiently reducing the level of chlorine from the water added to the pond. In his opinion, the fish community is diminished in quantity and quality, which he believes is a reflection of the quality of water being added to the pond.

In contrast, Maple Creek's expert, Dr. James Mudge, who is the vice-president of ecological services for CEC, testified that the level of chlorine in the water being added to the pond is not causing a problem. CEC's testing showed residual chlorine concentrations of 4.4 mg per liter at the spray nozzle where the water first enters the raceway, .3 mg per liter at the raceway before entering the pond, and less than .01 mg per liter in the pond itself. (T. 991) His testing shows the level of chlorine in the pond to be below the acute and chronic standards set forth in Pennsylvania's water quality regulations at 25 Pa. Code Chapter 93. In addition, he did

sample for trihalomethane, a byproduct of chlorine that can have potential adverse carcinogenic effects on humans. The maximum contaminant level for trihalomethane under EPA and Pennsylvania standards is .08 mg per liter. (T. 996-97) All of the samples in the pond were below .002 mg per liter, with one exception that was .004 mg per liter. (T. 997)

In response to Mr. Brundage's criticism of his failure to sample at the bottom of the pond, Dr. Mudge responded that due to the fact it is a shallow pond, there would be little or no stratification causing different readings at the bottom and surface. In response to Mr. Brundage's criticism of his failure to sample in the morning, Dr. Mudge did not agree that time of day would make a significant difference in sampling. In his opinion, if chlorine is going to have a toxic effect, that would not just occur in the morning.

Dr. Mudge did a qualitative fishery survey and observed no anomalies. He also found that the types of invertebrates in the pond were typical of other Pennsylvania ponds where potable water was not being added. In his opinion, the level of chlorine entering the pond is having no adverse effect on either human or aquatic life. While he agrees that some level of chlorine is entering the pond, he believes that it is being quickly used up by the amount of vegetation in the pond. He describes the Lang pond as being eutropic, which means it contains a profuse growth of vegetation. (T. 1036) He noted that surface waters generally do have a chlorine demand which comes from the organic material in the pond. (T. 1037)

The Department's Mr. Frederick also testified that he did not agree with the Landowners' objections regarding chlorine. In his opinion, chlorine volatizes and dissipates quickly. He acknowledged, however, that the Department did no testing to assess the impact of chlorine on the Lang pond, nor did it order Maple Creek to engage in any long term testing.

According to the testimony of the Landowners' expert, Mr. Scott, chlorine concentrations of .019 mg per liter have been shown to be toxic to fish. (T. 273) He further testified that guidance documents from both the Department and the U.S. Environmental Protection Agency do not recommend discharging chlorinated water to surface waters. (T. 272-73) His recommendation would be to install a carbon filtration system for the supplemental water being added to the pond. According to him, the cost would be approximately $14,000 to $17,000 for purchase and installation and an annual operating cost of approximately $4,000. (T. 275-76)

The record shows that there have been no fish kills at the pond as a result of the chlorine. It is the contention of the Landowners, however, that no fish kills occurred after the pond was drained and refilled because the water was allowed to sit in the pond for approximately 93 days before the pond was restocked. This gave the chlorine sufficient time to volatize and dissipate. There is no indication, however, that any fish kills have occurred subsequent to that time after the pond has been augmented with tap water.

The burden of proof on this issue is on the Landowners. They must meet this burden by a preponderance of the evidence. To establish one's case by a "preponderance of the evidence" means that "the evidence in favor of the proposition must be greater than that opposed to it. . . 'It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established.'" *Shuey v. DEP*, EHB Docket No. 2002-269-R (Adjudication issued August 10, 2005), *slip op.* at 52; *Noll v. DEP*, EHB Docket No. 2003-131-K (Adjudication issued May 20, 2005), *slip op.* at 11 (citing *Bethenergy Mines, Inc. v. DER*, 1994 EHB 925, 975 (quoting *Midway Sewerage Authority v. DER,* 1991 EHB 1445, 1476)).

Although the Landowners have established that chlorine can be harmful to aquatic life at certain levels, they have not shown that such levels exist in the Lang pond. The Landowners

provided no testing to show there were harmful levels of chlorine in the pond. Nor have they demonstrated any harm to fish or other aquatic life. The evidence indicates that the addition of tap water to the pond is not causing harmful levels of chlorine to exist in the pond. Based on this evidence, we find that there is no basis for ordering Maple Creek to install a carbon filtration dechlorination system for the pond or to pay the cost of operating such a system.

Although there appears to have been no toxic effect on the fish to date, the Landowners raise an issue that years of augmentation with chlorinated water could potentially cause a problem. They point out that the Pennsylvania American Water Company line supplying the pond with water has been expanded to include additional households and businesses, which could increase the amount of chlorine in the water. A higher level of chlorine in the tap water could potentially lead to higher chlorine levels in the pond. Though there is no evidence of this at the present time, we will dismiss this portion of the Landowners' claim without prejudice. They are free to raise this issue with the Department in the future if chlorine levels in the pond are shown to be causing a threat to human or aquatic life.

Calculation of Present Value:

Maple Creek is liable for the increased cost of operating and maintaining the Lang pond. 52 P.S. §§ 1406.5a and 1406.5b, and 25 Pa. Code § 89.145a (f) (1) (v).

There are two components to reducing the future costs of operating and maintaining the Lang pond to their present value. The first component is the amount of water that will be necessary; the second component is the cost. Calculating the present value of what it will cost to supplement the pond involves two variables: the rate of inflation for water and the rate of interest. The parties had varying methods for calculating each of these components. We agree with the Department and Maple Creek's calculations with regard to the *amount of water* that is

likely to be needed for future supplementation of the pond; however, we find the Landowners' method for calculating *present value* to be more persuasive. We examine each of the components below.

Amount of Water:

The Landowners presented the testimony of Troy Scott, a civil engineer with American Geosciences, Inc., regarding the amount of supplemental water that would be necessary to maintain the Lang pond at its pre-mining use. In performing his calculations, Mr. Scott isolated the pond and chose a time when there was no flow from the tributaries that feed the pond, no rainfall or runoff and no decant out of the pond. (T. 250-51) He calculated the amount of water that was lost from the pond during the critical, drier months to be approximately 62,000 gallons per day or 43 gallons per minute. (T. 251-52)

Mr. Scott calculated there to be 119 days of dry tributary conditions. (T. 252) This was the number of days there was no flow in 2002, which, based on climatological data, was representative of normal status for the Lang pond since there were no drought warnings or emergencies. In arriving at the number of 119, Mr. Scott looked only at days where there was no flow, not those where there was minimal flow. Therefore, if supplementation of approximately 62,000 gallons were needed for 119 days, that would result in annual amount of 7.36 million gallons.

The Landowners point out that the Department's data shows the pre-mining flow of the tributaries feeding the Lang pond to be 655 gallons per minute. (T. 252-53) According to Maple Creek's Phil Handte, the pre-mining flow was approximately 6 % of that amount during the drier months of the year, which would be approximately 39.3 gallons per minute. (T. 253) Mr. Scott testified that even that lower amount would be sufficient to maintain the use of the Lang pond.

Therefore, if a flow of 39.3 gallons per minute were needed for 119 days of the year, approximately 6.73 million gallons would be needed each year.

In contrast to Mr. Scott's calculations, the Department and Maple Creek looked at the volume of water added to the pond and adjusted it based on the amount of precipitation that was above normal. In addition, rather than looking at the year as a whole, Maple Creek focused on the months when supplemental water was added. Mr. Scott was critical of this approach because in his opinion, the monitoring data available to the Department and Maple Creek was not detailed enough to accomplish their method of calculation. Mr. Scott also criticized the failure to take the entire watershed into consideration. In his opinion, the Department and Maple Creek's approach took into consideration only the amount of direct precipitation falling into the pond but failed to consider the amount of runoff the pond would also receive from the watershed.

The Department's Mr. Koricich did not agree with Mr. Scott's method of calculating the amount of supplemental water added to the pond because he felt that approach did not represent reality since it assumed no inflow or outflow. Mr. Koricich explained that his model was more realistic because it took into account the only component that could be directly controlled, which was outflow from the pond. Further, whereas Mr. Scott's model assumed a steady flow rate, Mr. Koricich noted that the actual flow rate varies. He pointed out that whereas Mr. Scott's estimates had produced a figure of 7.36 million gallons, the actual water usage in 2003 was only 760,000 gallons.

Maple Creek presented the testimony of William Wright, a senior geologist with Moody and Associates. In his opinion, there is a significant likelihood that the streams will naturally restore to their pre-mining levels. (T. 854) It is also his opinion that, given the nature and condition of the Lang pond, it is not likely that the pond decanted everyday as the Landowners

assert but, rather, this would have been determined by rainfall. (T. 856) Mr. Wright felt that the one inch loss in pond surface that occurred in 2002 was due to the pond being refilled and using some of the water to re-saturate the banks and surrounding wetland area. (T. 857-58) He believes the pond's uses were restored in November 2003 and points out that water had to be added on fewer than 40 occasions from June through October 2004. (T. 859-60)

Mr. Wright calculated that the amount of water needed in 2003 was 800,000 gallons, which takes into account the actual amount of water used to supplement the pond and adjusting it for above normal rainfall during the period from August to November 2003, which is the only time that year that water had to be added. He also calculated there were 11 potential days in July 2003 when water might have been needed had it not rained. Taking the additional days in July into consideration, Mr. Wright estimated 1.4 million gallons of water would have been necessary in 2003 had there not been above average rainfall. The difference between his calculations and those of Joel Koricich was that while Mr. Koricich looked at the rainfall amount for the entire year, Mr. Wright looked only at rainfall for the drier months. (T. 866) Following similar calculations for 2004, he determined that 1.5 million gallons would have been needed to supplement the pond. (T. 866-67) Mr. Wright does not believe this amount of water will be needed in the future, however, because it is his opinion there will be an increase in the tributary flow over time as the hydrology of the area restores itself.

Mr. Wright further explained that the figures arrived at by him and the Department are conservative because they do not take into account evaporation and time periods when the pond would otherwise not decant. His figures and those of the Department estimate the amount necessary to maintain the pond at constant decant. He also felt that Mr. Scott's calculations did

not take into account that with the pond being maintained at decant, any excess water falling onto the pond in the form of precipitation would have flowed out of the pond.

We note that the requirement of the Consent Order negotiated by Maple Creek and the Department was that Maple Creek maintain the pond at a level no less than ¼ inch below decant. Maple Creek's chief engineer, Robert Kudlawiec, testified that he instructed Phil Handte to maintain the pond at a constant decant of one to three gallons per minute because the ¼ inch measurement was too difficult to maintain. (T. 921) This, then, kept the water level at an even higher level than required by the Department.

In summary, the Landowners assert that in excess of 6 million gallons of water is needed each year to supplement the Lang pond, while the Department contends that 760,000 gallons is more accurate. Maple Creek concurs with the Department's calculations. Because the Department's estimation of annual water usage was based on actual usage, we find its figures to be credible.

Cost of Water and Calculation of Present Value:

The next component in calculating the present value is the cost of the water, which as we have stated, is determined by two things: the rate of inflation and the interest rate (or investment rate). The approaches taken by the parties in calculating these figures varied greatly.

Maple Creek presented the testimony of William Morrow, a CPA with Smithfield Trust Company. Mr. Morrow determined that the appropriate rate of inflation for calculating the present value of a trust in perpetuity is 3 % based on historical data. (T. 944) He further opined that the appropriate rate of return for calculating the present value of a trust in perpetuity is 9.56 %. (T. 946) He testified that a split of 70 % stocks and 30 % bonds would be likely to produce a yield of 10.8 %, but chose what he considered to be a more conservative rate of 9.56%. (T. 947-

48) Subtracting a 3 % inflation rate from an investment rate of 9.56 % produces a real rate of interest of 6.56 %. He acknowledged that his calculations using a gross interest rate of 9.56 % are based on the assumption that the investor would either have a professional handle the investing or have the expertise to do it himself.

The Landowners presented the testimony of Dr. James Kenkel, a professor of economics at the University of Pittsburgh. Dr. Kenkel took a much more conservative approach in his calculations than did Mr. Morrow. First, in calculating the rate of inflation, he looked solely at the inflation rate for water, not at the general consumer price index. To calculate the rate of inflation for water, Dr. Kenkel looked at the increase in the cost of water from 2003 to 2004. This turned out to be 8 %. (T. 609-10) Dr. Kenkel felt this rate of inflation was high and did not expect it to continue.

To calculate the rate of investment, Dr. Kenkel looked at the current rate for 10-year Treasury securities, which he testified were the best and safest investment. That rate is 4.38 %. (T. 609) He did not agree with Mr. Morrow's testimony that a 70/30 stock/bond split was a safe investment in these circumstances because that involved risk. Dr. Kenkel testified that his calculation was based on his understanding that the victim in a case for damages should not have to bear the risk; rather, the calculation of present value in such a case should assume a fairly risk-free investment.

Dr. Kenkel noted that, in general, interest rates tend to be a bit higher than the rate of inflation, though this was not true for water from 2003 to 2004. (T. 601-03) In general, however, that is the case. Because it is difficult to predict the exact rate of interest or inflation from year to year, Dr. Kenkel testified that a more realistic approach is to calculate the difference between each of the rates. He testified that the difference between the rate of return on treasury

securities and the consumer price index has been slightly over 2.5% over a 50-year period (T. 602), but opined that the difference between the interest rate and inflation rate for water would be in the vicinity of 1-2%. (T. 613, 638) Assuming an interest rate of 4.38 % and an inflation rate of 3.5 %, Dr. Kenkel arrived at a present value of $836,565.41 for the cost of the water. (T. 614)

In contrast to Dr. Kenkel and Mr. Morrow's methods for calculating present value, the Department uses what is known as a "multiplier." With this method, the Department calculated the actual cost of water needed to supplement the Lang pond in 2003 and multiplied it by 36. This figure was then adjusted for above average rainfall in 2003, resulting in a sum of $154,298.14. (T. 711) The same calculations were performed for 2004, resulting in a sum of $251,827.13. (T. 715-16)

The Department's Chief of Underground Mining, Harold Miller, explained the rationale behind the multiplier of "36." Mr. Miller stated that the figure of "36" as a multiplier has been used historically by the district mining offices and was derived as part of a settlement in a prior case, *Carlson Mining Co. v. DER*, Docket No. 91-547-E. A settlement was entered into in that case in response to an adjudication issued by the Board on October 29, 1992.[3] That case dealt with an appeal by a coal mine operator from an order of the Department directing it to provide for the operation and maintenance of a replacement water supply for a homeowner. The Board found there was no evidence in the record that the fund required to be paid by the mining company would be sufficient to cover reasonable projections for inflation or unexpected operating and maintenance costs and remanded the matter to the Department to address the question of the funding mechanism.

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[3] *Carlson Mining Co. v. DER*, 1992 EHB 1401.

The remand resulted in the Department filing a Submission of Funding Mechanism, which was approved by the Board in an Order dated August 3, 1993. (Comm. Ex. 12) The Submission of Funding Mechanism explains the derivation of the multiplier of "36." In its calculations in the *Carlson Mining* matter, the Department appears to have used an interest rate of 8 % and an inflation rate of 5 % based on what were determined at the time to be historical averages. Using these percentages, the Department arrived at a present value multiplier of 36. In other words, the Department concluded that the total amount required would be 36 multiplied by the annual cost. (Comm. Ex. 12, pages 11-12)

For cases dealing with water supply replacement since *Carlson Mining* the Department has utilized the multiplier of 36. The Department does not take into account the current rate of inflation or interest but, rather, simply multiplies the operation and maintenance costs by 36 to arrive at the present value of operation and maintenance costs expected to continue in perpetuity. (T. 480) Mr. Miller testified that the 36 multiplier is meant to be a minimum number. (T. 475-76)

In reviewing the calculations of all the parties, we find the manner of calculating present value that was employed by Dr. Kenkel to be more persuasive than the methods used by the other parties in this particular case. With regard to the calculation of interest that the Landowners may expect to receive on any lump sum award given to them at this time, we agree that the Landowners should not have to bear the risk of the market's fluctuations. In *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), cited by the Landowners, the U.S. Supreme Court addressed the issue of calculating the present value of damages for future loss. Although that case dealt with lost wages, the portion of the Court's discussion dealing with the amount of

interest that could expect to be received on a lump sum damage award is relevant to our discussion here.

In *Jones & Laughlin*, the Court held as follows: "...in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award." *Id.* at 536-37 (quoting *Chesapeake & Ohio R. Co.* v. *Kelly*, 241 U.S. 485, 490, n. 20 (1916). The Court further held as follows:

> The discount rate should be based on the rate of interest that would be earned on "the best and safest investments." Once it is assumed that the injured worker would definitely have worked for a specific term of years, he is entitled to a risk-free stream of future income to replace his lost wages; therefore, the discount rate should not reflect the market's premium for investors who are willing to accept some risk of default.

462 U.S. at 537 (quoting *Chesapeake & Ohio*, 241 U.S. at 491).

We agree that the Landowners should not be required to hire a professional financial advisor in order to get the rate of return proposed by Maple Creek. This would require the Landowners to expend additional money associated with the fees for the professional management of the account, which were not taken into account in Maple Creek's calculations. Even more so, it would place additional burden on the Landowners to assume the risk of whether such returns are actually earned on their investment. If there is any burden to be borne, it must be on the party that caused the damage and not on the recipient.

Likewise, whereas the calculations performed by the Department that involved the use of the multiplier of "36" may have been appropriate in the *Carlson Mining* case, that does not necessarily make it appropriate in every case where the present value of damages is calculated. Between the two sets of calculations, the Landowners provided a more convincing explanation of

why their calculations were more appropriate in this particular case. Moreover, the Department acknowledged that the sum calculated by use of the "36" multiplier was the *minimum* sum to be awarded. Based on the testimony of all the parties, we find that the calculations performed by Dr. Kenkel provide a more accurate determination of the interest the Landowners may expect to receive on their damage award.

As to the calculation of the rate of inflation for water, we agree with Dr. Kenkel that a practical approach is to calculate the difference between the inflation rate and interest rate. However, whereas Dr. Kenkel testified that he would expect the difference between the interest rate and inflation rate of water to be in the vicinity of 1-2 percentage points, when performing his present value calculation at trial, the Landowners' counsel asked Dr. Kenkel to assume an inflation rate of 3.5%, which was a difference of only .88 from the assumed rate of interest of 4.38%. When questioned about this apparent inconsistency on cross examination, Dr. Kenkel testified that "a reasonable difference for the interest rate and the inflation rate is somewhere between say .75 and 1 ½ to 2." (T. 639) However, given all of Dr. Kenkel's testimony as a whole, a difference of .88 does not appear to be adequate. Rather, a difference of between 1-2 percentage points appears to be more appropriate. Given Mr. Morrow's testimony that the historical data shows the inflation rate in this country to be approximately 3% and Dr. Kenkel's testimony that he would expect the inflation rate to be 1-2 points lower than the interest rate, which he assumed to be 4.38%, we find that an appropriate difference between the rate of interest and rate of inflation is 1.38.

Recalculation of Present Value:

Putting his formula into a multiplier formula like that used by the Department, Dr. Kenkel arrived at a multiplier of approximately "113." (T. 614) The multiplier is developed by

dividing the number 1 by the difference between the interest rate and the inflation rate. In Dr. Kenkel's case, he assumed a difference of .88. In comparison, the Department's multiplier of 36 was based on a difference of approximately 3 percentage points. Maple Creek arrived at a multiplier of 15 based on a much larger spread between the rate of inflation and expected rate of return. As noted earlier, we are most persuaded by Dr. Kenkel's testimony regarding calculation of present value. However, we disagree with his assumption of only a .88 difference between the rate of interest and inflation and we find that, based on his own testimony, a difference of 1.38 is more realistic. A difference of 1.38 results in a multiplier of 72 (1 divided by 1.38). To calculate the present value of maintaining the pond in perpetuity, this figure must be multiplied with the annual cost of supplementing the pond.

The cost of supplementing the pond in 2003 was $3,374.85. (T. 710) Adjusting this figure for 27% above average rainfall in 2003 (T. 711), as per Mr. Koricich's calculations, gives an adjusted figure of $4,286.06 as the annual cost. The cost of supplementing the pond in 2004 was $4,996.57. (T. 715) Adjusting this figure for 40% above average rainfall in 2004, again as per Mr. Koricich's calculations, gives an adjusted figure of $6,995.20 as the annual cost. To arrive at an average annual cost, Mr. Koricich averaged the 2003 and 2004 costs together. We agree with Mr. Koricich's approach, and in doing so arrive at an average annual cost of $5,640.63.[4]

[4] Dr. Kenkel testified that it was not appropriate to average the two figures since costs would be expected to rise from one year to the next. We agree with Dr. Kenkel that averaging the costs for 2003 and 2004 is not likely to give an accurate accounting of 2005's costs, since they are likely to be higher than those in 2004; however, our purpose in averaging the costs for 2003 and 2004 is not to determine what costs are likely to be for 2005 or any subsequent year – the increase in costs from year to year is taken into consideration in the present value formula. Rather, we are simply trying to determine an average annual cost, which must then be multiplied by the multiplier of "72."

Multiplying the average annual cost of $5,640.63 by the multiplier of 72 gives a present value of $406,125.36. Therefore, we shall modify the directive of the Department in its March 17, 2004 letter and require Maple Creek to pay the sum of $406,125.36 in compensation to the Landowners for the increased cost of operating and maintaining their pond.

The Department points out in its post hearing brief that the purpose of providing for increased operation and maintenance costs associated with a restored or replaced water supply is to compensate the owner for any increased costs, not to provide a windfall to the owner of the water supply. We agree. The water supply owner who has suffered a loss and has thereby incurred increased operation and maintenance costs must be compensated for that loss and increase in costs. We believe that the amount calculated in this adjudication does that.

As the Department points out further, a present value lump sum payment to the injured water supply owner is one option for a mine operator to satisfy its obligation to provide for increased operation and maintenance costs under 25 Pa. Code § 89.145a (f) (iv). It is not the only option. Mr. Koricich testified that the mine operator may also establish a financial vehicle that would yield the annual cost to take care of the operation and maintenance on a yearly basis. We would assume that a trust fund or some other appropriate financial vehicle set up to provide for annual operation and maintenance costs would meet this requirement.

CONCLUSIONS OF LAW

1. The Board's review in this matter is *de novo*. *Warren Sand & Gravel Co. v. DEP,* 341 A.2d 556, 565 (Pa. Cmwlth. 1978); *Shuey v. DEP,* EHB Docket No. 2002002-269-R (Adjudication issued August 10, 2005), p. 33; *Smedley v. DEP*, 2001 EHB 131.

2. The Landowners and Maple Creek bear the burden of proof in their respective appeals. 25 Pa. Code § 1021.122 (a) and (c) (2).

3. The Department acted in a timely manner pursuant to Section 5.2 (b) (2) of the Mine Subsidence Act, 52 P.S. § 1406.5b (b) (2).

4. The criteria for reopening the record in this matter pursuant to 25 Pa. Code § 1021.133 have not been met.

5. If underground mining affects a water supply, the mine operator must restore or replace the affected water supply in an adequate quantity and quality so that the pre-mining uses can be maintained. 52 P.S. § 1406.5b.

6. If the operating and maintenance costs of the restored or replaced water supply are more than a de minimus cost increase, the mine operator shall provide for the permanent payment of the increased operating and maintenance costs of the restored or replaced water supply. 25 Pa. Code § 89.145a (f) (1) (v).

7. The Department acted reasonably and in conformance with the law when it concluded that the natural recharge of the Lang pond had not been restored and ordered Maple Creek to take action to restore the uses of the pond.

8. The Department acted reasonably and in conformance with the law when it determined that the uses of the pond could be restored through augmentation of the water supply.

9. The record does not demonstrate by a preponderance of the evidence that adding chlorinated tap water to the pond provides a detrimental effect on fish or on humans using the pond.

10. The Department acted reasonably and in conformance with the law when it required Maple Creek to provide for increased operation and maintenance costs for the pond on a permanent basis.

11. The Department reasonably calculated the amount of water needed to supplement the pond on a yearly basis and the annual cost of the water.

12. We find the testimony of the Landowners' expert witness, Dr. James Kenkel, regarding the method of calculating present value to be more credible than that presented by the Department and Maple Creek.

13. The present value of the increased operation and maintenance costs for the Lang pond in perpetuity is $406,125.36 and the Department's directive to Maple Creek shall be adjusted to reflect this amount.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRED W. LANG, JR., JOYCE E. SCHUPING, DELORES HELQUIST and SHERRY L. WISSMAN	:	
v.	:	**EHB Docket No. 2003-145-R**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and MAPLE CREEK MINING INC., Permittee	:	

ORDER

AND NOW, this 12th day of January, 2006, the appeal is **granted in part and dismissed in part** as follows:

1. The Landowners' petition to reopen the record is **denied.**
2. That portion of the appeal seeking further repairs to the pond is **denied.**
3. That portion of the appeal seeking to require Maple Creek to install a carbon filtration dechlorination system is **denied.**
4. That portion of the appeal seeking to amend the amount of operation and maintenance fees required to be paid by Maple Creek is **granted in part.**
5. Pursuant to the Mine Subsidence Act and the regulations at 25 Pa. Code § 89.145a (f) (1) (v), Maple Creek is liable for the increased operation and maintenance costs of restoring the Lang pond, the present value of which is $406,125.36.
6. In accordance with the law as set forth in this adjudication, in order to meet its obligation to provide for the increased operation and maintenance costs of the Lang pond on a permanent basis, on or before **February 13, 2006** Maple Creek is ordered

to do one of the following:

(a) make a one-time lump sum payment to the Landowners in the amount of $406,125.36 which represents the present value of the annualized increased operation and maintenance costs, with notice to the Board that such payment has been made, or

(b) develop a financial vehicle, acceptable to the Board, that will compensate the Landowners for the increased yearly operation and maintenance costs of the Lang pond, adjusted for inflation, on a permanent basis.

7. Jurisdiction is retained.

ENVIRONMENTAL HEARING BOARD

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GEORGE J. MILLER
Administrative Law Judge
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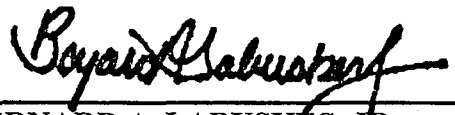
THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 2003-145-R

MICHELLE A. COLEMAN
Administrative Law Judge
Member



BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: January 12, 2006

c: **DEP Bureau of Litigation:**
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SECRETARY TO THE BOARD

DENNIS GROCE, NATIONAL PARKS CONSERVATION ASSOCIATION, GROUP AGAINST SMOG AND POLLUTION and PHIL COLEMAN	:	
v.	:	**EHB Docket No. 2005-246-R**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and WELLINGTON DEVELOPMENT – WDYT, LLC, Permittee	:	**Issued: January 19, 2006**

OPINION AND ORDER ON APPELLANTS' MOTION TO MODIFY THE DISCOVERY, PRE-HEARING AND HEARING SCHEDULE

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Pennsylvania Environmental Hearing Board denies in part and grants in part the Appellants' Motion to Modify the Discovery, Pre-Hearing and Hearing Schedule established by the Board by its Order of November 15, 2005. Appellants have not presented compelling reasons why the current schedule should be materially extended and the trial postponed to some unnamed future dates. The Permittee has set forth compelling reasons why it would be materially and substantially harmed by a further delay in the pre-trial and trial schedule. The

mere change in lead trial counsel, approximately five and one-half months before the scheduled trial, without more, does not warrant such extensions in the schedule. The Board's review of the facts as set forth in the parties' papers leads to the conclusion that all parties have adequate time to conduct any further discovery, prepare expert reports and pre-trial motions, and otherwise prepare for the trial. The Board has slightly adjusted the discovery schedule and added additional hearing dates.

OPINION

Presently before the Pennsylvania Environmental Hearing Board is the Appellants' Motion to Modify the Discovery, Pre-Hearing and Hearing Schedule (Motion to Extend). Appellants seek extensions to the dates earlier extended by the Board by our recent Order of November 15, 2005. They also seek additional trial dates. The Motion to extend is opposed by the Pennsylvania Department of Environmental Protection and vigorously opposed by the Permittee.

Appellants focus on the complexity of the issues, the recent change in lead counsel, and the busy professional and personal schedules of their counsel as the reasons supporting their Motion to Extend. The Motion to Extend proposes specific extensions to most of the pre-trial deadlines but fails to list new trial dates for the merits trial scheduled to begin on June 5, 2006.

Permittee argues that Appellants have not advanced a good reason to extend the carefully crafted pre-trial and trial schedule set forth by the Board. Permittee contends that

even though Appellants' former lead counsel has withdrawn from the case, Appellants' current counsel have sufficient time to prepare their case for trial. Moreover, Permittee argues strenuously that extending the pre-trial dates and postponing the trial will cause it dire financial problems.

As we stated in our Opinion of November 15, 2005, it is imperative "that the Board balance the competing interests of the parties in order to assure that the issues are resolved expeditiously but assuring that adequate time is allotted to prepare for hearing." *Groce et al. v. Department of Environmental Protection and Wellington Development-WDYT, LLC* (Opinion issued November 15, 2005, page 7). After carefully reviewing the respective positions of the parties we see no sufficient reasons to postpone the trial or substantially extend the pre-trial deadlines. We agree with Permittee that Appellants have not pointed to any conflicting hearings or trials but simply set forth other professional obligations of counsel that appear to be neither unique nor crushing. We also agree with Judge (now Chief Judge) Krancer's statement in *McCool v. Department of Environmental Protection*, 2000 EHB 388, 390, that a change in trial counsel "does not automatically negate pre-trial and trial deadlines."

In summary, Appellants have narrowed the issues raised in their Appeal, have not advised us why they will not be able to complete discovery in the time presently allotted, and have advanced insufficient reasons which would permit us in good faith to postpone the trial. Nevertheless, we will extend slightly the discovery period and the deadlines for filing expert

discovery to provide Appellants additional time, while still keeping the other pre-trial and trial deadlines intact. We will also add to the days allotted for trial to insure that the trial is completed in June 2006.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DENNIS GROCE, NATIONAL PARKS CONSERVATION ASSOCIATION, GROUP AGAINST SMOG AND POLLUTION and PHIL COLEMAN	:	
v.	:	**EHB Docket No. 2005-246-R**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and WELLINGTON DEVELOPMENT – WDYT, LLC, Permittee	:	

ORDER

AND NOW, this 19th day of January, 2006, following review of the Appellants' Motion to Modify the Discovery, Pre-Hearing and Hearing Schedule, it is ordered as follows:

1) The Motion is *granted in part and denied in part.*

2) Our Order of November 15, 2005 is *amended* as follows:

   (a) Paragraph 1 is modified as follows: All Discovery shall be served on or before **Friday, March 3, 2006.**

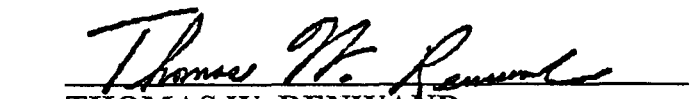
   (b) Paragraph 2 is modified as follows: All parties shall serve their answers to expert interrogatories or serve their expert reports on or before **Tuesday, February 21, 2006.**

(c) Paragraph 3 is modified as follows: All parties may file supplemental expert reports or answers to expert interrogatories in rebuttal or respond to any other expert reports on or before **Monday, March 6, 2006.**

(d) Paragraph 10 is modified as follows: The trial in this case will commence in Pittsburgh at 9:30 a.m. on **Friday, June 2, 2006** and continue on **June 5, 6, 7, 13, 14, 15, 16, 20, 21, 22, 23, 26, 27, 28, 29, and 30, 2006.**

3) All other provisions of our Order of November 15, 2005 ***remain*** as stated.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: January 19, 2006

c: DEP Bureau of Litigation:
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MORRIS TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-044-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SKY HAVEN COAL, INC., Permittee	:	**Issued: January 19, 2006**

OPINION AND ORDER ON MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis

The Board dismisses an appeal from a permit revision which authorized a permittee to use biosolids in reclamation activity. The Department has recently revised the permit to remove the approval to use biosolids which renders the appeal moot.

OPINION

Before the Board is a motion to dismiss filed by the Department of Environmental Protection. The Department seeks to dismiss the appeal of Morris Township from a revision to a surface mining permit issued to Sky Haven Coal, Inc. (Permittee), which approved the use of biosolids in reclamation activities. The basis for the Department's motion is that the permit has been revised since the appeal was filed to remove the approval for the application of biosolids thereby rendering the Township's appeal moot. We agree with the Department and for the reasons explained below, we will dismiss the Township's appeal.

On February 3, 2005, the Department revised the Permittee's surface mining permit for an operation located in Morris Township, to allow the use of biosolids in reclamation activities. Morris Township filed a timely appeal on March 7, 2005, but did not file any petition for supersedeas. Accordingly, the Permittee utilized biosolids at the site until by letter dated August 8, 2005, the Permittee informed the Department that it had completed its use of biosolids and would no longer be applying them at the site. The Department again revised the permit to remove the approval for the use of biosolids on August 24, 2005. The Township did not appeal this revision. The Department has therefore moved to dismiss the appeal because the August 24 permit revision rendered the Township's appeal moot. According to the Department, the objectionable activity has been completed and the Board can offer no relief.

It is axiomatic that if an event occurs during the appeal process which deprives the Board of the ability to provide effective relief or deprives an appellant of an actual stake in the outcome of a controversy, the appeal should be dismissed as moot.[1] Generally speaking where the Department rescinds or supplants a permit condition or approval, the Board has found the appeal objecting to that condition moot.[2] However, courts have established some narrow exceptions to the mootness doctrine, which include

---

[1] *Horsehead Resource Development v. Department of Environmental Protection*, 780 A.2d 856 (Pa. Cmwlth. 2001), *petition for allowance of appeal denied*, 796 A.2d 987 (Pa. 2002); *see also Cooley v. DEP*, EHB Docket No. 2003-246-C (Opinion issued September 15, 2005); *Valley Forge Chapter of Trout Unlimited v. DEP*, 1997 EHB 1160.

[2] *E.g., Cooley v. DEP*, EHB Docket No. 2003-246-K (Opinion issued September 15, 2005)(appeal is moot where a subsequent air plan approval superceded the plan approval under appeal); *Solebury Township v. DEP*, 2004 EHB 23 (appeal moot where the Department rescinded a water quality certification); *Valley Forge Chapter of Trout Unlimited v. DEP*, 1997 EHB 1160 (appeal is moot where amended permit superceded permit under appeal).

situations where the conduct complained of is capable of repetition but will evade review; where the case involves issues of great public importance; or where one party will suffer a detriment without the court's decision.[3]

The Township apparently concedes that its appeal is moot, but argues that the issues raised in the appeal are of great public importance and should be heard by the Board under that exception to the mootness doctrine. Specifically the Township contends that this case involves an issue of great public importance because of an unspecified hazard posed to the health and welfare of the Township's citizens, and "secondary issues" such as odors. The Township does not elaborate on what these hazards might be, nor does it suggest what relief the Board might be able to offer that would not amount to an advisory opinion. The courts have rarely applied the public importance exception to the mootness doctrine,[4] and when they have done so, it is normally to address an issue of statewide importance[5] or the case involves other peculiar circumstances make judicial review prudent.[6] Although the application of biosolids in this case is doubtless an important concern to the local residents, the Township has not described a legal issue of importance beyond the Township, nor has it described evidence of any real continued

---

[3] *Horsehead Resource Development*, 780 A.2d at 858.

[4] *In re Gross,* 382 A.2d 116 (Pa. 1978).

[5] *In re Duran*, 769 A.2d 497 (Pa. Super. 2001)(constitutionality of court ordered blood transfusion is an issue of public importance because of the number of Jehovah's Witnesses in the state and the likelihood that some will be involved in emergencies where a doctor will seek a court ordered blood transfusion).

[6] *Lutz v. Tanglewood Lakes Cmty. Ass'n*, 866 A.2d 471 (Pa. Cmwlth.), *petition for allowance of appeal granted on other grounds,* 880 A.2d 502 (Pa. 2005)(issue relating to the removal of directors of nonprofits is not only of fundamental importance, but the short term tenure of directors makes it likely that the mid-term removal of a director would not be considered by the court until after the term had expired).

hazard which the Board has the ability to alleviate. Accordingly, we must dismiss the Township's appeal.

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MORRIS TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-044-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SKY HAVEN COAL, INC.	:	

ORDER

AND NOW, 19th day of January, 2006, the motion to dismiss the appeal by the Department of Environmental Protection in the above-captioned matter is hereby **GRANTED**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: January 19, 2006

c: **DEP: Litigation:**
Brenda K. Morris, Library

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Southcentral Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SCHUYLKILL TOWNSHIP	:	
	:	
v.	:	**EHB Docket No.: 2005-361-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 24, 2006**

OPINION AND ORDER ON MOTION FOR EXTENSION OF TIME TO FILE AMENDED APPEAL AS OF RIGHT

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

Synopsis:

The Board denies a motion to extend the time for amending a notice of appeal as of right because the Board's rules do not authorize such action.

OPINION

Schuylkill Township (Appellant) has filed a motion for extension of time to file an amended appeal as of right. Appellant seeks an extension to amend its appeal as of right until January 29, 2006 in its appeal from a November 30, 2005 Notice of Violation regarding Appellant's NPDES MS4 Annual Report for Permit No. PAI130533.

Appellant originally filed its appeal on December 30, 2005, and reserved the right to amend the appeal pursuant to the Board's rules. The Board's rules provide that "[a]n appeal may be amended as of right within 20 days after filing thereof." 25 Pa. Code § 1021.53(a). Here, the twenty-day period to amend as of right expired on January 19, 2006. On January 19, 2006 Appellant filed a motion to extend the time to amend its appeal as of right until January 29, 2006.

The Board's rules do not allow for extensions of time to amend notices of appeal as of right. *See Williams Township v. DEP*, EHB Docket No.2005-096-MG, slip op. at 2 (Opinion issued October 4, 2005) (Board is not authorized to grant an extension of the amendment as of right period). However, the Board's rules do provide as follows:

> After the 20-day period for amendment as of right, the Board, upon motion by the appellant, may grant leave for further amendment of the appeal. This leave may be granted if appellant establishes that the requested amendment satisfies one of the following conditions:
>
> > (1) It is based upon specific facts, identified in the motion, that were discovered during discovery of hostile witnesses or Departmental employees.
> >
> > (2) It is based upon facts, identified in the motion, that were discovered during preparation of appellant's case, that the appellant, exercising due diligence, could not have previously discovered.
> >
> > (3) It includes alternate or supplemental legal issues, identified in the motion, the addition of which will cause no prejudice to any other party or intervenor.

25 Pa Code § 1021.53 (b).

Based upon the foregoing, we deny Appellant's motion for an extension of time to amend its notice of appeal as of right because no such mechanism exists in our rules. Appellant is free in the future to file a motion to amend its notice of appeal in accordance with Board rule 1021.53.

Accordingly, we enter the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SCHUYLKILL TOWNSHIP	:	
	:	
v.	:	**EHB Docket No.: 2005-361-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 24th day of January 2006, Appellants' motion for an extension of time to file an amended notice of appeal as of right is denied without prejudice to Appellant's right to file a motion to amend its notice of appeal in accordance with the Board's rules.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: January 24, 2006

c: **DEP Bureau of Litigation**
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	EHB Docket No. 2004-201-SA-K
AMERICAN FUEL HARVESTERS, INC.; NICHOLAS G. MAZZOCCHI; DEMOTECH, INC.; SCOTT SLATER; and WILLIAM SCHUTTER	:	Issued: March 1, 2006

OPINION AND ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT

By Michael L. Krancer, Chief Judge and Chairman

Synopsis

The Board denies Motions for Summary Judgment filed by two defendants when the defendants failed to show that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law. No statutory or legal basis was presented to support the claim that any supposed failure to provide notice under Subsection 501(e) of the Hazardous Substances Control Act precluded the Department from pursuing a cost recovery action. Moreover, the nature of quality of the notice or lack thereof is a matter of disputed fact which cannot be resolved on summary judgment. Section 1301 of HSCA does not establish a universal requirement of initiating and completing an enforcement action against all past, then present at the time of the enforcement action, and subsequent owners and operators of a site as a prerequisite to instituting a suit under HSCA's cost recovery provisions. Finally, neither Movant has proven an entitlement to summary judgment based on right to due process under the United

States Constitution.

Procedural and Factual Background

This matter involves a Complaint filed by the Department of Environmental Protection (DEP or Department) on September 8, 2004 pursuant to the Hazardous Substances Control Act (HSCA) seeking recovery of interim response costs incurred by the Department to address the release and threat of release of hazardous substances at an abandoned demolition waste processing facility in East Bangor, Northampton County (Site).[1] The Department seeks recovery of costs from the named defendants, American Fuel Harvesters, Inc. (AFH), Nicholas Mazzocchi (Mazzocchi), Demotech, Inc. (Demotech), Scott Slater (Slater) and William Schutter (Schutter) (collectively Defendants).[2] On December 10, 2004 Slater and Demotech each filed an Answer (Slater Answer and Demotech Answer, respectively), on January 10, 2005, Mazzocchi filed an Answer with Affirmative Defenses (Mazzocchi Answer), and on July 22, 2005 Schutter, action *pro se* filed a narrative Response to Complaint. Currently before the Board are Motions for Summary Judgment filed by Demotech and Slater. This opinion addresses both motions.

From 1988 until 1992 AFH, a New Jersey corporation, owned and operated the Site and processed construction and demolition wastes at the Site pursuant to a solid waste processing permit granted by the Department in 1988. Complaint ¶¶ 3 & 11; DEP Memo, Ex. B. Mazzocchi was the sole officer and director of AFH until approximately October 12, 1992. Complaint ¶ 4, Mazzocchi Answer ¶ 4. Schutter was the CEO of AFH and operated the Site from 1992 until 1995. Complaint ¶ 5. The operations involved processing wood chip material and fine aggregates which were separated from construction and demolition waste and stockpiled on the

---

[1] Act of October 18, 1988, P.L. 756, *as amended*, 35 P.S. §§ 6020.101-6020.1305.

[2] The Complaint also named Joseph P. Colarusso as a defendant; however, by order dated July 19, 2005, the Board granted the Department's Motion to Amend Complaint and released Mr. Colarusso from this action.

Site. Complaint ¶¶ 11-13; Mazzocchi Answer ¶¶ 11-13; Slater Answer ¶¶ 11- 13; Demotech Answer ¶¶ 11-13.

In 1990 the Department documented the storage of waste material off the permitted area and subsurface fires on the site. DEP Memos, Ex. B.[3] In the same year, the Department issued an Administrative Order to AFH to cease storage off the permitted area, to minimize releases and to monitor and extinguish the subsurface fires. *Id.* On October 22, 1992, Schutter signed a Consent Order and Agreement (1992 CO&A) with DEP requiring that the sub-surface fires be extinguished and materials located in unpermitted areas be removed, and establishing a maximum holding time for processed and unprocessed materials at the Site. Complaint ¶ 16; Slater Answer ¶ 16; Demotech Answer ¶ 16. Schutter did not comply with the terms of the 1992 CO&A. Complaint ¶ 17; Slater Answer ¶ 17; Demotech Answer ¶ 17.

According to DEP, Schutter did not comply with the 1992 CO&A. DEP Memos, Ex. B. Various other orders were issued, from both the Bureau of Air Quality and the Bureau of Waste Management, regarding the fires and prohibiting the acceptance of waste until the fires were extinguished. *Id.* Problems grew worse at the site as these orders were not complied with. In November 1993 DEP issued an Administrative Order suspending AFH's operating permit pending compliance by AFH with the 1992 CO&A. *Id.* In 1994 Schutter and a third party, Foster-Wheeler, agreed to and did submit an Immediate Action Plan (IAP) aimed at satisfying the requirements of the 1992 CO&A. *Id.* Later, though, Foster-Wheeler withdrew from the project. *Id.*

In October 1994 a Commonwealth Court Order was issued to AFH pursuant to the 1992 CO&A and the November 1994 Suspension Order. *Id.* In November 1994 AFH submitted and

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[3] The Department filed a memorandum of law in response to both the Slater Motion and the Demotech Motion. Both of the Department's memoranda contain identical exhibits. For purposes of this opinion, we will cite to the exhibits attached to the Department's memoranda as "DEP Memos, Ex. __."

DEP approved in January 1995 a Comprehensive Development Plan which, in essence, was a plan for compliance with the 1992 CO&A. *Id.* In June 1995 the Commonwealth Court upon the Department's request entered an Access Order permitting DEP to enter the site to implement compliance with the 1992 CO&A if AFH failed to do so. *Id*; Deposition of William Tomayko (Tomayko Dep.), Ex. 7.

On August 17, 1995, Demotech acquired the Site from AFH, Complaint ¶ 19.[4] Slater was President of Demotech. Complaint ¶ 7; Slater Answer ¶ 7; Demotech Answer ¶ 7. On September 20, 1995, the Pennsylvania Commonwealth Court, upon consideration of a petition filed by AFH on August 30, 1995, entered an order which continued the 1992 CO&A and the November 3, 1993 Suspension Order in full force and effect, but modified an October 27, 1994 Order and a June 30, 1995 Access Order. DEP Memo, Ex. G. The Commonwealth Court Order also required that AFH submit a Remediation/Operation Plan (ROP) "for the completion of site remediation and proposed future operations of the AHF facility." Id. ¶ 6. AFH did submit the ROP in January 1996. DEP Memos, Ex. B. In June 1996 Demotech submitted an application for the re-issuance and major modification of the suspended solid waste permit. *Id.* The Department found the application deficient in certain technical respects and requested additional information. *Id.* Demotech was active at the Site until September 1997 at which time, according to DEP, it abandoned the site. *Id.*

The parties dispute how to characterize Demotech's activity at the Site and the legal import of the activity. It is asserted that Slater was President of Demotech at least during the period Demotech was active at the Site. Demotech received an Interim Operational Approval with Conditions from DEP regarding the AFH Site ROP which AFH had submitted pursuant to

[4] Slater and Demotech deny that Demotech acquired the Site from AFH; they contend they acquired the stock of AFH, but AFH owned the Site. Slater Answer ¶ 7, Demotech Answer ¶ 7.

the September 20, 1995 Commonwealth Court Order. Tomayko Dep., Ex. 10. It is alleged that Demotech processed construction and demolition materials at the Site which had been present when it arrived and such material which was brought onto the Site after August 17, 1995.

Further development and final adjudication of these assertions will have to await trial. In any event, DEP alleges that Demotech was an operator of the Facility, which they abandoned in September 1997 leaving 180,000 cubic yards of lead contaminated unprocessed demolition waste and processed wood chips at the Site. Complaint ¶¶ 20-22. Slater and Demotech portray Demotech's involvement at the Site as primarily one of remediation pursuant to an approved ROP. Slater Brief at 2-3; Demotech Brief at 2-3.[5]

On September 8, 1998, DEP initiated an interim response action at the Site to address hazardous substances and contaminants at the Site (Interim Response). Complaint ¶ 34. "The Department's Interim Response action included, but was not limited to, the extinguishing of the sub-surface fires and the removal/disposal of the stockpiled materials into an abandoned quarry followed by the capping of the contaminated materials to eliminate the threat to human health and the environment posed by the contaminated materials." Complaint ¶ 35. The Interim Response was completed on July 16, 1999. Complaint ¶ 39.

The Department prepared an administrative record regarding its action at the Site. Complaint ¶ 30. Public notice of the comment period and a public hearing regarding the Interim Response at the Site were published in the *Pennsylvania Bulletin* on September 19, 1998,

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[5] Slater and Demotech state:

> Pursuant to the DEP approved [Operation and Remediation Plan], Demotech removed 50,039 net tons of processed and unprocessed construction and demolition materials from the site between August 16, 1995 and June 22, 1997; Demotech removed 26,000 tons of material from the site between August 16, 1995 and February 22, 1996 without taking in any new construction and demolition materials; and Demotech ceased taking in any construction and demolitions materials on May 9, 1997 and continued to process materials through June 22, 1997.

Slater Brief at 2-3; Demotech Brief at 2-3.

Complaint ¶ 31, and mailed to known responsible parties. Complaint ¶ 31; DEP Memos, Ex. J. The Department's Statement of Decision regarding the Interim Response at the Site was issued on January 26, 2000. Complaint ¶ 33.

The Department mailed demand letters to each of the Defendants on August 8, 2001 requesting reimbursement of the costs incurred for the Interim Response. Complaint ¶ 42. The Defendants have not reimbursed the Department. Complaint ¶ 45. The Complaint against the Defendants seeking recovery of the interim response costs incurred by the Department to address the release and threat of release of hazardous substances at the Site was filed on September 10, 2004. Presently before the Board are: the Motion for Summary Judgment (Slater Motion) and Brief in Support of Motion for Summary Judgment (Slater Brief) filed by Slater; the Motion for Summary Judgment (Demotech Motion) and Brief in Support of Motion for Summary Judgment (Demotech Brief) filed by Demotech; the Department's Response to the Slater Motion (DEP Response to Slater) and Memorandum of Law (DEP Memo on Slater Motion); the Department's Response to the Demotech Motion (DEP Response to Demotech) and Memorandum of Law (DEP Memo on Demotech Motion); and Slater's Reply to the DEP Memo on Slater Motion.

The Slater Motion and the Demotech Motion are almost identical and argue that summary judgment is appropriate and the recovery of response cost is barred because DEP did not adhere to the exhaustion requirements set forth in 35 P.S. § 6020.1301, Slater Motion ¶5; Demotech Motion ¶ 4, and because DEP failed to comply with the due process requirements of the United States Constitution. Slater Motion ¶ 6; Demotech Motion ¶ 5. Slater also claims that DEP did not provide notice as required by 35 P.S. § 6020.501 and that failure bars DEP from recovering costs from Slater. Slater Motion ¶ 4.

Standard of Review

The Board's standard of review of a summary judgment motion is well established:

> Our standard for review of motions for summary judgment has been set forth many times before. We will only grant summary judgment when the record, which is defined as the pleadings, depositions, answers to interrogatories, admissions, affidavits, and certain expert reports, show that there is no genuine issue of material fact *and* the moving party is entitled to judgment as a matter of law. *Holbert v. DEP*, 2000 EHB 796, 807-09 *citing County of Adams v. DEP*, 687 A.2d 1222, 1224 n. 4. (Pa. Cmwlth. 1997). *See* Pa. R.C.P. 1035.1. Also, when evaluating a motion for summary judgment, the Board views the record in a light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Holbert*, 2000 EHB at 808 (citations omitted).

E.g., Army for a Clean Env't, Inc. v. DEP, EHB Docket No. 2005-036-K, slip op. at 4-5 (Opinion issued July 28, 2005) (and cases cited therein).

Discussion

Notice under 35 P.S. § 6020.501(e)

Slater argues that alleged lack of notice to him under Subsection 501(e) of HSCA, 35 P.S. § 6020.501(e), negates as a matter of law DEP's cause of action against him under HSCA. The argument is a bit circuitous and is not apparent from the plain language of Subsection 501(e). Slater says that DEP did not provide notice to him prior to undertaking the Interim Response. Slater Brief at 5. According to Slater, no Subsection 501(e) notice was provided to him, thus, prejudicing him, depriving him of due process and accordingly, he "may not be held liable for the cost of the response action." Slater Brief at 7.

Slater's own construction of the argument reveals why it is flawed. The language of Subsection 501(e) does not provide what Slater says it does. Section 501, entitled "Response authorities" provides, in pertinent part:

> (a) General rule.–Where there is a release or substantial threat of release of a contaminant which presents a substantial danger to the public health or safety or the environment or where there is a release or threat of a release of a hazardous

> substance, the department shall investigate and, if further response action is deemed appropriate, the department shall notify the owner, operator or any other responsible person of such release or threat of a release if such persons are known and may allow such person or persons to investigate and undertake an appropriate response, or may undertake any further investigation, interim response or remedial response relating to the contaminant or hazardous substance which the department deems necessary or appropriate to protect the public health, safety or welfare or the environment.
>
> ...
>
> (e) Notice of investigations.–The department, upon undertaking any investigation, interim response or remedial response under this section, shall give prompt written notice thereof to the owner and operator of the site and to the first mortgagee holding a mortgage on the premises on which the site is located.

35 P.S. § 6020.501(a), (e). Subsection 501(e) does not say that a cost recovery action authorized by Section 507 may not be maintained in the absence of Subsection 501(e) notice. In other words, neither Subsection 501(e) nor Section 507 provide that Subsection 501(e) notice is a prerequisite to suit under Section 507. Nor does Subsection 501(e) say that a person who would otherwise be a "responsible person" under Section 701 is not a responsible party if there has not been Subsection 501(e) notice to that party. We note that there are specific exceptions provided in Section 701 whereby persons who would otherwise be "responsible persons" under HSCA are not "responsible persons." There is no such exception for persons who did not receive a Subsection 501(e) notice. *Cf. DER v. Crown Recycling & Recovery, Inc.*, 1993 EHB 1571 (lack of § 506(b)(2) notice regarding development of the administrative record has no effect on whether or not the person is a responsible person under HSCA).[6]

Thus, there is no link in the plain words of Subsection 501(e) between it and either the sections of HSCA which allow a suit to be filed against responsible persons or the sections which define who a responsible person is under HSCA. If the Legislature intended to bar cost recovery

[6] Slater does not allege he was not provided notice under Subsection 506(b) regarding the development of the administrative record. This is not an unimportant point. The *Crown Recycling* Board did hold that lack of Subsection 506(b) notice, while not negating responsible party status, was a serious substantive defect which mandated the remand of the matter to the Department with direction to reopen the Administrative Record. *Crown Recycling*, 1993 EHB at 1578-79.

actions if the Subsection 501(e) notice was not provided, or render otherwise responsible parties not responsible for lack of Subsection 501(e) notice, it could have and would have done so in plain language. Indeed, the Legislature did do so in Section 1301 which we will discuss later, and in Section 708 (during the Section 708 mediation process, the department shall not commence an action to recover response costs from any participating person). Clearly, then, even if Slater had never been provided notice under Subsection 501(e) he would not be entitled to dismissal of the HSCA suit against him as a matter of law on that basis.

Moreover, the nature and quality of the notice, or possible lack thereof, to Slater is a matter which, under the record as it stands, is the subject of disputed facts and interpretations of facts. DEP's Complaint alleges that: "On September 30, 1998, the Department submitted a letter to AFH, Schutter, Demotech, Slater and Colarusso notifying them of the Department's Prompt Interim Response action." Complaint ¶ 29. The record currently before the Board contains several letters to counsel allegedly representing Slater and Demotech and testimony and affidavits regarding various meetings between DEP, Slater, Demotech and counsel for Slater and Demotech regarding the Site and conditions at the Site. There is an August 6, 1998 letter from Joseph Brogna of DEP to Ronald Patterson, Esquire that specifically references Subsections 501(a) and 501(e) and DEP's determination that, based on its investigation at the Site, "further response action is appropriate." Deposition of Joseph Brogna, Ex. 5. The letter further notes that DEP has information that Demotech is the owner and former operator of the Site; therefore, Demotech could be responsible for the costs of investigations or responses at the Site. *Id.* Slater argues that the August 6, 1998 letter does not mention Slater by name, thus cannot constitute written notice to Slater. However, DEP presents another letter as evidence of notice to Slater and Demotech of the Interim Response; a September 30, 1998 letter from Woodrow Cole of DEP to

Ronald Patterson, Esquire, Attorney for Scott Slater – Demotech, providing a copy of the public notice regarding the prompt interim response at the Site and the development of the administrative record, including a public hearing and the opportunity to submit written comments. DEP Memos, Ex. J.[7] Slater and Demotech deny receiving these letters and argue that sending the letters to attorneys does not provide notice to the individual or the company. Slater Brief at 6; Affidavit of Scott Slater. DEP presents material which it says shows that Slater and Demotech advised DEP that Attorney Patterson should be the contact person, thus notice to the designated attorney provides notice to Slater and Demotech.

All of this shows that even if Subsection 501(e) notice were the lynchpin of whether DEP can maintain any HSCA action against Slater, a proposition that Slater has not demonstrated, there are a myriad of unresolved factual issues regarding the nature and quality of notice to Slater which stand in the way of Slater's being entitled to summary judgment.

Prior Administrative or Judicial Enforcement Action Requirement of 35 P.S. § 6020.1301

Section 1301 of HSCA provides, in part:

> (a) Application.-Notwithstanding the provisions of subsection 505(c) and section 507, an identified and responsible owner or operator of a site with a release or threatened release of a hazardous substance or a contaminant shall not be subject to enforcement orders or the cost recovery provisions of this act, until the department has instituted administrative or judicial enforcement action against the owner or operator under other applicable environmental laws and the owner or operator has failed to comply with or is financially unable to comply with such administrative or judicial enforcement action. In the event of noncompliance with such administrative or judicial enforcement action, the provisions of this act may be applied by the department unless the owner or operator has obtained a supersedeas from the board or the court conducting any such judicial enforcement action. For the purposes of this subsection, such a supersedeas shall be based on whether there is a release or threatened release at the site which constitutes a danger to the public health and safety or the environment. An appeal of the department's enforcement action shall not serve as a bar that prevents the

[7] The September 30, 1998 letter states: "This notice is provided to your client, Scott Slater of Demotech, pursuant to Section 1113 of [HSCA]." DEP Memos, Ex. J. Mr. Cole sent another letter to Attorney Patterson on December 21, 1998 correcting that reference to Subsection 506(b)(2) of HSCA. *Id.*

department from applying the provisions of this act to the owner or operator in the absence of the issuance of a supersedeas.

...

(c) Authority.-Nothing in this section shall affect the authority of the department or the Governor to implement an interim response or an emergency response.

35 P.S. § 6020.1301(a), (c) (footnote omitted).[8] Slater and Demotech argue that because DEP has not exhausted at least one other remedy available under the law against Slater or Demotech, DEP is barred from pursuing a cost recovery action against either Slater or Demotech. Slater Brief at 7; Demotech Brief at 5. Slater's position is: "DEP must *complete* an administrative or judicial enforcement action against the owner or operator under other applicable environmental law and the owner or operator must fail to comply with such administrative or judicial enforcement action prior to recovery of response costs." Slater Reply to DEP Memo on Slater's Motion at 4-5 (italicized emphasis supplied and underlined emphasis in the original). DEP argues that Subsection 1301(c) and the nature of an interim response makes Subsection 1301(a) inapplicable to interim response actions or, in the alternative, if Subsection 1301(a) applies to interim responses, the provisions regarding prior action have been met in this case.

The theory that completion of administrative or judicial enforcement actions is the prerequisite for suit is contrary to the plain language of the statute. Subsection 1301(a) says that

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[8] Subsection 35 P.S. 6020.1301(b) provides other instances when the department may not initiate enforcement orders or seek cost recovery, none of which are applicable here:

(b) Department action.-The department may not initiate enforcement orders nor apply the cost recovery provisions of this act against a responsible person for the release or threatened release of a hazardous substance or a contaminant at a site that is the subject of subsection (a), where the owner or operator of the site is financially able to comply with an administrative or judicial enforcement action instituted under subsection (a), and the owner or operator has undertaken appropriate action to abate the release or threatened release of the hazardous substance or contaminant, as required by the administrative or judicial enforcement action, or the owner or operator has obtained a supersedeas from the board or the court conducting any such judicial enforcement action. For the purposes of this subsection, such a supersedeas shall be based on whether there is a release or threatened release at the site which constitutes a danger to the public health and safety or the environment. An appeal of the department's enforcement action shall not serve as a bar that prevents the department from applying the provisions of this act to the responsible person in the absence of the issuance of a supersedeas to the owner or operator.

DEP is required to have "instituted administrative or judicial enforcement action against the owner or operator under other applicable environmental laws" not that such proceedings have been completed.

The word "completed" is not in Section 1301 and, of course, "instituted" does not mean "completed," it means "commenced" or "started."[9] *Accord Dept. of Envtl. Res. v. United States Small Business Admin.*, 579 A.2d 1001, 1005 (Pa. Cmwlth. 1990) (interpreting this provision to require that DEP "pursue remedies under [other applicable environmental laws which] encompass the concept of cleanup, before seeking to apply provisions of the Pennsylvania HSCA.").

We also disagree, for two reasons, with the contention advanced by Slater and Demotech that the administrative and judicial enforcement action required by Subsection 1301(a) must necessarily have been instituted against them specifically by name. In this case, the Department instituted administrative enforcement actions against Schutter and AFH which culminated in the September 20, 1995 Commonwealth Court Order. AFH and/or Schutter were the owners and/or operators of the Site during that time in which the Department initiated and maintained its enforcement action. Slater and Demotech came on the scene in August 1995 while DEP's actions were pending and being pursued against AFH and Schutter.

First, it is not clear on the record whether Demotech's purchase of AFH's stock just before the entry of the September 20, 1995 Commonwealth Court Order placed Demotech and its President Slater in the shoes of AFH with regard to this enforcement action. This is not the time or the place to delve into a discussion of possible successor liability and/or piercing corporate veils. Obviously, the record is not nearly in a state in which we could or should

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[9] Random House Webster's Unabridged Dictionary (2nd ed. 1998) defines "institute" in this sense as "to inaugurate; initiate; start..." at 988.

explore that issue. Suffice it to say that the question is open and neither Demotech nor Slater are entitled dismissal on the point that one or both of them does not stand in the shoes of AFH with respect to the enforcement actions DEP had taken against AFH. [10]

Second, Slater and Demotech have not convinced us that HSCA Subsection 1301(a) must be read to require individual actions against all past, and in this case, subsequent owners or operators. Thus, even if the enforcement actions would not be considered as against Slater and Demotech as such, they nevertheless have not shown that Subsection 1301(a) requires, as a matter of law, that judgment be entered in their favor.

Subsection 1301(a) provides that "an" identified owner or operator is not subject to the cost recovery provisions of HSCA until enforcement actions under other applicable environmental laws have been initiated against "the" owner or operator. The reference to "the" owner or operator can, and perhaps must, mean the owner or operator of the site at the time the enforcement action is initiated. That interpretation makes much sense in a case, like this one, of subsequent owners and operators. At the time of the initiation of the enforcement action, a subsequent owner is obviously not present. We are hesitant to read HSCA to require DEP to keep renewing or commencing anew ongoing enforcement activities every time a new owner comes into the picture as a prerequisite for suing such new owners and operators. We doubt that the drafters of HSCA meant to provide such safe harbor to late coming owners or operators.

Judge Myers agrees. In *Crown Recycling & Recovery*, enforcement actions were brought against the then owners of the site who were dead by the time suit was brought but not against

---

[10] Not only is the nature of the transaction that occurred on August 17, 1995 lacking from the record, it is not clear whether Slater and Demotech considered themselves bound by the September 20, 1995 Commonwealth Court Order. Slater states "Demotech, complied with the Commonwealth Court Order and submitted its ROP on January 31, 1996[.]" Slater Brief at 5. That statement certainly implies that Slater and Demotech considered the Commonwealth Court Order binding upon them, which may constitute an enforcement action against one or both of them for purposes of Section 1301.

the executors of the estates of the dead owners who had been named as liable persons in the lawsuit. 1993 EHB 1571. The executors claimed that they were not proper defendants because although enforcement actions had been brought against the dead owners, no such actions had been brought against them. Judge Myers in rejecting this argument said:

> By this argument, Defendants read more into §1301(a) than the Legislature put there. DER is only required to "initiate" administrative or judicial enforcement actions under other environmental laws. While there may be an argument over the precise meaning of this term in the context of §1301(a), we are satisfied that what DER did in this case is enough to meet the requirements.
>
> DER's enforcement actions lasted for about a year from August 1988 to August 1989, during which it issued an Administrative Order and obtained two Orders from Commonwealth Court, all directed at the then owners and operators of the site. In September 1989 it decided to proceed under the HSCA, obtained a Court Order in November 1989 and began the interim response in July 1990. This, in our judgment, is sufficient compliance with §1301(a) to remove the bar imposed there.

1993 EHB at 1584-85 (footnote omitted).

The bottom line is that initiation of administrative or judicial enforcement action against the then owner and/or operator is enough to remove the Subsection 1301(a) bar to suit. In this case that was done and there would be no bar to suit against Slater or Demotech.

Due Process Requirements of the United States Constitution

Both Slater and Demotech briefly argue that the United States Constitution requires hearing and notice before being deprived of life, liberty or property and with regard to DEP's Complaint, they "have been denied property without a hearing and notice." Slater Brief at 11; Demotech Brief at 9. Although it is less than clear from their filings, it appears that Slater and Demotech rely on the lack of notice and prior enforcement action against them in name as the basis for their due process argument. As noted above, Slater failed to show he is entitled to judgment as a matter of law regarding the notice issue and there are genuine issues of material fact surrounding the issue of notice in this matter. Similarly we denied both Motions with regard

to the Section 1301 issue so adopting those arguments to support a right to summary judgment on a due process claim likewise fails.

Also, we note that the proceedings before us provide a full due process trial. The range of results can vary from full vindication of Slater and Demotech to full vindication of DEP and anywhere in between.

For all the above reasons, both Motions are denied and an appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2004-201-SA-K**
AMERICAN FUEL HARVESTERS, INC.; NICHOLAS G. MAZZOCCHI; DEMOTECH, INC.; SCOTT SLATER; and WILLIAM SCHUTTER	:	

ORDER

AND NOW, this 1st day of March 2006, the Motion for Summary Judgment filed by Scott Slater and the Motion for Summary Judgment filed by Demotech, Inc. are **denied.**

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

DATED: March 1, 2006

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DENNIS GROCE, NATIONAL PARKS CONSERVATION ASSOCIATION, GROUP AGAINST SMOG AND POLLUTION and PHIL COLEMAN	:	
v.	:	**EHB Docket No. 2005-246-R**
COMMONWEALTH OF PENNSYLVANIA: DEPARTMENT OF ENVIRONMENTAL PROTECTION and WELLINGTON DEVELOPMENT – WDYT, LLC, Permittee	:	**Issued: March 1, 2006**

OPINION AND ORDER ON APPELLANTS' MOTION FOR EXTENSION OF TIME TO FILE THEIR AIR MODELER EXPERT REPORT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Pennsylvania Environmental Hearing Board grants a Motion for Extension of Time to file a specific expert report. The fact that Appellants' previous expert's mother recently died provides ample justification for the slight extension which will not affect the scheduled hearing dates.

OPINION

Presently before the Pennsylvania Environmental Hearing Board is the Appellants' Motion for Extension of Time To File Their Air Modeler Expert Report. Appellants' Motion for Extension is opposed by the Pennsylvania Department of Environmental Protection and vigorously opposed by the Permittee, Wellington Development-WDYT, LLC.

Appellants contend that the extension they seek will not affect any of the other deadlines established by the Board but without the extension they will not be able to present a significant portion of their case. The extension is needed because the expert they originally retained in this matter recently advised the Appellants that due to the death of her mother she would be unable to assist them on the case. Appellants have been able to retain another expert but due to his other work commitments, he would not be able to complete the required expert report until April 14, 2006.

The Department contends that no further extension is justified. Wellington reminds us that we have already denied two earlier motions for extensions and it claims that the Appellants' predicament is one of their own making. Wellington also is extremely concerned that should we "grant Appellants' Third Motion, there is serious risk that Appellants will have succeeded in extending all other pre-hearing deadlines, thereby delaying the hearing." (Wellington's Response to the Motion for Extension, page 4) Wellington also voices concern that such an extension would prejudice any motion for summary judgment it might file. Finally, Wellington states that it "simply desires a timely hearing on the objections Appellants raised back on July 29, 2005." (Wellington's

Response, page 7)

As noted by Wellington and referenced by Appellants, we have endeavored "to balance the competing interests of the parties in order to assure that the issues are resolved expeditiously but assuring that adequate time is allotted to prepare for the trial." *Groce v. DEP and Wellington Development –WDYT, LLC* (Opinion and Order issued November 15, 2006), page 7. It is our responsibility and duty to oversee the discovery by the parties including expert discovery. It is certainly very important to the integrity of the litigation process and part of the due process rights afforded to all of the parties that the deadlines we set are viewed as meaningful and important. Parties have a right to rely on our Orders and the deadlines they impose.

Chief Judge Krancer emphasized this concept in *Petchulis v. DEP*, 201 EHB 673, where he noted the Board's duty to enforce our deadlines:

> As for litigation obligations, they have to be followed in order to maintain the integrity of and respect for our legal process.

2001 EHB at 678.

Likewise, this sentiment was echoed by Judge Labuskes, in an opinion cited by Wellington in *Kleissler v. DEP and Pennsylvania General Energy Corporation*, 2002 EHB 617,

> The Board has an independent interest in maintaining the integrity of the litigation process and respect for the Board by enforcing compliance with its orders and rules.

2002 EHB at 619.

In the recent case of *DEP v. Neville Chemical Company*, 2003-297-CP-R (Opinion and Order issued January 3, 2005), we denied the Department's motion for an additional extension of discovery. We held that the Department did not present a valid excuse as to why it did not depose two earlier identified witnesses during the discovery period.

Indeed, in this case we have already substantially denied previous Motions to Extend Discovery filed by Appellants. We based these decisions, and especially our decision of January 19, 2006, on the fact that Appellants did not present compelling reasons why the current pretrial and trial deadlines should be extended. Moreover, we found the Permittee set forth compelling reasons why it would be materially and substantially harmed by a delay in the trial schedule. We found that the mere change in lead trial counsel approximately six months before trial did not warrant an extension. We also found that Appellants'counsel's schedule appeared to be neither unique nor crushing and did not justify an extension.

However, as aptly pointed out by Judge Labuskes "we cannot lose sight of the fact that our basic objective is to arrive at a proper resolution of the appeal on its merits." *Kleissler*, 2002 EHB at 620. A sanction that is too severe can be just as detrimental to the litigation process as allowing violations to go unsanctioned. To deny the Appellants' Motion to Extend would preclude them from presenting a substantial part of their case. We respectfully disagree with Wellington that Appellants did not diligently pursue retention of this expert. They believed their previous expert would continue to work with them even after the death of her mother. We will not penalize their compassion in not acting more aggressively in ascertaining whether their previous expert was still on their

litigation team.

Moreover, we fail to see how the extension of our deadlines for one specific aspect of the case will prejudice the Permittee or the Department. They will still have ample time to prepare their own dispositive motions and counter expert reports. We also will be receptive to any specific requests by the Permittee or the Department to counter any alleged prejudice necessitated by the granting of Appellants' Motion For Extension of Time to file Their Air Modeler Expert Report. Both the Department and Wellington have shown that they are represented by extremely able counsel who have had no trouble responding quickly to the vagaries of the litigation process.

Most importantly, nothing in our ruling today will delay the other deadlines or postpone the trial scheduled to begin on June 2, 2006. We will continue to work closely with counsel including monitoring the pretrial proceedings to assure that this case remains on schedule. In this regard, as part of our Order, we will require frequent individual status reports. Finally, we stand ready to address any problems not only through our regular Motion practice but by conference call.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

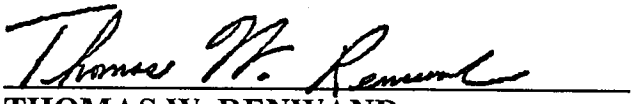
DENNIS GROCE, NATIONAL PARKS CONSERVATION ASSOCIATION, GROUP AGAINST SMOG AND POLLUTION and PHIL COLEMAN	:	
v.	:	**EHB Docket No. 2005-246-R**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and WELLINGTON DEVELOPMENT – WDYT, LLC, Permittee	:	

ORDER

AND NOW, this 1st day of March, 2006, following review of Appellants' Motion for Extension of Time to File Their Air Modeler Expert Report and the Responses of the Pennsylvania Department of Environmental Protection and Permittee, it is ordered as follows:

1) The Motion is ***granted***.
2) On or before **April 14, 2006** Appellants shall serve their Class 1 air modeler expert report. The other parties may also wait until that date to serve their Class 1 air modeler expert reports.
3) All parties may serve responsive expert reports by **April 28, 2006**.
4) All other deadlines *remain as set forth* in our earlier Orders.
5) Counsel shall file *individual status reports* on or before **March 22, 2006, April 19, 2006, May 3, 2006**, and **May 17, 2006**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administration Law Judge
Member

DATE: March 1, 2006

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SECRETARY TO THE BOARD

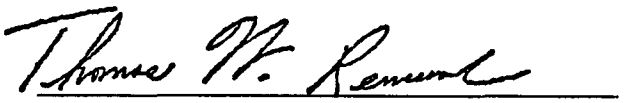
DENNIS GROCE, NATIONAL PARKS CONSERVATION ASSOCIATION, GROUP AGAINST SMOG AND POLLUTION and PHIL COLEMAN	:	
v.	:	**EHB Docket No. 2005-246-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WELLINGTON DEVELOPMENT – WDYT, LLC, Permittee	:	

ORDER

AND NOW this, 8th day of March, 2006, following review of Permittee Wellington Development's Petition for Reconsideration, it is ordered as follow:

1. The Petition for Reconsideration is ***denied***.
2. Any dispositive motions involving ***air modeling issues*** shall be filed on or before **Monday, April 24, 2006**. All other dispositive motions continue to be due on **March 10, 2006**.
3. *Responses* to any dispositive motions involving air modeling issues shall be filed on or before **Tuesday, May 9, 2006**.
4. *Replies*, if any, to the responses to any dispositive motions involving air modeling issues shall be filed on or before **Tuesday, May 16, 2006**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: March 8, 2006

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WILLIAM T. PHILLIPY IV
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THOMAS COLBERT	:	
	:	
v.	:	
	:	**EHB Docket No. 2005-029-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MIDDLE CREEK QUARRY, INC., Permittee	:	**Issued: March 10, 2006**

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis

The Board vacates a "large" noncoal surface mining permit because the Department failed to complete an adequate compliance review of the permit applicant. The applicant received several notices of violation and a compliance order in a relatively short period of time on several "small" permit sites, yet the Department failed to consider whether this history triggered the permit bar in Section 3308 of the Noncoal Act. The Department also should have required the permittee to include information concerning a contractor who was performing mining activities on both the large and small permits without authorization.

Because we are vacating the permit, we also deny a motion filed by the Department to reopen the record to add evidence that the large permit was modified after the hearing to include the subcontractor on the large permit.

BACKGROUND

Before the Board is an appeal by Thomas Colbert (Appellant)[1] from the Department's issuance of a noncoal surface mining permit, NPDES permit and authorization to mine (collectively Large Permit,) to Middle Creek Quarry, Inc. (Permittee), for an operation in Palmyra Township, Wayne County. The permit was issued on January 10, 2005, and the Appellant filed his appeal on February 10, 2005. The Appellant challenged the permit because, among other things, E.R. Linde should have been listed as a subcontractor on the permit application; the stream flow data in the permit application was flawed; and the Department failed to consider adequately the compliance history of the Permittee.

The Board held a hearing before the Honorable George J. Miller on November 29 and 30, 2005, which resulted in a transcript of 306 pages and 15 exhibits. The parties all filed post-hearing briefs including findings of fact and conclusions of law. The Department has also filed a motion to reopen the record to add evidence that the permit was modified after the hearing to add a subcontractor to the permit who had been performing mining activities at the Permittee's quarry. After full consideration of all these materials, we make the following:

FINDINGS OF FACT[2]

1. The Appellant, Thomas Colbert, is an individual residing in Hawley, Pennsylvania. His home is located across the valley from the Middle Creek Quarry on the

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[1] Despite warnings from the Board, Mr. Colbert proceeded as a *pro se* appellant.

[2] The notes of testimony are designated as "N.T. –". The Appellant's exhibits are "Ex. A-__" and the Department's as "Ex. C-_." The Permittee did not submit any of its own exhibits, but relied upon those introduced by the other parties.

Lackawaxen River. It is approximately .6 miles away. His has owned his home for approximately ten years.[3] (N.T. 124-25)

2. The Permittee is Middle Creek Quarry, Inc. The Permittee is in the general business of quarrying at its operation on the Owego Turnpike, Palmyra Township, Wayne County, Pennsylvania. John R. Malti, along with his father and Tom Goodwin own Middle Creek Quarry. (Malti, N.T. 242-43)

3. The Department of Environmental Protection is the agency with the duty and authority to administer and enforce the Noncoal Surface Mining Conservation and Reclamation Act,[4] the Clean Streams Law[5] and the rules and regulations promulgated thereunder.

4. Gary Harper is a mining inspector for the Department. His territory includes quarry inspections for Pike, Wayne and part of Susquehanna counties. This territory includes 200 to 300 quarries. Of those quarries, 28 are "Large Permits" and the remaining are "Small Permits." (Harper, N.T. 8-9)

5. A Small Permit is for operations that are five acres or less and is limited to 10,000 tons per year of material. A Small Permit also does not generally require an NPDES permit and has more limited reclamation requirements. (Harper, N.T. 9, 12; 25 Pa. Code § 77.108)

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[3] Mr. Colbert resides part-time in Hawley and part-time in New York City. (N.T. 136-37)

[4] Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301-3326. (Noncoal Surface Mining Act).

[5] Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001 (Clean Streams Law).

6. A Large Permit does not limit acreage or restrict tonnage, but has more complicated environmental resource and reclamation requirements. (Harper, N.T. 9, 12)

7. Middle Creek Quarry was issued three Small Permits sometime in 2001: SMP Nos. 64022807, 64022808 and 64002803. (Malti, N.T. 256-57; see Exs. A-2; C-2)

8. E.R. Linde also holds a Small Permit within the boundary of Middle Creek's Large Permit, SMP No. 64032802. Linde operates an asphalt plant on this site. (Ex. C-4; Harper, N.T. 11; Stutzman, N.T. 173)

9. The Large Permit, currently under appeal here, supersedes the three Small Permits initially held by Middle Creek. (Exs. A-12; C-1)

The Large Permit Application

10. John Malti owns and operates Middle Creek Quarry. He received his first small non-coal permit for the site sometime in late 2001. Shortly after he began working the Small Permits, he initiated the process for obtaining a Large Permit. (Malti, N.T. 242, 249)

11. Both the Small Permits and the Large Permit are on property that Mr. Malti owns with two other individuals. They have owned the property for five or six years. (N.T. 244, 259)

12. Middle Creek Quarry employs six individuals. John Malti works at the quarry every day and maintains the quarry's records at his house. (N.T. 254)

13. The Department formally received an application for a Large Permit from Middle Creek on or about July 22, 2003. (Exs. C-1; A-12; Spott, N.T. 227)

14. Joseph S. Blyler is a mining engineer in the Department's Pottsville office. His responsibilities include, among other things, the review of erosion and sedimentation control plans and NPDES permit applications related to mining operations. (N.T. 194)

15. He was first notified of the Middle Creek Large Permit application in August 2003. His review lasted for approximately 15 months, until November 2004. At that time he recommended approval and also the inclusion of certain special conditions concerning the erosion and sedimentation controls which were added to the permit. (Blyler, N.T. 194; 219)

16. The water quality of the receiving stream, Middle Creek, is "high quality." (Blyler, N.T. 195; Spott,[6] N.T. 228; 25 Pa. Code § 93.9b)

17. Accordingly, the erosion and sedimentation controls for the permit site had to be larger than normally required for mine sites in order to protect the water quality of Middle Creek. (Blyler, N.T. 198; 206-207)

18. The erosion and sedimentation controls on the site are designed at two to three times the factor of safety necessary for the volume of water that they will handle. (Spott, N.T. 231)

19. Generally, the controls on the site consist of large retention basins and a series of sediment traps to collect runoff and sediment from the site. The smallest of the

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[6] Frederick E. Spott is the consultant who prepared the application for the Large Permit on behalf of Middle Creek. He has held his professional engineer certification since 1964. The bulk of his work as a consultant involves mining operations. (N.T. 225-26)

retention basins can handle over a million gallons of water. (Blyler, N.T. 203-207; 221; Ex. C- 2; see generally testimony of Frederick E. Spott, P.E, N.T. 225-40)

20. The Permittee can only discharge from these basins after sampling the water and receiving permission to discharge from the Department, unless there is a 10-year/24-hour storm event. (Blyler, N.T. 200-201; 206-207; Spott, N.T. 230-31)

21. These basins and sediment traps are to be installed in four phases. The permit requires that Phase One controls be installed before mining begins, and consists of a sediment basin, a collection berm and a discharge channel. (Blyler, N.T. 212-13; Spott, N.T. 230)

22. Other phases are added later with the installation of additional basins, following the operation plan of the quarry. (Blyler, N.T. 213-18)

23. The permit does not allow the discharge of process water, nor will groundwater be encountered. (Blyler, N.T. 223)

24. Cynthia Kuklis is a geologic specialist with the Department's Pottsville office. She was responsible for reviewing the geologic and hydrologic modules in the Large Permit application. (N.T. 181-82)

25. She reviewed the water quality data that was submitted with the permit application. In her opinion, the monitoring points proposed in the application were appropriate. (N.T. 182)

26. Although there appeared to be some significant inaccuracies with the stream flow data that was submitted, she did not consider this information because flow data was not relevant to this permit application. (Kuklis, N.T. 182, 185; Harper, N.T. 85-88)

27. The Appellant testified that he witnessed a discoloration in the Lackawaxen River adjacent to his home in June 2004. He observed that the current was a chocolate color, but the shallows were not muddy. (Colbert, N.T. 130-37; Exs. A-9, A-10)

28. However, no discharge has been observed from the Middle Creek site by the Department or the Permittee. (Harper, N.T. 115; Malti, N.T. 246)

29. The Appellant offered no testimony connecting the "chocolate" color of the Lackawaxen to any discharge from the quarry site.

30. The Appellant offered no scientific evidence that the monitoring points used to monitor the water quality of Middle Creek were inappropriate.

31. Colleen Stutzman is an Inspector Supervisor in the Department's Pottsville District Mining Office. She supervises Gary Harper. (N.T. 166)

32. As part of the review of the Large Permit application, she visited the site with Gary Harper. (N.T, 166-67)

33. When she visited the Small Permit sites, including the Linde permit site, she and Mr. Harper discussed the fact that Mr. Harper believed that Middle Creek was exceeding the tonnage amount permitted under the Small Permit. (Stutzman, N.T. 176)

34. While she was aware that Middle Creek had been issued a compliance order for overmining, in her view, the operator had the option of choosing to file an application for a Large Permit in order to avoid further enforcement by the Department. (Stutzman, N.T. 177-78)

35. She described the procedure for performing a compliance review on a permit applicant. Specifically, she runs a "computer violation check." If there are no outstanding compliance orders or unpaid civil penalties, the permit is issued. (N.T. 167)

36. This computer check includes related parties, such as an officer or a stockholder in another company, or a parent corporation. (N.T. 167-68)

37. The actual computer check is run by a clerical staff person and presented to either a compliance manager or an inspector supervisor for review. (N.T. 168)

38. The Department gave no consideration to whether or not Middle Creek's compliance history indicated an intention or ability to comply with the law in the future. (Stutzman, N.T. 180)

39. The compliance review is the last step in the permit approval process. (N.T. 168)

40. Ms. Stutzman did not recall whether or not she or the compliance manager approved the compliance review for Middle Creek's Large Permit application. (N.T. 168)

41. In order to add a contractor or a subcontractor to a non-coal permit, all an applicant has to do is submit a revised Module 3, which is considered a minor permit revision. No public notice is required. (Stutzman, N.T. 169)

42. The purpose of the Department's review is to determine whether "they are a legitimate operator" and "can do contract work on a valid permit." (Stutzman, N.T. 171)

43. The Department would perform a compliance review for a proposed subcontractor in the same manner as for the primary permit applicant. (Stutzman, N.T. 171)

44. E.R. Linde was not listed as a subcontractor on the Large Permit application, even though Mr. Harper noted in a July 2003 inspection report that Linde should have been added as a subcontractor on the Small Permit. (Harper, N.T. 96; Ex. A-1)(See below)

45. The only explanation Mr. Malti could provide to explain why Linde was not listed as a subcontractor in the Large Permit application, was that no one asked him to. (Malti, N.T. 276-77)

46. The Department and the Permittee stipulated that Linde should have been listed as a subcontractor on the Large Permit application. (N.T. 100-102)

47. Because Linde was not listed as a subcontractor on the Large Permit application, no evaluation was made of Linde's compliance history, or the compliance history of any related parties. (Stutzman, N.T. 179-80)

Inspection History of Small Permit SMP No. 64002803

48. Gary Harper inspected the Middle Creek mine sites several times.

49. The first inspection of SMP No. 64002803 ("Small Permit 803" or "803 Permit") was on April 3, 2001. This inspection noted that the mine operator needed to post an appropriate identification sign and properly mark the entire five acre bonded area. (Ex. A-2; Harper, N.T. 29-31)

50. The next inspection was performed on March 23, 2003, in response to a complaint. Inspector Harper reminded the operator in his report that the tonnage limit

on the permit is 10,000 tons per year and that the berming on the site is no longer adequate and needed to be improved. Inspector Harper also noted that the permit boundary needed to be marked immediately. (Harper, N.T. 21-23; Ex. A-2)

51. Inspector Harper also warned Middle Creek that oil cans had to be properly stored and disposed of at the site because they were a danger as a pollutant. (Harper, N.T. 21-23)

52. On July 1, 2003, Inspector Harper again visited the site for an inspection in response to a complaint concerning dust from the haul road. He noted that the condition of the road was a safety hazard and issued a notice of violation to Middle Creek Quarry which required improvements to the road to prevent fugitive dust emissions by August 12, 2003. (Harper, N.T. 28; Ex. A-2)

53. Inspector Harper also noted in his report that the Small Permit be "corrected" to include E.R. Linde as a contractor at the site. A copy of the inspection report was mailed to E.R. Linde (Harper, N.T. 25; Ex. A-2)

54. He recommended that they be added as a contractor because at the time they were actually crushing at the site and were "more or less running that five acre permit at the time." (Harper, N.T. 25, 96)

55. Inspector Harper returned to the site on July 27, 2003. (Harper, N.T. 27)

56. He noted that since his vehicle raised no dust on either the public road or the common use road, that he was lifting the July 1 Notice of Violation. (Ex. A-2)

57. However, Inspector Harper noted that the operator left petroleum containers on the pit floor which created a danger of pollution to the waters of the

Commonwealth. He noted that he discussed the proper disposal of residual waste at the site with an individual on-site during the July 1, 2003 inspection and also noted the requirement in his April 2, 2003 inspection report. Accordingly, he issued a notice of violation to Middle Creek for failing to protect the waters of the Commonwealth, and required the operator to demonstrate the proper storage, handling and disposal of petroleum products on the site by September 5, 2003. (Harper, N.T. 27-28; Ex. A-2)

58. Inspector Harper also issued a notice of violation for the continued failure of Middle Creek to properly mark the boundary of the bonded area of the permit. He had warned Middle Creek about the necessity of marking the permit boundary in his inspections dated April 3, 2001, March 23, 2003 and July 1, 2003. He also noted that he discussed this matter with John Malti. In his report, he provided some suggestions for how the boundary might be adequately marked. (Harper, N.T. 28; Ex. A-2)

59. Finally Inspector Harper noted some concern about the condition of the common use roads on the site and warned Middle Creek that if they are not improved by his next inspection that he will be taking enforcement action. (Ex. A-2)

60. The next inspection of the 803 permit site was on August 28, 2003. Inspector Harper was accompanied by Colleen Stutzman, his supervisor, on this visit. (Harper, N.T. 38-39; Ex. A-2)

61. Inspector Harper noted that the common use road was again causing a safety hazard because of dust. He noted that he had brought this to the attention of the operator in his July 27, 2003 inspection. Accordingly, he issued a notice of violation for Middle Creek's failure to prevent fugitive dust and made recommendations for how they might control dust. (Harper, N.T. 40; Ex. A-2)

62. He also noted that petroleum products were now being properly stored and that other waste at the site had been cleaned up, so he lifted the NOV issued on July 27, 2003 for that violation. (Ex. A-2)

63. However, Inspector Harper noted that the permit boundary is still not marked and that the NOV issued for that violation was not lifted at that time. (Ex. A-2)

64. Mr. Malti testified that he didn't mark the perimeter because he "was just busy." (N.T. 271)

Inspection History of SMP No. 64032802 Held by E.R. Linde

65. E.R. Linde holds a Small Permit within the boundary of Middle Creek's Large Permit. (Ex. C-4)

66. E.R. Linde operates an asphalt plant on this site, and uses materials from Middle Creek's permit site.

67. On July 1, 2003, in addition to inspecting Middle Creek Small Permit 803, Inspector Harper inspected the Linde permit site in response to the complaint of dust and mud on the public road. Inspector Harper noted that the barrier between the Linde permit and Small Permit 803 was being used as a common use road. (Ex. A-4)

68. Inspector Harper did not note any specific violations at the site, but reminded Linde that a sign identifying the site needed to be posted. (Ex. A-4)

69. Inspector Harper again visited the Linde site while inspecting Small Permit 803 on August 28, 2003. (Ex. A-4)

70. In his report Inspector Harper noted that he had issued an NOV to E.R. Linde for failing to post an identification sign on July 27, but that sign was now posted. Therefore the NOV was lifted. (Ex. A-4)

71. However, fugitive dust from the common use road was crossing to the public road and was causing a hazard. Therefore Mr. Harper issued an NOV and required Linde to water the road during dry periods and either resurface the road with a durable material or apply a chemical dust suppressant. (Harper, N.T. 40; Ex. A-4)

72. The Linde site was reinspected on September 11, 2003. Inspector Harper noted that the common use road had been paved from the public road to the gate and was told that the operator would be using a dust suppressant on the remaining portions of the road. Therefore he lifted the August 28 NOV. (Ex. A-4)

73. Inspector Harper also inspected the Linde site on October 27, 2004 and November 10, 2004, to investigate a complaint that the operator had exceeded the maximum annual tonnage limit for the permit. (Ex. A-4)

74. Inspector Harper took measurements and concluded that Linde had engaged in mining activities off the permit site. Specifically, Linde had blasted the barrier between the Linde permit and Small Permit 803 held by Middle Creek. (Ex. A-4)

75. Inspector Harper stated in his report that he had discussed the requirement that the barrier between the two permits be maintained in July 2003. He decided to issue a compliance order to Linde for mining off its permit site and provided a list of compliance options from which Linde could choose in order to comply with the order. (Harper, N.T. 49-51; Ex. A-4)

76. On November 19, 2004, Inspector Harper visited the Linde site and noticed that a leak in the plant fuel supply line had not been repaired as he had directed on October 27, 2004. He reported that he had discussed this leak with personnel on the site in October, but that nothing had been done. (Harper, N.T. 53-56; Ex. A-4)

77. He left the area and returned in approximately one hour to find that still nothing had been done to commence repairs on the leak. When he threatened to issue a compliance order and shut down the plant, the leak was repaired. (Harper, N.T. 56-57; Ex. A-4)

78. Since he did not know how long the pipe had been leaking, he referred the matter to the Department's Waste Management Program. (Harper, N.T. 58-59; Ex. A-4)

79. He also issued and simultaneously lifted a notice of violation for creating a danger of pollution. (Harper, N.T. 56-57; Ex. A-4)

80. On December 17, 2004, Inspector Harper visited the site to follow up on the November compliance order and to investigate some complaints.

81. The barrier between the Linde permit and Small Permit 803 had been restored. Accordingly Inspector Harper lifted the November compliance order. (Ex. A-4)

Inspection History of Small Permit SMP No. 64002807

82. Inspector Harper also inspected SMP No. 64002807 ("Small Permit 807" or "807 Permit").

83. Inspector Harper visited the site on September 11 and October 1, 2003. His report stated that this inspection was a follow-up to an inspection on July 1, 2003, and was also done in the course of reviewing Middle Creek's large noncoal permit application. (Harper, N.T. 14; Ex. A-3)

84. He issued a notice of violation to Middle Creek for failing to renew its mining license which had expired on August 31, 2003. (Ex. A-3)

85. Inspector Harper lifted this notice of violation on November 18, 2003, because Middle Creek had applied for its license, although the application was still pending. (Ex. A-3)

86. On November 10, 2004, Inspector Harper issued a compliance order to Middle Creek for mining beyond the 5 acres authorized by the permit. Middle Creek was required to accurately mark the off bonded and permitted area and reclaim the area improperly affected by mining. (Harper, N.T. 15-16; Ex. A-3)

87. The compliance order also charged Middle Creek for mining more than the 10,000 tons per year allowed under the Small Permit. Mr. Harper estimated that the Permittee had mined 30,000 tons over the 10,000 ton limit. (Harper, N.T. 16; Ex. A-3)

88. Inspector Harper again inspected the 807 permit on December 17 and 28, 2004. (Ex. A-3)

89. He noted that the area to be reclaimed under the November 10 Compliance Order was marked off with orange traffic cones. (Ex. A-3)

90. Additionally, Mr. Malti submitted some of the information relating to the tonnage report that was required by the November 10 Compliance Order. (Ex. A-3)

91. Inspector Harper concluded that the compliance order had been sufficiently complied with and that the imminent issuance of the large noncoal permit would address any remaining concerns. (Ex. A-3)

92. Accordingly, he lifted the compliance order on December 28, 2004.

93. Mr. Malti testified that the overmining occurred because "we got working and it just got away from me." He also stated that "we just got working and the summer went by, like that, and when we checked we were over." (Malti, N.T. 268, 270)

94. He also testified that he did not understand that each Small Permit had a separate tonnage limit; he thought they all "stacked together." (Malti, N.T. 268)

95. The large noncoal permit was issued to Middle Creek on January 10, 2005. (Exs. A-12; C-1)

96. John Malti testified that in his view, no notices of violation or compliance orders were ignored. To the contrary, he believed that they were addressed immediately. (Malti, N.T. 248)

97. To summarize, in the eighteen months before the Permittee received its Large Permit, the Department issued five notices of violation and one compliance order for over-mining and mining off the bonded permit area.

DISCUSSION

The Board's review of an action of the Department is *de novo.* Accordingly, the Board makes its findings of fact based upon the record developed at the hearing.[7] Where we find that the Department has inappropriately exercised its authority, we may substitute our discretion.[8]

In a third-party appeal from the issuance of a permit, it is the appellant who bears the burden of proof.[9] In this case, Mr. Colbert (Appellant) must prove by a preponderance

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[7] *Pequea Twp. v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998).
[8] *Id.*
[9] 25 Pa. Code § 1021.122(c)(2).

of evidence that the Department's decision to issue the Large Permit violated the law or was otherwise unreasonable or inappropriate.

The Appellant argues that the Large Permit should be revoked because the Permittee did not comply with the terms and conditions of its Small Permits. Therefore, in his view, the Department erred in issuing the Large Permit. He also contends that the permit should be revoked because E.R. Linde was not included as a subcontractor in the permit application. Finally, he contends that the quarry has caused contamination of the Lackawaxen River and that the stream flow data in the permit application was flawed. The Department and the Permittee dispute these contentions and urge the Board to uphold the Large Permit and dismiss the Appellant's appeal.

Although we agree with the Permittee and the Department that the Appellant failed to prove that the Permittee caused any contamination of the Lackawaxen River, or that the mining operation creates any threat of pollution to that river, we do find that the Appellant sustained his burden of demonstrating that the Department's review of the Permittee's permit application was inadequate as a matter of law. We will vacate the Permittee's Large Permit on that basis.

It is clear from the record that the Appellant failed to prove any threat of pollution to either the Lackawaxen River or to Middle Creek[10] as a result of the Permittee's mining operation. Although the Appellant observed a "chocolate condition" in the Lackawaxen River, he offered no evidence linking that condition to any activity at the quarry. Further, he offered no scientific or engineering testimony to refute the position of Mr. Blyler and Mr. Spott that the erosion and sedimentation control plan approved in the Large Permit

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[10] Middle Creek ultimately empties into the Lackawaxen River. (Ex. C-3)

was more than adequate to protect the water quality of Middle Creek. Although the stream flow data submitted with the permit application was obviously inaccurate, Ms. Kuklis testified that the stream flow data was not relevant to the Department's review of the water quality of Middle Creek. The Appellant offered no evidence to refute that claim.

However, after reviewing Mr. Harper's testimony and his inspection reports, we are greatly troubled by the Department's cursory compliance review. Specifically, the computer check of the Permittee's history by itself was not in accordance with the requirements of the Surface Mining Act or its regulations. The Surface Mining Act requires that:

> (b)(1) The department shall not issue any surface mining permit or renew or amend any permit if it finds, after investigation and an opportunity for an informal hearing, that:
>
> (i) the applicant has failed or continues to fail to comply with any of the provisions of this act or the act of May 31, 1945 (P.L. 1198, No. 418), known as the Surface Mining Conservation and Reclamation Act; or
>
> (ii) the applicant has shown a lack of ability or intention to comply with any provision of this act or the Surface Mining Conservation and Reclamation Act, as indicated by past or continuing violations.[11]

Ms. Stutzman testified that the Department's compliance review consists of merely running a computer check of the applicant's compliance record. Because there were no "outstanding" violations, the Department did nothing further and cleared the applicant for a permit. This compliance check is performed as the last step in the permit review

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[11]Section 3308(b)(1) of the Noncoal Surface Mining Conservation and Reclamation Act, 52 P.S. § 3308(b)(1).

process. No consideration was given to whether the applicant's past failure to comply with the law under (b)(1)(i) would trigger the permit bar of Section (b)(1) or whether the applicant's conduct has shown a lack of ability or intention to comply with the law under (b)(1)(ii). That is, the Department complied with only part of subsection (b)(1)(i) of Section 3308, and completely ignored subsection (b)(1)(ii). It is the responsibility of the Department to do more than a ministerial computer check without some consideration of "the totality of the [applicant's] history, in combination with other possibly relevant factors, to assess whether the party's conduct shows that it [can] be trusted with a . . . permit."[12]

The Department takes the position that the fact that the Permittee had no outstanding violations at the time the Large Permit was issued is equivalent to a determination that the Permittee evidenced an intent and ability to comply with the law. We reject this argument. It is clear from the language of the statute that both an outstanding violations check *and* an assessment of an applicant's past behavior are required by the Noncoal Mining Act.

In this case this applicant -- within a relatively short period of time -- received five notices of violation and a two-count compliance order. A close reading of the inspection reports indicates that it was Mr. Harper's practice to warn the Permittee, at least once, that he was not in compliance with the provisions of the Small Permits before he issued a notice of violation. For example, over a period of months Mr. Harper warned Mr. Malti that the bond area of the permit had to be properly marked. Mr. Malti failed to properly mark the permit area, was issued more than one notice of violation, and then not

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[12] *O'Reilly v. DEP*, 2001 EHB 19, 44-45 (quotation omitted).

surprisingly was ultimately issued a compliance order for mining beyond the bonded area of his permit. When asked for an explanation, Mr. Malti could only say that he was too busy to mark the boundaries and take note of where he was mining. Similarly, he had no convincing explanation for mining over the tonnage allowed by the Small Permit other than that he was busy and did not understand that each Small Permit had a separate limit and that they were not to be "stacked together."

The Department should also have given at least some consideration to Mr. Malti's failure to include E.R. Linde as a subcontractor on the Large Permit application. Although Linde may not have been performing work on the Middle Creek permits when the Large Permit application was first submitted, it was certainly doing some activity thereafter. In Mr. Harper's July 1, 2003 inspection report of the 803 Small Permit, he notes that Linde should be added as a subcontractor on that permit. Linde's site is right next to the Permittee's Small Permit 803 site and is included within the boundary of the Large Permit. Yet Mr. Malti neither informed his consultant of Linde's mining activity nor did he otherwise amend his permit application during the eighteen months that the Department was reviewing it. An applicant has an obligation to amend its permit application when the circumstances of its proposed operation change.[13]

This behavior clearly merited a closer analysis by the Department. The whole purpose of a compliance review is for the Department to determine that a permit applicant is likely to be responsible enough to be informed of what the law and the

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[13] Sections 77.161 and 77.162 of the mining regulations require that contractors be identified in the permit application. 25 Pa. Code §§ 77.161 and 77.162(a)(1)(iii). Pursuant to Section 3308(b) of the Noncoal Act, contractors are also subject to a compliance review by the Department before a permit may be issued to the primary permittee.

regulations require and motivated to make an effort to comply with those regulations. Although an applicant need not have a perfect record in order to receive a permit, an applicant's past is certainly an indicator of his future behavior.[14] In this era of scarce resources – both in terms of Department personnel and environmental resources – it is imperative that the Department take a careful look at an applicant's record before issuing a large sophisticated permit. The Department's failure to do so creates a very a real risk that it will be required to expend resources in inspection and enforcement, not to mention the potential irreversible damage that might be done to the land. Under the Department's current review policy an applicant could be issued a notice of violation every day it has a permit and so long as it rectifies its misbehavior on the eve of the issuance of a new permit, the Department will not deny the permit application. That scenario is certainly not what was envisioned by the General Assembly when it enacted Section 3308.

The Department's review of the permit application was also inadequate because of the failure of the Permittee to include E.R. Linde as a subcontractor on the permit application. The Noncoal Act and the Department's regulations clearly require contractors to be identified in a permit application.[15] Contractors and subcontractors must be approved by the Department *before* engaging in mining activity.[16] As we discussed above, as soon as Mr. Malti and E.R. Linde entered into their business arrangement, he was under an obligation to amend his permit application to properly identify Linde for the Department's review. Furthermore, it is disingenuous of the Department to suggest that it

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[14] *O'Reilly v. DEP*, 2001 EHB 19.
[15] 52 P.S. § 3308(b)(2); 25 Pa. Code §§ 77.161 and 77.162(a)(1)(iii).
[16] 52 P.S. § 3308(b)(2).

had no reason to know that Linde was doing work on the Permittee's quarry when Mr. Harper specifically noted that fact in an inspection report in July of 2003. Although it may not be unusual to have overlapping noncoal permits, the fact that the Linde Small Permit was adjacent to the Permittee's 803 Small Permit, was completely encompassed within the proposed boundary for the Large Permit, and shared an access road with the Permittee's Small Permits, at least merited a closer look by the permit reviewers. Although the Department is entitled to rely on the information in a permit application and need not verify each and every fact presented by an applicant, it is an abdication of its duty to enforce the law to turn a blind eye to information in its own files which suggest that an application may not be complete or accurate.

Further, we reject the Department's attempt to cure this defect in the permit application by seeking to reopen the record to introduce evidence that the Large Permit has been modified to include E.R. Linde as a subcontractor. Section 3308 of the Noncoal Act also requires the Department to consider whether or not a proposed contractor or subcontractor has engaged in unlawful conduct. As we explained above, the compliance review of the Permittee was inadequate because the Department did not perform a full compliance review. Ms. Stutzman testified that had a subcontractor been identified in the permit application only outstanding violations would have been considered in the compliance review. The Department would not have considered the contractor's intent and ability to comply with the law based on reviewing its violation history. Accordingly, modifying the permit to include Linde without a full compliance review as required by Section 3308, does not cure the fact that the permit is void because it is not consistent with the requirements of the Noncoal Act.

In sum, we find that the Department failed to comply with Section 3308 when it did not consider whether the Permittee's past violations trigger the permit bar of Section (b)(1) or whether Permittee's conduct demonstrates a lack of ability or intention to comply with the Noncoal Act and its regulations. The Department's review was further inadequate because it failed to require the Permittee to identify E.R. Linde as a subcontractor on the permit application. Given the record developed in this appeal, including the information in the inspection reports, compliance orders, and Mr. Malti's inability to provide a convincing explanation for his failure to comply with the terms of his Small Permits, and the Department's failure to fulfill its statutory obligations as described above, we cannot conclude that the error is harmless. *Contrast Berks County v. Department of Environmental Protection, et al.*, 870 C.D. 2005, slip op. at 16 (Cmwlth. Ct., February 28, 2006) ("Assuming there was a procedural error during the processing of a permit application, it does not provide a basis for remand if it was harmless.") This conclusion that the error was not harmless, of course, in no way suggests that we have any predisposition on the substance of the Department's deliberations on these questions. Rather, all we are saying is that the Department failed to conduct a complete analysis in accordance with its statutory obligation and that based on the evidence adduced at trial, we cannot conclude that such error was harmless.

Accordingly, we will vacate the Large Permit and require the Department to review the Permittee's compliance history under the Small Permits in its totality as required by Section 3308(b)(1)(i) and (ii). The Department must also consider the Permittee's and E.R. Linde's compliance to-date with the Large Permit, so that any violations since the issuance of the Large Permit will be considered. We will retain jurisdiction.

We make the following:

CONCLUSIONS OF LAW

1. The Board's scope of review is *de novo.* Where we find that the Department has inappropriately exercised its authority, we may substitute our discretion. *Pequea Twp. v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998).

2. The Appellant bears the burden of proof. 25 Pa. Code § 1021.122(c)(2).

3. The Appellant failed to prove that the Department's review of the erosion and sedimentation plan and review of water quality data in the permit application were inadequate.

4. The Department failed to comply with Section 3308(b) of the Noncoal Act by failing to consider whether or not the Permittee's violation history triggered the permit bar or indicated an ability or intention to comply with the law by only considering whether the Permittee had outstanding violations. 52 P.S. § 3308(b)(1).

5. The Department failed to comply with Section 3308(b)(2), by not requiring the Permittee to identify E.R. Linde as a subcontractor in the permit application and by failing to assess the compliance history of E.R. Linde.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THOMAS COLBERT	:	
	:	
v.	:	
	:	**EHB Docket No. 2005-029-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MIDDLE CREEK QUARRY, INC., Permittee	:	

ORDER

AND NOW, this 10th day of March, 2006, the appeal of Thomas Colbert in the above-captioned matter is hereby SUSTAINED. Surface Mining Permit No. 64032802 held by Middle Creek Quarry is hereby VACATED and REMANDED to the Department for a complete compliance review of the Permittee and any proposed contractor or subcontractor in accordance with Section 3308 of the Noncoal Act, 52 P.S. § 3308, and consistent with the foregoing adjudication. Jurisdiction is retained.

The motion of the Department of Environmental Protection to reopen the record is DENIED.

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
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DATED: March 10, 2006

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FRED W. LANG, JR., JOYCE E. SCHUPING, DELORES HELQUIST and SHERRY L. WISSMAN	:	
v.	:	**EHB Docket No. 2003-145-R (Consolidated with No. 2004-090-R and 2004-093-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MAPLE CREEK MINING, INC.	:	**Issued: March 21, 2006**

OPINION AND ORDER ON PETITION FOR STAY

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A mining company's petition for stay is granted while this appeal is pending before the Commonwealth Court. However, the mining company is ordered to continue to pay the cost of maintaining the Lang pond and is required to post an appeal bond in the amount of $30,000.

OPINION

This matter involves an appeal by Fred W. Lang, Jr. and his sisters, Joyce E. Schuping, Delores Helquist and Sherry L. Wissman (the Landowners). In an adjudication issued on January 12, 2006, we held that underground mining conducted by Maple Creek Mining Company, Inc. (Maple Creek) had caused a pond (the Lang pond) on property owned by the Landowners to be diminished, and we ordered Maple Creek to pay for the increased cost of

operating and maintaining the pond.[1] Our order required Maple Creek either to pay a lump sum to the Landowners, representing the present value of the increased operation and maintenance costs in perpetuity, or to develop a financial vehicle, acceptable to the Board, compensating the Landowners for the yearly increased operation and maintenance costs. Our adjudication denied that portion of the appeal asking that further repairs be made to the pond and that the mining company install a dechlorination system.

The Landowners and Maple Creek appealed the Board's adjudication to the Commonwealth Court at Docket Nos. 192 C.D. 2006 and 329 C.D. 2006, respectively. Maple Creek has filed a petition to stay our order pending the disposition of the appeals by the Commonwealth Court. During the stay, Maple Creek has agreed to pay for any increased operation and maintenance costs that are incurred. In the alternative, Maple Creek petitions that a stay be granted on the condition that it post an appeal bond in the amount of $10,000. The Landowners filed a response opposing the petition. The Department of Environmental Protection sent a letter to the Board stating that it did not support the petition for a stay but did not intend to file any response to the petition.

Pennsylvania Rule of Appellate Procedure 1781 (a) states that an application for stay of an order of a government unit pending review in an appellate court shall ordinarily be made to the government unit. When ruling on an application for stay pending appeal, the Board employs the same criteria as that in ruling on a petition for supersedeas. *Heston S. Swartley Transportation Co., Inc. v. DEP*, 1999 EHB 160, 163; *E. Marvin Herr v. DEP*, 1997 EHB 977. In other words, we consider the following factors: irreparable harm, the likelihood of the applicant prevailing on the merits, and the likelihood of injury to the public or other parties. *Id.*

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[1] *Lang et al. v. DEP and Maple Creek Mining Co.*, EHB Docket No. 2003-145-R (Adjudication

Here, the Landowners assert they will be irreparably harmed if Maple Creek is not required to post adequate security during the pendency of the appeal. They point out that a $10,000 appeal bond, as suggested by Maple Creek, would not cover the cost of maintaining the pond. According to the affidavit of landowner Fred Lang, the cost of supplying water to the pond in 2005 was in excess of $15,000. The Landowners further argue that they would have no guarantee as to the financial capability of Maple Creek to make payment of the amount adjudicated by the Board in the future. They suggest that Maple Creek should be required to provide security in the amount of 120% of the amount adjudicated by the Board, or $487,350.43, which is the amount that would be required under Pa.R.A.P. 1731(a) for an automatic supersedeas from orders requiring solely the payment of money.

We agree with the Landowners that the posting of a $10,000 bond would not provide adequate financial security. We find that this problem can be remedied by requiring Maple Creek to continue to pay for the cost of maintaining the pond during the pendency of this appeal in addition to posting an appeal bond in an amount that is adequate to cover the cost of maintaining the pond during the pendency of this appeal.

None of the parties have alleged there will be harm to the public if this matter is stayed. As to the final criterion, the likelihood of success on the merits, we do not find that Maple Creek is likely to succeed on the merits of its appeal before the Commonwealth Court. However, because this matter has been appealed by both Maple Creek and the Landowners and involves an issue that this Board has not previously addressed, we find there is merit to allowing a stay until this matter can be addressed by the Commonwealth Court.

Therefore, we enter the following order:

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issued January 12, 2006).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRED W. LANG, JR., JOYCE E. SCHUPING, DELORES HELQUIST and SHERRY L. WISSMAN	:	
v.	:	**EHB Docket No. 2003-145-R (Consolidated with No. 2004-090-R and 2004-093-R)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and MAPLE CREEK MINING, INC.	:	

ORDER

AND NOW, this 21st day of March, 2006, Maple Creek Mining Company's petition for a stay of the Board's order of January 12, 2006 is **granted** provided that Maple Creek Mining Company continues to pay the increased cost of maintaining the Lang pond as set forth in the Board's January 12, 2006 adjudication and further that Maple Creek Mining Company post an appeal bond in the amount of $30,000 while this appeal is pending before the Commonwealth Court.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATE: March 21, 2006

EHB Docket No. 2003-145-R
(Consolidated with 2004-090-R
and 2004-093-R)

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2004-201-SA-K**
AMERICAN FUEL HARVESTERS, INC.; NICHOLAS G. MAZZOCCHI; DEMOTECH, INC.; SCOTT SLATER; and WILLIAM SCHUTTER	:	**Issued: April 4, 2006**

OPINION AND ORDER DENYING SLATER AND DEMOTECH'S PETITION FOR RECONSIDERATION

By Michael L. Krancer, Chief Judge and Chairman

Synopsis

Petitioners' request for reconsideration of an interlocutory order denying their motions for summary judgment is denied.

OPINION

Before us is the petition of Slater and Demotech (Petitioners) for reconsideration of the Opinion and Order we issued on March 1, 2006 denying their motions for summary judgment. *DEP v. American Fuel Harvesters, Inc.*, Docket No. 2004-201-SA-K (Opinion Issued March 1, 2006)(Opinion and Order). There are three points they make all of which relate to HSCA Section 1301(a). We discussed and quoted that section in our Opinion and Order and we refer the reader to it for a discussion of the subsection and for more detail on the motions for summary judgment.

First, Petitioners say that we "misunderstood" one of the points of their Section 1301(a) argument. The say they never meant to say that an administrative or judicial action had to be complete before DEP would be allowed to commence a cost recovery action. The other points of Petitioners' argument relate to the question whether enforcement action against some prior owner can, under any circumstances, be sufficient for Section 1301(a) purposes as to a later owner. Slater and Demotech have contended that Section 1301(a) requires the conclusion as a matter of law that they are entitled to dismissal because no enforcement action of any kind was brought against either of them by name. They say that we *sua sponte* and inappropriately injected into the case a notion of successor in interest or that they were "standing in the shoes" of other parties when we concluded that they had not demonstrated that Section 1301(a) could not be read to preclude absolutely the conclusion that they stood in the shoes of the party or parties to an earlier enforcement action. Finally, they say that our reading of both Section 1301(a) and *Crown Recycling & Recovery, Inc.*, 1993 EHB 1571, was wrong when we found, on the basis of both, that we could not conclude now that Section 1301(a) does not allow the possibility that an enforcement action against a then owner and/or operator of a site is enough to remove the Section 1301(a) bar to suit against later owners and/or operators.

Petitioners do not cite in their Petition or their brief the Rule or the standard for reconsideration. As the Order from which they seek reconsideration is an interlocutory one, 25 Pa. Code § 1021.151 is on point. That Rule provides that a petitioner must demonstrate that extraordinary circumstances justify reconsideration. *Id.* The comment to the Rule provides that "reconsideration [of an interlocutory order] is an extraordinary remedy and is inappropriate for the vast majority of rulings issued by the Board." *Id.* Also, the comment provides that a party need not file a petition for reconsideration of an interlocutory order in order to preserve a point

for later argument which presumably means in the context of the final disposition of the case. *Id.* In this case, summary judgment having been denied, and the next step being trial, that would mean in the Adjudication phase. Interestingly, there is no qualitative description of what "extraordinary circumstances" means in 25 Pa. Code § 1021.151, but 25 Pa. Code § 1021.152 contains such a qualitative description as to reconsideration of final orders. Rule 1021.152 provides that "reconsideration is within the discretion of the Board and will be granted only for compelling and persuasive reasons" and that compelling and persuasive reasons may include situations where: (1) the final order rests on a legal ground or a factual finding which has not been proposed by any party and (2) the crucial facts set forth in the petition: (i) are inconsistent with the findings of the Board; (ii) are such as would justify a reversal of the Board's decision; (iii) could not have been presented earlier to the Board with the exercise of due diligence. 25 Pa. Code § 1021.152. Subsection (2) is not written with the greatest of clarity or syntactical perfection but it would seem that the "crucial new facts" being referred to must mean new facts that were unavailable at the time the case was tried.

The Board has treated the Rule 1021.151 standard as more demanding, narrower and harder to satisfy than the Rule 1021.152 standard. *DEP v. Angino*, Docket No. 2003-004-CP-C (Opinion Issued November 29, 2005); *Earthmovers Unlimited, Inc. v. DEP*, 2003 EHB 577, 578-81. This makes sense from the perspective that, as the comment notes, a party need not file a petition for reconsideration of an interlocutory order in order to preserve a point for later argument. The matter is open for further consideration at the Adjudication stage.

We will address Petitioners' points in order.

Slater and Demotech say that we "misunderstood" them to be arguing that Section 1301(a) requires an enforcement action to be complete before DEP would be allowed to

commence a cost recovery action. We had merely taken the precise wording from their reply brief and even quoted the language in our Opinion and Order. We may not be the only ones having trouble with this particular aspect of the Slater and Demotech argument since we see that their summary judgment motion reply brief mentions that the Department has "mischaracterized" their argument on this point. Again, the language in the reply brief, which is supposed to clear up the Department's supposed mischaracterization of this argument is: "[t]he Defendant's true contention is that the DEP must complete an administrative or judicial enforcement action against the owner or operator under other applicable environmental law...prior to recovery of response costs." We are even more confused because the very next section of Petitioners' brief in support of reconsideration is entitled, "Section 1301(a) does require completion of an administrative or judicial action against an alleged owner or operator prior to cost recovery under HSCA."

In any case, we can do nothing more now than apologize to Petitioners for our continuing inability to apprehend and we promise to continue to try to understand. Our current inability to understand, though, necessitates our having to say no again to Petitioners. If it is any consolation to Petitioners, this aspect of their Section 1301(a) argument, about which we take them at their word that it has escaped us, and still does, is only one facet of their Section 1301(a) strategy. Moreover, if Petitioners are saying to us that they are not saying that an enforcement action has to be complete then there would not appear to be any problem since they and we agree on that point.

That is the good news, now for the bad. We do not believe that any other aspect of our Opinion and Order on the Section 1301(a) points requires gutting. Remember that all we have done in our Opinion and Order is determine that the moving parties have not demonstrated, as

they must, that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law under Section 1301(a). We were invited by the Petitioners in their offensive (in the sense being on the attack, not the sense of being insulting) imposition of Section 1301(a) to conclude that this section requires their being dismissed now from the case. We found that it does not so require.

The other points of Petitioners' argument relate to the question whether enforcement action against some prior or then owner can, under any circumstances, be sufficient as to a later owner. On the successor in interest and/or "standing in the shoes" discussion, Petitioners protest that we have erred because we have raised the issue *sua sponte* and that the Department has neither raised nor plead facts, causes of action or arguments which give rise to such a ruling. We are troubled by the fact that the Department's response to the Petition For Reconsideration does not address Petitioners' point that the Department has not put this approach, the successor in interest or "standing in the shoes" approach, into play in this case. The Department's Complaint does not specifically allege that either Slater or Demotech is successor in interest or that either is standing in the shoes of anyone for purposes of either liability or for purposes of the Section 1301(a) requirements. It was really Petitioners in their motion papers who flagged the possibility that, for purposes of Section 1301(a), they could potentially be considered successors in interest or might stand in the shoes of others. As we said in the Opinion and Order,

> Not only is the nature of the transaction that occurred on August 17, 1995 lacking from the record, it is not clear whether Slater and Demotech considered themselves bound by the September 20, 1995 Commonwealth Court Order. Slater states "Demotech, complied with the Commonwealth Court Order and submitted its ROP on January 31, 1996[.]" Slater Brief at 5. That statement certainly implies that Slater and Demotech considered the Commonwealth Court Order binding upon them, which may constitute an enforcement action against one or both of them for purposes of Section 1301.

Opinion and Order, at 13 n.10. Thus, Petitioners themselves suggest that they voluntarily stepped into the shoes of others against whom enforcement action was pending. We will have to leave for another day whether that issue is in the case or not and what the outcome might be if it is. At this point in time, both questions remain open. Of course, that being the case, Slater and Demotech would still not be entitled to summary judgment on the point.

The final question boils down to our treatment of *Crown Recycling & Recovery*, 1993 EHB 1571 in the context of this case. We concluded, based on an analysis of the language of subsection 1301(a) and our reading of the *Crown Recycling* case, that, "initiation of administrative or judicial enforcement action against the then owner and/or operator is enough to remove the Subsection 1301(a) bar to suit. In this case that was done and there would be no bar to suit against Slater and Demotech." *DEP v. American Fuel Harvesters, Inc.*, Docket No. 2004-201-SA-K (Opinion Issued March 1, 2006), *slip op.* at 13. The Petitioners disagree with the way we read the *Crown Recycling & Recovery* case and they say it is distinguishable and that our Opinion and Order unduly expanded the principle of that case. They say that our conclusion is not supported by the language of Section 1301(a) which, instead, supports their view.

All judicial tribunals in applying the principle of *stare decisis* apply to the facts at hand decisional case law from prior cases. The facts from the prior decision are never identical to the facts in the case at hand. We note, though, that even the Department characterizes our treatment of *Crown* as an extension thereof. Thus, we will defer the Board's definitive determination of whether *Crown* applies to this case and if it does, how, to the Adjudication phase of the case. It is at that time that the question will be ripe for consideration by all Judges of the Board and, furthermore, we will have complete briefing on the subject. At this point in time, however, all Petitioners have done is say that they disagree with our application of *Crown* to the facts here in

the context of a denial of summary judgment and Petitioners have not yet carried the burden to demonstrate that they are now entitled to judgment as a matter of law on the point. Thus, the denial of their motion for summary judgment on this point stands as is.

For the foregoing reasons, Petitioners' petition is denied and an appropriate Order follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2004-201-SA-K**
AMERICAN FUEL HARVESTERS, INC.; NICHOLAS G. MAZZOCCHI; DEMOTECH, INC.; SCOTT SLATER; and WILLIAM SCHUTTER	:	

ORDER

AND NOW, this 4th day of April 2006, upon consideration of the Petition for Reconsideration of Slater and Demotech, the Brief in Support thereof, and the Opposition thereto by the Department, IT IS HEREBY ORDERED that the Petition is **denied**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

DATED: April 4, 2006

Service list on following page

EHB Docket No. 2004-201-SA-K

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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 2005-069-CP-L**
v.	:	**Issued: April 6, 2006**
PATRICK J. BRESLIN, d/b/a CENTURY ENTERPRISES	:	

ADJUDICATION

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

Synopsis:

The Board assesses a civil penalty in the amount of $25,000 for violations of the Clean Streams Law. The defendant failed to submit Discharge Monitoring Reports from April 2003 through April 2005 in violation of his NPDES Permit. The amount of the penalty is based largely upon the willfulness and duration of the violations.

INTRODUCTION

The Department of Environmental Protection (the "Department") filed a complaint for civil penalties under the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, against Patrick J. Breslin, doing business as Century Enterprises (hereinafter "Breslin"). The complaint is based upon Breslin's failure to submit Discharge Monitoring Reports ("DMRs") as required by his National Pollutant Discharge Elimination System ("NPDES") permit from April 2003 to the date of the complaint, April 18, 2005. The Department attached a notice to defend to the complaint. The Department personally served the complaint on Breslin. Notes of Transcript at p. 8 ("T. 8").

When Breslin did not file an answer to the Department's complaint, the Department filed a motion for deemed admissions. The Department served Breslin with a copy of the motion. Breslin did not respond to the Department's motion. We issued an Opinion and Order on July 1, 2005 granting the Department's motion and deeming all facts alleged in the Department's complaint to be admitted. *DEP v. Breslin*, EHB Docket No. 2005-069-CP-L (Opinion issued July 1, 2005).

We thereafter set a date for a hearing to determine liability and to receive evidence regarding the amount of the civil penalties to be assessed. The Order setting the hearing date also established mandatory deadlines for the filing of pre-hearing memoranda by both parties. The Department timely filed its pre-hearing memorandum. Breslin did not file a pre-hearing memorandum.

The Board held a hearing on October 6, 2005. Although Breslin had not previously participated in the case in any way, he appeared at the hearing *pro se*. The Department did not object to Breslin's participation. Nevertheless, Breslin did not ask any questions or call any witnesses. He made a brief statement, and he asked the Board to consider two stacks of documents that had not been previously identified or disclosed. Some of those documents were admitted as Breslin Exhibit 1.

The Department filed its post-hearing brief on December 8, 2005. Counsel entered an appearance for Breslin for the first time on January 5, 2006 and, after a request for an extension that we granted, filed a five-page post-hearing brief on Breslin's behalf on February 23, 2006. The brief does not mention Breslin Ex. 1 or explain its relevance. The Department opted not to file a reply brief. After a full and complete review of the record, we make the following findings of fact and conclusions of law.

FINDINGS OF FACT

A. Facts Deemed Admitted[1]

1. Plaintiff is the Department. The Department is the executive agency of the Commonwealth with the duty and authority to administer and enforce the provisions of the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, and the rules and regulations promulgated at Title 25 of the Pennsylvania Code. (C., ¶ 2.)

2. Defendant is Patrick J. Breslin doing business as Century Enterprises. Century Enterprises is represented to be a general partnership. Breslin is an individual. Breslin has represented to the Department a business address of Route 202, Box 502, Montgomerysville, PA 18936. Breslin also maintains an address at 825 Monticello Place, Lansdale, PA 19446. (C., ¶ 3.)

3. Breslin owns and operates a sewage treatment plant (the "facility") that services a mobile home park in Overfield Township, Wyoming County. (C., ¶ 4.)

4. On December 29, 1997, Breslin entered into a consent assessment of civil penalty with the Department for violations that included the failure to submit monthly DMRs to the Department in a timely manner. (C., ¶ 6.)

5. On February 9, 2001, the Department reissued NPDES Permit No. PA0060321 (the "Permit") to Breslin authorizing the discharge of treated sewage from his facility to an unnamed tributary to the South Branch of Tunkhannock Creek. (C., ¶ 7.)

6. Part D, Paragraph 2A of the Permit states:

> The permittee must comply with all conditions of this permit. Any Permit noncompliance constitutes a violation of the Pennsylvania

[1] As previously noted, on July 1, 2005 the Board issued an Opinion and Order providing that all facts in the Department's complaint for civil penalties were deemed admitted. *DEP v. Breslin*, EHB Docket No. 2005-069-CP-L (Opinion issued July 1, 2005). References to the Department's complaint for civil penalties shall be noted as "C., ¶ ___."

> Clean Streams Law and the Clean Water Act and is grounds for an Enforcement action....

7. Part C, Special Condition 1.6 of the Permit mandates that "[p]roperly completed and signed Discharge Monitoring Reports (DMRs), as described in Part A.3.b. of this permit, shall be submitted, within 28 days after the end of each monthly reporting period, to the Department...." (C., ¶ 8.)

8. On August 14, 2001, the Department sent a Notice of Violation ("NOV") to Breslin. The NOV was sent to the contact address identified by Breslin in his September 25, 2000 application for the NPDES Permit. The NOV indicated that DMRs required by the Permit were overdue for the months of September, October, November, and December 2000, and January, February, March, April, May, and June of 2001. (C., ¶ 9.)

9. The Department's August 14, 2001 correspondence was returned as unclaimed. (C., ¶ 10.)

10. On September 19, 2001, the Department sent a second letter to Breslin requesting a response by no later than September 28, 2001. (C., ¶ 11.)

11. The Department's September 19, 2001 correspondence was returned as unclaimed. (C., ¶ 12.)

12. On March 8, 2002, the Department sent a third NOV to Breslin. The NOV stated that "[o]ur records indicate that the Discharge Monitoring Reports (DMRs) required by your NPDES Permit No. PA0060321 are overdue from September 2000 to the date of this letter." Breslin signed the return receipt associated with the Department's correspondence and then returned the letter as unclaimed. (C., ¶ 13.)

13. On April 24, 2002, representatives of the Department inspected Breslin's facility. The Department's representatives again informed Breslin of the violation of the terms and

conditions of his permit for failing to submit DMRs since August of 2000. There was no evidence of chlorine disinfection observed at the facility during the inspection as required by the Permit. (C., ¶ 14.)

14. On April 26, 2002, a representative of the Department inspected Breslin's facility. Breslin was present during the inspection. During the inspection, the Department's representative instructed Breslin to submit the missing DMRs by May 3, 2002. (C., ¶ 15.)

15. On November 18, 2003, the Department issued an NOV to Breslin for failing to submit DMRs for the months of April, May, June, July, August, and September 2003. The Department's NOV instructed Breslin to submit all overdue DMRs within ten days. Breslin received the NOV on December 5, 2003. (C., ¶ 16.)

16. On January 28, 2004, the Department issued an NOV to Breslin for failing to submit any DMRs since April of 2003. The Department's correspondence requested that the late DMRs be submitted to the Department within ten days of the date of the letter. The NOV was returned as unclaimed. (C., ¶ 17.)

17. On June 9, 2004, a representative of the Department inspected Breslin's facility. Breslin was contacted during the inspection by phone. During the Department's discussion with Breslin, the Department indicated that it had not received DMRs since April 2003. (C., ¶ 18.)

18. On June 14, 2004, the Department issued an NOV to Breslin. The NOV indicated that the Department had not received DMRs in accordance with the Permit since April 2003. The NOV requested that Breslin contact the Department immediately to schedule a meeting. The NOV was returned as unclaimed. (C., ¶ 19.)

19. On October 7, 2004, representatives of the Department met with Breslin. During this meeting the Department informed Breslin that he continued to operate in violation of the

terms and conditions of his permit because he had not submitted any DMRs since April of 2003. (C., ¶ 20.)

20. Breslin failed to submit any DMRs to the Department from April of 2003 until at least the date of the Department's complaint (April 18, 2005). (C., ¶ 1.)

B. Additional Findings of Fact

21. On August 8, 1995, the Department sent an NOV to Breslin for failure to submit DMRs for April, May, and June of 1995. (Commonwealth Ex. ("C. Ex.") 20; T. 32-33.)

22. On October 21, 1997, an administrative conference was held between the Department and Breslin. The parties discussed Breslin's failure to submit DMRs on a timely basis during the conference. The Department pointed out that there was a poor record of DMR submittal over the past several years and that a penalty action might be instituted for continued noncompliance. Breslin's DMR submittal record did not improve subsequent to the conference. (C. Ex. 17; T. 42-44.)

23. The December 1997 consent assessment of civil penalty between Breslin and the Department assessed a $1,400 civil penalty for 13 violations. Breslin admitted in the agreement that, "[o]n numerous occasions, Century did not submit monthly DMRs to the Department on a timely basis as required by its NPDES Permit and discharged effluent in excess of the limits of its NPDES Permit . . .." (C. Ex. 16.)

24. Breslin failed to submit DMRs to the Department from September of 2000 through April 2002. (C. Exs. 11-12; T. 31.)

25. Breslin has not submitted DMRs for the first four months of 2005. (T. 20.)

26. Department representatives have personally reminded Breslin numerous times over the years of his obligation to submit DMRs. (T. 21-22, 26, 28, 30, 39-40, 43, 51-52, 56-58.)

27. Breslin's only explanations for chronically failing to submit DMRs were that he way "too busy" (T. 40), and that the Department's letters and telephone calls caused him "pain" (T. 53).

28. Breslin's failure to submit DMRs in accordance with the terms and conditions of his permit after receiving numerous inspection reports, notices of violation, and verbal and written warnings constituted knowing, intentional, and willful violations of the laws of this Commonwealth.

29. As of the date of the hearing, Breslin had not provided the Department with the DMRs that were missing from April 2003 through April 2005. (T. 65.)

30. The Department received DMRs from May 2005 until the time of the hearing. (T. 19.)

31. The Department did not produce any evidence of discharge violations or harm to the environment between April 2003 and April 2005.

32. There is no record evidence to support Breslin's claim that he suffers from health problems, or that such problems if they do exist interfered with his ability to submit DMRs.

33. There are approximately 19 mobile homes in Breslin's mobile home park. (T. n-18.)

DISCUSSION

We have previously discussed the Board's role when the Department files a complaint for civil penalties pursuant to the Clean Streams Law:

> Our role where the Department has filed a complaint for penalties under the Clean Streams Law is slightly different than our review in an appeal from the Department's assessment of a civil penalty. In an appeal from a civil penalty assessment, we determine whether the underlying violations occurred, and then decide whether the amount assessed is lawful, reasonable, and appropriate. *Farmer v. DEP*, [2001 EHB 271, 283]. Although our review of an assessment is

> *de novo*, we do not start from scratch by selecting what penalty we might independently believe to be appropriate. Rather, we review the Department's predetermined amount for reasonableness. *Stine Farms and Recycling, Inc., v. DEP*, [2001 EHB 796, 812]; *202 Island Car Wash, L.P. v. DEP*, 2000 EHB 679, 690.
>
> In contrast to an appeal from an assessment, the Board must make an independent determination of the appropriate penalty amount in a complaint action. The Department suggests an amount in the complaint, but the suggestion is purely advisory. *Westinghouse v. DEP*, 705 A.2d 1349, 1353 (Pa. Cmwlth. 1998) ("*Westinghouse I*"); *DEP v. Whitemarsh Disposal Corporation*, 2000 EHB 300, 346 [*aff'd* 745 A.2d 1277 (Pa. Cmwlth. 2000)]; *DEP v. Silberstein*, 1996 EHB 619, 637; *DEP v. Landis*, 1994 EHB 1781, 1787.

DEP v. Leeward Construction, Inc., 2001 EHB 870, 885, *aff'd*, 821 A.2d 145 (Pa. Cmwlth.), *app. denied*, 827 A.2d 431 (Pa. 2003). The Department bears the burden of proof in complaint cases. 25 Pa. Code § 1021.122(b)(1).

There is no question here that Breslin violated the law. Indeed, it is not disputed. Part A.3.b. of Breslin's permit requires that the permittee "monitor the operation and efficiency of all wastewater and treatment and control facilities, and the quantity and quality of the discharge(s) as specified in this permit." (C. Ex. 1, p. 8.) It further requires that "monitoring results obtained each month shall be summarized for that month and reported on a Discharge Monitoring Report (Discharge Monitoring Report)." *Id.* The DMRs must be signed and certified. *Id.* In addition, Special Condition Part C.1.6 of the permit requires that "[p]roperly completed and signed Discharge Monitoring Reports (DMRs), as described in Part A.3.b. of th[e] permit, shall be submitted, within 28 days after the end of each monthly reporting period, to the Department . . .." (C. Ex. 1, p.16.)

Section 611 of the Clean Streams Law reads as follows:

> It shall be unlawful to fail to comply with any rule or regulation of the department or to fail to comply with any order or permit or license of the department, to violate any of the provisions of this act or rules and regulations adopted hereunder, or any order or permit or license of the department . . .. Any person or municipality engaging in such conduct shall be subject to the provisions

of sections 601, 602 and 605.

35 P.S. § 691.611. (Section 605, 35 P.S. § 691.605, is the section that authorizes the Board to assess civil penalties.) Condition B.2.a. of Breslin's permit states: "Any person or municipality who violates any provision of this permit, any rule, regulation, or order of the Department, or any condition or limitation of any permit issued pursuant to the Clean Streams Law is subject to criminal and/or civil penalties as set forth in Sections 602, 603, and 605 of the Clean Streams Law." (C. Ex. 1, p. 13.)

The allegations in the Department's complaint, which have been admitted, as well as the evidence offered at the hearing, establish that Breslin failed to submit DMRs to the Department for the months of April 2003 through April 2005 in violation of Special Condition Part C.1.6 of the Permit. A violation of an NPDES permit condition constitutes a violation of Section 611 of the Clean Streams Law. *See DEP v. Tessa*, 2000 EHB 770, 785. Therefore, Breslin is liable for civil penalties under Section 605 of the statute. *Tessa*, 2000 EHB at 787.

The Board may assess a penalty of up to $10,000 per day for each violation of the Clean Streams Law. 35 P.S. § 691.605. In determining the penalty amount, the Board is to consider the willfulness of the violations, damage or injury to the waters of the Commonwealth or their uses, costs of restoration, and other relevant factors. *Id.* The deterrent value of the penalty is a relevant factor. *Leeward*, 821 A.2d at 155; *Westinghouse v. DEP*, 745 A.2d 1277, 1280-81 (Pa. Cmwlth. 2000); *DEP v. Whitemarsh Disposal Corporation*, 2000 EHB at 346. We, of course, consider for advisory purposes the civil penalty recommended by the Department. *DEP v. Tessa*, 2000 EHB at 787; *DER v. Landis*, 1994 EHB 1781, 1787.[2]

[2] The Department in this case asked for a penalty of $94,000. Although we understand and sympathize with the Department's frustration, for the reasons discussed in this Opinion, we have concluded that a lower penalty is appropriate under the circumstances presented here.

We have defined the levels of culpability with regard to violations resulting in civil penalties as follows:

> An intentional or deliberate violation of law constitutes the highest degree of willfulness and is characterized by a conscious choice on the part of the violator to engage in certain conduct with knowledge that a violation will result. Recklessness is demonstrated by a conscious disregard of the fact that one's conduct may result in a violation of the law. Negligent conduct is conduct which results in a violation which reasonably could have been foreseen and prevented through the exercise of reasonable care.

Whitemarsh, 2000 EHB at 349 (citations omitted).

There is no question that Breslin has made a conscious decision to violate the law. He knows that he is legally required to submit DMRs, and yet he has consistently refused to do so. This has been a chronic, recurring problem of his for more than ten years. (See Finding of Fact "F.F." 21.) In addition to his permit, which clearly spells out the obligation to submit DMRs, Breslin has been reminded countless times of his responsibility, and yet he has failed to comply for months or even years at a time. It is difficult to imagine a clearer demonstration of an intentional or deliberate violation of the law.

Breslin exhibited a complete disdain for appropriate procedures and a stubborn refusal to cooperate in any way up until the time the complaint was filed. Even though the Department has attempted to contact Breslin through correspondence addressed in accordance with Breslin's certified representations as made in his permit application, Breslin repeatedly failed to accept correspondence from the Department. (C. Ex. 2, 4, 7, 14 and 15; T. 12-13.) Breslin has refused to return phone calls. (T. 26, 51-52.) He has failed to respond to Departmental Notices of Violation even though a response was specifically requested. (C. Ex. 18 and 19; T. 45-46.) When the Department was finally able to speak with Breslin, Breslin indicated that he would submit the late DMRs, but he never did. (T. 22.) Breslin hung up on a Department employee

when he was phoned. (C. Ex. 13.) Breslin signed the return receipt associated with correspondence, but it was returned to the Department unopened. (C. Ex. 13; T. 38-39.)

Breslin offered no evidence to rebut the Department's characterization of the willfulness of his misconduct. Breslin alleges in an unsworn statement and in his post-hearing brief that he has health problems, including "early stages of Alzheimer's." Contrary to counsel's averment in the post-hearing brief, however, Breslin did not *testify* about anything, including any alleged health problems. Breslin did not ask Department witnesses any questions, call any witnesses of his own, or take the stand on his own behalf, so we have nothing to go on accept his unsworn statement in the nature of argument. There is no record evidence whatsoever to support Breslin's claim of health problems, or that if such problems exist, that they explain his failure to submit DMRs as far back as 1995. We would be remiss if we factored such an unsworn, unverified allegation into our calculations.[3]

Putting aside Breslin's unsubstantiated health claim, the only record evidence we have explaining Breslin's failure to comply with his permit is his statements that he could not file the reports because he was "busy", and because the Department letters caused him "pain." These are not legitimate excuses and, if anything, reinforce our conclusion that Breslin has not taken his legal reporting obligations seriously.

Violations that are long-lasting or repeated, particularly in disregard of warnings and orders, evidence willfulness and generally merit a higher penalty. *Leeward*, 821 A.2d at 153. Here, the violations immediately at issue went on for two years.[4] Breslin had a history of

[3] Notwithstanding his alleged health problems, Breslin has apparently been fully capable of complying with his reporting duties since May 2005, after the Department filed its complaint against him for rather substantial penalties. (F.F. 30.)

[4] The Department's proposed penalty calculation was based on the violations that occurred from April 2003 through December 2004. The Department, however, averred in its complaint that the violations were continuing, and it established at the hearing that Breslin missed the first four months of 2005. (F.F.

committing the same violation in the past. He already paid one civil penalty for similar violations. Indeed, it is worth noting that, despite everything that has happened, including this litigation, Breslin has *still* not submitted the missing DMRs.

A civil penalty is necessary in this case to deter future violations. Although one might reasonably ask why, Breslin continues to hold a permit and operate his trailer park sewage treatment facility. The penalty must be significant enough to convey the importance of compliance with the permit because it seems that little else has made an impact on Breslin.

On a more general level, permittees must understand that it is potentially more expensive to fail to file DMRs than it is to file them, even if they are otherwise in compliance. DMRs are a critical part of the Department's permitting programs. They encourage compliance with the law through self-monitoring, thereby conserving government resources and emphasizing permittee responsibility. *DER v. East Penn Manufacturing Co.*, 1995 EHB 259, 271; *DER v. Wawa*, 1992 EHB 1095, 1202.

With regard to factors that militate in Breslin's favor, we note that there is no evidence of damage or injury to waters of the Commonwealth, and no evidence of any other harm to the environment.[5] No evidence was presented regarding any costs of restoration. There was no evidence of cost savings or competitive advantage as a result of Breslin's violations.[6] The

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29.) It asked that penalties be assessed for these months as well. Breslin has not contested that those months should be included in the penalty. We agree that it is appropriate to include those four months. *See Tessa*, 2000 EHB at 789-90.

[5] The Department typically reserves the highest civil penalties for violations associated with a demonstrated threat to the environment or an actual impact on human health, the environment, or public safety. *See, e.g., Pickelner Fuel Oil v. DEP*, 1996 EHB 602, 613-14. Indeed, our research has not disclosed any cases that would support the Department's proposed penalty, which was as high as $8,000 per violation, in this case. *See Whitemarsh, supra* (no separate penalties sought for DMR violations).

[6] As this Board has pointed out in the past, *Leeward*, 2001 EHB at 918 (Krancer concurring), it should *never* be cheaper to violate the law than to comply with the law. Civil penalties should, at an absolute minimum, recoup any savings or excess profit that resulted from the choice to violate the law. We, once again, strongly encourage the Department and other parties to produce evidence along these lines in future cases where this Board is asked to assess a penalty.

Department did not present any evidence regarding the cost of its enforcement efforts.

We have also noted that Breslin began submitting DMRs in May 2005, after the complaint in this case was filed. The fact that Breslin was in compliance for a few months prior to the hearing is encouraging and reduces somewhat the compelling need for specific deterrence, but it does not eliminate entirely the need for deterrence in light of Breslin's checkered compliance history.

The facility in question is a modest sewage treatment plant that services a small mobile home park. While Breslin's recalcitrance is remarkable and inexcusable, there is no evidence that DMRs were withheld to cover up an underlying discharge problem. There is no evidence of fraud. Finally, in the 1997 consent assessment, Breslin was asked to pay $1,400 for 13 violations, which is an order of magnitude per violation less than the Department's request in this matter.

In the final analysis, there is no doubt that Breslin's recalcitrance must be penalized. Given that we are dealing with a small facility and the violations have not been shown to have caused harm to the environment, considering all of the facts and circumstances presented here, we believe that a $1,000 penalty per DMR violation is appropriate. Breslin's string of 25 violations (April 2003-April 2005) results in a total penalty of $25,000.

Breslin raises one evidentiary point that needs to be addressed. Breslin brought two stacks of documents to the hearing. The first stack consisted of lab results. Although Breslin has never explained the relevance of the documents, the documents were admitted without objection as Breslin Ex. 1. (T. 72.)

Breslin also brought a second stack of documents to the hearing. He asked that they be included in the record, but did not explain why. The documents had not been previously

disclosed in the litigation. The Department asked for a break to review the documents.[7] The Department then objected to the admission of the documents because of lack of authentication, because they were hearsay, because they were not shown to be relevant, and because of the last-minute disclosure. We sustained the objection, particularly because of the prior nondisclosure. (T. 72.)

Breslin in his post-hearing brief challenges that ruling. Breslin's counsel characterizes the documents as sampling results, but it may be that the sampling results to which he refers are the sampling results that were admitted as Breslin Ex. 1. In any event, there is no record evidence of what was contained in the second stack of documents. There was no response from Breslin to the Department's objection at the hearing. There was no offer of proof. There is simply no basis or record for overturning the ruling.

Even if we accept counsel's understanding that the documents constituted sampling results, there is no reason to reopen the record as he requests in the post-hearing brief. Breslin is being penalized for failing to submit certified DMRs. He has not been charged with effluent violations. In fact, the lack of demonstrated harm to the environment actually militated in Breslin's favor. Even if Breslin was in the habit of obtaining lab results for his own information, it does not mitigate the fact that he was not submitting DMRs to the Department as required by law.

Finally, if we were to admit the documents over objection, it would be an insult to every other party-litigant appearing before this Board who follows our rules. Breslin disregarded every one of our pre-hearing orders in this case. He did not file a pre-hearing memorandum as required

[7] Breslin's counsel, who was not present at the hearing, incorrectly states that the Department changed its position regarding the second stack of documents. The Department did not object to the *first* stack. It did, however, object to the *second* stack of documents at its first opportunity after being given a short break to review the documents for the first time. (T. 72-73.)

by our rules. A pre-hearing memorandum must identify all documents to be offered as exhibits so as to avoid exactly this sort of problem. The Department could not be expected to absorb a four-inch stack of documents produced by surprise at the last minute in violation of all of our requirements and procedures. Had the missing documents been the missing DMRs, the extreme relevance might have been enough to overcome the procedural infirmities and prejudice to the Department. They were not. The ruling stands.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and subject matter of this complaint. *See* 35 P.S. § 691.605; 35 P.S. § 7514.

2. The Board assesses civil penalties under the Clean Streams Law by considering the willfulness of the violation, damage or injury to the waters of the Commonwealth and their uses, the cost to the Department of enforcing the provisions of the Act, cost of restoration, deterrence, and other relevant factors. 35 P.S. § 691.605.

3. Breslin's failure to provide DMRs to the Department from April 2003 through April 2005 as required by his NPDES permit was a violation of the Clean Streams Law. 35 P.S. § 691.611.

4. The Board assesses a civil penalty in the amount of $25,000 against Breslin for his violations of the Clean Streams Law.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 2005-069-CP-L**
v.	:	
PATRICK J. BRESLIN, d/b/a CENTURY ENTERPRISES	:	

ORDER

AND NOW, this 6th day of April, 2006, it is ordered that civil penalties are assessed against Patrick J. Breslin d/b/a Century Enterprises in the total amount of $25,000 for violations of the Clean Streams Law.

ENVIRONMENTAL HEARING BOARD

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Chief Judge and Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: April 6, 2006

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

FRED W. LANG, JR., JOYCE E. SCHUPING, DELORES HELQUIST and SHERRY L. WISSMAN	:	
v.	:	**EHB Docket No. 2003-145-R (Consolidated with 2004-090-R and 2004-093-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MAPLE CREEK MINING, INC.	:	**Issued: April 10, 2006**

OPINION AND ORDER ON MOTION FOR CLARIFICATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Appellants' motion for clarification is granted. The Board's March 23, 2006 order was intended to clarify that we believe our January 12, 2006 adjudication and order to be appealable to the Commonwealth Court. The Appellants are not required to file an application for appeal by permission in addition to the petition for review they have already filed.

OPINION

This matter involves a claim of subsidence damage to a pond owned by the Appellants due to mining conducted by Maple Creek Mining, Inc. On January 12, 2006, this Board issued an adjudication ordering Maple Creek to pay for the increased cost of maintaining the pond. The order stated in relevant part as follows:

* * * * *

6. In accordance with the law as set forth in this adjudication, in order to meet its obligation to provide for the increased operation and maintenance costs of the Lang pond on a permanent basis, on or before **February 13, 2006** Maple Creek is ordered to do one of the following:

   (a) make a one-time lump sum payment to the Landowners in the amount of $406,125.36 which represents the present value of the annualized increased operation and maintenance costs, with notice to the Board that such payment has been made, or

   (b) develop a financial vehicle, acceptable to the Board, that will compensate the Landowners for the increased yearly operation and maintenance costs of the Lang pond, adjusted for inflation, on a permanent basis.

7. Jurisdiction is retained.

Lang v. DEP, EHB Docket No. 2003-145-R (Adjudication issued January 12, 2006).

Both the Appellants and Maple Creek appealed the adjudication. The Appellants did so by filing a petition for review with the Commonwealth Court pursuant to Pa.R.A.P. 341 (a), which states that "an appeal may be taken as of right from any final order of an administrative agency or lower court." Maple Creek, on the other hand, did not consider the adjudication to be a final order and, therefore, filed with the Board a petition to amend the order to contain the language prescribed in 42 Pa.C.S. § 702 (b), namely that the order in question contains 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, thereby allowing an interlocutory appeal pursuant to Pa.R.A.P. 1311 (b). Pa.R.A.P. 1311 (b) requires that the lower court act within 30 days or the application is deemed denied.

The Board did not act on Maple Creek's petition to amend. The parties notified the Board by means of a telephone conference that their communications with the Commonwealth

Court indicated that the court was unsure as to whether the Board's adjudication was final. The parties subsequently informed the Board that the Commonwealth Court had ordered the filing of briefs on the issue, and the parties requested that the Board clarify its adjudication to indicate whether it was appealable.

Though the Board considered the adjudication to be appealable as of right pursuant to Pa.R.A.P. 341, we issued an order on March 23, 2006 stating that the adjudication and order of January 12, 2006 contained controlling questions 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, so that there would be no question that the Board considered the January 12 adjudication and order to be appealable.

The matter now before the Board is a motion filed by the Appellants seeking clarification of its March 23, 2006 order. Specifically, the "Appellants seek clarification as to whether or not this Board entered its Order of March 23, 2006 so as to include statutory language to make the Order of January 12, 2006 appealable by permission under Chapter 13 of the Rules of Appellate Procedure or was meant to contain language as to a determination of finality as contemplated under Pennsylvania Rule of Appellate Procedure 341 (c)."

The difficulty here is that the appellate rules addressing this matter use the word "final." The Board's adjudication is final in the sense that it is appealable. It is not final in the sense that, if Maple Creek chooses to pay for the maintenance of the pond by establishing a financial vehicle covering the yearly operation and maintenance cost, that financial vehicle must be approved by the Board.

In response to the Appellants' motion for clarification, the Board believes the January 12, 2006 adjudication and order to be appealable as of right pursuant to Pa.R.A.P. 341 (a). The order

of March 23, 2006 was intended to address any concerns the Commonwealth Court or parties might have as to the appealability of the adjudication and order. It is not the intent of this Board that the Appellants should be required to file an application for appeal by permission in addition to the petition for review that they have already filed. The Board believes that the appeals of both the Appellants and Maple Creek are properly before the Commonwealth Court.

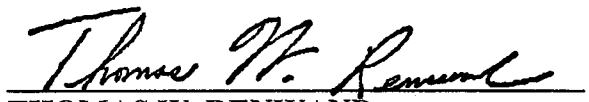
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRED W. LANG, JR., JOYCE E. SCHUPING, DELORES HELQUIST and SHERRY L. WISSMAN	:	
v.	:	**EHB Docket No. 2003-145-R (Consolidated with 2004-090-R and 2004-093-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MAPLE CREEK MINING, INC.	:	

ORDER

AND NOW, this 10th day of April 2006, the Appellants' motion for clarification is granted as set forth in this Opinion. We find that the appeals of the Appellants and Maple Creek are properly before the Commonwealth Court.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATE: April 10, 2006

Service list next page.

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MOUNTAINTOP AREA JOINT SANITARY AUTHORITY	:	
	:	**EHB Docket No. 2004-088-MG**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 12, 2006**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis

The Board denies a motion for summary judgment in an appeal of an NPDES permit filed by the appellant-sanitary authority. The authority did not demonstrate that as a matter of law, the Department policy which it uses to develop criteria for toxic pollutants is actually a binding norm, rather than a guidance tool. It is very clear that a hearing is necessary in order to determine whether the Department used an appropriate procedure to develop the criteria which generated the effluent limitations for toxic chemicals. It is also necessary to resolve outstanding issues of fact concerning whether the limitations developed by the Department are more stringent than necessary to protect the designated uses of the receiving stream and whether the Department should have utilized a "fate coefficient" to account for the volatilization of the pollutants in the authority's discharge water.

OPINION

Before the Board is a motion for summary judgment by the Mountaintop Area Joint Sanitary Authority (Authority) in an appeal from the issuance of an amended NPDES permit to the Authority for its publicly owned treatment facility located in Dorrance Township, Luzerne County.[1] That facility discharges to the Big Wapwallopen Creek. The permit, as amended, established a discharge limit for bromodichloromethane (BDC) of 1.3 micrograms per liter, and a limit for chlorodibromomethane (CDB) of .97 micrograms per liter. These chemicals are known as "trihalomethanes" (THMs) and are produced during the chlorination of wastewater. The treatment process in use by the Authority at the Mountaintop facility includes a breakpoint chlorination system which uses chlorine gas to oxidize ammonia to nitrogen gas and to disinfect the final effluent.

The Authority has challenged the discharge limitations established by the Department on several fronts. First, the Authority contends that Chapter 16 of 25 Pa. Code entitled *Water Quality Toxics Management Strategy – Statement of Policy,* which was used to develop the effluent limits, was applied as a binding regulation and therefore constitutes an impermissible rulemaking. Second, the Authority takes the position that the limits are not reasonable to protect the designated use of the receiving stream and that they were not calculated in a scientifically rational manner. Finally, the Authority argues

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[1] This matter was transferred to Judge Miller for disposition on March 28, 2006.

that the limits were developed in a different way than those developed for other publicly owned treatment works and were therefore arbitrary and capricious.[2]

The Authority first urges us to find that the limits for CDB and BDC are void because they were developed in accordance with the policy described in Chapter 16, as if that document were a "binding norm" rather than guidance. The Department disagrees and argues that the mere fact that the Department acted consistently with its policy does not mean that the application of the procedures described by the policy rise to the level of an unpromulgated regulation.

The Commonwealth Court has described the "binding norm" test several times, both in the seminal case of *Department of Environmental Resources v. Rushton Mining*,[3] and more recently in *Homebuilders Ass'n of Chester v. Department of Environmental Protection*.[4] In *Rushton Mining* the court examined fifteen standard permit conditions regulating coal mining activities to determine whether or not they constituted "binding rules of general applicability" and therefore should have been promulgated as regulations in accordance with the notice and comment procedures set out in the Commonwealth Documents Law. After reviewing federal cases which attempted to distinguish statements

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[2] The amended permit also changed the expiration date of the original permit from April 9, 2006 to September 2005. Inasmuch as both of the expiration dates have now passed, we will not rule on this issue. While we can make no decision on the propriety of the Department's action in that regard, we can find no justification for shortening the permit term in the absence of following the federal requirements in 40 C.F.R. §§ 122.62 and 124.5(c)(2), which require the agency to provide notice to a permittee of modifications in a draft permit. The notice requirements for modification for "minor modifications," such as correction of typographical errors, are only permitted if the permittee consents. 40 C.F.R. § 122.63.

[3] 591 A.2d 1169 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 600 A.2d 541 (Pa. 1991).

[4] 828 A.2d 446 (Pa. Cmwlth. 2003), *affirmed,* 844 A.2d 122 (Pa. 2004).

of policy from regulation, as well as the regulatory definitions of those terms in the Commonwealth Documents Law, the court noted that "the distinction between a statement of policy and a regulation is enshrouded in considerable smog."[5] Accordingly, it adopted what is known as the "binding norm" test announced by the Pennsylvania Supreme Court in *Pennsylvania Human Relations Commission v. Norristown Area School*,[6] which focuses on the "practical effect" of the agency pronouncement:

> [A]n agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules or through adjudications which constitute binding precedents. A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent, but is *merely an announcement* to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. *A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications.*
>
> The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings . . . A properly adopted substantive rule establishes a standard of conduct *which has the force of law* . . . The underlying policy embodied in the rule is not generally subject to challenge before the agency.
>
> A general statement of policy, on the other hand, *does not establish a 'binding norm'* . . . A policy statement announces the agency's *tentative intentions for the future*. When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. (Emphasis added.)[7]

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[5] 591 A.2d at 1172 (quoting *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir.), *cert denied*, 423 U.S. 824, 96 S.Ct. 37, 46 L.Ed.2d 40 (1975).

[6] 374 A.2d 671 (1977).

[7] 591 A.2d at 1173-74.

Applying the test, the court found that the permit conditions were "binding norms" and not simply a general statement of the course that the agency hoped to follow in the future. After finding that the conditions set forth a comprehensive system regarding mining operation, the court noted that none of the agency's personnel had any discretion to vary the conditions – they were ministerially attached to every permit regardless of the facts presented by an individual application. The court further found that the Department intended the conditions to be binding on the agency and that employees would not exercise discretion when including them in mining permits.

In the *Homebuilders Ass'n of Chester* the court examined the Department's stormwater policy, after extensively reviewing its holding in *Rushton Mining.* In contrast to *Rushton Mining*, the court determined that although the policy listed specific requirements, including a permit requirement, it did not establish a "binding norm." Rather it was merely a description of the agency's "recommended approach for achieving compliance with existing requirements."[8] The language of the policy itself was examined and the court noted specific language stating that the intent of the policy was to comply with existing use protection regulations and was explicitly not intended to create new requirements. The policy also explicitly stated that the procedures that it described were not to be given the same deference as a regulation. Accordingly, the court concluded that the agency was able to exercise discretion to follow or to not follow the policy in an individual case.

At this time, we can not hold that Chapter 16 establishes a binding norm upon the Department and that the effluent limitations developed following the guidance of Chapter

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[8] 828 A.2d at 453.

16 are void. Although hardly a mere "general statement of intent," like the stormwater policy analyzed in *Homebuilders Ass'n of Chester*, the stated purpose of Chapter 16 is to establish a procedure to create water quality criteria for toxic pollutants which are "designed to protect the water uses listed in Chapter 93 (relating to water quality standards)." The chapter "specifies guidelines and procedures for development of criteria for toxic substances and also lists those criteria which have been developed."[9]

However, the basic framework for the establishment of the criteria (that may be viewed as a "binding norm"), referred to in Chapter 16, are also set forth in Section 93.8a of the Department's regulations. Subsection (a) states that the "waters of the Commonwealth may not contain toxic substances attributable to . . . discharges in concentrations or amounts that are inimical to the water uses to be protected."[10] Subsection (d) requires control to "a risk management level of one excess case of cancer in a population of 1 million . . . over a 70-year lifetime."[11] Subsection (e) applies the same test to carcinogens.[12] Accordingly, it may be that the discharge limits applied in the permit were the result of the application of these regulations that compel the Department action rather than simply the policy contained in Chapter 16.

Further, the Authority concedes that the engineer who developed the limits for BDC and CDB, had the ability to create site-specific criteria for the computer model used to generate the limits. But he chose not to do so. This fact by itself is not sufficient to persuade us that Department employees do not have any discretion to depart from the

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[9] 25 Pa. Code § 16.1.
[10] 25 Pa. Code § 93.8a(a).
[11] 25 Pa. Code § 93.8a (d).
[12] 25 Pa. Code § 93.8a (e).

procedures of Chapter 16 in an individual case. Apparently here, the engineer simply chose not to depart from the policy. A policy does not become a binding norm, simply because an agency employee relied upon it to make a decision.[13]

Even if the Department's application of water quality requirements was directed in part by its policy set forth in Chapter 16 of its regulations, the issue may still be a factual question. We are mindful of the direction of the Supreme Court which held that "when an agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued."[14] Yet there is certainly insufficient evidence in the record before us now that would allow us to conclude that the risk assessment protocols and other procedures used to develop the toxic pollutant criteria in this permit were inappropriate.

Our rejection of the Authority's argument that, as a matter of law, the Department's use of its Chapter 16 procedures to assess risk for toxic substances created an unlawful binding norm means that all of the other contentions by the parties also involve disputes of material fact.

The Authority argues that the Department used an inappropriate water quality standard in developing the criteria used to establish the discharge limits for CDB and BDC. Specifically, the Authority contends that the criteria are more stringent than necessary to protect the use of the receiving stream as a drinking water source because there is no drinking water intake in the stream; because the toxics would virtually

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[13] *R.M. v. Pa. Housing Finance Agency*, 740 A.2d 302 (Pa. Cmwlth. 1999), *petition for allowance of appeal denied,* 759 A.2d 390 (Pa. 2000).

[14] *Pennsylvania Human Relations Commission v. Norristown Area School*, 374 A.2d 671, 680 (Pa. 1977).

disappear through volatilization before they reached any likely future drinking water intake; and any future uses of the stream for drinking water would be made safe by the application of drinking water standards after treatment occurred. Accordingly, the Authority's position is that the discharge limits for CDB and BDC should have been based on the use of the water for drinking water after treatment and in accordance with the safe drinking water regulations. In the Authority's view, there is no rational reason for the water quality program and the drinking water program to implement different limits for the same pollutants in a receiving stream with the same designated use.

The Department counters that the Authority "confuses" the issue by attempting to relate water supply standards to water quality standards, pointing to Section 93.8a, which provides, among other things, that "waters of this Commonwealth may not contain toxic substances attributable to point or nonpoint source waste discharges in concentrations or amounts that are inimical to the water uses to be protected."[15] The Department contends that the coefficient for volatilization would give no relief to the Authority because of the very short time the toxics would have to volatize in the mixing zone before they would reach the "point of compliance." In addition, certain pollutants are exempted at water supply intakes, but that list of pollutants does not include CDB or BDC.[16] Furthermore, the Department takes the position that the levels of CDB and BDC in the discharge water are related to the treatment process used by the Authority, implying that the difficulty the Authority may have in complying with the discharge limits is not because the limits are unreasonable, but rather are due to the Authority's chosen treatment process. Finally,

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[15] 25 Pa. Code § 93.8a(a).
[16] 25 Pa. Code § 96.3(d).

according to the Department the criteria developed for this permit protect the receiving stream for other uses in addition to its use as a water source for which a lesser standard would be inadequate. Accordingly, in the view of the Department, the proper regulatory standards were utilized to develop the discharge limits in the Authority's amended permit.

Resolution of the conflicting positions of the parties obviously involves resolution of matters of fact. The Authority's claim that the chemicals involved would volatilize quickly before they reached any prospective drinking water intake is based on actual water sampling. The Authority therefore claims that the Department should have given credit for a fate coefficient. The Department claims that it normally does not give such a credit because of the absence of reliable data and because such extensive volatilization would not occur before the point of compliance from the mixing zone. Whether the Appellant's testing results are sufficiently reliable to enable the Department to accept them in adopting another standard for compliance involves a question of fact that may well be material to the resolution of the dispute.

However, we are not prepared to fully accept the Department's position that the water quality criteria established pursuant to the water quality regulations and those established to regulate drinking water quality are "apples and oranges" and that no comparison is reasonable. It is not clear that the protection of a surface water for use as potable water supply (PWS) means that the water must be safely drinkable without treatment. The definition of "PWS" in fact, suggests otherwise: "Used by the public . . . after conventional treatment, for drinking, culinary and other domestic purposes, such as

inclusion into foods, either directly or indirectly."[17] We have often held that one program of the Department may not simply ignore the requirements of other programs, particularly in permitting actions.[18] If as the Authority's expert contends, the reduction of the CDB and BDC at the source is unnecessary for a drinking water treatment system to meet drinking water standards, there may be substance to the claim that the Department's failure to allow for a volatilization coefficient was inappropriate.

Obviously, the issues are not appropriate for resolution by summary judgment. There are outstanding questions of fact concerning whether a fate calculation is appropriate, whether or not it can be reasonably calculated and whether the application of such a coefficient would protect the water uses to be preserved in the receiving stream. Therefore, we can not hold as a matter of law that either the procedure used by the Department in establishing the criteria used to generate discharge limits was unreasonable, or that the regulations applied by the Department are unreasonable or inconsistent with the statutes that they implement. Those questions can only be answered after a hearing and a full evaluation of the competing expert opinions on those topics. We therefore enter the following:

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[17] 25 Pa. Code § 93.3.

[18] *Cf. Solebury Township v. DEP*, 2004 EHB 95 (observing that the NPDES regulations require compliance with mining law); *Tinicum Township v. DEP*, 2002 EHB 822); *Oley Township v. DEP*, 1996 EHB 1098 (Safe Drinking Water Act regulations require compliance with other laws).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MOUNTAINTOP AREA JOINT SANITARY AUTHORITY	:	
	:	**EHB Docket No. 2004-088-MG**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 12th day of April, 2006, the motion for summary judgment filed by the Mountaintop Area Joint Sanitary Authority in the above-captioned matter is hereby DENIED.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Member

DATED: April 12, 2006

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

BROAD TOP TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-012-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND WSI, SANDY RUN LANDFILL, INC., Permittee	:	**Issued: April 17, 2006**

OPINION AND ORDER
ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A Department of Environmental Protection's (Department) motion to dismiss is denied. The Board has jurisdiction over the appeal of a Consent Order and Agreement (CO&A) between the Department and WSI, Sandy Run Landfill, Inc. (Sandy Run) where the CO&A adversely affects the property rights of the Township.

BACKGROUND

On December 2, 2004, Sandy Run[1] and the Department entered into a CO&A to address alleged violations of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.101 *et seq.* (SWMA).[2] The CO&A requires Sandy Run to pay a civil penalty in the amount of $25,000 and dedicate $15,000 to perform a community environmental

[1] WSI owns and operates the Sandy Run landfill, a municipal waste landfill and processing facility located at 995 Landfill Road, Hopewell, Pennsylvania 16650.

[2] The Department is the agency with the duty and authority to administer and enforce the Solid Waste Management Act.

project in Bedford County.

The community environmental project requires Sandy Run to supply fifteen roll-off containers to clean up solid waste dump sites and tires in Broad Top and Londonderry Townships, Bedford County. The Department is responsible for determining the location of these roll-off containers.[3] The community environmental project was scheduled to expire when roll-off container No. 15, or its equivalent, was properly disposed of or by January 1, 2006, whichever occurred first.

On January 12, 2005, Broad Top filed an appeal of the CO&A between Sandy Run and the Department challenging terms of the CO&A such as the amount of the civil penalty assessed against Sandy Run, the value assigned to the community environmental project, and the description of the alleged violations identified in the CO&A. Broad Top also objects to the CO&A because it was not consulted about its designation as a potential recipient of the roll-off containers. Further, Broad Top contends that the CO&A is violative of a Host Community Agreement (HCA) between the Township and Sandy Run.

On March 3, 2005, the Department moved to dismiss the appeal, asserting that: (1) the Board lacks jurisdiction over the appeal; (2) the Board cannot review allegations concerning a HCA between Broad Top and Sandy Run; (3) the SWMA does not allow a third party to initiate an appeal of a civil penalty assessment; and, (4) the Board cannot provide the relief sought by the Township.

In a response filed on March 18, 2005, Broad Top raises several objections to the Department's motion. First, Broad Top contends that the Department entered into a CO&A with a non-existing legal entity. Second, Broad Top argues that the Board has jurisdiction over this

[3] The CO&A states that the roll-off containers shall be placed in "Broad Top and/or Londonderry Townships, Bedford County." *See* Dept. Ex. A, Page 1.

matter because the CO&A in question adversely affects the Township. Third, Broad Top asserts that the SWMA does not prohibit the Township from appealing the amount of the civil penalty assessed against Sandy Run. Fourth, Broad Top insists that the CO&A creates an "unfunded mandate" for the Township. Further, Broad Top maintains that the value assigned to the community environmental project presents a genuine issue of material fact. Finally, Broad Top argues that the Department erred in its calculation of the civil penalty assessed against Sandy Run.

In its March 24, 2005 reply to Broad Top's response to the motion to dismiss, the Department initially argues that Broad Top raises several allegations in its response to the Department's motion that were not raised in its original or amended notice of appeal. Thus, the Department asserts that these issues have been waived and should be stricken from the pleadings. Next, the Department contends that the CO&A does not require Broad Top to accept the roll-off containers. Further, the Department maintains that the Board cannot increase the amount of the civil penalty assessed against Sandy Run. Additionally, the Department insists that the value assigned to the community environmental project does not constitute a genuine issue of material fact.

On April 11, 2005, Broad Top filed a final response brief in opposition to the Department's motion to dismiss. The Department filed a motion to strike the final brief on April 13, 2005. On April 15, 2005, Sandy Run filed a motion to dismiss/strike, in which it joined and incorporated the Department's motions. On April 26, 2005, Sandy Run filed a praecipe to defer ruling on its motion until the resolution of the Department's motion to dismiss.

STANDARD OF REVIEW

The Board evaluates motions to dismiss in the light most favorable to the non-moving

party. *Sri Venkateswara Temple v. Dept. of Environmental Protection*, EHB Docket No. 2003-385-R (Opinion and Order issued February 2, 2005), slip op. at 2. The Board treats motions to dismiss the same as motions for judgment on the pleadings: a motion to dismiss will be granted only where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Donny Beaver et al. v. Dept. of Environmental Protection*, 2002 EHB 666, 671; *Borough of Chambersburg v. Dept. of Environmental Protection,* 1999 EHB 921, 925. As a matter of practice, when a motion to dismiss puts the Board's jurisdiction at issue the Board has permitted the motion to be determined on undisputed facts outside those stated in the notice of appeal. *Barra et al. v. Dept. of Environmental Protection*, 2004 EHB 276, 281.

JURISDICTION

The Department contends the Board lacks jurisdiction over this appeal because the CO&A does not adversely affect the rights of the Township. Broad Top counters that the CO&A commits the Township to allowing Sandy Run to place roll-off containers in the Township.

The Board has held that the Department's entry into a CO&A is a matter that is subject to review by the Board where the CO&A has an impact on a party's rights. *Fred W. Lang, Jr. et al. v. Dept. of Environmental Protection and Maple Creek Mining, Inc.*, 2004 EHB 584; *Burroughs v. Dept. of Environmental Resources*, 1992 EHB 1084. Thus, in the instant case, we must determine whether the CO&A has an impact on the rights of the Township.

The Board addressed a similar situation in *Throop Property Owners Assn.* v. *Dept. of Environmental Resources and Keystone Landfill, Inc.*, 1988 EHB 381. In that case, the Throop Property Owners Association (Association) appealed a CO&A entered into by the Department and Keystone for the abatement of violations at the Keystone landfill. The Association objected to the CO&A, which superseded a previous closure order, because it failed to remedy the

problems resulting from Keystone's operations. Keystone moved for the dismissal of the appeal on the grounds that the CO&A was a discretionary enforcement action of the Department, and thus not subject to review by the Board. The Association responded by asserting that the Department's actions are subject to review once it exercises its discretion and decides to act. The Board held, "Although the Department had discretion to select the CO&A as a means of enforcement...the CO&A itself...is a final action of the Department affecting the personal and property rights of the members of the Throop Association, and as such is subject to challenge by those affected, and is [subject to review] by this Board." *Id.* at 396. In reaching its decision, the Board reasoned that the CO&A, did in fact, constitute a "final order or determination" that affected the personal or property rights of the Association's members.

Applying the reasoning employed in *Throop* to the instant case, we must reject the Department's contentions. The Department entered into a CO&A with Sandy Run, which designates Broad Top as a potential location for the placement of roll-off containers. The parties' designation of Broad Top as a potential recipient of roll-off containers provides Sandy Run with the authorization to deposit roll-off containers in the Township and obligates Broad Top to serve as a potential receptacle for solid waste. Furthermore, while the Department construes the roll-off containers as a "potential opportunity or gift" for free waste disposal that the Township is free to decline, the CO&A is devoid of any language indicating the Township retains this right. *See* Department's Memorandum of Law in Support of its Motion to Dismiss, at Page 6. Thus, as in *Throop*, the CO&A clearly has an impact on the existing rights of the Township.

Conversely, the Department insists that the CO&A in controversy here is more analogous to the Consent Order and Adjudication (COA) contested in *R&A Bender, Inc. v. Dept. of*

Environmental Protection et al., 1996 EHB 1041, in which Bender appealed a COA entered into by the City of Harrisburg (City), the Department, and the Cumberland County Waste Authority (Permittee). Bender had operated a landfill that had a waste disposal contract with the Permittee that was scheduled to expire in a year. In the COA, the Harrisburg Incinerator was designated as a long-term provider for 25 percent of the solid waste generated in the County. The Authority did not notify Bender of any renewal or extension of the contract. The Board held that the COA had no impact on Bender's personal or property rights because the COA did not alter any of Bender's existing rights provided for under the contract.

The Department's citation of *Bender* does not command a different result here. *Bender* is distinguishable from the instant case because the Township does not retain the same rights it had prior to the Department's entry into a CO&A with Sandy Run. As a result of the CO&A, Sandy Run is permitted to place roll-off containers in the Township while Broad Top does not retain the right to decline receipt of these containers in their Township. Accordingly, we find that the CO&A in this situation, like that in *Throop*, affects the property rights of the Township, and thus, is subject to the Board's jurisdiction.

We also deny the Department's motion regarding the Board's jurisdiction over the HCA between the Township and Sandy Run. The Department argues that the issue of whether the CO&A violates the HCA between Broad Top and Sandy Run must be resolved in another forum because the Board only has jurisdiction over actions of the Department. In response, Broad Top asserts that the Board has jurisdiction over the issue because it was alleged in its notice of appeal. Obviously, the mere inclusion of an allegation in a party's notice of appeal does not automatically render that allegation appealable; however, we cannot draw an informed conclusion regarding the Board's jurisdiction over this matter without knowing the terms and

conditions of the HCA. Thus, this issue is not ripe for resolution at the present time.

STANDING UNDER THE SOLID WASTE MANAGEMENT ACT

The Department argues that Broad Top lacks the standing necessary to challenge the civil penalty contained in the CO&A because the SWMA limits the right to appeal a civil penalty to the "person charged with the civil penalty." 35 P.S. § 6018.605. Broad Top responds that a third party may appeal a civil penalty that has been calculated and assessed in an arbitrary and capricious manner. We will not delve into the task of statutory interpretation in a motion to dismiss. Thus, the Department has posed a question of law that cannot be properly disposed of until there is a trial on the merits.

In consideration of the above, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

BROAD TOP TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-012-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND WSI, SANDY RUN	:	

ORDER

AND NOW, this 17th day of April, 2006, the Department's Motion to Dismiss is **denied.**

An Order scheduling a hearing and relevant pre-hearing procedures will issue shortly.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 17, 2006

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

BUCKS COUNTY WATER AND SEWER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2005-101-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 17, 2006**

ADJUDICATION

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Board dismisses an appeal from a Department of Environmental Protection Field Order issued under the authority of the Clean Streams Law which required Bucks County Water and Sewer Authority to "remediate" a series of manholes "according to the information provided to the Department during the January 31, 2005 field meeting." BCWSA's main contention in its post-trial brief, that the form of the Field Order made it too vague to comprehend, was not in its Notice of Appeal or Pre-Hearing Memorandum. In any event, the Board finds that BCWSA did comprehend that the Field Order required it to remediate a series of manholes by raising them even though there was confusion about exactly how BCWSA was to perform the task.

INTRODUCTION

This is an appeal challenging the Compliance Order ("Field Order") issued by the Department of Environmental Protection (DEP or Department) on April 21, 2006 to Bucks County Water and Sewer Authority (BCWSA). The Field Order addresses sanitary sewer overflow

conditions occurring at manholes located along a sewer conveyance line owned by BCWSA. BCWSA filed a Notice of Appeal challenging the Field Order on May 20, 2005. Chief Judge Michael L. Krancer presided over the trial of this matter, which was conducted on November 29 and 30, 2005 in the Board's courtroom located in Norristown, Montgomery County. Filing of post-hearing briefs was completed on March 27, 2006 and the matter is now ripe for adjudication. After careful review of the record, the Board makes the following findings of fact:[1]

FINDINGS OF FACT

The Parties and People

1. The Department is the agency with the duty and authority to administer and enforce The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.1-691.1001 ("Clean Streams Law"); Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17; and the rules and regulations promulgated thereunder. Exhibit S-1, The Parties' Stipulation of Fact (Stip.) ¶ 1.

2. BCWSA is a municipal authority of the Commonwealth of Pennsylvania with offices at 1725 Almshouse Road, Warrington, PA 18976. Stip. ¶ 2.

3. Mr. Jesse Goldberg is a Department Water Quality Compliance Specialist; he has held that position since 1993. In the course of his duties he has recommended numerous enforcement

[1] The transcripts produced for each of the two days of trial both are numbered starting with page 1. Therefore we will cite to transcript by noting the trial date and the page number, for example, N.T. 11/29/05, at X and N.T. 11/30/05, at X. Thirty exhibits were admitted during the trial, two stipulated exhibits which are cited to as Ex. S-#, fifteen offered by the Department which are cited to as Ex. D-#, and thirteen offered by the Appellant, which are cited to as Ex. A-#. The Field Order which is the subject of this appeal was not admitted into evidence at the trial but the parties agreed upon a Rule to Show Cause issued on March 15, 2006 that the record should be reopened for the sole purpose of adding the Field Order to the record as S-3.

actions and/or remediations for violations of The Clean Streams Law. Mr. Goldberg holds Bachelor's and Master's degrees in Environmental Engineering from the Pennsylvania State University, and before becoming a Compliance Specialist spent five years as a Water Management Permit writer for the Department. Stip. ¶ 13.

4. Mr. John Butler, operations director of BCWSA since 1995, is not an engineer nor does he hold an engineering degree. Although he began a course of study at Drexel University, he obtained a Bachelor's degree in business administration at Gwynned Mercy College in 2002. Stip. ¶ 14.

The Sewer Line and Manholes

5. BCWSA operates a sanitary sewer collection system in Upper Dublin Township, Montgomery County, Pennsylvania as a result of its acquisition of the system from Upper Dublin Township in April 2002. Stip. ¶ 3.

6. The particular line involved in this case is located along Ambler Road, and feeds into the Borough of Ambler's sewage treatment plant (Ambler STP), located in Upper Dublin Township, which plant BCWSA did not purchase and does not operate. Stip. ¶ 4.

7. Hundreds of feet upstream of the Ambler STP, on property adjacent to the Fort Washington Day Camp, the line is punctuated by a half dozen manholes which are the subject of these proceedings (Ambler Road Manholes). The Ambler Road Manholes are located in a low lying area approximately 100 yards from a public street. Stip. ¶ 5.

8. Each of the Ambler Road Manholes is located not far from a pond and/or a stream tributary to the Wissahickon Creek. Stip. ¶ 6.

9. The Ambler Road Manholes were located at topographic points on the line lower than the Ambler STP; there are two other manholes on the line, on property of the Ambler STP, near the junction of the line and the plant, which were at a higher elevation than the Ambler Road Manholes. Stip. ¶ 7.

Overflow Events and Actions to Address Overflow Issues

10. From June 2003 onward, as the Department learned from its own inspections, citizen complaints and reports on behalf of BCWSA, since at least the end of 2003, during rainy weather, sewage overflowed from the Ambler Road Manholes on at least five occasions. Stip. ¶ 8.

11. During the overflow incidents the sewage traveled into the pond and/or the stream, and it deposited various nonliquid items on the ground near the Ambler Road Manholes. Stip. ¶ 9.

12. BCWSA has never held a permit to discharge sewage from the Ambler Road Manholes to the surface of the ground or into the pond or stream. Stip. ¶ 10.

13. On July 7, 2003, Department Water Management Specialist Joy Gillespie sent BCWSA a Notice of Violation concerning a June 20, 2003 overflow incident at one of the manholes in question. Her inspection "had revealed clear evidence of a recent discharge of sewage [from the manhole] in the form of sewage solids surrounding the manhole. The sewage discharged to an adjacent stream, which flows directly into the Wissahickon Creek." The Notice of Violation cited complaints about prior similar overflows, and requested that BCWSA promptly submit reports and proposals for pollution abatement. Stip. ¶ 11.

14. The overflows from the Ambler Road Manholes were caused by hydraulic constraints experienced at that Amber STP pump station during wet weather periods. Ex. A-8, ¶ F. The Department alleges in a Consent Order and Agreement dated October 26, 2005 entered into between

it and the Borough of Ambler (Borough) regarding the Ambler STP that, "due to hydraulic constraints experienced at the Plant's influent pump station during wet weather periods, homeowners located along Ambler Road in Upper Dublin Township have reported sanitary sewer overflows from several manholes. This portion of the collection system is owned and operated by the [BCWSA]." *Id.*

15. During late July 2003, in response to the July 7, 2003 Notice of Violation, BCWSA conducted a television study of, and flushed the line to make sure there were no blockages or other issues intrinsic to the pipe which would cause the overflows. Stip. ¶ 12.

16. The report indicated that there were no blockages or other issues intrinsic to the pipe which could account for the overflows. N.T. 11/29/05, at 190.

17. In December 2003, the Department received a complaint from a citizen who resides in the vicinity of the Ambler Road Manholes about overflow of the Ambler Road Manholes. N.T. 11/29/05, at 16; Ex. D-3.

18. In December 2003, Department Water Management Specialist Thomas Magge sent BCWSA a Notice of Violation concerning a December 15, 2003 overflow incident at five of the Ambler Road Manholes. Stip. ¶ 15.

19. In response to communications from the Department, BCWSA and the Borough, operator of the Ambler STP, conducted further studies to ascertain the cause of sewage overflows at the STP and associated collection lines, including the line at issue. Stip. ¶ 16.

20. In May 2004, the BCWSA also conducted a meter study, which concluded that the problem with the surcharges was due to the pump station at the Ambler STP, which was causing the hydraulic backup, thus surcharging the line. Stip. ¶ 17.

21. BCWSA reported that expanding the Ambler Road line diameter or construction of a parallel sewage line would be unduly expensive, and the Department concurred based on BCWSA's study. Stip. ¶ 18.

22. After meeting with Upper Dublin Township in July 2004, BCWSA and Borough representatives proposed to the Department interim courses of action that they and the Department believed would, *inter alia*, stop the overflows at the Ambler Road Manholes. The Borough undertook to work on its "wet well," modify the large pump at the Ambler STP's pump station and supplement the pump, at a cost in the high five figures; that has since been accomplished. BCWSA proposed to raise the elevation of the manholes to relieve the pressure, and to install a "check valve" at the Ambler STP in order to minimize backflow from the Ambler STP. Stip. ¶ 19.

23. The Department agreed with BCWSA's proposal to raise the manholes because it would both create extra capacity in the line and render the Ambler Road Manholes no longer the low point of the line and thus no longer the path of least resistance for flow, and agreed with the installation of the check valve as a means to lessen the need for extra capacity. Stip. ¶ 20.

24. BCWSA at all times contended that raising the manholes was only a temporary solution to the discharge problem without the Borough increasing its pump capacity to 100% and that without the Borough doing so the raising of the manholes would simply push the discharge problem further up the line, to wit, into an apartment complex located upstream of the Ambler Road Manholes. N.T. 11/29/05, at 281.

25. However, in a letter dated August 11, 2004, BCWSA committed to perform the manhole elevation work and valve installation within three or four weeks. Mr. Butler states in that letter,

"[w]e anticipate raising the manholes to be completed in 3-4 weeks depending on material delivery." Stip. ¶ 21; Ex. D-9.

26. As of mid-April 2005, the Borough chose to effect, in late spring 2005 began, and in July 2005 completed, installation of the check valve. Stip. ¶ 22.

27. In April 2005, the Borough had submitted to the Department a Corrective Action Plan (CAP), the purpose of which was to outline plans for eliminating sanitary sewer overflows at the Borough's plant. Ex. A-2, § 1. In the CAP, the Borough indicates that it had been reducing the inflow pumping capacity of the pumps in the wet well from 100% to 92%-93%. *Id.*, § 3.2. This reduced the flow capacity in the pumps between 11% and 16% and resulted in the raising of the wet well levels during rain events causing water flowing into the plant from the sewer lines, including those of BCWSA, to surcharge. N.T. 11/29/05, at 257-59; Ex. A-9.

28. Raising of the manholes was within the existing power of BCWSA's employees to accomplish without putting out public bids and, with the exception of spray-lining of one manhole, without resorting to outside contractors. Stip. ¶ 23.

29. In late October 2004, Department Water Quality Compliance Specialist Jesse Goldberg telephoned BCWSA's John Butler to inquire as to the progress of the manhole-raising process. Mr. Butler assured him that the work would begin November 4 or 5, 2004, and would be completed in about a week. Stip. ¶ 24.

30. BCWSA began the work to raise the Ambler Road Manholes on or about Thursday, December 23, 2004. Over the next two weeks the height of some of the manholes was increased by the addition of concrete ring risers. Stip. ¶ 25.

31. Even the manholes which had been raised were not so constructed at that point in time as to be watertight. N.T. 11/29/05, at 31-33.

32. Additional surcharging occurred in mid January 2005, and the Department met with BCWSA and with the Borough at the site, on January 31, 2005. Stip. ¶ 26.

33. At that meeting BCWSA's John Butler agreed promptly to complete the elevation of the manholes, and to line them by meshing and pouring them. Subsequent to that meeting the parties agreed that instead of being relined, all but one of the manholes would be encased in concrete cubes. Stip. ¶ 27.

34. Although initiated over the winter, the manhole work had still not been completed as of mid April 2005. Stip. ¶ 28.

35. On April 21, 2005, the Department issued to BCWSA a field Administrative Order under the Clean Streams Law and the Administrative Code of 1929. The Order states that "within 30 days of the date of this Field Order, BCWSA shall remediate the Ambler Road manholes according to the information provided to the Department during the January 31, 2005 field meeting." Stip. ¶ 30; Ex. S-3.[2]

36. In mid July 2005, the Department found the manholes to have been put in a condition satisfactory to it. Stip. ¶ 32.

DISCUSSION

Burden of Proof and Standard of Review

The Department bears the burden of proof in this matter and must establish its case by a

[2] The Parties' Stipulation of Fact submitted by the parties before the Trial and marked as Bd. Ex. 1 contains no paragraph number 29.

preponderance of the evidence. 25 Pa. Code §1021.122; *Borough of Edinboro Mun. Auth. v. DEP*, 2003 EHB 725, 743, *aff'd*, No. 2696 CD 2003 (Pa. Cmwlth. 2004) (unreported decision). Preponderance of the evidence has been defined by the Board "to mean that the evidence in favor of the proposition must be greater than that opposed to it. ...'It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established.'" *Bethenergy Mines, Inc. v.* DER, 1994 EHB 925, 975 (quoting *Midway Sewerage Auth. v. DER*, 1991 EHB 1445, 1476).

The Board reviews actions by the Department on a *de novo* basis. *Smedley v. DEP*, 2001 EHB 131. The Board makes its own findings of fact based upon the evidence presented to the Board and makes "a determination, based on the evidence we hear, whether the findings upon which DEP based its actions are correct and whether DEP's action is reasonable and appropriate and otherwise in conformance with the law." *Id.* at 160. Accordingly, in this case DEP must prove that facts exist to support the Field Order, that the Field Order was authorized by law and that the Field Order was reasonable and appropriate. *See Starr v. DEP*, 2003 EHB 360, 368.

Factual Background

This case involves a Field Order the Department issued to BCWSA regarding six manholes which had been experiencing overflow problems located along Ambler Road in Upper Dublin Township, Montgomery County. BCWSA has owned and operated the sanitary sewer collection system in Upper Dublin Township since it acquired the lines from Upper Dublin Township in April 2002. The line along Ambler Road feeds into a sewage treatment plant in close proximity down the line which is owned and operated by the Borough.

The manholes are located in a low lying area approximately 100 yards from a public street.

Each of the manholes is located not far from a pond and/or a stream tributary to the Wissahickon Creek. The manholes are located at topographic points on the line lower than the Ambler STP. There are two other manholes on the line, on property of the Ambler STP, near the junction of the line and the plant, which are also at a higher elevation than the manholes in question.

In about June 2003, the Department learned from its own inspections, citizen complaints and reports on behalf of BCWSA, that since at least the end of 2003, during rainy weather, sewage overflowed from these manholes on at least five occasions. During the overflow incidents the sewage traveled into the pond and/or the stream, and it deposited various nonliquid items on the ground near the manholes. It goes without saying that BCWSA has never held a permit to discharge sewage from the manholes to the surface of the ground or into the pond or stream.

On July 7, 2003, Department Water Management Specialist Joy Gillespie sent BCWSA a Notice of Violation concerning a June 20, 2003 overflow incident at one of the manholes in question. Her inspection "had revealed clear evidence of a recent discharge of sewage [from the manhole] in the form of sewage solids surrounding the manhole. The sewage discharged to an adjacent stream, which flows directly into the Wissahickon Creek." The Notice of Violation cited complaints about prior similar overflows, and requested that BCWSA promptly submit reports and proposals for pollution abatement. During late July 2003, in response to the July 7, 2003 Notice of Violation, BCWSA conducted a television study of, and flushed the line to make sure there were no blockages or other issues intrinsic to the pipe which would cause the overflows. The report indicated that there were no blockages or other issues intrinsic to the pipe which could account for the overflows.

On or about December 2003, the Department received a complaint from a citizen who lives in the area of the Ambler Road Manholes about overflow from them. Department of Environmental

Protection Water Management Specialist Thomas Magge sent BCWSA a Notice of Violation concerning this overflow incident which involved five of the Ambler Road Manholes. In response to communications from the Department, BCWSA and the Borough, operator of the Ambler STP, conducted further studies to ascertain the cause of sewage overflows at the STP and associated collection lines, including the line along Ambler Road.

In May 2004, BCWSA conducted a meter study, which concluded that the problem with the surcharges was due to the pump station at the Ambler STP, which was causing the hydraulic backup, thus surcharging the line. Indeed, the Department not only acknowledges but alleges in a Consent Order and Agreement dated October 26, 2005 entered into between it and the Borough regarding the Ambler STP that, "due to hydraulic constraints experienced at the influent pump station during wet weather periods, homeowners located along Ambler Road in Upper Dublin Township have reported sanitary sewer overflows from several manholes. This portion of the collection system is owned and operated by the [BCWSA]." Also, prior to April 2005, the Borough had been reducing the inflow pumping capacity of the pumps in the wet well from 100% to 92%-93%. Ex. A-2, § 3.2. This reduced the flow capacity in the pumps between 11% and 16% and resulted in the raising of the wet well levels during rain events causing water flowing into the plant from the sewer lines, including those of BCWSA, to surcharge.

BCWSA reported that expanding the Ambler Road line diameter or construction of a parallel sewage line would be unduly expensive, and the Department concurred based on BCWSA's study. After meeting with Upper Dublin Township in July 2004, BCWSA and Borough representatives proposed to the Department interim courses of action that they and the Department believed would, *inter alia*, stop the overflows at the Ambler Road Manholes. The Borough undertook to work on its

"wet well," modify the large pump at the Ambler STP's pump station and supplement the pump, at a cost in the high five figures; that has since been accomplished. BCWSA proposed to raise the elevation of the manholes to relieve the pressure, and to install a "check valve" at the Ambler STP in order to minimize backflow from the Ambler STP.

The Department agreed with BCWSA's proposal to raise the manholes because it would both create extra capacity in the line and render the manholes no longer the low point of the line and thus no longer the path of least resistance for flow, and agreed with the installation of the check valve as a means to lessen the need for extra capacity. BCWSA at all times, however, contended that raising the manholes was only a temporary solution to the discharge problem without the Borough increasing its pump capacity to 100% and that without the Borough doing so the raising of the manholes would simply push the discharge problem further up the line, to wit, into an apartment complex located upstream of the manholes.

Nevertheless, in a letter dated August 11, 2004, BCWSA committed to perform the manhole elevation work and valve installation within three or four weeks. Mr. Butler states in that letter, "[w]e anticipate raising of the manholes to be completed in 3-4 weeks depending on material delivery." As of mid-April 2005, the Borough chose to effect, in late spring 2005 began, and in July 2005 completed, installation of the check valve.

In late October 2004, Department Water Quality Compliance Specialist Jesse Goldberg telephoned BCWSA's John Butler to inquire as to the progress of the manhole-raising process. Mr. Butler assured him that the work would begin November 4 or 5, 2004, and would be completed in about a week. BCWSA began the work to raise the manholes on or about Thursday, December 23, 2004. Over the next two weeks the height of some of the manholes was increased by addition of

concrete ring risers. The manholes which were raised were still not watertight and additional surcharging occurred in mid January 2005. On January, 31, 2005, representatives of the Department including Mr. Magge and Mr. Goldberg, met with representatives of BCWSA and the Borough at the site. At that meeting BCWSA's John Butler agreed promptly to complete the elevation of the manholes and to line them by meshing and pouring them. Subsequent to that meeting the parties agreed that instead of being relined, all but one of the manholes would be encased in concrete cubes.

Although initiated over the winter, the manhole work had still not been completed as of mid April 2005. On April 21, 2005 the Department issued to BCWSA a Field Administrative Order under The Clean Streams Law and the Administrative Code of 1929. The Order states that "[w]ithin 30 days of the date of this Field Order, BCWSA shall remediate the Ambler Road manholes according to the information provided to the Department during the January 31, 2005 field meeting." In mid July 2005 the Department found the job to be completed in accordance with the Order.

Legal Analysis

There is no question, and BCWSA agrees, that, as it says in its brief, "the law governing these matters ... requires a 'municipality to repair and/or alter a sewage system when that activity is necessary to prevent pollution or a public nuisance'." BCWSA Post-Trial Brief, at19-20. 35 P.S. §§ 691.202 and 691.203. Nobody disagrees that BCWSA was under the obligation to keep the sewer lines in repair and not allowed to have discharges coming from them. There is also no question that the Department has the authority to issue field orders under The Clean Streams Law and that field orders can be and are an important enforcement tool. 35 P.S., §§ 691.5(b)(1), 691.610. N.T. 11/29/05, at 103-05. A field order is a valid enforcement tool for which there can be serious

consequences to a party who fails to comply. 35 P.S., § 691.611.[3]

BCWSA's main argument in its Post-Hearing Brief is that the Field Order was vague and it did not understand what was being required. Thus, the Field Order violated its right to due process of law. However, that argument regarding the form of the Order is not alleged in its Notice of Appeal. The Notice of Appeal merely alleges that the Department never should have issued the Field Order because the overflow problem was caused by the Ambler Borough plant backing up; that tests had shown that the BCWSA lines were free from obstruction; and BCWSA had already scheduled the work when the Field Order was issued. In other words, the Department's issuance of the Field Order under the circumstances was unreasonable. There is no allegation that BCWSA did not understand what it had to do. Indeed, the NOA suggests that it did know what to do since one of the reasons it gives that the Department's issuance of the Field Order was unreasonable, as already noted, is that BCWSA had already scheduled the work to be done. It could not very well have scheduled work to be done if it did not know what it was supposed to do. BCWSA likewise does not make the vagueness or lack of understanding argument in its Pre-Hearing Memorandum.

The Board's Rules do provide that allegations not raised in the NOA are waived. 25 Pa. Code § 1021.51. Moreover, Paragraph No. 8 of our July 25, 2005 Order Amending Pretrial Deadlines and Establishing Discovery and Trial Schedule in this case provides, "[t]he parties are

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[3] Section 611 of the Clean Streams Law, 35 P.S. § 691.611, provides as follows:

> It shall be unlawful to fail to comply with any rule or regulation of the department or to fail to comply with any order or permit or license of the department, to violate any of the provisions of this act or rules and regulations adopted hereunder, or any order or permit or license of the department, to cause air or water pollution, or to hinder, obstruct, prevent or interfere with the department or its personnel in the performance of any duty hereunder or to violate the provisions of 18 Pa.C.S. section 4903 (relating to false swearing) or 4904 (relating to unsworn falsification to authorities). Any person or municipality engaging in such conduct shall be subject to the provisions of sections 601, 602 and 605.

reminded that any party may be deemed to have waived any contentions of law and/or fact which are not set forth in their respective pre-hearing memoranda."

Beyond that, however, we simply do not see that BCWSA did not understand what it had to do. The Stipulations between the parties upon which the case was tried state quite clearly that BCWSA agreed in July 2004 to raise the manholes and that the Department agreed with this proposal. By letter dated August 11, 2004, BCWSA committed to raising the manholes within 3 to 4 weeks depending on material delivery. Also, the NOA states that the Field Order should not have been issued because BCWSA had, in fact, already scheduled "the work" to be done. It could not have scheduled "the work" if it did not know what "the work" was. Obviously, "the work" was raising the manholes which had been the plan for BCWSA to do since July 2004.

There may very well have not been a complete agreement between the Department and BCWSA about how the work was to be done, but we find that BCWSA understood that the manholes were to be remediated by being raised and that is what the Field Order was about. The language in the Field Order which states that BCWSA shall remediate the Ambler Road manholes according to the information provided to the Department during the January 31, 2005 field meeting is what BCWSA points to as being the problem with the Field Order. It is true that there is no description of what "information" was provided. Nor is there reference to any documents or written plan to which this statement could be referring and the Department is not contending that this line is referring to any such physical material.

The evidence showed that there was no uniform agreement, even among DEP personnel about exactly how the execution of the raising of the manholes would be executed. Shortly after the

January 31, 2005 field meeting, Mr. Goldberg drafted a letter as a follow-up to that meeting. That letter , which was unsigned and never sent, provided as follows:

> Dear Mr. Butler:
>
> This letter is being written to confirm the discussions that we had on January 31, 2005, concerning the manhole reconstruction which will take place along the sanitary sewer system in the area of the Fort Washington Day Camp and the property of Mr. Roger Egglestein. As you are aware, these manholes have been the topic of much discussion with [sic] the past year or so with respect to manhole overflows. While the Department appreciates that BCWSA has recently performed some reconstructive work on these manholes, it is apparent that more work still needs to be performed in order to make sure that the manholes do not overflow during periods of wet weather. It is anticipated that the future work to be performed, in conjunction with the check valve and wet weather pumping scenario recently proposed by the Borough of Ambler, will prevent future sanitary sewer overflows.
>
> Specifically, it was determined that the four manholes closest to the railroad tracks, on the Day Camp's property and Mr. Egglestein's property, will be remeshed and poured, and ~~drop-in manhole frames~~ will be utilized. In the two manholes closest to the pond (the last two that were observed), the height of the manholes will be raised two to two and a half feet more above grade. [In addition the first two manholes which we observed coming from the apartment complex will be remeshed and poured to ensure the integrity of the manhole structure.]
>
> As we discussed, we request that you provide the Department with a plan and schedule by which this work will be completed, in addition to a shop drawing of the drop-in manhole frames listed above. Please provide this information by February 16, 2005. If you have any questions or comments, please contact me[.]

Ex. A-3. The interlineations and the brackets were added later by Mr. Goldberg in handwriting and appear on the draft which is the trial exhibit. Mr. Goldberg testified that the letter was drafted sometime after the January 31, 2005 meeting. N. T. 11/29/05, at 150. He sent it to word processing, the draft letter was not routed back to his inbox and some time passed before he followed up with word processing about it. *Id.* at 151. Thus, the letter was not sent to BCWSA at the time it was drafted and only was provided to representatives of BCWSA, still unsigned, in late April at the time

the Field Order was issued. *Id.* at 152-53.

The letter was clearly written before February 16, 2005 since the letter requests that BCWSA submit a plan and a schedule by February 16, 2005. This request indicates that no specific or agreed to plan had been devised at the January 31, 2005 field meeting. Indeed, Mr. Goldberg testified as follows:

> Q: Was it clear in your mind that a final decision had been made as to how to deal with this issue?
>
> A: No.
>
> Q: There was a final decision?
>
> A: No, there was not.

Id. at 151. Mr. Goldberg also testified that, "[t]here was a lot of back and forth discussions during our field meeting in January about what was going to be done, what was contemplated to be done. And, you know, it was---you know, there were still some questions that had to be answered at that point." *Id.* at 161.[4] He also testified that "on January 31st, there was still---there was not a clear defined concept of how [BCWSA] would work on these manholes." *Id.* at 166.

We can see that not even Mr. Goldberg had a clear picture of what the upshot of the January 31, 2005 meeting might have been. We also see from Mr. Goldberg's testimony that his and Mr. Magge's recollection about the substance of the January 31, 2005 meeting were in conflict. In fact, Mr. Goldberg so testified. *Id.* at 162-63. That is what the handwritten additions to the draft letter are about. It was when Mr. Goldberg went over his draft letter with Mr. Magge when Mr. Goldberg

[4] We also note that the reference to "drop-in manhole frames listed above" in the last paragraph of the draft unsent letter, which was not crossed out, is erroneous. When asked about that second reference to "drop-in manhole frames," Mr. Goldberg testified that this reference in the draft letter was incorrect and that it too should have been crossed out. N.T. 11/29/05, at 162. This obviously follows from his testimony that his first reference in the letter to "drop-in manhole frames" was incorrect.

found that his recollection of what was discussed at the January 31, 2005 meeting differed from that of Mr. Magge. *Id.* Thus, in the period after the January 31, 2005 field meeting but before February 16, 2005, there was no single view within DEP of what BCWSA was supposed to be doing as a follow-up to the January 31, 2005 field meeting.

With respect to the "drop-in manhole" reference in the draft letter which was interlineated, Mr Goldberg testified that in his discussions with Mr. Magge about the January 31, 2005 field meeting it turned out that his reference to "drop-in manhole frames" was "incorrect." *Id.* at 152. In addition, Mr. Goldberg testified that the bracketed material was something that on reflection in looking over the letter "was something that [he] was unsure about at the time and [he] was contemplating deleting that from the letter based on [his] discussions with Mr. Magge." *Id.* at 161.

It is apparent, then, that Mr. Goldberg and Mr. Magge had come away from the January 31, 2005 field meeting with different understandings of what BCWSA was supposed to do. In what may be characterized as a bit of an understatement, Mr. Goldberg admitted that there was some "subtle differences" how he and Mr. Magge recalled the discussion at the January 31, 2005 field meeting. *Id.* at 167.

The draft letter was eventually provided to BCWSA on the day DEP issued the Field Order. N.T. 11/29/05, at 152. However, the record shows that there was a substantial difference of views as between DEP and BCWSA on what happened and what, if anything, was agreed to at the January 31, 2005 field meeting. N. T. 11/29/05, at 219-21. So not only was there no agreement even within DEP as to what specifically was to be taken from the January 31, 2005 meeting, DEP and BCSWA were not synchronized on that question.

Mr. Goldberg testified that even as of the April 21, 2005 field meeting there was no set plan

on how BCWSA was supposed to accomplish the raising of the manholes. He testified as follows,

> Q: I think I'm right to say then...that there was nothing set in stone as of April 21, 2005, either?
>
> A: Well, no. Your Honor, you're correct.

Id. at 169.

While all this testimony and evidence was dramatic and embarrassing to the Department, it does not require that the Field Order be overturned on the basis alleged by BCWSA. While the wording of the Field Order was unartful and clumsy and so too was Mr. Goldberg's failure to follow up on the letter he drafted which, if sent, would have had BCWSA provide a work plan by February 16, 2005 which would have avoided any confusion, we return to our findings, based on the parties pre-trial stipulations, that BCWSA itself proposed that, as of July 2004, the manholes would be remediated by being raised and at the January 31, 2005 meeting, "BCWSA ...agreed promptly to complete the elevation of the manholes, and to line them by meshing and pouring them." It looks to us like BCWSA knew what to do all along.

Conclusions of Law

1. The Department bears the burden of proof in this matter and must establish its case by a preponderance of the evidence. 25 Pa. Code § 1021.122.

2. The Department has demonstrated that this particular Field Order was reasonable and appropriate.

Based on the foregoing Findings of Fact, Discussion and Conclusions of Law we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BUCKS COUNTY WATER AND SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2005-101-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

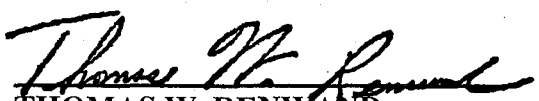
ORDER

AND NOW, this 17th day of April, 2006, it is hereby ORDERED that the appeal of Bucks County Water and Sewer Authority of the Field Order of the Department dated April 21, 2005 is **dismissed.**

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

GEORGE J. MILLER
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: April 17, 2006

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

VICTOR KENNEDY	:	
	:	
v.	:	EHB Docket No. 2005-332-L
	:	(Consolidated with 2005-333-L)
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	Issued: April 20, 2006
PROTECTION	:	

OPINION AND ORDER ON MOTION TO COMPEL

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

Synopsis:

The Board issues an order compelling an appellant to submit to a deposition. The Board will typically consider a party's failure to respond in any way to a nondispositive motion as an expression that the party does not oppose the motion. A deposition of the appellant is an appropriate measure to assure adequate discovery.

OPINION

Victor Kennedy d/b/a Kennedy's Mobile Home Park ("Kennedy") appearing *pro se* filed the appeal docketed at Docket No. 2005-332-L from the Development of Environmental Protection's (the "Department's) denial of his community water supply permit application. Kennedy filed the *pro se* appeal docketed at Docket No. 2005-333-L from a Department order directing him to correct alleged violations associated with the operation of his sewage treatment

plant.[1] By Orders dated January 24, 2006, the Board previously denied without prejudice the Department's motions to dismiss both appeals as untimely filed due to contested issues of fact regarding the date of Kennedy's receipt of the Departmental actions. The Board consolidated these appeals on April 18, 2006.

The Department has now filed two nearly identical motions to compel Kennedy to appear for deposition in each appeal. According to the motions, the Department on March 1, 2006 noticed Kennedy's deposition for March 7 at the Department's Meadville offices. The notices were delivered by hand and Kennedy signed an acknowledgement of receipt. The Department had a court reporter on hand on March 7, but Kennedy did not show up.[2] The Department's motions ask us to issue an order compelling Kennedy to submit to a deposition at a reasonable date and time no later than ten days following our order. Kennedy has not responded to the Department's motions.

Under our rules, "[f]or purposes of the relief sought by a motion, the Board will deem a party's failure to respond to a motion to be an admission of all properly-pleaded facts contained in the motion." 25 Pa. Code § 1021.91(f). *See Buddies Nursery v. DEP*, 1999 EHB 885; *Enterprise Tire Recycling v. DEP*, 1999 EHB 900. Speaking more generally, the Board will typically consider a party's failure to respond in any way to a nondispositive motion as an expression that the party does not oppose the motion. Thus, in the immediate context, Kennedy's failure to respond to the Department's motions signifies that he has no objection to the motions and is willing to appear for deposition as demanded by the Department.

---

[1] The Department has also filed a complaint for civil penalties, which is docketed at Docket No. 2005-299-CP-L. The complaint cites Kennedy for alleged violations associated with the sewage treatment plant. Kennedy has not answered the complaint and the Department has a motion for default judgment pending.

[2] The reporter charged the Department a $77.00 appearance fee. The Department has not requested reimbursement of that fee.

In any event, there is no doubt that Kennedy must make himself available to be deposed at a reasonable date, time, and place. He is the appellant in both appeals and doubtless has key factual information. "It is important to remember that the purpose of discovery is so both sides can gather information and evidence, plan trial strategy, better explore settlement opportunities, and discover the strengths and weaknesses of their respective positions. *George v. Schirra*, 814 A.2d 202 (Pa. Super. 2002). The Board is charged with overseeing ongoing discovery between the parties and has wide discretion to determine appropriate measures necessary to assure adequate discovery where required. *DEP v. Neville Chemical Company*, EHB Docket No. 2003-297-CP-R (Opinion issued January 3, 2005, page 3); *PECO Energy v. Insurance Co. of North America*, 852 A.2d 1230 (Pa Super 2004)." *Wheeling-Pittsburgh Steel Corp. v. DEP*, EHB Docket No. 2005-093-R, slip op. at 3 (Opinion issued September 19, 2005). *See also American Iron Oxide Co. v. DEP*, EHB Docket No. 2005-094-R, slip op. at 3 (Opinion issued September 19, 2005). It cannot be gainsaid that compelling the deposition of Kennedy would be an appropriate measure to assure adequate discovery.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

VICTOR KENNEDY	:	
	:	
v.	:	**EHB Docket No. 2005-332-L**
	:	**(Consolidated with 2005-333-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 20th day of April 2006, it is hereby ordered that Victor Kennedy will submit to a deposition beginning at **10:00 a.m.** and continuing until completed on **May 2, 2006** at the Department's Meadville office in compliance with the terms of the Department's notices of deposition dated March 29, 2006. The parties may jointly petition the Board to take the deposition at a different, mutually agreeable time. An unexcused failure to comply with this Order will likely result in the imposition of sanctions, including a possible dismissal of the appeals.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: April 20, 2006

c: **DEP Bureau of Litigation:**
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ROBERT BARRA and ROBERT AINBINDER	:	
v.	:	**EHB Docket No. 2003-038-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WHITE ASH LAND ASSOCIATION, Intervenor	:	**Issued: April 24, 2006**

OPINION AND ORDER ON
MOTION FOR SUMMARY JUDGMENT

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

Synopsis:

A third-party appeal from the Department's forfeiture of surface mining bonds is dismissed where the appellants' only challenge to the Department's action is that the Department should have accepted the third parties' proposal to perform reclamation in lieu of forfeiture.

OPINION

Background

This matter involves a *pro se* third-party appeal by two individuals, Robert Barra and Robert Ainbinder, from a letter issued by the Department of Environmental Protection (the "Department") to Bernice Mining and Contracting, Inc. ("Bernice") declaring a forfeiture of certain collateral bonds pursuant to the Surface Mining Conservation and Reclamation Act, 52 P.S. § 1396.1 *et seq.* ("SMCRA"). The case relates to Bernice's abandoned surface coal mining operation in Cherry Township, Sullivan County, formerly permitted at SMP No. 57813001,

known as the Bliss Site, on land owned by the Intervenor, White Ash Land Association. The operator, Bernice, posted seven collateral and surety bonds for the Bliss Site mining operation in an amount totaling approximately $260,000. The Department issued the forfeiture letter to Bernice on December 18, 2002. It is that letter which is the subject of this third-party appeal. We issued a prior opinion in this matter denying the Department's motion to dismiss the appeal as untimely, *Barra v. DEP*, EHB Docket. No. 2003-038-C (Opinion issued April 16, 2004), and we will continue to assume for current purposes that this appeal was timely filed.[1]

The Appellants did not operate the Bliss Site. They did not hold the permit for the site. They did not submit the bonds for the site or act as sureties on the bonds. Rather, in averments that we accept as true for current purposes, they provided money to Peter Pastusic, the sole shareholder and president of Bernice. Pastusic allegedly used the funds improperly and in violation of the parties' agreement. Pastusic died in 1999. As a result of various court cases, Barra and Ainbinder and/or their company, Capitol Coal Corp., obtained judgments against Pastusic's estate, some sort of an interest in the bonds posted for the site, and the mine lease. Capitol at one point made a partial attempt to have the permit transferred to it, but it never followed through on the Department's request for bonding, and the Department eventually denied the transfer application. Capitol did not appeal the transfer denial. The Department has questioned, but not formally challenged, Barra and Ainbinder's standing in this appeal. Given our disposition on the merits, there is no need for us to address that issue.

Barra and Ainbinder do not allege that the Department failed to satisfy the legal and factual predicates for bond forfeiture. The only theory that Barra and Ainbinder advance in their notice of appeal as a basis for this Board to take action is that the Department erred by forfeiting the bonds instead of allowing Barra and Ainbinder to reclaim the site. They allege that all parties

[1] This appeal was reassigned to Judge Labuskes for primary handling on March 28, 2006.

would be better served if the Department would wait and allow Barra and Ainbinder to reclaim the site. They explain that they have had difficulty moving forward in part because of disagreements with the land owner. Although this appeal has been pending for three years, Barra and Ainbinder have not produced anything firm on how they plan to reclaim the site. Barra and Ainbinder have verbally discussed general concepts with the Department involving the use of fly ash on the site, but they have never actually submitted a reclamation plan.

On November 10, 2004, the Department moved for summary judgment. The Department accurately states in its motion that Barra and Ainbinder have never challenged the long and serious history of past and ongoing violations at the site. The Department argues that Barra and Ainbinder would have been precluded in any event from challenging the violation history associated with the site because there were no appeals regarding the Department's prior enforcement actions against the operator. Given the undisputed and indisputable violation history, the Department contends that it had a mandatory obligation to forfeit the bonds. It contends that Barra and Ainbinder have failed to offer up any valid reason to overturn the bond forfeiture, but instead, have merely complained that the Department should have postponed bond forfeiture pending receipt of Barra and Ainbinder's promised but never delivered reclamation proposal.

In their responses to the Department's motion, Barra and Ainbinder once again do not dispute the history of past and continuing violations that have occurred at the site. They do not question that Bernice's violations are charged on the bonds. They do not deny that, as third parties, they have the burden of proof in this matter, *see* 25 Pa. Code § 1021.122(c)(2)(third-party appeals), or that they had an obligation to describe specific objections to the Department's action in their notice of appeal, 25 Pa. Code § 1021.51(e). Instead, in opposition to the

Department's motion for summary judgment, they continue to focus on the back story of their dealings with Bernice, Pastusic, White Ash, and other entities. They renew their only theme in this appeal; namely, that there is no need to rush to judgment in this matter, and the Department should wait until Barra and Ainbinder are able to consummate a viable reclamation plan. They concede that that has not happened yet and they make no promise that it ever will happen.

Discussion

Summary judgment may be granted where the record shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Global Eco-Logical Services, Inc. v. Department of Environmental Protection*, 789 A.2d 789, 793 n.9 (Pa. Cmwlth. 2001); *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222, 1224 n.4 (Pa. Cmwlth. 1997); *Zlomsowitch v. DEP*, 2003 EHB 636, 641. When deciding summary judgment motions, the Board views the record in the light most favorable to the nonmoving party and all doubts as to the existence of a genuine issue of fact are resolved against the moving party. *Bethenergy Mines, Inc. v. Department of Environmental Protection*, 676 A.2d 711, 714 n.7 (Pa. Cmwlth.), *appeal denied*, 546 Pa. 668 (1996); *Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 1162, 1164.

While we ordinarily review the Department's actions to determine whether they are reasonable and otherwise in accordance with the law, *Carl L. Kresge & Sons, Inc., v. DEP* ("*Kresge II*"), 2001 EHB 502, 507;[2] *Smedley v. DEP*, 2001 EHB 131, there is some question about the scope of our review in this case. The Department has argued that it has a "mandatory" obligation to forfeit the bonds, and therefore, there is little for this Board to do but to sustain that action.

[2] Although *Kresge* was a noncoal mining case, it has precedential value here because there is little or no material difference between the statutory forfeiture processes in the noncoal and coal mining programs.

The operative standard in this bond forfeiture case is set forth in the statute: "If the operator fails or refuses to comply with the requirements of the act in any respect for which liability has been charged on the bond, the department shall declare such bond forfeited...." 52 P.S. § 1396.4(h). *See also* 25 Pa. Code § 86.181.[3] It is true that case law holds that the Department has a mandatory duty to forfeit a bond *once* the Department finds that the mining operator has failed or refused to comply with the requirements of the statute in any respect. *Snyder v. DER*, 588 A.2d 1001, 1005 (Pa. Cmwlth. 1991); *Carl L. Kresge & Sons v. DEP* ("*Kresge I*") (discussing coal mining cases), 2001 EHB at 30, 68; *Bituminous Processing Co. v. DEP*, 2001 EHB 489, 503. *See also Kresge II*, 2001 EHB at 506 n. 1 (leaving the issue open in noncoal cases). Indeed, in *Morcoal v. DER*, 459 A.2d 1303, 1308 (Pa. Cmwlth. 1983), the Court held that this Board may not undertake an analysis of whether less stringent means of

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[3] Section 86.181 provides:

(a) The Department will forfeit the bonds for a permit when it determines that:

(1) The permittee has violated and continues to violate any of the terms or conditions of the bond.

(2) The permittee has failed and continues to fail to conduct the mining, or reclamation operations in accordance with the law, the regulations adopted thereunder or the conditions of the permit.

(3) The permittee has abandoned the permit area.

(4) The permits for the area under the bond have been revoked, and the permittee has failed to complete the reclamation, abatement and revegetation required by the law, the regulations adopted thereunder and the conditions of the permit.

(5) The permittee has failed to comply with a compliance schedule in an adjudicated proceeding, consent order or agreement approved by the Department.

(6) The permittee has become insolvent, failed in business, been adjudicated a bankrupt, filed a petition in bankruptcy or for a receiver, or had a receiver appointed by the court; or a creditor of the permittee has attached or executed a judgment against the permittee's equipment, materials or facilities at the permit area, or on the collateral pledged to the Department; and the permittee cannot demonstrate or prove the ability to continue to operate in compliance with the acts, the regulations adopted thereunder and the conditions of the permit.

enforcement short of forfeiture would have been appropriate because the Department's forfeiture duty is mandatory, not discretionary, once the requisite determination of noncompliance is made. *Morcoal*, 459 A.2d at 1307-08. In other words, the Board may not entertain challenges to the Department's choice of the bond forfeiture remedy after that point at which it has been established that an operator has failed or refused to comply with the law within the meaning of the statutory forfeiture provision.

The case law, however, does not foreclose the exercise of judgment and common sense in deciding whether an operator has "failed or refused to comply with the law" within the meaning of the forfeiture provision. A review of the cases confirms that it is only *after* that determination is made that bonds must be forfeited. *See, e.g., Snyder*, 588 A.2d at 1005 (mine operator admits to failing to backfill and other actions affecting the entire site); *Morcoal*, 459 A.2d at 1308 ("This record reveals massive evidence of Morcoal's history of abandoning sites and leaving them unreclaimed."). To conclude otherwise would have absurd consequences. Every regulatory violation is in the literal sense a "failure to comply with the law." If there is no room for discretion in making the prerequisite finding of a "failure or refusal to comply with the law," every violation, no matter how trivial and quickly repaired, would need to result in the death sentence that is bond forfeiture.[4] There would be no more mining in the Commonwealth of Pennsylvania because perfect compliance 100 percent of the time tends to be elusive, at best. The legislature could not have intended such a result.[5]

Instead, the statutory phrase "fails or refuses to comply" connotes at least some degree of recalcitrance or materiality. This leaves the Department with room for some discretion. It is

[4] An operator whose bonds have been forfeited may not obtain a license or a permit to mine anywhere in the state. 25 Pa. Code § 86.355(a)(1).

[5] We would also note that the pertinent regulation speaks largely in terms of continuing violations. *See e.g.*, 25 Pa. Code § 86.181(a)(1) (bonds to be forfeited when permittee "has violated *and* continues to violate" terms of bond).

only after the Department exercises that discretion in a reasoned manner and concludes that an operator has failed or refused to comply with the law that the Department must assess whether liability has been charged on the bond. Following that positive determination, we agree that there is nothing left for the Department to do but to forfeit the bonds, and our review is circumscribed accordingly. 52 P.S. § 1396.4(h); *Snyder*, 588 A.2d at 1005; *Morcoal*, 459 A.2d at 1307; *Lucky Strike Corp. v. DEP*, 1997 EHB 787, 803.

There is no need to explore the outer limits of the Department's discretion here. There is no question that the Department correctly concluded that the operator in this case has "failed and refused to comply with the law" within the meaning of the forfeiture provision. Indeed, it is not disputed and it is legally beyond dispute.

Departmental inspections indicated that, throughout 2001 and 2002, no mining activity took place at the Bliss Site and that the equipment remaining on site was idle. On July 2, 2002, the Department issued a notice of violation that found that Bernice had failed to backfill and regrade the site concurrently with mining in violation of its permit conditions and 25 Pa. Code § 87.141(c). Backfilling was to be commenced on July 19, 2002 and continue until completed. After a Department inspection revealed that backfilling had not commenced, it issued Compliance Order #024050 on July 29, 2002 directing that the operator commence backfilling and continue it until completed. No appeal was taken of the compliance order.[6]

On August 15, 2002, the Department again inspected the site and determined that no action had been taken to comply with the July 29, 2002 compliance order. Compliance Order # 024055 was issued on August 16, 2002 requiring compliance with the July 29, 2002 compliance

[6] Any attempt by Barra and Ainbinder to challenge the fact of the violations giving rise to the forfeiture would likely have been barred by the doctrine of administrative finality. *Kresge I*, 2000 EHB at 68-69; *Lucky Strike*, 1997 EHB at 802-03.

order regarding backfilling and regrading and ceasing all mining activity other than reclamation. The Department sent along with the August 16, 2002 compliance order a notice of intent to suspend the Bliss Site permits if the violations were not remedied within thirty days. No appeal was taken of the August 16, 2002 compliance order, and the Department received no response to the notice of intent to suspend the permits.

On September 19, 2002, the Department conducted an inspection of the Bliss Site and again observed that no action toward compliance with the Department's orders had been taken. The Department suspended the Bliss Site permits on September 26, 2002. The September 26, 2002 suspension also included a notice of intent to declare forfeit the bonds for the site for violations including but not limited to failure to backfill and regrade concurrently with mining, failure to reclaim all affected areas of the permit, failure to comply with an order of the Department, and failure to maintain liability insurance in accordance with 25 Pa. Code § 86.168. No appeal was taken from the September 26, 2002 permit suspension and no response was ever received by the Department regarding the notice of intent to forfeit the bonds.

On December 18, 2002, the Department declared the bonds for the Bliss Site forfeit. The Department declared the bonds forfeit for failure to backfill and regrade concurrently with mining, failure to reclaim all affected areas of the permit, failure to comply with an order of the Department, failure to maintain liability insurance in accordance with pertinent regulations, and failure to show a willingness or intention to comply with the applicable laws and regulations. On January 14, 2003, the Department issued an assessment of civil penalty in the amount of $23,500 to Bernice for the violations described in the compliance orders, which was not appealed and never paid.[7]

[7] On December 30, 2002 the Department sent notice to Lackawanna Casualty Co. instructing that the full amount of the forfeited *surety* bonds be paid over to the Department within thirty days. On January 31,

Thus, this appeal presents the classic case for the forfeiture of mining bonds. Even if the matter had been contested, there would be no doubt that the operator failed and refused to comply with the law within the meaning of the statutory forfeiture provision. Liability on the bonds is not contested. Accordingly, forfeiture is required. *Snyder; Morcoal; Bituminous Processing; Kresge I and Kresge II; Lucky Strike.*

As previously noted, Barra and Ainbinder have not alleged that they were the operators at the Bliss Site. The SMCRA merely requires that the "operator" fail or refuse to comply with the law as a prerequisite to bond forfeiture. Therefore, whether Barra and Ainbinder have taken or failed or refused to take any action at the site is legally irrelevant. Even if we accept that Barra and Ainbinder's purported offer to reclaim the site demonstrates that *they* have not failed or refused to comply with law, accepting that contention does not change the undisputed fact that *Bernice*--the only operator--failed and refused to comply. Barra and Ainbinder's reclamation proposals are completely outside of the analysis mandated by the statute. They are beside the point.

Although Barra and Ainbinder have described their complicated financial arrangement with Bernice, they do not allege that they are alter egos of Bernice. They do not argue that they stand in the shoes of Bernice. In short, this is not a case where Barra and Ainbinder can in any way be defined as the "operators" of the site, directly or indirectly, through privity, operation of law, or otherwise. We are quite sure that Barra and Ainbinder are not asking us to pierce Bernice's corporate veil and hold them personally responsible for everything that has happened and continues to happen at the site.

Barra and Ainbinder have simply argued that business decisions that they made in

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2003, Lackawanna Casualty Co. paid the full amount of the surety bonds for the site, $49,040 (Motion, Ex.R.)

dealing with Bernice turned out badly and that the Department should factor those unfortunate events into formulating its plan of action by allowing Barra and Ainbinder to perform some obscure reclamation proposal at some undefined future time. This argument simply has no merit. The law requires bonds to be submitted to ensure that, whatever financial difficulties the operator gets into, the Department has a fallback position to see that a site is reclaimed without undue delay. The financial details and circumstances that lead to the operator's noncompliance are and should be completely beside the point. *See Morcoal*, 459 A.2d at 1307. *See also Kresge I*, 2000 EHB at 66. If the financial circumstances regarding the *operator* are beside the point, the financial circumstances regarding the parties who did business with the operator are even more remote and could not be less relevant. Barra and Ainbinder would have us essentially turn this case into a bankruptcy proceeding, with the bonds being the bankrupt's estate. This would be entirely inappropriate.

Even if we assume for purposes of argument that Barra and Ainbinder were the operators, it does not follow that their after-the-fact offer to reclaim the site would be a valid defense to the forfeiture action. As previously discussed, once it is determined that an operator has failed or refused to comply with the law, so long as the violations are charged on the bonds, the bonds must be forfeited. *Snyder; Morcoal.* An after-the-fact offer to reclaim a site in lieu of forfeiture is at most a settlement offer. Any decision by the Department to allow such reclamation in lieu of forfeiture is, at best, a matter of grace. The most enticing, cost-effective, and legitimate after-the-fact offer to reclaim, no matter how sincere and realistic, is not a legal impediment to forfeiture.

Taking it yet one more step further for purposes of argument, Barra and Ainbinder have not actually presented an offer to reclaim here. They have discussed vague proposals, but

nothing more. (*See, e.g*, Barra and Ainbinder's response to DEP's motion, paragraph 28 ("Robert Barra and Robert Ainbinder have never submitted a formal reclamation plan to the DEP.").) They have had years to put together a proposal but have failed to do so.

Finally, if we assume *arguendo* that (1) Barra and Ainbinder's compliance with the law or willingess to reclaim is somehow relevant, (2) the Department is somehow legally obligated to consider their settlement offer, and (3) they have actually presented a meaningful, specific plan, we would still be required to rule against them. Barra and Ainbinder admit they have site access issues and concede that they are unable to proceed with what they perceive to be a reclamation proposal. Their contention that the Department should give them more time because of the site access problem has no merit. Impossibility, financial or physical, is not a defense to a bond forfeiture. *Kresge I*, 2000 EHB at 65-67; *Kresge II*, 2001 EHB at 506 n.1; *Wasson v. DER*, 1998 EHB 1148, 1158-59. If anything, Barra and Ainbinder's inability to gain access to the site at any time in the foreseeable future supports the Department's and our conclusion that no further delay or forbearance can possibly be countenanced in this case.

For all of these reasons, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT BARRA and ROBERT AINBINDER	:	
	:	
v.	:	**EHB Docket No. 2003-038-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WHITE ASH LAND ASSOCIATION, Intervenor	:	

ORDER

AND NOW, this 24th day of April 2006, the Department's motion for summary judgment is granted. This appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: April 24, 2006

c: **DEP Bureau of Litigation:**
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JUDITH ACHENBACH and GREG and DEBRA BISHOP	:	
v.	:	**EHB Docket No. 2004-202-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LANDIS W. and ENDA G. WEAVER, Permittee	:	**Issued: April 28, 2006**

OPINION AND ORDER
ON MOTION FOR LEAVE TO AMEND NOTICE OF APPEAL OR ALTERNATIVELY GRANT LEAVE TO APPEAL NUNC PRO TUNC

By Michelle A. Coleman, Judge

Synopsis:

A Motion for Leave to Amend Notice of Appeal or Alternatively Grant Leave to Appeal *nunc pro tunc* is denied where Appellants have failed to demonstrate that permitting Appellants to amend their notice of appeal will not impose undue prejudice on the opposing parties. Where Appellants have neither alleged nor demonstrated fraud, a breakdown in the Board's operations, or circumstances establishing a non-negligent failure to file their appeal in a timely manner, granting Appellants leave to appeal *nunc pro tunc* is not appropriate.

OPINION

Presently before the Board is the motion by Judith Achenbach and Greg and Debra Bishop (collectively, Appellants) for leave to amend their notice of appeal or appeal *nunc pro*

tunc. Their appeal objects to the Department of Environmental Protection's (Department) issuance of an NPDES General Permit for stormwater discharges associated with Landis and Edna Weaver's (Permittees) construction and operation of chicken barns on the Permittees' property. In their Motion, Appellants seek to amend their appeal on two grounds. First, Appellants aver that subsequent to the filing of their notice of appeal, the Permittees installed an artificial pipe on their property and altered the natural flow of stormwater on that property into an artificial channel that discharges the stormwater onto Appellants' property. Appellants allege that each discharge of stormwater that traverses their property constitutes an illegal trespass on their property. Second, because the Permittees have allegedly failed to effectively manage this stormwater runoff, Appellants assert that the Permittees' Land Development Plan is violative of the Stormwater Management Act, Act of October 4, 1978, P.L. 864, *as amended*, 32 P.S. 608.1 *et seq*.

In separate Answers to the Motion, both the Department and Permittees oppose Appellants' proposed amendments. The Permittees argue that Appellants' Motion is untimely because Appellants have been aware of the allegations presented in their Motion since January of 2005, when they filed a Complaint in the Lebanon County Court of Common Pleas raising the same allegations. The Permittees further contend that allowing Appellants to amend their appeal at this stage of the case would be prejudicial to them because they would be required to conduct additional discovery to prepare for trial.

The Department also argues that the Permittees have not installed an artificial pipe on their property. Instead, the Department insists that the Permittees have implemented Best Management Practices to regulate stormwater during and after construction of the chicken barns on the Permittees' property. The Department further claims that there is no trespass from the

Permittees' property or specific injury to Appellants' property. The Department additionally argues that the Stormwater Management Act imposes no duty on the Permittees because there is no stormwater management plan adopted under the Stormwater Management Act for Little Swatara Creek.

Both the Permittees and Department (Appellees) contend that Appellants' Motion should be denied because the case was assigned for trial prior to the filing of this Motion. Appellees also assert that Appellants' Motion should be denied for failure to verify or support by affidavit the factual allegations raised in their Motion. Appellees further argue that Appellants' requested amendments do not satisfy any of the conditions specified in the Board's Rules upon which the Board may grant leave to amend a notice of appeal or appeal *nunc pro tunc*.

Discussion

Appellants' Motion for Leave to Amend Notice of Appeal or Alternatively Grant Leave to Appeal *nunc pro tunc* was filed on September 29, 2005. On February 11, 2006, amendments to the Board's Rules became effective. One of the amendments to the Board's Rules significantly revised Rule 1021.53. An appeal may be amended as of right within twenty days after filing a Notice of Appeal.[1] After the twenty-day period for amendment as of right, the Board, upon motion by the appellant may grant leave for further amendment of the appeal.[2] Previously, the Board was authorized to grant leave to amend an appeal if the appellant established that the amendment satisfied one of the following conditions:

(1) It is based upon specific facts, identified in the motion, that were discovered during discovery of hostile witnesses or Departmental employees.

(2) It is based upon facts, identified in the motion, that were discovered during preparation of appellant's case, that the appellant, exercising due diligence, could not

[1] 25 Pa. Code § 1021.53 (a).
[2] 25 Pa. Code § 1021.53 (b).

have previously discovered.

(3) It includes alternate or supplemental legal issues, identified in the motion, the addition of which will cause no prejudice to any other party or intervenor.

However, pursuant to revised Rule 1021.53 (b), the Board's standard for granting leave to amend an appeal has changed. Under revised Rule 1021.53 (b), the Board may grant leave to amend an appeal if "no undue prejudice will result to the opposing parties."[3] The party requesting the amendment has the burden of proving the amendment will not impose undue prejudice on the opposing party.[4] Thus, the standard for granting leave to amend an appeal now requires that the appellant demonstrate the absence of undue prejudice.[5]

Applying this standard to the facts presented in the instant case, we are not convinced that allowing Appellants to amend their appeal at this stage of the case would not impose undue prejudice on the Appellees. An opposite conclusion would require the Appellees to conduct additional discovery in preparation for trial. Also, since the period for conducting discovery was closed over a year ago, granting the Appellants' Motion would further delay a trial in this matter. Furthermore, as the Permittees persuasively argue, Appellants have been aware or should have been aware of the facts giving rise to their requested amendments since January of 2005, when Appellants filed a Complaint in the Lebanon County Court of Common Pleas which raises allegations identical to those presented in Appellants' Motion. *See* Permittees' Ex. A, Pages 2-4. However, Appellants have not even provided us with any explanation as to why they waited until September 29, 2005, nine months later, before seeking leave to amend their notice of appeal.

Similarly, Appellants' request to appeal *nunc pro tunc* must also be denied. The Board's

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[3] *Id.*

[4] *Id.*

[5] A *Comment* to the rule provides that: In addition to establishing a new standard for assessing requests for leave to amend an appeal, this rule clarifies that a *nunc pro tunc* standard is not the appropriate standard to be applied in determining whether to grant leave for amendment of an appeal, contrary to the apparent holding in *Pennsylvania*

Rules provide that: "[t]he Board upon written request and for good cause shown may grant leave for the filing of an appeal *nunc pro tunc*; the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in courts of common pleas in this Commonwealth."[6] In *Bass v. Commonwealth*, 401 A.2d 1133, 1135 (Pa. 1979), the Pennsylvania Supreme Court explained that an appeal *nunc pro tunc* is only appropriate in cases "where there is fraud or some breakdown in the court's operation or where there is a non-negligent failure to file a timely appeal." In the instant case, not only do we not find fraud, a breakdown in the Board's operations, or circumstances demonstrating a non-negligent failure to file a timely appeal, none is even alleged by Appellants. Accordingly, an appeal *nunc pro tunc* is not appropriate here.

An Order in accordance with this Opinion follows.

Game Commission v. Dept. of Environmental Resources, 509 A.2d 877 (Pa. Cmwlth. 1986.)

[6] 25 Pa. Code § 1021.53(a).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JUDITH ACHENBACH and GREG and DEBRA BISHOP	:	
v.	:	**EHB Docket No. 2004-202-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LANDIS W. and EDNA G. WEAVER, Permittee	:	

ORDER

AND NOW, this 28th day of April 2006, it is ordered that Appellants' Motion for Leave to Amend Notice of Appeal or Alternatively Grant Leave to Appeal *Nunc Pro Tunc* is denied.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 28, 2006

c: **DEP Bureau of Litigation**
Attention: Brenda K. Morris, Library

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JUDITH ACHENBACH and GREG and DEBRA BISHOP	:	
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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LANDIS W. and ENDA G. WEAVER, Permittee	:	**Issued: April 28, 2006**

OPINION AND ORDER
ON MOTION IN LIMINE AND MOTION TO PRELCUDE WITNESS

By Michelle A. Coleman, Judge

Synopsis:

A motion to preclude expert testimony as a sanction for failure to identify a witness in response to both written interrogatories and a request for production of documents, and for failure to provide a report regarding the substance of the witness's testimony is granted.

Factual and Procedural Background

The background of this case is outlined in detail in our Opinion and Order denying Appellants' Amended Petition for Supersedeas issued on May 25, 2005, so a full procedural history will not be included here. *Judith Achenbach and Greg and Debra Bishop v. Dept. of Environmental Protection et al.*, EHB Docket No. 2004-202-C (Opinion issued May 25, 2005). For purposes of this opinion, the relevant history is as follows. This matter was initiated by Judith Achenbach and Greg and Debra Bishop, (collectively, Appellants) with the September 10,

2004 filing of a notice of appeal challenging the Department of Environmental Protection's (Department) issuance of an NPDES General Permit to Landis and Edna Weaver (Permittees) for stormwater discharges associated with the construction and operation of chicken barns on the Permittees' property. On September 14, 2004, the Board issued Pre-Hearing Order No. 1, in which it established a schedule for the completion of discovery and the filing of dispositive motions in this matter. In accordance with the Board's Order, the Department served its First Set of Interrogatories and Request for Production of Documents on Appellants on October 6, 2004. The Department's interrogatories and request for the production of documents were continuing requests for information.[1] Appellants were ordered to serve their answers to all interrogatories or serve their expert reports on the Department and Permittees by February 1, 2005. The Board issued Pre-Hearing Order No. 2 on June 16, 2005, in which it set a schedule for the filing of pre-hearing memoranda and scheduled a trial to occur on November 1-3, 2005. Appellants filed their pre-hearing memorandum on October 3, 2005, in which they identified Mr. Jeff Erickson, a biologist, as an expert witness that Appellants intend to call in this matter.

Presently before the Board for disposition are the Department's Motion in Limine and the

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[1] In the interrogatories served upon Appellants, the Department indicates:

> These Interrogatories shall be deemed continuing Interrogatories. If, between the time Appellant files Answers to these Interrogatories and the time of hearing in this case, Appellant or anyone acting on Appellant's behalf, learns of any information responsive to the Interrogatories not contained in the Answers hereto, Appellants shall promptly notify the [Department] by way of Supplemental Answers.

See Dept. Ex. 1, Page 2. Similarly, in the Request for Production of Documents that was served on Appellants, the Department states that:

> These requests shall be deemed continuing Requests. If, between the time Appellant files Answers to these Requests and the time of hearing in this case, Appellant, or anyone acting on Appellant's behalf, learns of any information responsive to the Requests not contained in the answers or not produced in response hereto, Appellant shall promptly notify the [Department] by way of supplemental answers and a supplemental production of documents.

See Dept. Ex. 1, Page 5.

Permittees' Motion to Preclude Witness which both seek to preclude Appellants from offering the testimony of Mr. Erickson at trial. Both the Department and Permittees (Appellees) allege that Appellants failed to identify Mr. Erickson as an expert witness in their response to the Department's First Set of Interrogatories and Request for Production of Documents or submit an expert report to Appellees regarding Mr. Erickson's testimony. Appellees maintain that they first learned of Appellants' intent to offer the testimony of Mr. Erickson in Appellants' pre-hearing memorandum. Consequently, Appellees contend that they cannot adequately prepare for trial regarding Mr. Erickson's testimony. Thus, Appellees ask the Board to impose a sanction and preclude expert witness testimony by Mr. Erickson in this matter.

In response, Appellants argue that they made several attempts to acquire a copy of the Department's test results for an unnamed tributary and the Department's testing protocol; however, the Department failed to provide Appellants with this information or stipulate that said information did not exist. Appellants seek to have Mr. Erickson testify regarding the alleged impairment of the unnamed tributary. Appellants assert that they should not be prohibited from offering Mr. Erickson's testimony since the Department failed to respond to their discovery requests.

DISCUSSION

Discovery in proceedings before the Board is generally governed by the Pennsylvania Rules of Civil Procedure. *See* 25 Pa. Code § 1021.102(a). Full disclosure of a party's case underlies the discovery process. *Pennsylvania Trout et al. v. Dept. of Environmental Protection and Orix-Woodmont Deer Creek Venture*, 2003 EHB 652, 657. The "integrity of the adjudication process requires that all parties promptly and with thoroughness respond to discovery requests." *Hein v. Hein*, 717 A.2d 1053, 1056 (Pa. Super. 1998). Thus, in the absence

of a valid objection, a party must answer each interrogatory "fully and completely." Pa. R. Civ. P. 4006(a)(2). Further, Rule 4007.4 imposes an obligation on a party to supplement its answers when the party learns it will be calling additional experts to testify at trial. Pa. R. Civ. P. 4007.4(2). Additionally, when the identity of an expert witness is not disclosed in accordance with the Rules, that witness will be barred from testifying on behalf of the defaulting party at trial. Pa. R. Civ. P. 4003.5(b). 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 Board may grant a continuance or other appropriate relief. *Id.*

Undoubtedly, Appellants were obligated to identify Mr. Erickson as an expert witness prior to filing their pre-hearing memorandum in this matter. On October 6, 2004, the Department served interrogatories, which specifically requested Appellants to identify each expert witness that Appellants intended to call at trial. For each of the expert witnesses identified by Appellants, the Department requested to know: (i) the subject matter on which the expert is expected to testify; (ii) the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion; (iii) each and every document or communication relied upon by the expert in reaching his or her opinion; (iiii) the educational background, employment history, and texts, articles, reports, theses, or other publications of the expert which relate to the matters upon which the witness will be qualified as an expert in this matter. *See* Dept. Ex. 1, Pages 7-9. Appellants concede that they neglected to provide the Department with responses to its interrogatories or supplemental answers in regard to Mr. Erickson's testimony.

Even more compelling, the interrogatories served on Appellants were continuing requests for information. Thus, if Appellants acquired additional information regarding an expert witness

that was not included in their initial response to the Department's interrogatories, Appellants had a duty to supplement their answers in a timely fashion and inform the Department of the identity of this witness. However, Appellants failed to supplement their responses to the Department's interrogatories when they realized that they intended to call Mr. Erickson at trial. Identifying this witness in Appellants' pre-hearing memorandum is not the proper way to supplement answers to interrogatories or document requests. *See City of Harrisburg v. Dept. of Environmental Resources, et al.*, 1993 EHB 226, 227 n.1. Consequently, Appellants' identification of Mr. Erickson as an expert witness for the first time in their pre-hearing memorandum is a clear violation of the discovery rules.

Furthermore, given the allegations of harm to Appellants' property and an unnamed tributary raised in Appellants' notice of appeal, and the Board's Opinion and Order denying Appellants' Amended Motion for Supersedeas, in which we determined that Appellants failed to provide us with sufficient evidence to substantiate their allegations, the need for expert testimony in this matter should have come as no surprise to Appellants. *See Achenbach*, slip op. at 6-9.

The decision whether to sanction a party for the failure to comply with a discovery order, and the degree of that sanction, are within the discretion of the [Board].[2] *Philadelphia Contributionship Ins. Co. v. Shapiro*, 798 A.2d 781 (Pa. Super. 2002). The Board has exercised its discretion to sanction parties by prohibiting expert testimony where an expert was not properly identified during discovery. *See Midway Sewerage Authority v. Dept. of Environmental Resources*, 1990 EHB 1554. The Board has wide discretion to impose sanctions for discovery

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[2] Rule 4019 (a) of the Pennsylvania Rules of Civil Procedure authorizes the imposition of sanctions for the failure to comply with the rules of discovery. Rule 4019 (i) provides in pertinent part as follows:

> A witness whose identity 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

violations provided that the sanction imposed is appropriate to the magnitude of the violation. The appropriateness of the sanction is assessed in light of four factors: (1) the prejudice caused to the opposing party and whether the prejudice can be cured; (2) the defaulting party's willfulness or bad faith; (3) the number of discovery violations; and (4) the importance of the precluded evidence. *See Hein*, 717 A.2d at 1056; *Environmental & Recycling Services, Inc.* v. *Dept. of Environmental Protection*, 2001 EHB 824, 834. Further, in *Caernarvon Township Supervisors v. Dept. of Environmental Protection and Chester County Solid Waste Authority*, 1997 EHB 601, 605, Judge Myers, *citing Green Construction. Co. v. Department of Transportation*, 643 A.2d 1129, 1139 (Pa. Cmwlth. 1994), *appeal denied*, 672 A.2d 311 (Pa. 1996), warned that:

> The preclusion of expert testimony is a drastic sanction, which should not be applied unless the facts of a case make it absolutely necessary to do so ... [Sanctions] are generally not imposed until there has been a refusal to comply with a [Board] order compelling compliance. Assuming that a party has not acted in bad faith and has not misrepresented the existence of the expert ... no sanction should be imposed unless the complaining party shows that it has been prejudiced from properly preparing its case ... as a result of a dilatory disclosure.

In *Caernarvon*, the Permittee filed a motion in limine to preclude the testimony of Appellant's expert witness due to Appellant's failure to identify the witness in a timely manner. Applying the principles listed above, Judge Myers determined that while Appellant's answers to the Permittee's interrogatories were dilatory, the Permittee did not seek and the Board did not issue, an order compelling Appellant to answer the Permittee's interrogatories. He also found that Appellant did not act in bad faith or misrepresent the existence of the expert, since Appellant identified the witness in its answers to interrogatories and filed an expert report for said witness, and any prejudice resulting from Appellant's tardy response to the Permittee's discovery request could still be cured because no hearing date had been scheduled in the case, thus the Permittee's motion was denied. Similarly, in the *City of Harrisburg*, Judge Woelfling denied a motion to

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continuance or other appropriate relief.

preclude the testimony of expert and fact witnesses first identified in the Department's pre-hearing memorandum. She held that while the moving party would "suffer some prejudice" from the testimony of the expert witnesses, there had been no timely action by the City to compel compliance with its discovery requests, and since there was time remaining to cure the default, the motion could be denied. In the instant case, the situation is the exact opposite of that presented in *Caernarvaron* and the *City of Harrisburg*.

In light of the facts presented in this case, we believe that the appropriate sanction is to prohibit Appellants from offering Mr. Erickson as an expert witness in this matter. We come to this conclusion after balancing the aforementioned factors. The Appellees have been unduly prejudiced by Appellants' failure to identify Mr. Erickson as an expert witness in their response to the Department's discovery requests. Without possession of the information requested in the Department's interrogatories, the Appellees are ill-prepared at best to challenge the substance of this witness's testimony at trial. Furthermore, at this stage of the case, the prejudice imposed on the Appellees cannot be cured. The period for conducting discovery in this case was closed over a year ago. The only remedy available to us at this point in the case is to extend the deadline for conducting discovery, which would only serve to further delay a trial in this matter. Also, Appellants' failure to identify their expert witness prior to the filing of their pre-hearing memorandum cannot be construed as being anything other than willful. There was a span of nearly eight months over which Appellants neglected to inform the Appellees of their intent to call Mr. Erickson at trial. In defense of their negligence, Appellants allege that they made several attempts to acquire a copy of the Department's test results of an unnamed tributary and the protocol used in testing impaired waterways, but to no avail. Since, Appellants claim, they were unsuccessful in obtaining this information, Appellants seek to have Mr. Erickson testify at

trial regarding his test of the unnamed tributary using the Department's testing protocol (*sic*). Unfortunately, Appellants' reasoning for the dilatory disclosure of their expert witness does not provide a sufficient basis for their actions or lack thereof. While we understand Appellants' frustration in not having this information, Appellants had the opportunity to file a motion to compel the Department to provide them with this information, but nonetheless failed to do so. Consequently, we cannot be expected to allow Appellants' disclosure of an expert witness in the eleventh hour when: they were forewarned that more evidence was needed, they failed to provide the Department with responses to its interrogatories or supplemental answers or an expert report regarding Mr. Erickson's testimony, discovery has closed, and a trial date had been set. Therefore we issue the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JUDITH ACHENBACH and GREG and DEBRA BISHOP	:	
v.	:	**EHB Docket No. 2004-202-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LANDIS W. and EDNA G. WEAVER, Permittee	:	

ORDER

AND NOW, this 28th day of April 2006, it is ordered that the Department's Motion in Limine and Permittees' Motion to Preclude Witness are granted.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 28, 2006

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

DENNIS GROCE, NATIONAL PARKS CONSERVATION ASSOCIATION, GROUP AGAINST SMOG AND POLLUTION and PHIL COLEMAN	:	
v.	:	**EHB Docket No. 2005-246-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WELLINGTON DEVELOPMENT – WDYT, LLC, Permittee	:	**Issued: April 28, 2006**

OPINION AND ORDER ON APPELLANTS' MOTION TO COMPEL

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Discovery before the Pennsylvania Environmental Hearing Board is governed by both the Board's Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure. A motion to compel the production of documents is denied in part and granted in part even though some of the documents requested were made after the close of discovery and shortly before trial. Normally forcing the responding party to respond to such requests would be an unreasonable annoyance, burden and expense at this point in the proceedings. However, due to the confusion about what files the Department relied on and because of the expedited pre-hearing schedule we will order the production of some of these documents. Documents in the possession of a

consultant and not in the possession or control of the party are not discoverable through a discovery request merely directed to the party.

Introduction

Presently before the Pennsylvania Environmental Hearing Board is the Appellants' Motion to Compel Production of Documents by Wellington. In addition, the Board is also treating a letter from Appellants' counsel to Wellington's counsel as a Motion to Compel and/or a request for documents.[1] On April 24, 2006, Permittee filed a detailed Response to Appellants' Motion to Compel and the April 8 letter. In addition, both the Permittee and Appellants filed comprehensive briefs in support of their respective positions. The Department advised the Board that it would not be responding to the Appellants' Motion to Compel.[2]

Discussion

Discovery before the Pennsylvania Environmental Hearing Board is governed by our Rules of Practice and Procedure in conjunction with the Pennsylvania Rules of Civil Procedure. *See* 25 Pa. Code Section 1021.102(a). Full disclosure of a party's case underlies the discovery process. *Pennsylvania Trout et. al. v. DEP et al.*, 2003 EHB 652, 657. The main purposes of discovery are so all sides can accumulate information and evidence, plan trial strategy, and

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[1] This is necessitated by the short time remaining before the trial of this matter. The April 8, 2006 letter is sufficiently detailed to allow for such a designation.

[2] Prior to discussing the merits of the parties' positions on these discovery issues we wish to acknowledge and recognize the excellent work being done by all counsel. This has been an extremely hard fought case in which all counsel have zealously represented their clients in the highest tradition of American jurisprudence. Counsel for the Appellants, Attorneys Ukeiley and Fiorentino, were not the original attorneys but have taken the laboring oars in Appellants' case and have worked diligently. The flurry of recent motions filed by Appellants coupled with the expedited schedule has resulted in our imposing extremely tight response deadlines on the Permittee. These deadlines, although allowable under our Rules are much shorter than the standard deadlines set forth in our Rules of Practice and Procedure. Counsel for the Permittee, and specifically Attorneys Collins and Rudnick, have never once complained, whined or objected to these deadlines but have instead filed detailed replies and responses.

discover the strengths and weaknesses of their respective positions. *DEP v. Neville Chemical Company*, 2004 EHB 744, 746. The Board is given great flexibility to fashion a discovery schedule and pre-hearing schedule that accomplishes these goals and is fair to all parties.

Indeed, in this case we have extended the discovery and other pre-hearing deadlines several times at the Appellants' request and over the strenuous objections of the Permittee. However, just as we have a duty to fashion appropriate measures necessary to insure adequate discovery we have a concurrent duty to limit discovery where required. Pennsylvania Rule of Civil Procedure 4012. Neither the Board's Rules of Practice and Procedure nor the Pennsylvania Rules of Civil Procedure authorize broad discovery "fishing expeditions." *See* Pennsylvania Rules of Civil Procedure 4001(c), 4007.1, 4011(c), *McNeil v Jordan*, 814 A.2d 234 (Pa. Super. 2002); *Neville Chemical*, 2004 EHB at 746.

Moreover, as we have stated before in this case and emphasize again now it is very important to the integrity of the litigation process that the deadlines we set are viewed as meaningful and important. Parties have a right to rely on our Orders and the deadlines they impose. As Chief Judge Krancer noted in *Petchulis v. DEP*, 2001 EHB 673, it is the duty of the Pennsylvania Environmental Hearing Board to enforce deadlines:

> As for litigation obligations, they have to be followed in order to maintain the integrity of and respect for our legal process.

2001 EHB at 678.

Turning now to the Appellants' Motion to Compel and the April 8, 2006 letter request, it is clear to us that some of the information Appellants are requesting had not earlier been requested. Wellington has produced thousands of documents. In most cases, we believe it is unfair when discovery is over and trial is approaching that a party has to turn its attention from trial preparation and respond to late discovery requests. Normally, forcing the responding party

to respond to such requests shortly before trial is an unreasonable annoyance, burden and expense.

Nevertheless, we realize that this case is complex and different in that it is on a more expedited schedule than usual. It also involves thousands of documents. Appellants have raised important issues and their counsel, who were not original lead counsel, have also worked very hard to respond to various motions and pre-hearing obligations. Moreover, it is the Permittee who has pushed to move this case along. Although the schedule we have established is not as fast as the Permittee would wish, it is still much quicker than the Appellants would prefer. Our decision on the Motion to Compel and the April 8, 2006 letter request is also influenced by the confusion regarding what modeling files the Department actually relied on. Although there may be some disagreement about this confusion and its cause, we believe that in the interest of fundamental fairness and to insure that justice is done that certain of these requests, which we will set forth in more detail, should be granted. Therefore, in balancing the equities on those discovery issues we will rule on the side of the Appellants as to some of the information they have requested in their April 8, 2006 letter.

It is our understanding that the files identified in paragraphs 1(B)(3)(4) of the April 8, 2006 letter have been provided by Wellington, and no dispute exists with respect to those items. We will order Wellington to produce the files listed in 1(A) and 1(B)(1) and (2). We have carefully reviewed the additional issues raised in the Motion to Compel and the April 8, 2006 letter and we hold that Wellington's objections are well taken and their responses are adequate.

Appellants have also requested that Wellington produce documents in the possession of Bechtel Power. There is no showing that Bechtel Power is an agent of Wellington. Documents in the possession of a consultant and not in the possession or control of the party are not

discoverable through a discovery request merely directed to the party. Appellants evidently made no attempt to subpoena this information directly. Wellington indicated its position on this issue long ago. It is inappropriate to wait this long to address an issue that could have been raised much earlier.

Appellants have also requested Wellington to identify any documents it forwarded to the Department during the permit review. Due to the short time left prior to trial and the fact that this information could have been more easily discovered by deposing the Department's lead permit reviewer, we find it burdensome to require Wellington to set forth this information now.

Discovery is rarely a perfect process. Although counsel here have done an excellent job in working together to resolve discovery disputes it is the nature of the process that disagreements occur. The Board's job is to make sure that these discovery disputes are resolved in the fairest way to all parties in accordance with the law. We will issue an Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DENNIS GROCE, NATIONAL PARKS CONSERVATION ASSOCIATION, GROUP AGAINST SMOG AND POLLUTION and PHIL COLEMAN	:	
v.	:	**EHB Docket No. 2005-246-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WELLINGTON DEVELOPMENT – WDYT, LLC, Permittee	:	

ORDER

AND NOW, this 28th day of April, 2006, after review of Appellants' Motion to Compel, requests set forth in its April 8, 2006 letter (collectively "Motion to Compel"), and Permittee's Responses, it is ordered as follows:

1) The Motion to Compel is ***granted in part and denied in part.***

2) Wellington shall produce as quickly as possible the files requested in paragraphs 1(A), 1(B)(1) and (2) of the April 8, 2006 letter.

3) The Motion to Compel is ***denied*** in all *other respects*.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 2005-246-R

DATED: April 28, 2006

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

UMCO ENERGY, INC.	:	
	:	
v.	:	**EHB Docket No. 2004-140-L**
	:	**(Consolidated with 2006-091-L)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 28, 2006**

OPINION AND ORDER ON MOTION TO DISMISS AS MOOT

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

Synopsis:

An appeal from an order to restore a stream is not moot where one of the restoration methods required by the order, continuous flow augmentation from alternate water sources, is being employed on an ongoing basis.

OPINION

On May 20, 2004, the Department of Environmental Protection (the "Department") ordered UMCO Energy, Inc. ("UMCO") to restore portions of a stream overlying a longwalled panel at UMCO's High Quality Mine in Washington County. The stream is alleged to have suffered adverse effects from subsidence. The appeal docketed at EHB Docket No. 2004-140-L is UMCO's appeal from that restoration order. Although UMCO contends that the order is invalid, it has employed various mitigation measures in an effort to restore the stream. One of those measures is maintenance of a certain level of flow in the stream by adding water to the

stream channel on an ongoing basis from a public water tap and several wells.

The Department has moved to dismiss the appeal as moot. It states that both the Department and UMCO agree that UMCO has taken every measure that is "technologically and economically feasible" to restore the stream. It follows in the Department's view that, in "the absence of any other techniques that could be employed by UMCO beyond those already used by UMCO there is no relief that the Board could grant." (DEP Memorandum p. 4.) Thus, the Department argues, the appeal is moot. UMCO opposes the motion.

One need not look far to uncover the controlling principles of law regarding mootness because we are fed a steady diet of motions to dismiss on that basis. In a nutshell, the Board will generally not engage in the academic exercise of deciding moot cases. A matter is moot where events occur that deprive the Board of the ability to grant effective relief or that deprive a party of a stake in the outcome of the case. *Morris Township v. DEP*, EHB Docket No. 2005-044-MG, slip op. at 2 (January 19, 2006); *Cooley v. DEP*, EHB Docket No. 2003-246-K, slip op. at 14-16 (September 15, 2005); *Borough of Edinboro v. DEP*, EHB Docket No. 2004-016-R, slip op. at 3 (April 12, 2005).

It would seem to go without saying that an appeal from an order that requires continuing, ongoing compliance activity is not moot. If such an appeal is sustained in full, the activity may stop. This obviously constitutes "effective" relief. In fact, it would seem to be a text-book example of a case that is *not* moot. As previously noted, the order that has been appealed in this case requires UMCO to restore flow to the stream. One restoration measure that UMCO has employed and continues to employ is flow augmentation. The augmentation is ongoing. If this appeal were to be sustained in its entirety, augmentation as required by the order could stop. On the other hand, so long as the order remains in force, augmentation presumably must continue.

At first blush, then, it is difficult to understand how the Department could believe that this appeal is moot.[1]

A closer examination of the Department's papers, however, reveals the theory that the appeal from the order is moot notwithstanding the continuing duty to augment flow because UMCO also has a duty to maintain flow under its permit: "The permit's obligation to maintain stream flow is independent of the May 20, 2004 Order, and is not implicated in the instant appeal." (Motion, Ex. A., ¶ 10.) We do not agree with the Department's theory that it can take two actions requiring the same thing, then successfully argue that an appeal from each action is moot because of the pendency of the other action. Each Department action has a life of its own. It has ramifications and consequences of its own. It has independent force and effect. The order under appeal does not depend on the permit for its existence, force, or effect, and *vice versa.* Who is to say what the future holds for the permit requirement to maintain flow? In fact, the appeal docketed at EHB Docket No. 2006-091-L concerns terms in UMCO's permit. So long as the order creates an independent, continuing obligation to maintain flow, it is not moot.

Of course, the Department continues to believe that the order was properly issued. It has, therefore, refrained from vacating, rescinding, or annulling the order. In the absence of such an action, an appeal from a compliance order will rarely be found to be moot. *See Eighty-Four Mining Co. v. DEP*, 2004 EHB 141, 145-149. Even in cases where the Department has "lifted" an order because of compliance, we are disinclined to find a case to be moot because the order might retain its validity and can continue to have a tangential impact on the recipient. *Goetz v. DEP*, 2001 EHB 1127, 1132. The case at hand is even further removed from being found to be

[1] Because the continuing augmentation aspect of the order is so obvious, we are putting aside the Department's apparent concession that there are no continuing obligations under other aspects of the order. In other words, there are no maintenance obligations, and there is no duty to perform additional repairs or adjustments as events unfold (e.g. additional settling) or new information comes to light.

moot because UMCO has continuing compliance obligations. That is undoubtedly why the order has not been lifted. If we were to dismiss this appeal, the order would continue to remain in effect, and it would continue to require UMCO to act in a certain way on a going-forward basis. UMCO would violate the order at its peril, and it would have no vehicle for bringing a challenge to its terms or its requirements. That opportunity would have been lost with our dismissal of the appeal.

The Department argues that UMCO could rechallenge the fact of the violations giving rise to the order if and when the Department pursues civil penalties. The Department cites *Colt Resources v. DEP*, 2002 EHB 757, for the proposition that a mine operator who appeals a civil penalty assessment may challenge both the amount of a civil penalty and the fact of the violations leading to the penalty. The Department goes on to assert: "Whether an order is appealed, not appealed, or dismissed as moot would have no bearing whatsoever on subsequent litigation over a civil penalty assessment." (Reply p. 6.)

There are, in fact, serious problems with the Department's argument. First, *Colt* does not provide for a challenge to all aspects of an order. It does not, for example, allow a challenge to the remedy mandated by an order. In an appeal from an order, UMCO could be unsuccessful in disproving the fact of a violation but successful in challenging the mandated remedy. There is no such opportunity in a civil penalty appeal.

Furthermore, and perhaps more fundamentally, *Colt Resources* does not hold that a party may prosecute an appeal from an order, and then relitigate those very same issues in a civil penalty appeal. To the contrary, *Colt Resources* was based upon the Commonwealth Court's holding in *Kent Coal Mining Co. v. DER*, 550 A.2d 279 (Pa. Cmwlth. 1988). In *Kent Coal*, the Court addressed this point as follows:

> [I]f a coal company immediately appealed from a compliance order challenging the fact of the violation, and lost, the company would be precluded by the doctrine of collateral estoppel from challenging the fact of the violation in a later civil penalty proceeding. Section 18.4 of SMCRA is not designed to give a person charged with a violation of the Act two bites at the apple, but rather to assure, when that person takes his one bite, that the fruit is ripe.

550 A.2d at 283. Thus, whether an order is appealed or not appealed most certainly *does* have a potential bearing in subsequent litigation over a penalty assessment.

Although preclusion doctrines such as collateral estoppel are typically applied when an issue is decided *on the merits*, it is not entirely clear that those doctrines are inapplicable when an appeal dismissed *as moot*. *Cf. Solebury Township v. DEP*, 863 A.2d 607 (Pa. Cmwlth. 2004), *app. granted*, 880 A.2d 502, 503 (Pa. 2005) (attorney fees awarded where case dismissed as moot). It could be that the mere filing of an appeal might affect the application of *Kent Coal*, since that holding was not intended to give operators "two bites at the apple." *Id.*, 550 A.2d at 283. Indeed, in *White Glove, Inc. v. DEP*, 1998 EHB 372, the Board held in a penalty appeal that a party's liability under the Air Pollution Control Act, 35 P.S. § 4006.1 *et seq.*, was conclusively established by its withdrawal with prejudice of its appeal from a compliance order. 1998 EHB at 377. There, *Kent Coal* did not apply and the party was not permitted to relitigate facts in the penalty appeal. *Id.* Although dismissal for mootness is not the same thing as withdrawal with prejudice, the extent to which matters can be relitigated in a subsequent penalty case if the compliance order is dismissed as moot is, to say the least, a tricky question of administrative law that we chose not to get into any further in this context. Suffice it to say for our current purposes that UMCO's concern about its ability to protect its rights in a theoretical future penalty appeal is well founded.

It is worth mentioning that we see a practical difficulty with the Department's proposed

solution that the issues dismissed here as moot can be tried again in a future penalty appeal. This appeal has been pending for almost two years (due to the parties' many extension requests). Under the Department's approach, all of this time would have been wasted because the parties would simply start all over again in a civil penalty appeal. This would be a waste of everyone's time and resources and provides further justification for rejecting the Department's theory that appeals from orders that are being complied with can be dismissed at any time if there is a possibility of future penalties.

The Department in its motion papers "commits" that it will not use the order under appeal "as a factor to escalate any civil penalty that it may assess for violations relating to UMCO's damage" to the stream. (Memorandum p. 4-5; Ex. A. ¶ 10.) It also "represents" that it will not "consider [the order] in calculating a compliance history factor" in future penalty assessments. (Reply p. 12.) The Department argues that these statements render this appeal moot. There is no evidence that the individuals involved have the authority to contractually bind the Department to disregard practices that are normally applied in assessing penalties. We are not willing to assume that these statements are legally binding on this or any future Administration. Therefore, the statements might at most create an estoppel defense, but estoppel can be difficult to prove. *See, e.g., Attawheed Foundation v. DEP*, 2004 EHB 858, 879 (a governmental agency may not be estopped from performing its statutory duties and responsibilities). The attempted offer of a governmental estoppel argument to UMCO provides little succor. Furthermore, the compliance order will remain on UMCO's compliance docket. We do not conclude at this juncture that that mark on its record is completely meaningless. *Cf. Colbert v. DEP*, EHB Docket No. 2005-029-MG (March 10, 2006)(compliance issues, even if not outstanding, should be considered in permit reviews).

The Department never comes out and says that UMCO is in full compliance with the order. As previously noted, the order has not been lifted. Instead, the Department says that the parties agree that UMCO has "employed all known mitigation measures," and similar statements along those lines. The fact that the parties agree on issues of fact and/or law does not make an appeal moot. The Board is not required to accept any stipulations, and it commits reversible error if it accepts a stipulation of law without independently verifying its accuracy.

It simply does not follow, logically or otherwise, that the parties' willingness to stipulate to certain issues means that the Board is unable to grant effective relief. Stipulations or concessions may have an impact on *how* the Board will act, but they do not eliminate the need for us to act, one way or the other. Indeed, the Department could stipulate away its entire case, say, stipulate that it issued the order in error, but the order would still stand until the Department rescinds the order or this Board takes some action. Stipulations of fact or law do not relieve the Board of its obligation to issue an appropriate order. Thus, the parties' apparent lack of disagreement on certain issues is nice to see, but it simply does not follow that the Board has somehow lost the ability to award effective relief.

It is obvious from the parties' filings that they have been trying to settle this appeal. But saying that a case should settle for practical, tactical, or economic reasons is not the same as saying a case is legally moot as far as the Board is concerned. From our vantage point, we hope that we have adequately explained why we see that UMCO has a continuing stake in a decision regarding the validity of the order, and this Board continues to be in a position to grant effective relief.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UMCO ENERGY, INC.	:	
	:	
v.	:	**EHB Docket No. 2004-140-L**
	:	**(Consolidated with 2006-091-L)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 28th day of April, 2006, it is hereby ordered that the Department's motion to dismiss the appeal docketed at EHB Docket No. 2004-140-L as moot is denied.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: April 28, 2006

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

LOWER MILFORD TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2006-109-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GERYVILLE MATERIALS, INC., Permittee	:	**Issued: May 3, 2006**

OPINION AND ORDER DENYING PETITION FOR SUPERSEDEAS

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Board denies a petition for supersedeas of a Department letter granting a waiver to Geryville Materials, Inc. from the requirement to obtain a permit to conduct noncoal exploration under 25 Pa. Code § 77.109. The petitioner, Lower Milford Township, failed to show any harm has resulted or would result from the very limited activities conducted and planned to be conducted by Geryville Materials, Inc.

OPINION

Before us is the petition for supersedeas of Milford Township, Lehigh County, requesting the Board to supersede a letter of the Department dated March 1, 2006 which states that: "[y]ou [Geryville Materials] are hereby granted a waiver from the requirement to obtain a permit to conduct noncoal exploration under 25 Pa. Code § 77.109." We will refer to the letter as the Permit Waiver. The Department's Permit Waiver was in response to Geryville's filing with the Department a

completed document bearing the title, "Noncoal Exploration Notice of Intent To Explore Or Request For Permit Waiver" which the Department received on February 17, 2006. A supersedeas trial was held at the Board's Norristown courtroom on April 20, 2006. Lower Milford and Geryville, but not the Department, filed post-supersedeas trial briefs on Friday, April 28, 2006. The filing by Geryville and the Permit Waiver provide that the Permit Waiver terminates on May 31, 2006, so there is a need to render a decision on the petition for supersedeas as soon as possible.

We will not repeat the supersedeas standard here in the interest of brevity and alacrity. The standard is set forth at 35 P.S. § 7514(d) and 25 Pa. Code § 1021.63. We find that Lower Milford has not made the showing required for this Board to issue a supersedeas.

The parties have argued whether the type of activity contemplated and done at the Geryville site is allowed to happen without a mining permit. Lower Milford has argued that even if 25 Pa. Code § 77.109 does allow such activity, the regulation is contrary to the statute and therefore illegal. The Department has also questioned whether the Permit Waiver is an appealable action. The matter is complicated because the document filed by Geryville and the Permit Waiver under appeal conflate two activities: exploration, such as boring for groundwater well installation on the one hand, and actual mining of minerals for the purpose of performing testing on the materials so mined on the other hand. A reading of the surface mining statute and the appurtenant regulations can lead to the conclusion that the former may be performed as a matter of right, with no permit and no permit waiver, only upon notice to the Department and the party doing the exploring following the performance standards outlined in 25 Pa. Code § 77.109, and the latter activity requires an

affirmative permit waiver, that is, a decision by the Department to waive the requirement that the applicant obtain a permit.[1]

The answers to these questions would have to be based on the outcome of reading, interpreting and harmonizing a crowded series of statutory and regulatory definitions about which we would need much more briefing. The answers cannot and should not come now in the context of this time-pressured supersedeas proceeding and decision. Thus, we will assume for the purposes of this proceeding that the Permit Waiver and the regulations lawfully allow the type of exploration done here as a matter of right without a mining permit. We will further assume that the Permit Waiver is an appealable action of the Department in that it constitutes its affirmative decision and action of granting a permit waiver for actual mining for the sole purpose of testing the minerals if Geryville had desired to do so. However, we do recognize that Geryville represented in its supersedeas presentation that it has not taken, nor does it intend to actually take, any minerals from the property to conduct testing on those minerals.

Upon its receipt of the Department's Permit Waiver of March 1, 2006, Geryville proceeded to drill a series of 12 boreholes on its 628-acre property for the purpose of constructing groundwater wells in order to conduct a groundwater monitoring regime and groundwater pump test. The well

[1] On April 28, 2006, the Department filed a Motion to Dismiss the Notice of Appeal on the basis that the Permit Waiver is not an appealable action. The Department argues that no DEP action is involved with respect to the exploration aspect of the letter and that a permit waiver to allow removal of minerals solely for the purposes of testing the minerals is an unappealable exercise of the Department's enforcement discretion. However, underlying the Department's motion are these events which followed the supersedeas trial in close order. On April 21, 2006, the day after the supresedeas trial, Geryville's consultant submitted a letter to DEP which says that the drilling of the boreholes was completed on April 1, 2006 and that the holes were finished into groundwater monitoring wells. The letter goes on to say that "exploration activities are now complete." Finally, the letter states that a groundwater pumping test will be completed within the next several weeks. The Department immediately responded to that letter with a letter dated April 25, 2006 to the consultant. The Department's letter acknowledges the April 21, 2006 letter from the consultant and says that it understands that exploration activities have been completed at that site and that no minerals were removed from the site under the Permit Waiver. The letter goes on to say that "[t]he Department's March 1, 2006 letter...is modified to rescind the permit waiver in the first instance, as no minerals were removed from the site."

drilling activities were completed on or about April 6, 2006, which was two days after Lower Milford filed its Notice of Appeal and Petition for Supersedeas in this case. Geryville Materials used existing roads to bring in the drilling equipment. It cut down no trees except for one 3-inch diameter sapling. The Board reviewed a series of 25 photographs, accepted into evidence as Ex. G-1, which demonstrate that the work done by Geryville involved a virtually negligible degree of disturbance of the property. We do not accept the testimony of Township Manager Ellen Koplin who, on the basis of three photographs entered into evidence as Ex. A-10, testified that Geryville's activities had involved substantial clearing which had encroached upon or impacted wetlands. She is not an expert in wetlands identification. Moreover, to the extent the photographs showed any such incursion at all, which is not apparent by looking at the photographs, she did not effectively or credibly link the supposed incursion to Geryville's activities relating to the drilling of the 12 boreholes or completing the wells. All she could say was that the photographs represented activity which had occurred "over the last several months." Moreover, when Ms. Koplin was asked if she knew who did the clearing which is supposedly depicted in the 3 photographs and when the supposed clearing was done she replied, "I have no idea." We accept the testimony of Mr. Ross, Geryville's consultant, that the activity undertaken by it was at least 100 feet, and probably closer to 150 feet to 200 feet, from any wetlands or stream and that no disturbance of any wetlands or stream took place.

Lower Milford did not demonstrate that the activities, which are completed now, did any harm or pose any threat of any harm. As noted, the activities were extremely limited and completed with remarkably little physical intrusion and no alteration of the property. Lower Milford did not show that the activities threaten any species on the site which may be endangered. We do not find

that the testimony of ecologist Amy Greene presented by Lower Milford leads to the conclusion that there is, was, or will be any damage done to any species or species habitat by Geryville's activities.

Moreover, Ms. Greene did not offer any testimony which would permit the conclusion that the performance of the anticipated pump test poses a threat to the existing wetlands on the site by creating "drawdown." She is not qualified to give such testimony since she is not a hydrogeologist. Moreover, there is a serious question whether a groundwater pump test is an activity which is touched by the mining regulations or could be covered by the Permit Waiver.

The fact that a more comprehensive survey of the status of endangered plants or animals or their habitats will need to be done when and if Geryville might apply for a mining permit does not translate into there being a threat to such species and habitat posed by the limited activities performed by Geryville. Likewise, the fact that agencies such as the Pennsylvania Fish and Boat Commission and the Federal Wildlife Service had told Geryville's consultants that a full survey would have to be conducted and this information was not revealed to the Department by Geryville in its Notice of Intent filing or otherwise makes for dramatic testimony but does not prove that the activities conducted are having or had any negative impact on any endangered species.

The bottom line is that Lower Milford has not shown that Geryville's very limited activities posed or pose a threat of harm. No supersedeas will be issued.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

LOWER MILFORD TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2006-109-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GERYVILLE MATERIALS, INC., Permittee	:	

AND NOW, this 3rd day of May 2006, upon consideration of the Petition For Supersedeas and the trial testimony and exhibits, it is hereby ordered that the Petition is **denied**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

DATED: May 3, 2006

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DENNIS GROCE, NATIONAL PARKS CONSERVATION ASSOCIATION, GROUP AGAINST SMOG AND POLLUTION and PHIL COLEMAN	:	
v.	:	**EHB Docket No. 2005-246-R**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and WELLINGTON DEVELOPMENT – WDYT, LLC, Permittee	:	**Issued: May 5, 2006**

OPINION AND ORDER ON APPELLANTS' MOTION TO MODIFY THE SCHEDULE

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Pennsylvania Environmental Hearing Board grants in part and denies in part the Appellants' Motion to Modify the Schedule. Appellants have not presented compelling reasons why dates for filing supplemental expert reports and the supplemental pre-hearing memoranda need to be extended. Likewise, Appellants' request for a one-week delay in beginning the trial of this case is not supported by compelling reasons. Since Appellants' expert just recently received substantial information pursuant to this Board's Order partially granting a Motion to Compel Production of Documents, we will

slightly extend the due date for the submittal of air modeling reports.

Discussion

Presently before the Pennsylvania Environmental Hearing Board is the Appellants' Motion to Modify Schedule which was filed on May 4, 2006. Although Appellants seek the extension of several deadlines the main focus of its Motion is its request to extend by one week the deadline for expert air modeling reports. By our count, we have earlier extended this deadline twice; most recently extending it from April 14, 2006 to May 5, 2006.

Despite the fact that the Appellants' Motion was just filed yesterday, Permittee filed an extensive Response strongly opposing the Motion. The Department does not oppose the Motion but indicated that if the Board would have to add additional trial days, counsel for the Department are not available until mid-July for the resumption of the trial.

We held oral argument this morning on the Motion. Appellants' main reason for the extension centers on large computer files it recently received pursuant to our Order partially granting their Motion to Compel. They claim their expert simply needs more time to digest this vast amount of information and prepare his report.

Permittee points out that it responded within two hours of receiving our Order and produced all of the information by noon of the next business day. It argues that counsel for Appellants could have arranged for the expert to receive the information directly from counsel for Permittee. Moreover, Permittee contends that the review of the information should not take as long as Appellants have requested and suspects that Appellants are trying to stall the trial of this case to the Permittee's detriment.

We have struggled in this case to balance the competing interests of the parties in order to assure that the issues are resolved expeditiously but assuring that adequate time is allotted to prepare for the trial. *Groce v. DEP and Wellington Development-WDYT, LLC* (Opinions and Orders issued November 15, 2005 page 7 and March 1, 2006, page 3). Moreover, we have emphasized the importance of our pretrial deadlines. Nevertheless, in balancing the interests of the parties we have occasionally extended deadlines. In each instance, we did so after determining that the Permittee and the Department would suffer no undue prejudice.

A key factor which weighs heavily on our decision is that "we cannot lose sight of the fact that our basic objective is to arrive at a proper resolution of the appeal on its merits." *Kleissler v. DEP and Pennsylvania General Energy Corporation*, 2002 EHB 617, 620. An important part of Appellants' case seems to be dependent on its air modeling expert. We, therefore, have to balance the need to allow the expert sufficient time to prepare his report with the needs of the Permittee's and Department's experts to have sufficient time to respond to the expert report.

Turning now to the specific requests for extension we will only partially grant the motion to extend the deadline for the filing of air modeler reports. We are granting a slight extension to this deadline because of the substantial information that Appellants' expert must review, analyze, and then use to help prepare his expert report. We find no prejudice to either the Permittee or the Department by granting Appellants another five days. This will be the third time we have extended this specific deadline. We are not extending the deadline to the date requested by Appellants but only until May 10, 2006.

While we agree with Appellants' counsel that "discovery deadlines are not written in stone" *Oley Township v. DEP*, 1995 EHB 1005, we hasten to add that they are also not written in sand to be washed away in an ocean of litigation. Therefore, we are denying Appellants' requests to extend the deadlines for Responses to the Air Modeling Expert Reports and the filing of Supplemental Pre-Hearing Briefs. Likewise, we are denying Appellants request to move back the pre-hearing conference two days and delay the start of the trial by one week. We see no need to extend these deadlines. All the other deadlines will remain as earlier ordered with the exception that the Department's request for a one-day extension to the deadline for submittal of its pre-hearing memorandum and the Permittee's pre-hearing memorandum will be granted. Appellants' attorney graciously consented to this request after hearing the reason which is that Mother's Day is the day before the original due date.

We will issue an Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DENNIS GROCE, NATIONAL PARKS CONSERVATION ASSOCIATION, GROUP AGAINST SMOG AND POLLUTION and PHIL COLEMAN	:	
v.	:	**EHB Docket No. 2005-246-R**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and WELLINGTON DEVELOPMENT – WDYT, LLC, Permittee	:	

ORDER

AND NOW, this 5th day of May, 2006, following oral argument and a review of Appellants' Motion to Modify Schedule and the Permittee's Responses, it is ordered as follows:

1) Appellants' Motion is ***granted in part*** and ***denied in part.***

2) The due date for the submittal of air modeling expert reports is extended until **Wednesday, May 10, 2006.**

3) The Motion is ***denied*** in all other respects.

4) The Department's oral motion, consented to by the Appellants, to extend the filing of the Department's and Permittee's Pre-Hearing Memoranda by one day is ***granted.*** These documents shall be filed on or before **Tuesday, May 16, 2006.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administration Law Judge
Member

DATE: May 5, 2006

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

SOLEBURY TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-183-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW HOPE CRUSHED STONE & LIME COMPANY, Permittee	:	**Issued: May 10, 2006**

OPINION AND ORDER ON MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis

The Board denies a permittee's motion to dismiss an appeal by a municipality on the basis of mootness and lack of jurisdiction. Read as a whole, the municipality's appeal challenges the Department's compliance with an order of the Board. Accordingly, the issuance of a new permit pursuant to that order does not render the appeal moot and we have jurisdiction to consider the municipality's claims with respect to the adequacy of the Department's compliance with the Board's order.

OPINION

Before the Board is a motion to dismiss filed by New Hope Crushed Stone & Lime Company (Permittee). The Permittee seeks to dismiss an appeal filed by Solebury Township because the Department has renewed the Permittee's NPDES permit which

renders the Township's appeal of an administrative order requiring a hydrogeologic study upon which the permit is based moot.[1] The Permittee also argues that to the extent other issues raised in the notice of appeal which are not directly related to the administrative order are not moot, the Board has no jurisdiction to adjudicate those claims. The Township opposes the motion. As we explain below, we will deny the Permittee's motion and consolidate this appeal with the Township's appeal of the current NPDES permit.

The genesis of this appeal derives from a 2002 appeal by the Township challenging the issuance of an NPDES permit renewal to the Permittee in connection with its stone quarry operation. The Township argued that the continued discharge at the rate approved in the renewal was dewatering the Primrose Creek Basin and upsetting the hydrogeologic balance, resulting in the dewatering of residential water supplies in the Township. In an adjudication issued on March 5, 2004, the Board found that the Department had failed adequately to consider the effect of the continuing discharge and remanded the permit to the Department for further consideration. Specifically the Board required the Department to consider what limits on the permit might be necessary to minimize disturbance on the hydrogeologic balance; to conduct an in-depth hydrogeologic study of the Primrose Creek Basin; and to amend the permit to authorize pumping at a rate sufficient to keep the quarry pit dry, but not to exceed four million gallons per day on a month average, until the study was completed.[2] Both the Permittee and the Township appealed the Board's order to the Commonwealth Court. By order

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[1] By letter dated April 11, 2006, the Department informed the Board that it concurs with the Permittee's motion seeking dismissal of the present appeal.

[2] *Solebury Township v. DEP*, 2004 EHB 95.

dated June 1, 2004, that court quashed both appeals finding that the order of the Board was interlocutory.

Nearly a year later, on May 19, 2005, the Department issued an administrative order to the Permittee which required the Permittee to complete the study ordered in the March 2004 adjudication. On June 10, 2005, the Township filed a notice of appeal, charging generally that the Department was not acting diligently to comply with the Board's adjudication, that the Permittee was effectively operating without a permit and that as a result, residential water supplies continued to experience problems allegedly attributable to the Permittee's pumping operation. Among other things, the Department's administrative order was attached to the notice of appeal. The Department then issued a letter on October 11, 2005, which "discharged" the May administrative order because the study required by the administrative order had been completed. The Permittee therefore filed a motion to dismiss based solely on the mootness of the administrative order, but did not include any motion relating to the justiciability of the Township's broader claims. The Township's response to the motion also raised some concern that there were also outstanding discovery issues. Therefore, we denied the Permittee's motion to dismiss at that time, because the Township's notice of appeal raised a broader spectrum of claims relating to the Department's conduct concerning compliance with the Board's order, than simply a complaint about the administrative order, and found that the "discharge" of the order did not by itself render the entire appeal moot. [3]

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[3] *Solebury Township v. DEP,* EHB Docket No. 2005-183-MG (Opinion issued November 21, 2005).

Since that time the Department has reviewed the hydrogeologic study submitted by the Permittee and has issued a renewal of the Permittee's NPDES permit on March 16, 2006.[4] Accordingly, in the Permittee's view, the Township's appeal is moot and that issues not related to the administrative order are beyond the Board's jurisdiction to consider.

The Township opposes the motion and argues that its appeal is not moot, because there remain outstanding issues which include the Department and the Permittee's compliance with the Board's March 2004 Order; whether the Permittee was legally pumping after the Board's order; and whether the hydrogeologic study was complete and accurate. Although the Township's response does not directly address the power of the Board to hear these claims, we may address questions related to jurisdiction *sua sponte*.[5]

We do not believe that the issuance of the NPDES permit renewal clearly renders the claims made by the Township moot. The claims raised in the Township's June 2005 notice of appeal relate to the Department's compliance with the Board's order, not simply the terms of the reissued permit. The notice of appeal claims that the Department has not complied with our remand order and that the study is not consistent with our order. It also claims that the Permittee discharged water in excess of the four million gallon per day limit specified in our order before the Department issued a new permit. Whether or not the activity authorized by the new permit is appropriate does not answer the question whether it was reasonable for the renewal process ordered by the Board to take two years

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[4] The Township has filed an appeal of this permit at EHB Docket No. 2006-116-MG.

[5] *E.g., Ondek v. Allegheny County Council*, 860 A.2d 644 (Pa. Cmwlth. 2004); *Bentley v. DEP*, 1999 EHB 447.

to complete, and whether the Department acted appropriately by apparently excluding the Township from that process. As we have explained before, the administrative order is just one piece of the Township's claim. It is not the sole basis for the objections raised in the notice of appeal.

We acknowledge that there is a certain amount of overlap between the issues raised in this appeal and the appeal of the renewed NPDES permit. The renewed NPDES permit apparently places no restriction on the amount of water that may be discharged other than that required to keep the pit dewatered with no restriction for times of drought. Whether this feature of the renewed permit complies with the Board's order presents a common issue for adjudication of both appeals. Accordingly, in the interest of judicial economy and to avoid repetitive discovery requests, [6] we will consolidate the two appeals.

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[6] We note that the Township complains that its discovery requests have not all been answered. We are not sympathetic to this argument. First, after discussing the necessity for filing a motion to compel in the event that discovery submissions are not satisfactory on conference calls with the parties, the Board has never received any motion from the Township. Second, in its reply to the Township's response to the motion to dismiss, the Permittee has provided copious evidence in support of its position that it has answered all outstanding discovery requests. The Township is cautioned to proceed with discovery in accordance with the Board's rules and to file a motion to compel when appropriate.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOLEBURY TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-183-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW HOPE CRUSHED STONE & LIME COMPANY, Permittee	:	

ORDER

AND NOW, this 10th day of May, 2006, upon consideration of the motion to dismiss by New Hope Crushed Stone & Lime Company, IT IS HEREBY ORDERED as follows:

1. The motion to dismiss is **DENIED.**

2. This appeal is hereby consolidated with EHB Docket No. 2006-116-MG. All future filings with the Board shall reflect the following caption:

Solebury Township	:	
v.	:	EHB Docket No. 2005-183-MG
Commonwealth of Pennsylvania, Department of Environmental Protection and New Hope Crushed Stone & Lime Company, Permittee.	:	(consolidated with EHB Docket 2006-116-MG)

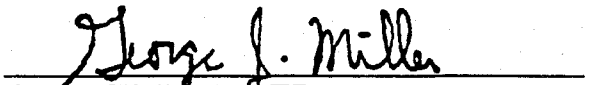
3. Pre-hearing proceedings shall be governed by the deadlines set forth in Pre-Hearing Order No. 1 dated April 20, 2006 at EHB Docket No. 2006-116-MG:

> All discovery in this matter shall be completed within **180** days of the date of this pre-hearing order, **October 20, 2006**, unless extended for good cause upon written motion. The service of an expert report together with a statement of qualifications may be substituted for an answer to expert interrogatories. Subpoenas for discovery purposes may be issued by Counsel in accordance with the Pennsylvania Rules of Civil Procedure.

Within the first 45 days of the discovery period specified in Paragraph 3 hereof the parties shall meet and discuss the settlement of some or all of the issues raised in this appeal.

All dispositive motions shall be filed within **210** days of the date of this prehearing order, **November 20, 2006**. The motions shall comply with the Board's rules on dispositive motions at 25 Pa. Code §§ 1021.94 and 1021.94a.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Member

DATED: May 10, 2006

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

MICHAEL H. CLABBATZ	:	
	:	
v.	:	**EHB Docket No. 2004-216-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, GREENFIELD TOWNSHIP and RONALD VARGO, Permittees	:	**Issued: May 16, 2006**

OPINION AND ORDER ON MOTION FOR NONSUIT

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

Synopsis

The Board grants a joint motion for nonsuit and dismisses an appeal from the Department's approval of an official plan revision for a single residence sewage treatment plant. The appellant failed to present any evidence of record to show that the Department improperly approved the official plan revision by violating a provision of law or otherwise acting unreasonably.

OPINION

Michael H. Clabbatz, appearing *pro se*, filed this appeal challenging the approval of a sewage treatment facility for a single family residence owned by Ronald Vargo. After being ordered by the Board to provide a copy of the specific action of the Department of Environmental Protection that he was challenging, Clabbatz submitted a letter from the Department issued to Greenfield Township, Erie County approving an official plan revision for a

single resident sewage treatment plant to be operated by the Permittee; an NPDES permit for the plant; and a water quality management permit for the plant. Vargo and the Department moved to dismiss the appeal because it was untimely filed, and by order dated January 26, 2005, the Board dismissed the appeal of the NPDES permit and the water quality management permit. There was no evidence that the official plan revision was ever published in the *Pennsylvania Bulletin*, however, and the Board did not dismiss Clabbatz's challenge to that action. *Clabbatz v. DEP*, EHB Docket No. 2004-216-L (Opinion issued January 26, 2005).

Clabbatz thereafter filed a pre-hearing memorandum in which he stated that he did not intend to call any witnesses at the hearing. We held a prehearing conference wherein Clabbatz repeated that he did not intend to call any witnesses or move for the admission of any exhibits in support of his appeal. Accordingly, with the agreement of all the parties, Clabbatz was permitted to make a personal, unsworn statement on the record. The Department and Vargo moved for nonsuit and the parties were directed to submit briefs in support of their respective positions.

The Department argues that Clabbatz has failed to present a prima facie case that the Department erred in approving the official plan revision. Clabbatz submitted a letter in response to the joint motion that reiterates his frustration and concern that a discharge from the plant will run onto his property and create a hazard to his family and property. We are constrained to conclude that Clabbatz has not established any of the elements of a cause of action that are necessary to make a case.

The Board's standard for the issuance of a nonsuit was enunciated in *Decker v. DEP*, 2002 EHB 610:

> This Board has the authority to order a nonsuit. *Ron's Auto Service v. DEP*, 1992 EHB 711, 731. The Board may enter a nonsuit if the party with the burden of proof and the initial burden of proceeding fails to establish a cause of action. *Leone v. Com., Department of*

> *Transportation*, 780 A.2d 754, 756 (Pa. Cmwlth. 2001); *Delaware Environmental Action Coalition, et al. v. DEP*, 1994 EHB 1427, 1430; *City of Harrisburg v. DEP*, 1993 EHB 90, 91; *County of Schuylkill v. DEP*, 1991 EHB 1, 6. Of course, the initial party's case must be clearly insufficient, *Schuylkill*, 1991 EHB at 6, and the evidence and all reasonable inferences arising from that evidence must be considered in a light most favorable to the nonmoving party with all doubts resolved in favor of the nonmoving party, *Leone*, 780 A.2d at 756, *Nottingham Network of Neighbors v. DEP*, 1996 EHB 4, 6.

2002 EHB at 612.

In this case, Clabbatz bears the burden of proof. 25 Pa. Code § 1021.122(c)(2). Because we have dismissed Clabbatz's claims related to the NPDES permit and the water quality management permit, the only remaining action under appeal is the official plan revision. In order to establish a cause of action relating to the plan revision, Clabbatz needed to prove by a preponderance of evidence that the Department violated the Sewage Facilities Act or some other provision of law, or was unreasonable in the manner in which it carried out its duties. *Delaware Riverkeeper v. DEP*, 2004 EHB 599, *aff'd*, 879 A.2d 357 (Pa. Cmwlth. 2005). This burden must be carried out by presenting the testimony of witnesses who either have personal knowledge of relevant events or can provide expert opinions regarding the Department's action, and by introducing properly authenticated documents that would be admissible at the hearing according to the Pennsylvania Rules of Evidence. Unfortunately, Clabbatz has not produced any of these things. The only record we have before us is Clabbatz's unsworn statement. Even if we could consider that statement as evidence, it fails to address any specific error that the Department made by approving the Township's official plan revision. Accordingly, we must grant the joint motion for nonsuit and dismiss the Appellant's appeal.

We therefore enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MICHAEL H. CLABBATZ	:	
	:	
v.	:	**EHB Docket No. 2004-216-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, GREENFIELD TOWNSHIP and RONALD VARGO, Permittees	:	

ORDER

AND NOW, this 16th day of May, 2006, upon consideration of the joint motion for nonsuit of the Department of Environmental Protection and Ronald Vargo, Permittee, the motion is hereby granted. The appeal of Michael H. Clabbatz in the above-captioned matter is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: May 16, 2006

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

DENNIS GROCE, NATIONAL PARKS CONSERVATION ASSOCIATION, GROUP AGAINST SMOG AND POLLUTION and PHIL COLEMAN	:	
v.	:	**EHB Docket No. 2005-246-R**
COMMONWEALTH OF PENNSYLVANIA: DEPARTMENT OF ENVIRONMENTAL PROTECTION and WELLINGTON DEVELOPMENT- WDYT, LLC, Permittee	:	**Issued: May 17, 2006**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Cross motions for summary judgment are denied where genuine issues of material fact exist.

OPINION

Presently before the Pennsylvania Environmental Hearing Board are cross-filed Motions for Summary Judgment of the Appellants and Permittee. All of the parties, including the Pennsylvania Department of Environmental Protection (Department) have

filed extensive briefs setting forth their positions on these issues. Oral argument before the entire Board was held in Pittsburgh on April 27, 2006. The transcript of that argument has been made part of the record. We have carefully reviewed the briefs and transcript in deciding the motions.

Appellants have appealed the Department's issuance of a permit to Wellington Development (Wellington) for the construction of a power plant in Greene County, Pennsylvania. Appellants contend in their Motion for Summary Judgment that adequate public notice was not provided prior to the Department's issuance of the permit.

Wellington contends that the Department did give adequate public notice. It further argues that, in the event that there may have been an error in the initial publication, the Department cured any alleged prejudice in a subsequent publication. Finally, Wellington argues that Appellants have not satisfied the Board's "continuing relevance" standard. The Department echoes some of Wellington's arguments but further contends that there are issues of material fact concerning Appellants' public notice contentions that prevent summary judgment from being granted.

The Board may grant a motion for summary judgment when the record shows that no genuine issue of material fact exists *and* that the moving party is entitled to judgment as a matter of law. 25 Pa. Code Section 1021.94(b) and Pa. R.C.P. Nos. 1035.1 and 1035.2. We must view each motion in the light most favorable to the non-moving party. Applying these standards, it is clear that the issues raised by Appellants and Wellington are not free from doubt. Regarding the public notice issues, the parties

are asking us to accept their interpretations of technical language in the regulations. We are hesitant to do so on this record. These are the types of issues that should be developed at a trial. Moreover, as Judge Labuskes observed near the end of the oral argument, all of the parties relied on evidence outside the summary judgment filings to support their respective positions. (Transcript, page 78).

As noted recently by Judge Miller in *Mountaintop Area Joint Sanitary Authority v. DEP*, EHB Docket No. 2004-088-MG (Opinion and Order on Motion for Summary Judgment issued April 12, 2006), where resolution of the parties' conflicting positions involves resolution of matters of fact, the case is not appropriate for summary judgment. Such issues can only be resolved after a full trial and evaluation of expert opinions on those matters. *Slip op.* at 9-10.[1]

Therefore, we enter the following Order:

[1] This also applies to the remaining issues raised by the parties such as the standing issues raised by Wellington.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DENNIS GROCE, NATIONAL PARKS CONSERVATION ASSOCIATION, GROUP AGAINST SMOG AND POLLUTION and PHIL COLEMAN	:	
v.	:	**EHB Docket No. 2005-246-R**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and WELLINGTON DEVELOPMENT- WDYT, LLC, Permittee	:	

ORDER

AND NOW, this 17th day of May, 2006, the cross motions for summary judgment are *denied*.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: May 17, 2006

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

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2005-299-CP-L**
VICTOR KENNEDY d/b/a KENNEDY'S MOBILE HOME PARK	:	**Issued: May 18, 2006**

OPINION AND ORDER ON MOTION FOR DEFAULT JUDGMENT

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

Synopsis:

The Board grants the Department's unopposed motion for default judgment where the defendant failed to file an answer to the Department's complaint for civil penalties for violations of the Clean Streams Law. A hearing will be scheduled to determine the amount of the penalty that should be assessed.

OPINION

On October 14, 2005, the Department of Environmental Protection (the "Department") filed a complaint for civil penalties against Victor Kennedy d/b/a Kennedy's Mobile Home Park ("Kennedy") for violations of the Clean Streams Law, 35 P.S. § 691.1 *et seq*. The Department attached a notice to defend to the complaint. On October 20, 2005, a Department representative, Edward Mokos, personally served a copy of the Department's complaint and notice to defend on Kennedy, as evidenced by the sworn affidavit of Mokos. Although an answer to the complaint

was due on or before November 20, 2005, Kennedy has never answered or otherwise responded to the complaint.

On March 21, 2006, we issued a rule to show cause why the case should not be dismissed for lack of prosecution. The rule was returnable on or before April 10, 2006. On that date, the Department filed a motion for default judgment. The Department served Kennedy with a copy of the motion. Kennedy has not responded to the motion.

Kennedy was required to answer the Department's complaint within 30 days of service. 25 Pa. Code § 1021.74(a). The Board's rules provide as follows:

> A defendant failing to file an answer within the prescribed time shall be deemed in default and, upon motion made, all relevant facts in the complaint may be deemed admitted. Further, the Board may impose any other sanctions for failure to file an answer in accordance with § 1021.161 (relating to sanctions).

25 Pa. Code § 1021.74(d). Section 1021.161 reads as follows:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including those permitted under Pa.R.C.P. 4019 (relating to sanctions regarding discovery matters).

25 Pa. Code § 1021.161.

Where no answer is filed to a Department complaint for civil penalties and the Department files an unopposed motion for default judgment, the Board has typically granted the motion, deemed the facts averred in the Department's complaint admitted, and entered default judgment as to liability. *DEP v. Huntsman*, 2004 EHB 594, 595-596; *DER v. Allegro Oil and Gas Company*, 1991 EHB 34; *DER v. Canada-Pa., Ltd.*, 1987 EHB 177. *See also DEP v. Breslin*, EHB Docket No. 2005-069-CP-L, slip op. at 2 (July 1, 2005) (motion for deemed

admissions); *DEP v. G & R Excavating and Demolition, Inc.*, EHB Docket No. 2005-022-MG (May 9, 2005) (same). There is no reason to depart from that practice here.

Accordingly, we enter the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2005-299-CP-L**
VICTOR KENNEDY d/b/a KENNEDY'S MOBILE HOME PARK	:	

ORDER

AND NOW, this 18th day of May, 2006, the Department's unopposed motion for default judgment is granted, all relevant facts set forth in the Department's complaint for civil penalties are deemed admitted, and default judgment is entered against Kennedy as to liability. A hearing will be scheduled to receive evidence regarding the amount of the civil penalties to be assessed.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

GEORGE J. MILLER
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: May 18, 2006

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2003-004-CP-L**
RICHARD C. ANGINO, ESQUIRE, KING DRIVE CORPORATION, and SEBASTIANI BROTHERS	:	**Issued: May 22, 2006**

OPINION AND ORDER ON
MOTION IN LIMINE

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

Synopsis:

Under the Board's Rules of Practice and Procedure, assuming expert discovery has been directed to a party, interrogatories concerning the expert's opinion must be answered or an expert report must be provided if the expert is to be called as a witness to give an expert opinion. It does not matter whether the opinion was originally developed for use at trial or for some other purpose. Whether to impose sanctions for late disclosure of an expert witness is not automatic and will turn on such factors as the relative degree of prejudice suffered by the parties. In this appeal, the Board reserves ruling until the time of the hearing.

OPINION

The Department of Environmental Protection (the "Department") filed the complaint in this action against Richard C. Angino, King Drive Corporation, and Sebastiani Brothers (collectively "Angino") asking for civil penalties for alleged violations of the Clean Streams

Law, 35 P.S. § 691.1 *et seq.*, associated with certain earth disturbances activities conducted at or near the Felicita Resort in Middle Paxton Township, Dauphin County. The hearing on the merits will begin on May 30, 2006 and continue until completed.[1]

The controversy giving rise to this Opinion and Order may be traced back to March 17, 2006 when the Department filed a motion in limine. The Department filed the motion because Angino identified James Cieri as an expert witness for the first time in his pre-hearing memorandum. Cieri had not been previously identified in response to the Department's expert interrogatories. Cieri had not signed answers to interrogatories or filed an expert report. In response to the Department's motion in limine, Angino stated that he did not intend to call Cieri as an expert witness, but rather, as a factual witness.

The Board held a conference call on March 23. As a result of that call, the Board issued an Order on March 24 postponing the previously scheduled hearing to allow Angino to respond to the Department's discovery requests and provide the Department with an opportunity to depose James Cieri.

Angino thereafter supplemented his interrogatory answers. The answers stated that "Defendants plan to call James Cieri as a factual not an expert witness." The answers described Cieri's role as follows:

> James Cieri has familiarity with various aspects of the defense of this case and particularly the Department's conduct since [Cieri] took over for William Swanick. Mr. Cieri has been supplied with Mr. Swanick's files and has worked with Defendants in the Commonwealth Court lawsuit. Mr. Cieri has also been the individual who has worked with the Department in seeking approvals for various development activity being pursued by Defendants. Mr. Cieri has been the engineer with respect to various filings in Middle Paxton Township. He has also worked with Defendants and provided factual and expert testimony in Defendants' constitutional challenge as to the Middle Paxton

[1] This matter was assigned to Judge Labuskes for primary handling on March 28, 2006.

> Township 2000 Zoning Ordinance. Mr. Cieri has been an engineer and involved in developments throughout Pennsylvania and is quite knowledgeable as to the approval process and associated law and procedure, including the assessment of penalties.

The Department deposed Cieri on May 11. Immediately after the deposition, Angino served a supplemental interrogatory response that read as follows:

> James Cieri will testify as a factual and expert engineer with respect to all issues in this case along the lines of the direct and cross-examination of his deposition and based upon personal experience and experience gained from his work, reading, and involvement with Mr. Angino's projects. He will testify from records that have been given to him as well, including various documents associated with the civil penalty case, the constitutional challenge case, Middle Paxton Township matters, related court documents in Dauphin County and federal court, personal observations, what has been told to him from Richard Angino, various individuals from DEP and Conservation, and other things learned from working on all of Mr. Angino's projects, including projects dealing with a 2.2 million gallon water retention facility for golf irrigation purposes.

The Department filed the motion in limine that is now before us the next day. The Department avers that Cieri testified at his deposition that he has no personal knowledge of the factual circumstances surrounding the alleged violations. Angino denies that averment. We do not have a deposition transcript.

The Department essentially complains that it has been misled about Cieri's status. It states that it did not receive timely answers to its expert interrogatories and it has never received an expert report. It states that it cannot adequately prepare for trial, and asks that we preclude the testimony of Cieri as an expert witness.

Angino opposes the motion, but it is not altogether clear how Angino intends to use Cieri. At one point, he refers to Cieri as a "factual expert." He notes that Cieri "took over for William Swanick and Cieri has been supplied with William Swanick's files." (Swanick was previously

identified as Angino's expert, and Swanick filed an expert report.) He argues that Cieri's testimony has not been acquired or developed in anticipation of litigation or for trial, and therefore, Cieri's testimony is not governed by the Pennsylvania Rules of Civil Procedure regarding trial experts. He argues that preclusion is too severe a sanction, particularly since the hearing was already postponed once to allow the Department to depose Cieri.

Discovery in proceedings before the Board is governed by the Pennsylvania Rules of Civil Procedure, *except as otherwise provided in the Board's Rules or by Order of the Board.* 25 Pa. Code § 1021.102(a); *Warren County Quality of Life Coalition v. DEP*, 2004 EHB 423, 424 (the Board follows its own rules regarding discovery in addition to the Pennsylvania Rules of Civil Procedure). In our Adjudication in *Borough of Edinboro v. DEP*, 2003 EHB 725, *aff'd*, 2696 C.D. 2003 (June 23, 2004), the Board unanimously announced certain bright-line rules regarding expert witnesses:

> [F]rom this point forward, if any party, including the Department, wishes to proffer expert testimony, it will need to fully follow both the Pennsylvania Rules of Civil Procedure and the Board's Rules and orders and identify its proposed experts, answer expert interrogatories and/or provide expert reports, and identify the expert and summarize his or her testimony in its pre-hearing memorandum. If any party, including the Department, does not follow these requirements, it may be precluded from offering such witnesses at trial in accord with applicable law.

2003 EHB at 772. Specifically,

> [i]f a party, including the Department, wishes to present what would be considered expert testimony of one of its employees, then even if it would not be required to identify such employees as an expert or produce an expert report under Pennsylvania Rule of Civil Procedure 4003.5, the party is required under Board Rules 25 Pa. Code §§ 1021.101 and 1021.104 to identify the expert, answer expert interrogatories and/or provide expert reports, or summarize the expert's testimony in its pre-hearing memorandum. *Kleissler v. DEP and Pennsylvania General Energy Corp.*, 2002 EHB 617; 25 Pa. Code §§ 1021.101 and 1021.104.

Id., 2003 EHB at 776. In other words, regardless of what the Pennsylvania Rules of Civil Procedure might require,

> in order to testify before the Board as an expert, *pursuant to the Board's Rules of Practice and Procedure* [emphasis added], it does not matter if the proposed expert is an employee of the party or not or whether the opinion was developed in anticipation of litigation. The employee still must be identified as an expert. Assuming discovery has been directed to that party, not only must the expert be identified but interrogatories concerning the expert's opinion must be answered or an expert report must be provided.

Id., 2003 EHB at 771.

Thus, the Board, in interpreting and applying its own Rules of Practice and Procedure, has unanimously and unambiguously ordered that, assuming discovery has been directed to a party, interrogatories concerning an expert's opinion must be answered or an expert report must be provided for *all* proposed expert witnesses.[2]

An expert witness is a person who will be asked to express an opinion to us on our record. It must be given under tightly controlled circumstances. An expert opinion as contemplated by the rules of evidence can only be given by a duly qualified person of specialized knowledge or skill. It is made under oath. Under Pennsylvania law, it must be explained. Pa.R.Ev. 705. It must be expressed to a reasonable degree of certainty. The opinion may be the same as or consistent with earlier off-the-record conclusions, but once the witness vouches to it before us on our record, it becomes a different animal. The opinion in and of itself becomes part of the body of evidence that forms the basis for our adjudication. The person testifying to the opinion is an expert witness within the meaning of our rules.

---

[2] The *Edinboro* decision was discussed at length at several meetings of the Environmental Hearing Board Rules Committee, but no pertinent changes to the Board's Rules were adopted.

In contrast, a person who is *only* going to be asked to testify about what advice or conclusions the person made in the past is not an expert witness. That prior advice may have included opinions expressed to others, but it is not a sworn, on-the-record opinion given to us. The off-our-record conclusions were not developed for use at trial. They were not made under oath. They are essentially hearsay. *Kleissler*, 2002 EHB at 621 n.3. They may or may not be relevant. The rules of evidence regarding expert opinions did not constrain the conclusions. Such a witness is not an expert witness under the Board's rules.[3]

Of course, the same person may testify about past advice *and* opine on the record to the Board. In that case, in Board cases, the person is an expert witness. It is the on-the-record opinion given to us that really matters.

In the case before us, we are unable to discern from the parties' filings exactly what Cieri is being called to do. If he is only being called to testify about facts regarding his involvement with the site, and/or about what advice he has given in the past, he is not an expert witness. If, however, Angino intends to qualify him as an expert and introduce substantive opinions on the record given to a reasonable degree of professional certainty, he is an expert witness. If the latter situation turns out to be the case, Angino had an obligation to comply with the discovery rules regarding expert witnesses.

If Cieri is in fact to be called as an expert witness, we would be hard pressed to conclude that Angino has complied fully with the pre-hearing disclosure requirements. He has never submitted signed expert interrogatories or an expert report with respect to Cieri. There are no discovery responses describing the opinions to be rendered and the bases therefor. Angino has

[3] By way of analogy, treating physicians in malpractice cases do not typically need to be listed as expert witnesses if their testimony is limited to their prior diagnoses and courses of treatment. If that same doctor, however, is to asked to opine that a standard of care exists and was breached, the doctor is an expert witness. *See Alwine v. Sugar Creek Rest, Inc.*, 883 A.2d 605, 610 (Pa. Super 2005); *Katz v. St. Mary's Hospital*, 816 A.2d 1125, 1127 (Pa. Super. 2003).

stated on more than one occasion that Cieri is only a fact witness. On the other hand, Angino made Cieri available for deposition pursuant to an agreement of the parties with the approval of the Board. Unlike the situation in *Edinboro*, Cieri was identified in the pre-hearing memorandum, albeit without a particularly helpful description of his expert opinion. We will consider these factors in any ruling that becomes necessary at the hearing.

If Cieri turns out to be an expert witness, and we conclude that Angino has failed to comply fully and in good faith with the rules of discovery regarding experts, we will need to decide what to do about it. Our inquiry does not end when we conclude that a person is an expert witness and that there has not been compliance with the rules regarding pre-hearing disclosure. As we said in *Edinboro*, preclusion of an expert's testimony does not automatically follow from a violation of the pre-hearing disclosure requirements:

> Instead, the tribunal must undertake a balancing test between the facts and circumstances of each case to determine the prejudice to each party. *Feingold v. Southeastern Pennsylvania Transportation Authority*, 517 A.2d 1270, 1273 (Pa. 1986). The basic considerations the tribunal should review are:
>
> > (1) the prejudice or surprise in fact of the party against whom the excluded witnesses 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 or willfulness in failing to comply with the court's order. [*Miller v. Brass Rail Tavern, Inc.*,] 664 A.2d [525] at 532 n.5.

Edinboro, 2003 EHB at 770. *See also Environmental & Recycling Services, Inc. v. DEP*, 2001 EHB 824, 834 (factors to be considered in imposing discovery sanctions); *Land Tech Engineering v. DEP*, 2000 EHB 1133 (party precluded from presenting expert testimony due to disregard of Board orders and prejudice to other parties).

Thus, for example, we concluded in *Edinboro* that the Department had violated our rules of prehearing disclosure, but we did not exclude the testimony of the expert witnesses because we found that the appellant suffered no prejudice. The individuals in question were not surprise witnesses. To the contrary, the roles played by the individuals were clearly identified during discovery. *Id.*, 2003 EHB at 770.

The Department complains in this appeal that it has not been able to prepare adequately for trial because Cieri and his opinions have not been properly disclosed. We will give the Department the opportunity to object at the hearing and explain how it has been harmed in response to specific areas of Cieri's testimony.[4] Although the Department may object, we note at this point that the alleged prejudice is not particularly obvious. In fact, the hearing in this matter was already postponed to allow the Department to depose Cieri. There is no indication that the Department was prevented from obtaining any pertinent information or grilling Cieri on his views, even if the Department went into the deposition believing that Cieri would only be a fact witness. Furthermore, this appeal has been pending since 2003 and the record shows that it has been bitterly contested. The issues in this case are important, *see DEP v. Leeward Construction, Inc.*, 2001 EHB 870, *aff'd*, 821 A.2d 145 (Pa. Cmwlth.), *app. denied*, 827 A.2d 431 (Pa. 2003), ($258,500 civil penalty assessed for E & S violations), but they do not appear to be inordinately complex or involve cutting-edge science. These and other characteristics of this case lead us to question whether the Department will really be caught by unfair surprise by anything that Cieri has to say, or that it will suffer undue prejudice if Cieri is permitted to testify.

Unfortunately, the late disclosure of expert witnesses occurs more often than it should, and we will not tolerate trials by ambush. On the other hand, we are reluctant to preclude expert testimony in its entirety unless it would be truly prejudicial not to do so, or there has been

[4] As previously noted, we are not even sure Cieri is being called as an expert witness.

contumacious conduct. *See Dauphin Meadows v. DEP*, 2003 EHB 612, 615; *Caernarvon Township v. DEP*, 1997 EHB 601, 605. We have on occasion postponed a hearing to allow for additional discovery to relieve the prejudice caused by a late disclosure. *See, e.g., UMCO Energy, Inc. v. DEP*, EHB Docket No. 2004-245-L (June 15, 2005). In fact, that is exactly what Judge Coleman did here, although to hear the Department tell it, it was done under the false pretense that Cieri would only be called as a fact witness. In any event, we are reluctant to postpone proceedings where, as here, we believe that the case has gone on long enough. *See, e.g., Achenbach v. DEP*, EHB Docket No. 2004-202-C, slip op. at 7 (April 28, 2006). Further delay in this appeal is not the answer. If rulings need to be made, we will make them at the hearing in the context of specific questions directed at Cieri.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2003-004-CP-L**
RICHARD C. ANGINO, ESQUIRE, KING DRIVE CORPORATION, and SEBASTIANI BROTHERS	:	

ORDER

AND NOW, this 22nd day of May, 2006, in consideration of the Department's motion in limine and the defendants' response in opposition thereto, it is hereby ordered that, if James Cieri is offered as an expert witness, the Department may object to specific areas of testimony based upon a specific showing of prejudice and other relevant factors.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: May 22, 2006

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DENNIS GROCE, NATIONAL PARKS CONSERVATION ASSOCIATION, GROUP AGAINST SMOG AND POLLUTION and PHIL COLEMAN	:	
v.	:	**EHB Docket No. 2005-246-R**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and WELLINGTON DEVELOPMENT – WDYT, LLC, Permittee	:	**Issued: May 26, 2006**

OPINION AND ORDER ON MOTION FOR LEAVE TO AMEND SECOND AMENDED NOTICE OF APPEAL

By Thomas W. Renwand, Judge

Synopsis:

The Appellants' motion for leave to amend their appeal is granted where no undue prejudice will result to either the Permittee or the Department, and where the amendment is the result of information which was not produced in discovery and was only recently made available to the Appellants as a result of a Board order. Not allowing the amendment would unduly prejudice the Appellants and violate rules of fundamental fairness.

OPINION

History

This appeal involves a challenge to the Department of Environmental Protection's (Department) plan approval and modified plan approval for a coal-fired power plant in Greene County, Pennsylvania. The developer of the facility is Wellington Development – WDYT, LLC (Wellington). The original plan approval was issued on June 21, 2005, with notice published in the Pennsylvania Bulletin in July 2005. The Appellants filed their appeal on July 29, 2005 and an amended notice of appeal on August 18, 2005. On September 1, 2005, the Department issued a modified plan approval, with notice published in the Pennsylvania Bulletin on September 17, 2005.

By motion filed October 21, 2006, Wellington sought leave to expedite the trial in this matter, as well as all pre-trial proceedings. The motion was vigorously opposed by the Appellants. In an Opinion and Order issued on November 15, 2005, the Board granted the motion in part. While rejecting the schedule proposed by Wellington, the Board did adopt a schedule that set forth an aggressive pre-trial schedule and trial date beginning in June 2006. *Groce v. DEP, EHB Docket No. 2005-246-R* (Opinion and Order issued November 15, 2005).

On December 29, 2005, the Appellants sought leave to further amend their appeal to eliminate certain objections and refine others, which leave was granted.

Presently before the Board is the Appellants' Motion for Leave to Amend Second Amended Notice of Appeal, filed on May 11, 2006. The Appellants seek leave to assert an additional objection that the Department "unlawfully, though unknowingly" allowed

Wellington to use a modified version of a particular air modeling program known as CALPUFF without satisfying the requirements of the applicable state and federal regulations.[1] Based on our review of the Appellants' motion and Wellington's and the Department's responses in opposition, we find that the Appellants' motion should be granted.

Discussion

Amendments to appeals are governed by Board Rule 1021.53, which was substantially revised effective February 11, 2006. 36 Pa.B. 709. The rule allows appeals to be amended as of right within 20 days after the filing thereof. After that, appeals may be amended upon the granting of leave by the Board. Pursuant to recently revised subsection (b) of the rule, "This leave may be granted if no undue prejudice will result to the opposing parties." 25 Pa. Code § 1021.53(b). The burden of showing that no undue prejudice will result is on the party requesting the amendment. *Id.*

Under the prior version of the rule, a party requesting an amendment had to meet one of three narrow criteria.[2] The new rule was adopted by the Board upon the

---

[1] The objection that the Appellants seek leave to add to their appeal is as follows:

> PA DEP approved the Plan Approval in violation of 40 CFR § 52.21(k) and (l) because Wellington used a modified version of the CALPUFF air modeling program in its analysis of impacts to Class 1 areas which had not received written approval from PA DEP or the U.S. EPA and which had not been subject to notice and opportunity for public comment of the model modification as required by 40 CFR § 52.21(l)(2).

[2] The previous version of the rule read as follows:

(b) . . . This leave [to amend a notice of appeal] may be granted if appellant establishes that the requested amendment satisfies one of the following conditions:

recommendation of its nine-member Rules Committee and is intended to create a more liberal standard for allowing the amendment of appeals and complaints. *See Preamble to Proposed Rulemaking* 106-8, 35 Pa. B. 2107.

The basis for the Appellants' motion to amend is their allegation that Wellington failed to produce in discovery the air modeling files that would have allowed them to detect the modification to the air modeling program in question. Indeed, this, among other matters, was the subject of a motion to compel filed by the Appellants after the close of the discovery period and addressed by the Board in an Opinion and Order issued on April 28, 2006. *Groce v. DEP, EHB Docket No. 2005-246-R* (Opinion and Order issued April 28, 2006). In that Opinion and Order, the Board granted in part the Appellants' motion to compel, holding as follows:

> Our decision on the Motion to Compel and the April 8, 2006 letter request is also influenced by the confusion regarding what modeling files the Department actually relied on. Although there may be some disagreement about this confusion and its cause, we believe that in the interest of fundamental fairness and to insure that justice is done that certain of these requests, which we will set forth in more detail, should be granted.

Id. at 4.

Likewise, in the interest of fundamental fairness, we allow the Appellants to

---

(1) It is based upon specific facts, identified in the motion, that were discovered during discovery of hostile witnesses or Departmental employees.

(2) It is based upon facts, identified in the motion, that were discovered during preparation of appellant's case, that the appellant, exercising due diligence, could not have previously discovered.

(3) It includes alternate or supplemental legal issues, identified in the motion, the

amend their appeal to include an objection regarding the modified version of the CALPUFF air modeling program since this information was not made available to them until the Board ordered its production on April 28. We find no undue prejudice to Wellington or the Department since it was Wellington's own failure to produce this information in discovery that led to the need for amendment of the appeal at this late date. Moreover, denying the Appellants' motion would result in undue prejudice to them since their request to amend is made through no fault of their own.

We further find that the objection which the Appellants seek to add should cause no surprise to either Wellington or the Department since it is legally similar to the Appellants' other objections. However, if Wellington and/or the Department can demonstrate that they are unduly prejudiced by the Appellants' proposed amendment of its appeal, we will entertain a motion to continue the trial to a later date so that they may conduct discovery on this issue.

---

addition of which will cause no prejudice to any other party or intervenor.

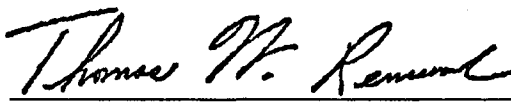
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DENNIS GROCE, NATIONAL PARKS CONSERVATION ASSOCIATION, GROUP AGAINST SMOG AND POLLUTION and PHIL COLEMAN	:	
v.	:	**EHB Docket No. 2005-246-R**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and WELLINGTON DEVELOPMENT – WDYT, LLC, Permittee	:	

ORDER

AND NOW, this 26th day of May 2006, the Appellants' Motion for Leave to Amend the Second Amended Notice of Appeal is ***granted***.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Judge

DATE: May 26, 2006

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ROBACHELE, INC.	:	
	:	
v.	:	**EHB Docket No. 2005-091-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 26, 2006**

OPINION AND ORDER ON MOTION TO QUASH

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

Synopsis:

The Board quashes a subpoena directed at a person who has been offered to provide testimony regarding an irrelevant issue. The subpoena is quashed to protect the person from unreasonable annoyance, embarrassment, oppression, burden, and expense in accordance with Pa.R.Civ.P. 234.4.

OPINION

The Department of Environmental Protection (the "Department") issued a compliance order to Robachele, Inc. on April 8, 2005. The order cited Robachele for mining without a permit and without a license on a noncoal mine site that is permitted to McClure Enterprises, Inc. ("McClure") in Duryea Borough, Luzerne County. The order directed Robachele to cease mining immediately.

Robachele filed this appeal from the April 8 order. Robachele objects to the order for the following reasons:

> (a) Area subject to valid permit;
> (b) Matter is civil matter between property owner, lesee and Robachele, Inc.;
> (c) Robachele reserves the right to bring forth further issues;
> (d) Robachele had the permission of the property owner to remove dirt.

Of course, issues not raised in a notice of appeal are waived. *Wayne v. DEP*, 1999 EHB 395, 405.

We convened a hearing on the merits at 10:00 a.m. on May 2, 2006. At 10:25, McClure's Secretary and general manager, David Domiano, and McClure's attorney appeared at the hearing and hand-filed two motions, one of which was a motion to quash a subpoena that Robachele sent to Harold Clemo, McClure's mine foreman.[1] Clemo did not appear at the hearing. We interrupted the taking of testimony to hear argument on the matter. We gave Robachele until May 17 to file a written response to the motion to quash. At the conclusion of the testimony, we closed the hearing subject to reopening pending the resolution of the Clemo issue.

Robachele subsequently filed a response in opposition to the motion to quash. The Department filed a letter joining in McClure's motion, stating, among other things, "Given the undisputed testimony at hearing regarding Robachele's activities at the site, Mr. Clemo's testimony would have no relevance with regard to the instant appeal."

McClure asks that the subpoena be quashed for several reasons. First, McClure argues that the subpoena was not properly served. Second, it argues that Clemo cannot possibly provide any relevant testimony. Third, it characterizes Robachele's effort to examine Clemo as "at best a fishing expedition." At the hearing and in related papers, McClure expanded on this point by

[1] McClure also moved to limit the testimony of David Domiano. That motion was addressed in the context of Domiano's testimony at the hearing.

referencing a RICO action that is currently pending between McClure and Robachele in federal court arising out of "an alleged conspiracy among named and unnamed defendants to obtain a transfer of McClure's permit through threats of violence, criminal prosecution, perjured testimony, and other predicate acts." There is also a civil lawsuit pending between Robachele and McClure regarding a debt apparently owed by the owner of the mine site to Robachele. McClure argues that Robachele is attempting to use the Board proceeding to obtain information regarding these other lawsuits. McClure notes that Robachele never deposed Clemo to determine whether he would be capable of providing competent testimony. Finally, McClure argues that Clemo will be required to travel a great distance and McClure will suffer the loss of work from a key employee if Clemo is required to testify.

In response, Robachele claims that service was adequate, that McClure lacks standing to file a motion to quash Clemo's subpoena, and that the motion was untimely. In response to the allegation that Clemo can provide no relevant information, Robachele states that Clemo's testimony would go to the issue of whether Robachele had permission to operate on the site in the past and/or the credibility of the Department inspector and David Domiano, both of whom testified. Robachele asks that the motion to quash be denied, and the hearing be reopened to receive Clemo's testimony.

The Board's Rules of Practice and Procedure incorporate for the most part the Pennsylvania Rules of Civil Procedure regarding subpoenas. 25 Pa. Code § 1021.103; *Raven Crest Homeowners Ass'n v. DEP*, EHB Docket No. 2004-122-MG, slip op. at 2-3 (October 5, 2005). The rule pertinent to the immediate discussion is Pa.R.Civ.P. 234.4(b), which reads as follows:

> A motion to quash a subpoena, notice to attend or notice to produce may be filed by a party, by the person served or by any

> other person with sufficient interest. After hearing, the court may make an order to protect a party, witness or other person from unreasonable annoyance, embarrassment, oppression, burden or expense.

With regard to Robachele's argument that McClure is not a party in this appeal and has no standing to move to quash the subpoena, Rule 234.4(b) clearly provides that a motion to quash may be filed by not only a party or the person served, but by "any other person with sufficient interest." Clemo is McClure's mining foreman. We are satisfied that McClure is a "person with sufficient interest" in the activities of its mining foreman to file a motion to quash a subpoena directed to that foreman.

With regard to Robachele's complaint that the motion to quash was not filed in a timely manner, we would have to agree. The motion was not filed until McClure's attorney appeared in person at the hearing in this matter, even though the subpoena had been sent several weeks earlier. We do not agree, however, that the late filing requires us to deny the motion. The rules do not set a deadline for filing the motions. Furthermore, we agreed at the hearing that Robachele would have an opportunity to respond to the motion. We closed the hearing subject to reopening the record pending the resolution of this issue, and we gave Robachele an opportunity to respond to the motion on or before May 17, which it did. The matter was also debated at the hearing, and there was testimony from Domiano regarding Clemo's position with the company. We believe that these measures have afforded Robachele an adequate opportunity to respond to the motion to quash.

McClure argues that Clemo was not properly served with the subpoena in accordance with Pa.R.Civ.P. 234.2(b)(2), which requires restricted delivery if service is attempted by mail. Robachele admits that Clemo was not served by restricted delivery, but argues that such delivery is not necessary. Although McClure is technically correct, the solution for this error would

ordinarily be to require Clemo to be re-served in accordance with the rule. There is no point to requiring re-service here because we are quashing the subpoena on grounds that cannot be cured by proper service.

We now turn to what we believe to be the controlling issue in this matter, which is whether it would cause Clemo and/or McClure to suffer unreasonable annoyance, embarrassment, oppression, burden, or expense if we require Clemo to testify. Pa.R.Civ.P. 234.4(b). Our interest in conducting full and fair hearings means that we are very hesitant to quash subpoenas if there is any realistic possibility that the witness in question could provide probative, noncumulative testimony. The person who would have us quash a subpoena bears a heavy burden of convincing us that the annoyance, embarrassment, oppression, burden, or expense referred to in Pa.R.Civ.P. 234.4 would be truly unreasonable. *Cf. Pennsylvania Crime Commission v. Nacrelli*, 5 Pa. Cmwlth. 551 (Pa. Cmwlth. 1972) (after showing of proper service, burden shifts to proposed witness to show testimony would be neither pertinent nor material). We conclude that McClure has satisfied that heavy burden in this case because Clemo cannot provide any information that is relevant to the very narrow issues that are presented in this case.

Although Clemo is undoubtedly an important employee and compelling him to testify would involve some inconvenience, such burdens and expenses are probably incurred by more witnesses than not who testify before us. We would not have quashed the subpoena on that basis alone. We are persuaded, however, that compelling Clemo to bear those burdens in this case would be unreasonable because it would be a complete waste of time for all concerned.

Robachele's contention is that Clemo's testimony goes to whether Robachelle had the landowner and/or permittee's permission to conduct mining activities on the site. It is completely irrelevant, however, whether Robachele had the landowner or the permittee's

completely irrelevant, however, whether Robachele had the landowner or the permittee's permission to mine the site. We are willing to concede for purposes of the current discussion that Robachele had the landowner and the permittee's permission to mine. This case, however, is about whether Robachele had *the Department's* permission to mine, which is to say the legal authority to mine on the McClure site. It is undisputed that Robachele did not have a mining license. It is undisputed that Robacehle did not have a permit. It is undisputed that Robachele was not listed with the Department as an approved contractor in the permit that was issued for the site. The order under appeal cites Robachele for mining without a permit and a license. Needless to say, in order to be legally mining on the site, Robachele would have also needed the permittee's permission, but that is entirely beside the point in this appeal.

To repeat the analogy that we used at the hearing, this case is like a citation for driving without a driver's license. In response to the State Trooper writing up a ticket, Robachele's contention is akin to a driver arguing that he has the owner's permission to drive a borrowed vehicle. The disconnect is that the driver has not been charged with driving a stolen vehicle. The fact that the driver has the owner's permission to operate the vehicle simply has nothing whatsoever to do with whether the driver has a driver's license. The driver is required to have a license to drive *any* vehicle. Robachele did not have that license.

Thus, even if we assume that Clemo would somehow bolster Robachele's contention that it had the owner's permission to mine the site, it would not be probative in any way. Robachele has not suggested that Clemo would have anything to say regarding Robachele's possession of the legal documents that must be obtained from the Department in order to operate on a permitted mine site. Furthermore, there was no dispute about what Robachele's agent or employee, Joseph Bufalino, was doing on the site.

Robachele makes a vague allegation that Clemo might serve to impeach the Departments' inspector or Domiano's testimony. It does not explain how. Given the extremely narrow issue in this case, there is nothing that those individuals testified about--beyond Robachele's misguided attempt to get into the landowner-permission issue--that is material and in dispute. In sum, Clemo will not be required to testify because he has only been offered to provide direct or impeachment testimony regarding a completely irrelevant issue.

It should be noted that this case is not a discovery dispute. Discovery of inadmissible evidence is allowed if it is reasonably calculated to lead to the discovery of relevant information. Pa.R.Civ.P. 4003.1(b); *Raven Crest Homeowners Ass'n, supra*, slip op. at 4-5. In contrast, testimony to be provided at the actual hearing must be relevant. Pa.R.Ev. 402; *DEP v. Neville Chemical Company*, 2004 EHB 744, 746 (relevancy standard during discovery is necessarily broader than that allowed by the Pennsylvania Rules of Evidence at trial).

Robachele does not explain why, if it truly believed that the testimony of McClure employees was important, it did not call any of Robachele's own employees or representatives at the hearing. A principal of Robachele was present during the hearing but was not called to testify. It is difficult to appreciate why Robachele would find it necessary to subpoena an employee of McClure to testify that Robachele was rightfully on the site, but it did not call one of its own employees to testify. Our current purpose is not suggest that any adverse inference can or should be drawn. We simple point out, in the context of resolving the motion to quash, that Robachele's unusual approach adds to our belief that Clemo's testimony would not have any incremental value. For example, Clemo's testimony is not necessary to resolve any conflict between witnesses previously called to the stand.

The fact that Clemo could not add anything probative tends to give weight to McClure's assertion that Clemo is being called for purposes other than the prosecution of this appeal. There is obviously a lot going on between McClure and Robachele. Domiano testified that he was frustrated by Robachele's illegal mining on McClure's permit, but was unable to find a way to stop the activity. He testified that on one occasion when he had previously complained his mining equipment suffered tens of thousands of dollars in vandalism damage. Both parties mentioned the RICO action currently pending, as well as Robachele's effort to collect on a debt allegedly owed by the deceased landowner of the mine site. As we explained at the prehearing conference and again at the hearing, these background matters are not our concern and are not the focus of this limited appeal. It is our strong sense from the hearing that Clemo is being called to annoy, embarrass, or oppress in connection with these underlying disputes more than anything else. We will not require Clemo to testify under such circumstances.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBACHELE, INC.	:	
	:	
v.	:	**EHB Docket No. 2005-091-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 26th day of May, 2006, in consideration of McClure's motion to quash the subpoena directed to Harold Clemo, it is hereby ordered that the motion is granted, the subpoena is quashed, and the record in this matter is closed.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: May 26, 2006

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

HALVARD E. ALEXANDER	:	
	:	
v.	:	**EHB Docket No. 2005-105-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** May 30, 2006

ADJUDICATION

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Board dismisses an appeal of Halvard Alexander from the State Board for Certification of Water and Wastewater Operators declination to renew Mr. Alexander's wastewater treatment operator's certification. Alexander had pleaded guilty to one misdemeanor charge and no contest to another misdemeanor charge, both of which directly related to his duties as operator of a wastewater treatment plant. After a full due process trial before the Environmental Hearing Board, the EHB holds that the action of the State Board was reasonable, appropriate and not in error. The two pleas to the criminal charges and the circumstances of Mr. Alexander's actions with respect thereto are sufficient grounds in this case to decline to renew Mr. Alexander's wastewater treatment operator's certification.

INTRODUCTION

This appeal presents the question whether the State Board of Water and Wastewater Systems Operators (BWWSO or State Board) properly denied the renewal of the wastewater treatment certification of Halvard Alexander. The denial was based upon Mr. Alexander's pleas of guilty and *nolo contendere* to two criminal charges relating to his operation of the Memphord Estates water treatment facility and the particular facts underlying those criminal charges. Mr. Alexander appealed the BWWSO's decision to the Environmental Hearing Board. A one day trial was held before Chief Judge Michael L. Krancer on December 8, 2005 in the Board's Harrisburg courtroom.

FINDINGS OF FACT

1. The BWWSO is an entity created within the Commonwealth of Pennsylvania, DEP which has the duty and authority to certify operators of water and wastewater systems pursuant to the Water and Wastewater Systems Operators' Certification Act (Act). 63 P.S. § 1001-1015.1.

2. Alexander is an individual residing in Dillsburg, York County, Pennsylvania. N.T. 13.

3. Alexander became a certified wastewater operator in 1984. N.T. 14.

4. Memphord Estates Sewerage Company (MESCO) owns a wastewater treatment plant for a development known as Memphord Estates (Memphord Estates Plant). Comw. Ex. 1; N.T. 14.

5. The Memphord Estates Plant is a small "package plant" which serves the Memphord Estates Development located in Monaghan Township, York County. N.T. 15.

6. Mr. Alexander is the President and part owner of MESCO. N.T. 14.

7. Mr. Alexander, since 1984 and at all relevant times to this action, was the certified

operator of the MESCO Memphord Estates Plant. N.T. 14.

8. On October 24, 2003, Alexander pled guilty to a misdemeanor charge of unlawful conduct and pled *nolo contendere* to a misdemeanor charge of tampering with public records. N.T. 18, 23; Petitioner's Ex. 1(Pet. Ex.), pp. 5-9. [1]

9. The unlawful conduct conviction relates to an overflow of sludge at the Memphord Estates Plant. Mr. Alexander had rented a pump with the aim of containing the overflow but he was not familiar with how it operated. N.T. 23.

10. Mr. Alexander's failure to operate the pump properly resulted in the release of solid waste into a nearby stream and the dumping of sludge on a riverbank without a permit. N.T. 23, 91; Pet. Ex., pp. 6-7.

11. Alexander failed to report that overflow into the stream to the Department. N.T. 23.

12. During October 1999, Alexander hired Hydrotech, Inc. (Hydrotech) to assist with the maintenance and operation of the Memphord Estates Plant due, in part, to his traveling which took him away from the Memphord Estates Plant. N.T. 15-17, 37-38, 42.

13. Hydrotech was not educated in the water treatment business; the employees of Hydrotech were only trainees in need of education and were at the Memphord Estates Plant for the purpose of gaining education to become certified operators. N.T. 16-17, 37-38.

14. Alexander's *nolo contendere* plea to the misdemeanor charge of tampering with public records or information arose from falsified Discharge Monitoring Reports (DMRs) for the Memphord Estates Plant submitted to DEP from the Memphord Estates Plant from November

[1] There was an incredible dearth of documentary exhibits introduced into evidence at trial. All that we have are: Commonwealth's Exhibit No. 1, a Consent Assessment of Civil Penalty dated March 16, 2000, between the Department and Memphord Estates Sewerage Company (i.e., MESCO); and Petitioner's Exhibit No. 1, the transcript of the November 24, 2003 plea colloquy from the Common Pleas Court of York County memorializing the two pleas entered by Mr. Alexander to the two criminal charges.

17, 1999 through July 7, 2000. N.T. 18, 21; Pet. Ex. 1, p. 5.

15. DMRs are an important monitoring tool in that they show whether the discharge from the facility is within the legally permitted limits or whether a facility should be scheduled for an inspection to ensure compliance with legal permit discharge limits. N.T. 107-08.

16. Alexander submitted an application to renew his wastewater operator's certificate along with a criminal history record. The criminal history report reflected the two criminal convictions. N.T. 106-07.

17. The BWWSO held a board meeting on April 27, 2005 during which Alexander and his legal counsel were present to discuss his application for renewal and the factual circumstances regarding the two convictions. N.T. 84, 104.

DISCUSSION

Burden of Proof and Standard of Review

The Department bears the burden of proof in this matter and must establish its case by a preponderance of evidence. 25 Pa. Code § 1021.122; *Borough of Edinboro Mun. Auth. v. DEP*, 2003 EHB 725, 743, *aff'd*, No. 2696 CD 2003 (Pa. Cmwlth. 2004) (unreported decision). Preponderance of evidence has been defined by the Board "to mean that the evidence in favor of the proposition must be greater than that opposed to it .... 'It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established.'" *Bethenergy Mines, Inc. v. DER*, 1994 EHB 925, 975 (quoting *Midway Sewerage Auth. v. DER*, 1991 EHB 1445, 1476).

The EHB reviews actions by the Department on a *de novo* basis. *Smedley v. DEP*, 2001 EHB 131. The Board makes its own findings of fact based upon the evidence presented to the Board and makes "a determination, based on the evidence we hear, whether the findings upon

which DEP based its actions are correct and whether DEP's action is reasonable and appropriate and otherwise in conformance with the law." *Id.* at 160.

Statutory Backdrop and Factual Background

The Pennsylvania Waste and Wastewater Systems Operators' Certification Act provides for and requires that persons who operate wastewater treatment plants in Pennsylvania be certified to do so. The Act became effective in 1968 and was substantially overhauled in 2002. The Act creates the BWWSO within the Department of Environmental Protection. The BWWSO's job is to review and act upon applications for certification, recertification or renewal of certifications of wastewater treatment systems operators. 63 P.S. § 1004.

The BWWSO consists of seven members including the Secretary of the Department, who is the only Department representative on the BWWSO, and six others appointed by the Governor. 63 P.S. § 1003(a)(1)-(7). The other six members of the BWWSO include: (1) a certified operator of a water or wastewater system who is an employee of a political subdivision or who represents a State association of political subdivisions who is certified to operate a water or wastewater system; (2) an individual certified to operate a water system; (3) a person certified to operate a wastewater system; (4) a certified operator who is the owner or official of a privately owned water or wastewater system; (5) a person who is on the teaching staff of the civil, environmental or sanitary engineering department of a Pennsylvania college or university; and (6) a member of the general public knowledgeable about water or wastewater systems. 63 P.S. § 1003(a)(2)-(7).

In February 2002, substantial amendments to the Act became effective. Several of the new provisions are relevant here. First, Section 4 provides that as of 2002, all applications for certification or recertification must be accompanied by a report of criminal history record from

the Pennsylvania State Police pursuant to 18 Pa. C.S. Ch 91 (relating to criminal history record information). 63 P.S. § 1001(a)(1). Moreover, all persons who were already certified in 2002 under the prior version of the Act are required to submit a criminal records report with an application for renewal of their certification within three years of the effective date of the amendments. [2] The relevant provision of Chapter 91 of 18 Pa.C.S., in turn, states as follows:

> (c) State action authorized. –Boards, commissions or departments of the Commonwealth authorized to license, certify, register or permit the practice of trades, occupations or professions may refuse to grant or renew, or may suspend or revoke any license, certificate, registration or permit for the following causes:
>
> (1) Where the applicant has been convicted of a felony.
>
> (2) Where the applicant has been convicted of a misdemeanor which relates to the trade, occupation or profession for which the license, certificate, registration or permit is sought.

18 Pa. C.S. § 9124(c).

This "criminal history" provision of the Act, with its reference to 18 Pa. C.S. Chapter 91, represents a major point of departure from the prior version of the Act. According to the BWWSO, the only criteria on which the BWWSO was to base certification decisions under the prior version of the Act was whether the applicant had the requisite education and experience. DEP's Post-Trial Brief, p. 8. In addition, amendments provide that a decision by the BWWSO pursuant to 63 P.S. § 1004(a)(1) "shall be considered an action of the Department and shall be appealable to the Environmental Hearing Board." *Id.*

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[2] In addition, upon petition of the Department, the BWWSO may revoke or suspend a certification. 63 P.S. § 1004(a)(3). Upon such petition, the BWWSO must hold a hearing and such hearings must be in accordance with the provisions of 2 Pa.C.S. Chapter 5, Subchapter A. (The Administrative Agency Law) *Id.* The BWWSO may revoke or suspend a certification in such proceedings for "misconduct, including, but not limited to, negligence in the operation of a water or wastewater system, fraud, falsification of application, falsification of operating records, incompetence or failure to use reasonable care or judgment in performance of duties as specified in this act or other applicable laws administered by the department." *Id.* This particular provision is not on point for this case as this matter is a denial of a renewal of a certification and not an action by the BWWSO upon petition by the Department.

In this case, Mr. Alexander had been a certified operator since 1984. He was part owner and the operator of the Memphord Estates Plant. The Memphord Estates Plant is a small "package plant" which serves the Memphord Estates development located in Monaghan Township, York County.

Mr. Alexander's certification renewal application came before the BWWSO pursuant to the requirement in the Act's amendments that all certified operators submit a renewal application together with a criminal history record. Alexander's criminal history record showed that he had pled guilty to a misdemeanor charge of unlawful conduct and pled no contest to a misdemeanor charge of tampering with public records. (N.T. 18, 23; Pet. Ex., pp. 5-9). Both criminal episodes related to the operations of the Memphord Estates Plant.

The unlawful conduct conviction came from an incident in which sewage overflowed from the facility and reached a nearby stream. Mr. Alexander testified that the discharge into the stream happened because he had rented a pump to try to clean up the spill but that he "was not familiar with the operation of the pump." (N.T. 23). Moreover, Mr. Alexander failed to report the spill to the Department. He admitted that "it was my negligence to not inform the Department." *Id.*

The tampering with public records conviction arose from falsified numbers on the facility's DMRs. (N.T. 18; Pet. Ex., p. 5). The falsified DMRs covered a period of November 1999 through July 2000. DMRs are recorded on a daily basis and reflect the water quality at the plant. (N.T. 107-08). DMRs are required to be filed with the Department.

Alexander maintained at our trial that the false DMRs were not his doing, but that of Hydrotech employees. In 1999, Alexander had hired Hydrotech to assist him in operating the plant because he was traveling and was not physically present at the plant on a regular basis.

(N.T. 17). Hydrotech was not then in the business of water treatment facility operation and was looking for education and experience in plant operations so it might possibly expand its business into operating sewage treatment facilities. (N.T. 16-17).

Upon Alexander's application to renew his certification, the BWWSO reviewed his application together with his criminal history record. The BWWSO saw that he had pled to the two misdemeanors. (N.T. 106-07). The precise procedure followed by the BWWSO from that point in this case is quite hard to discern. There is no documentary evidence which shows how the BWWSO followed up on the criminal history record. It appears that the BWWSO reviewed the criminal history record at the outset via a subcommittee consisting of one BWWSO member, one DEP staff person and legal counsel. The subcommittee reviewed Mr. Alexander's records of conviction, including looking at court records. (N.T. 103-04). A member of the BWWSO staff contacted DEP personnel at the Regional Office. (N.T. 106). Mr. Diedato of the Regional Office presented information about Alexander's criminal convictions at the BWWSO meeting of March 5, 2005. (N.T. 122). Mr. Alexander was invited to attend the next BWWSO meeting at which time the subject of his prospective certification renewal was scheduled for decision by the BWWSO. (N.T. 122-23). There was apparently correspondence between the BWWSO and Mr. Alexander during this time but none of it was offered into evidence. (N.T. 122-23). Such evidence would have been helpful and we encourage that it be offered the next time such a case comes up from the BWWSO.

The denouement of the BWWSO's involvement came at the BWWSO meeting of April 27, 2005. The BWWSO had invited Mr. Alexander to that meeting to tell his side of the story, which he did. (N.T. 104). Also present at that meeting was Mr. Roth, the Department water quality specialist responsible for inspecting the Memphord Estates Plant from 1997 to 2000. Mr.

Roth told the BWWSO that he had spoken to Mr. Coble, a Hydrotech employee, who had told Mr. Roth that there was a second set of books and that Mr. Alexander had directed Hydrotech to keep two sets of books "so they would make sure that they had the right answers for DEP". (N.T. 105).

At the conclusion of the meeting, the BWWSO notified Alexander that it would not be renewing his certification largely based on his two convictions that were related to his occupation as a certified operator. Again, we have no documentary evidence such as minutes of that meeting or the March meeting. Not even the official correspondence notifying Mr. Alexander of his fate, *i.e.,* the April 28, 2005 letter which was attached to Mr. Alexander's Notice of Appeal as required by our Rules, was introduced into evidence at the trial and is, therefore, not a part of our trial record. All such evidence would be more than welcome at the trial of the next case like this one coming from the BWWSO since it gives us a picture of the context of the case we are being charged to decide and of the logical sequence of events which went before.

Legal Analysis

Due Process

The main argument Alexander makes in his Post-Trial Brief is that the process, or more precisely the lack thereof, afforded to Alexander at the BWWSO level constitutes a lack of due process. Alexander points out, for example, that there was no formal BWWSO hearing or trial, witnesses were not placed under oath, discussions were had and findings were presented at meetings with Mr. Alexander not being present, there was no stenographic record of the proceedings of the BWWSO, the BWWSO made no written findings of fact, there are no defined rules of procedure for BWWSO proceedings, and there is no written record from the BWWSO to

review. Petitioner's Post-Trial Brief (Pet. Post-Trial Brf.), pp. 6, 8-9. Alexander rests his argument that he was entitled to all such procedures, and that we must reverse the BWWSO's ruling solely on the basis of their absence, on Section 11 of the Act which states that the BWWSO shall be subject to the provisions of the Administrative Agency Law. 63 P.S. § 1011.

We note that Alexander did not raise that argument in either his Notice of Appeal or his pre-trial memorandum. This argument appears for the first time in his post-trial brief. The Board's Rules do provide that allegations not raised in the Notice of Appeal are waived. 25 Pa. Code § 1021.51. Moreover, Paragraph No. 8 of our September 19, 2005 Order Amending Pre-Trial Deadlines and Establishing Discovery and Trial Schedule in this case provides, "[t]he parties are reminded that any party may be deemed to have waived any contentions of law and/or fact which are not set forth in their respective pre-hearing memoranda."

Beyond that, however, we think that Alexander's argument misses a few important points. First, we note that Section 4(a)(1) of the 2002 amendments, involving the certification renewal process, which is what we are dealing with in this case, does not contain a requirement for an Administrative Agency Law hearing while, in stark and noticeable contrast, Section 4(a)(3) of the 2002 amendments, involving Department initiated petitions for revocation or suspension of a certification, does provide that the BWWSO must conduct an administrative hearing and issue an adjudication in accordance with the Administrative Agency Law. *Compare* 63 P.S. § 1004(a)(1) *with* 63 P.S. § 1004(a)(3). The Legislature created an obvious difference between the two subsections and we must give that difference its effect.

We see the effect that we give here to the Legislature's clear language as quite intended by the Legislature when it enacted the 1992 Amendments. There are 12,000 certified operators in Pennsylvania, this means that the BWWSO was to face 12,000 renewal applications within

three years after the amendments of 2002. (N.T. 111, 112). The Legislature must have intentionally decided that the BWWSO, a part-time, uncompensated board, could not be expected to undertake the large number of full adjudicative proceedings which may result from 12,000 renewal applications within three years, in addition to the normal traffic of applications for certification pursuant to Section 1004(a)(1), and that full adjudicative proceedings at the BWWSO would occur only in the cases in which the Department chose to take action to suspend or revoke a permit pursuant to Section 1004 (a)(3).

Moreover, the 2002 Amendments provide that decisions of the BWWSO under Section 4(a)(1) may be appealed to the Environmental Hearing Board. This, then, provides for full due process rights because, here, there is certainly due process in every respect. Under the Environmental Hearing Board Act, this Board "has the power and duty to hold hearings and issue adjudications under 2 Pa.C.S. Ch. 5 Subch. A (relating to practice and procedure of Commonwealth agencies) on orders, permits, licenses or decisions of the department." 35 P.S. § 7514(a). Section 7514(c) of the Environmental Hearing Board Act states that "no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board . . . ." 35 P.S. § 7514(c).

In addition to the due process rights built into the Environmental Hearing Board Act, our Rules provide a full panoply of due process rights fully exercisable by litigants including, but not limited to, full discovery, compulsory process, a trial with witnesses under oath allowing cross-examination and at which the rules of evidence apply. See 25 Pa. Code § 1021.1-1021.201. Thus, the BWWSO's declination to renew Alexander's certification at the April 27th meeting, having been appealed here, is litigated with automatic application of our institutional due process infrastructure. In addition, Mr. Alexander enjoyed the opportunity to exercise the full panoply of

litigation and trial rights which constitute due process by any standard.

As we have alluded to before, it would be an understatement to say that our trial record of what precisely happened at the BWWSO level and of the BWWSO's process and deliberations is thin. This may be the result of trial counsel's decision not to use such material, we do not know. We would have liked to have had that evidence and we think trial counsel in future cases should offer it since, without it, it is harder for the Board to determine whether to uphold or reverse the BWWSO's action. However, after the due process trial here, we are satisfied that, based upon the trial that we conducted, the action of the BWWSO need not be overturned. We turn to that discussion next.

Denial of Certification Renewal

Our *de novo* review of the matter shows that the BWWSO acted prudently and appropriately when it decided to deny Alexander's application for renewal. His two criminal episodes stem directly from Alexander's activities as a wastewater treatment operator and they are, thus, within the scope of subsection (2) of 18 Pa. C.S. § 9124(c). Both show an egregious mismanagement in the operation of the Memphord Estates Plant.

The first offense involved the overflow of sewage which caused pollution to a stream. A major contributing factor to the situation was Alexander's own failure to know how to work a pump he rented which was supposed to have ameliorated the overflow. Then, to make matters worse, Alexander failed to report the incident to the Department. Even he admitted that "it was my negligence to not inform the Department." (N.T. 23). That an operator who does not know how to use a pump he rented which, in turn, causes a discharge of sludge into the waters of the Commonwealth which the operator admits was his negligence to not report to the authorities were all considered by the BWWSO to cast major doubt whether this person's certification

should be renewed. (N.T. 106-107, 128).

Yet there was still another plea by Mr. Alexander to a criminal offense. He pled no contest to the crime of tampering with public records. The public records involved were DMRs of the Memphord Estates Plant, so there is no question that the offense is directly related to the operation of the business of wastewater operator. Indeed, Mr. Alexander is in charge of the Plant.

Alexander and the BWWSO dispute whether the ground level issue of Alexander's actual guilt or innocence is open now for this proceeding. The BWWSO filed a pre-trial motion in limine arguing that any evidence of Alexander's supposed innocence of the charge should be excluded. We denied that motion. Alexander did offer testimony which he contends tends to show that he was innocent of the charge to which he pled no contest. Alexander testified at our trial that he did not tamper with any records. He simply relied upon information provided to him by the Hydrotech people. (N.T. 20). Alexander said it was they who "took it upon themselves to make up numbers" and he did not know about any false or second set of books. (N.T. 21). The BWWSO, in its post-trial brief, basically renewing its motion in limine, requests that such evidence be stricken.

We need not provide extended discussion on the intricacies of the legal points raised by the BWWSO in it motion in limine as renewed in its post-trial brief nor do we need to try a criminal case here. Mr. Alexander's exculpatory "explanation" is as problematic for him on the question of whether he ought to be certified as would be his actual guilt of the crime charged. The irony is hard to miss. Mr. Alexander is saying that the BWWSO erred in declining to renew his certification because he did not know that a second set of books were being kept at his plant or that DMRs were being falsified and submitted under his signature from his plant. That there

could have been a second set of books at his plant without him knowing about it, and that DMRs from his plant could be falsified and submitted without his knowing they were false, rightly caused the BWWSO to doubt whether he ought to have a certification. (N.T. 130).

We note also that Alexander admitted that if Hydrotech employees would have testified they would have said that Alexander directed them to falsify the numbers (N.T. 36; Pet. Ex., pp. 8-9). Further, he admitted that if this matter would have gone to a criminal trial he would have been found guilty if the state's witnesses would have been believed, specifically the testimony of Hydrotech employees. (Pet. Ex., pp. 8-9).

Under these circumstances, two criminal incidents relating directly to Alexander's operation of the Memphord Estates Plant and the underlying facts showing Alexander's criminal behavior and/or complete disengagement from the plant he was supposed to be in charge of, the BWWSO did not act unreasonably or without foundation in declining to renew his certification.

CONCLUSIONS OF LAW

1. The BWWSO is not required to hold a hearing subject to The Administrative Agency Law under 63 P.S. § 1004(a)(1) when reviewing and acting upon applications for renewal of certifications and its not doing so is not grounds, without more, to reverse the action of the BWWSO in this case.

2. The BWWSO's action in declining to renew the certification of Mr. Alexander was reasonable and appropriate under the circumstances presented here. 63 P.S. § 1004(a)(1); 18 Pa. C.S. § 9124(c).

Based on the foregoing Findings of Fact, Discussion and Conclusions of Law we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

HALVARD E. ALEXANDER	:	
	:	
v.	:	**EHB Docket No. 2005-105-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 30th day of May, 2006, it is hereby ORDERED that the appeal of Halvard E. Alexander is **dismissed**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

GEORGE J. MILLER
Judge

THOMAS W. RENWAND
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: May 30, 2006

c: **DEP Bureau of Litigation**
Attention: Brenda K. Morris, Library

For the Commonwealth, DEP:
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Legal Counsel Division

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DENNIS GROCE, NATIONAL PARKS CONSERVATION ASSOCIATION, GROUP AGAINST SMOG AND POLLUTION and PHIL COLEMAN	:	
v.	:	**EHB Docket No. 2005-246-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WELLINGTON DEVELOPMENT – WDYT, LLC, Permittee	:	**Issued: May 31, 2006**

OPINION AND ORDER ON APPELLANTS' MOTION IN LIMINE TO EXCLUDE PERMITTEE'S NITROGEN OXIDES LIMIT EXPERT'S TESTIMONY

By Thomas W. Renwand, Judge

Synopsis:

The Board will not preclude the Permittee from presenting expert testimony on nitrogen oxides limits as a sanction for failing to serve an expert report or answer expert interrogatories on this topic until the date for responsive filings was due. Rather, the Appellants will have an opportunity to rebut the Permittee's expert testimony at trial on cross-examination and in rebuttal testimony. Therefore, we find no prejudice justifying the exclusion of the Permittee's expert testimony.

OPINION

This matter involves an appeal of a plan approval by the Department of Environmental

Protection (Department) for the construction of a coal-fired power plant in Greene County, Pennsylvania by Wellington Development, WDYT, LLC (Wellington). Several opinions have been issued in this matter, which is currently scheduled for trial beginning June 6, 2006.

Presently before the Board is Appellants' Motion in Limine to Exclude Permittee's Nitrogen Oxides Limit Expert's Testimony (motion in limine).[1] Both Wellington and the Department have filed responses in opposition. The motion seeks to preclude Wellington from presenting expert testimony relating to the lowest achievable emission rate and the best available control technology for nitrogen oxides (the nitrogen oxides limit testimony).[2]

The Appellants seek to exclude the nitrogen oxides limit testimony as a sanction for what they contend is Wellington's failure to comply with a Board order and the rules of discovery. The Board order in question was issued on January 19, 2006 and required "*All* parties shall serve their answers to expert interrogatories or serve their expert reports on or before Tuesday, February 21, 2006." Under the rules of the Board that were in effect at that time, the typical procedure was for the party with the burden of proof to serve its answers to expert interrogatories or expert report first, followed by the opposing parties. However, due to the expedited nature of the proceedings in this appeal,[3] all parties were required to serve their answers to expert interrogatories or expert reports simultaneously, followed by the service of supplemental or responsive reports or answers in rebuttal on March 6, 2006, subsequently extended to March 13, 2006. *Groce v. DEP*, EHB Docket No. 2005-246-R (Opinion and Order on Appellants' Motion to Modify the Discovery,

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[1] The Appellants have also filed another motion in limine to exclude testimony on what they consider to be irrelevant matters, as has Wellington. Those motions will be addressed in a separate opinion or order.

[2] The Board recognizes and appreciates the parties' use of full and complete terminology rather than acronyms in the motions and responses.

[3] *Groce v. DEP*, EHB Docket No. 2005-246-R (Opinion and Order on Motion to Expedite Hearing and Motion to Extend Discovery issued November 15, 2005).

Pre-hearing and Hearing Schedule issued January 19, 2006); *Groce v. DEP*, EHB Docket No. 2005-246-R (Order issued on March 7, 2006).

The Appellants contend that Wellington violated the Board's order by serving, on February 21, what the Appellants say amounted to a prolonged objection to the Appellants' expert interrogatories, rather than a summary of the nitrogen oxides limit testimony to be given by their expert, William Campbell, and waited until the supplemental date of March 13 to serve their report or answers to expert interrogatories. The Appellants argue that Wellington's failure to serve an expert report or substantive answers to expert interrogatories for Mr. Campbell on February 21 deprived them of the opportunity to file a truly responsive expert report on March 6 (subsequently March 13), as set forth in the Board's order. They claim that they have been seriously prejudiced by this failure because it limits their nitrogen oxides limit testimony to the scope of their initial expert report, without being able to counter what was in Wellington's March 13 report.

In its response in opposition, Wellington argues that its March 13 supplemental expert response, which included Mr. Campbell's analysis of what was already in the plan approval application and a rebuttal of the Appellants' expert report, satisfied the Board's January 19 order. Wellington also argues that the sequential service of expert reports, first by the party with the burden of proof followed by the opposing parties, is not *per se* prejudicial since that had been the normal practice of the Board.[4] Finally, Wellington argues that if the Appellants had felt it necessary to serve a responsive expert report to Wellington's March 13 submission, they could have moved for leave to file a rebuttal expert report. The Department also opposes the motion,

[4] The Board's rules were revised on February 16, 2006 to allow concurrent fact and expert discovery, and the separate timeframes for the service of expert reports were eliminated. 36 Pa.B. 709.

arguing that the proper way to have dealt with what the Appellants believe was Wellington's failure to comply with the Board's January 19 order would have been to file a motion to compel after receiving Wellington's allegedly defective response on February 21. The Department argues that it is only appropriate for the Board to issue sanctions for a discovery violation after a motion to compel has been filed.

It appears that the Appellants' primary concern with regard to Wellington's failure to submit an expert report or answers to expert interrogatories with regard to the nitrogen oxides limit testimony on February 21 is that they are being deprived of the opportunity to rebut Wellington's expert submissions, while Wellington had every opportunity to include its rebuttal to the Appellants' expert in its own March 13 report. The Appellants argue as follows:

> Wellington has essentially "stacked the evidentiary deck" in their favor. Appellants' expert testimony is currently limited to the scope of the information found in their initial expert report, while Wellington's expert testimony may directly counter Appellants' expert opinion. [footnote omitted] As discussed in *Kleissler* [*v. DEP*, 2002 EHB 617], this is exactly the type of unfair advantage that sanctions are designed to rectify.

Appellants' Motion in Limine, p. 4.

The Appellants are correct that due to the expedited nature of these proceedings, which were expedited at Wellington's request, we carefully crafted our scheduling Order so that all parties would have the ability to review opposing expert reports and then draft their rebuttal reports. Wellington, by not filing expert answers or an expert report in accordance with our Order, did not comply with the Order. We are now faced with the task of determining whether a sanction is appropriate.

As Judge Labuskes noted in *Kennedy v. DEP*, EHB Docket No. 2005-332-L (Opinion and Order on Motion to Compel issued April 20, 2006), *slip op.* at 3, "It is important to

remember that the purpose of discovery is so [all] sides can gather information and evidence, plan trial strategy, better explore settlement opportunities, and discover the strengths and weaknesses of their respective positions. *George v. Schirra*, 814 A.2d 202 (Pa. Super. 2002)." (*quoting Wheeling-Pittsburgh Steel Corp. v. DEP,* EHB Docket No. 2005-093-R (Opinion issued September 19, 2005)).

In other words, the purpose of discovery is so all parties can be adequately prepared for trial. Discovery will never be perfect. However, "the Board has wide discretion to determine appropriate measures necessary to assure adequate discovery where required. *DEP v. Neville Chemical Company,* EHB Docket No. 2003-297-CP-R (Opinion issued January 3, 2005, page 3); *PECO Energy v. Insurance Co. of North America*, 852 A.2d 1230 (Pa. Super. 2004)." *Id.*

The Appellants request that we strike Wellington's expert testimony regarding the lowest achievable emission rate/best available control technology for nitrogen oxides. We find this much too draconian. This is not a situation where Appellants are prejudiced at the time of trial because they do not know the subject matter to which Wellington's expert will testify. Rather, they know exactly how he will testify. The prejudice they suffer is that their expert did not have Wellington's report at the time for serving a responsive expert report.

We crafted our Order calling for concurrent expert reports in lockstep fashion to protect everyone's rights. Wellington, by not filing an expert report or substantive answers to the Appellants' expert interrogatories on February 21, has put itself in a position where justice and fairness require us to remedy the situation. Although the Appellants may not have had an opportunity to file a written response to Wellington's expert report submission, they will, nevertheless, have an opportunity to rebut it at the trial through cross-examination and/or rebuttal testimony. They will not be deprived of an opportunity to challenge the expert opinion put forth

by Wellington, and, therefore, we find no prejudice justifying the sanction which they seek. We do not see the evidentiary cards as being stacked against the Appellants but, rather, in their favor since they have been given an opportunity to see precisely what Wellington intends to assert in rebuttal to their expert testimony at trial, whereas Wellington does not have the benefit of a rebuttal expert report from the Appellants.

We enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DENNIS GROCE, NATIONAL PARKS CONSERVATION ASSOCIATION, GROUP AGAINST SMOG AND POLLUTION and PHIL COLEMAN	:	
v.	:	**EHB Docket No. 2005-246-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION DEVELOPMENT – WDYT, LLC, Permittee	:	

ORDER

AND NOW, this 31st day of May 2006, the Appellants' Motion in Limine to Exclude Permittee's Nitrogen Oxides Limit Expert's Testimony is **granted in part and denied in part**, as set forth in our Opinion.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATE: May 31, 2006

c: **DEP Bureau of Litigation:**
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

GARY BERKLEY TRUCKING, INC.	:	
	:	
v.	:	EHB Docket No. 2005-199-R
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	Issued: June 2, 2006

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Parties, except individuals appearing on their own behalf, shall be represented before the Pennsylvania Environmental Hearing Board by an attorney at all stages of the proceedings after the filing of the notice of appeal. Since the Appellant Corporation is not represented by an attorney it is required to obtain counsel or its appeal will be dismissed.

Background

Presently before the Pennsylvania Environmental Hearing Board is the Pennsylvania Department of Environmental Protection's Motion to Dismiss Appeal for violation of Board Rule 1021.21(b) which requires corporations to be represented by counsel.

Appellant, Gary Berkley Trucking, Inc. (Gary Berkley Trucking), is a Pennsylvania Corporation registered with the Pennsylvania Department of State. Appellant has appealed from an assessment of civil penalty. The notice of appeal was filed by Mr. Gary Berkley on behalf of the Appellant Corporation.

Section 1021.21(b) of the Board's Rules of Practice and Procedure, 25 Pa. Code § 1021.21(b), requires that corporations shall be represented by an attorney:

> Corporations shall be represented by an attorney of record admitted to practice before the Supreme Court of Pennsylvania.

Appellant has neither filed a response to the Department's Motion to Dismiss nor has any attorney entered his or her appearance on its behalf.

Discussion

The Board evaluates Motions to Dismiss in the light most favorable to the non-moving party. *Solebury Township v. DEP*, 2004 EHB 23, 28; *Ainjar Trust v. DEP*, 2000 EHB 505, 507; *Wheeling and Lake Erie Railway v. DEP*, 1999 EHB 293, 295. The Board treats Motions to Dismiss the same as Motions for Judgment on the Pleadings: a Motion to Dismiss will be granted only where there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law. *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282.

Appellant was required by our Rules to file a Response and supporting

memorandum of law to the Department's Motion to Dismiss within 30 days of service. 25 Pa. Code Section 1021.94(b). It did not do so. Therefore, the key factual averments in the Motion to Dismiss – that the Appellant is a Pennsylvania Corporation not represented by counsel – are assumed to be true.

The Board enjoys broad sanction powers pursuant to 25 Pa. Code Section 1021.161:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The Sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including those permitted under Pa. R.C.P. 4019 (relating to sanctions regarding discovery matters).

Our Rule is quite clear: corporations are required to be represented by counsel in all stages of the proceedings before the Board after the filing of the notice of appeal. Appellant is a corporation and is not represented by an attorney. We certainly have the power to dismiss the Appellant's case as a sanction for its failure to abide by our Rule requiring corporations to retain counsel. However, since we always favor deciding cases on their merits we will afford Appellant an opportunity to comply with the law and retain legal counsel. If it does not retain counsel within thirty days of the date of this Opinion and Order we will dismiss its appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GARY BERKLEY TRUCKING, INC.	:	
	:	
v.	:	**EHB Docket No. 2005-199-R**
	:	
COMMONWEALTH OF PENNSYLVANIA: DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 2nd day of June, 2006, following review of the Pennsylvania Department of Environmental Protection's Motion to Dismiss, it is ordered as follows:

1) Appellant shall retain an attorney ***within 30 days of the date of this Order*** who shall enter his or her appearance on its behalf pursuant to 25 Pa. Code Section 1021.21 and 1021.22.

2) If Appellant does not retain counsel within 30 days of the date of this Order, the Board will enter an Order granting the Department of Environmental Protection's Motion to Dismiss and dismissing the Appeal.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

GEORGE J. MILLER
Judge

THOMAS W RENWAND
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATE: June 2, 2006

c: **DEP Bureau of Litigation:**
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DENNIS GROCE, NATIONAL PARKS CONSERVATION ASSOCIATION, GROUP AGAINST SMOG AND POLLUTION and PHIL COLEMAN	:	
v.	:	**EHB Docket No. 2005-246-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WELLINGTON DEVELOPMENT – WDYT, LLC, Permittee	:	**Issued: June 2, 2006**

OPINION AND ORDER ON MOTIONS IN LIMINE

By Thomas W. Renwand, Judge

Synopsis:

Although the Board's *de novo* review power allows us to consider evidence not relied upon by the Department in taking its action, we are still bound by the rules of evidence and will only consider evidence that is relevant to the issues on appeal. Motions in limine are granted to the extent they seek to exclude hearsay or evidence of matters not raised in the notice of appeal or covered by the regulations pertaining to the plan approval that is the subject of the appeal.

O P I N I O N

This matter involves an appeal of a plan approval by the Department of Environmental Protection (Department) for the construction of a coal-fired power plant in Greene County, Pennsylvania by Wellington Development, WDYT, LLC (Wellington). Several opinions have

been issued in this matter, which is currently scheduled for trial beginning June 6, 2006. Presently before the Board are motions in limine filed by the Appellants and Wellington. The motions seek to preclude evidence on what each of the parties contends are matters irrelevant to the issues on appeal.[1]

Relevance

"Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa.R.E. 401. A determination regarding the admissibility of evidence is within our discretion as the trial court. *Commonwealth v. Weaver*, 768 A.2d 331, 332 (Pa. Super. 2001). Evidence is relevant if it meets any of the following criteria:

(1) it logically tends to prove or disprove a material fact,

(2) it tends to make the fact at issue more or less probable, or

(3) it supports a reasonable inference about the existence of a material fact.

Id.

We turn now to the evidence that the parties seek to have precluded as irrelevant.

Appellants' Motion in Limine

The Appellants' motion in limine seeks "to prevent any mention in opening statements, questioning of witnesses, closing arguments or in any other way, of the following matters:

a. Air or water pollution allegedly caused by the waste coal piles intended to be used as fuel for the plant.

b. The economic, social, environmental or other benefits that will allegedly accrue to the State of Pennsylvania or any other party from construction or operation of the plant.

[1] The Appellants also filed a motion to preclude the testimony of Wellington's expert on nitrogen oxides limit which was addressed in a separate Opinion of the Board. *See Groce v. DEP* EHB Docket No. 2005-246-R (Opinion and Order issued May 31, 2006).

c. The monetary costs Wellington has accrued or allegedly will accrue as a result of the permitting, construction, financing, sale or operation of this plant and its associated interconnected facilities.

(Appellants' Motion, p. 1)

The Appellants contend that these matters are irrelevant because they are matters that were not raised in the notice of appeal and were not considered by the Department as a basis for issuing the plan approval to Wellington. The Appellants assert, "It would have no bearing on the outcome of this case for the Board to take testimony on such matters as whether the community will benefit from Wellington's plant, or whether this appeal is harming Wellington's prospects with investors." (Appellants' Motion, p. 5)

Wellington opposes the motion, first, on the grounds that it is procedurally deficient since the Appellants do not cite to particular pieces of evidence to be excluded or to witnesses whose testimony they seek to preclude, but rather make a blanket request for exclusion of all testimony and evidence related to the matters set forth above. We find no procedural deficiency in the Appellants' motion. The Board often receives and rules on motions seeking to exclude evidence related to certain issues, as opposed to a listing of specific exhibits and witnesses. While the Board has cautioned parties that a motion in limine should not be a thinly disguised motion for summary judgment, *Dauphin Meadows v. DEP*, 2002 EHB 237, the Appellants' motion does not fall into this category.

Next, Wellington asserts that the subjects on which the Appellants wish to exclude testimony and other evidence are, in fact, relevant to the issues on appeal. Based on our review of the motion and responses, we find that much of the proposed evidence appears to be of questionable relevance to the specific issues raised in the notice of appeal. Much of it does not

appear related to the applicable regulations. Even so, the Department argues that evidence of environmental and economic impacts is, "at a minimum, appropriate background information that provides context and helps the Board to fully understand the project and the issues in the appeal." (Department's Response, p. 1) Additionally, both Wellington and the Department cite the Board's power of *de novo* review, by which we may consider and rely on evidence that the Department did not rely upon when it took its action. *Smedley v. DEP*, 2001 EHB 131, 155-60.

While it is true the Board may consider evidence the Department did not rely upon, in doing so we are still bound by the rules of evidence and will *only* consider evidence that is relevant to the issues before us. In this case, the Appellants have raised specific issues pertaining to the propriety of the Department's plan approval. Only matters pertaining to those issues and the relevant regulations and statutory provisions will be admitted into evidence. Matters falling outside the scope of those confines are not before the Board. Wellington may, of course, raise a wide range of defenses to the Appellants' allegations, but these defenses must be relevant to the issues on appeal. While we cannot state in the context of this Opinion what specific exhibits or testimony will not be admissible, such rulings will be made during the course of the trial. We do note, however, that matters that are not raised in the notice of appeal or covered by the regulations applicable to the plan approval are not before us in this appeal and evidence pertaining to such matters will not be admissible at the trial. Although we may allow very limited so-called background information, we will only do so if we are convinced it will aid us in understanding the issues.

Wellington's Motion in Limine

Wellington seeks to exclude from evidence the following three documents that the Appellants identified in their pre-hearing memorandum: P68, entitled "Air Pollution and Sudden

Infant Death Syndrome;" P69, entitled "Ambient Air Pollution: Health Hazards to Children;" and P70, entitled "The effects of air pollution on lung development." The documents are scientific studies addressing the effects of air pollution on children. Wellington is opposed to the introduction of these exhibits on the basis that the effects of air pollution on the health of children is not an issue in this appeal. Wellington points out that the Appellants did not raise this issue in their notice of appeal or amendments thereto and have not submitted an expert report on this subject. Wellington further asserts that such studies are not required by or relevant to the Department's consideration of its plan approval application and that such information has already been evaluated by the Federal EPA in adopting regulations in this area.

The Department supports Wellington's motion but states that the issue of relevancy need not be reached. It is the Department's contention that the aforementioned exhibits are inadmissible as hearsay since they were authored by persons not associated with this proceeding outside of court. The Department cites *Majdic v. Cincinnati Machine Co.*, 537 A.2d 334, 340 (Pa. Super. 1988) as support for its argument. In *Majdic*, the court recognized that learned treatises are not admissible as direct evidence. Pa.R.E. 803(18), excluding such documents from the hearsay rule, has not been adopted.

We find that the Appellants' exhibits P68, P69 and P70 are inadmissible as hearsay.

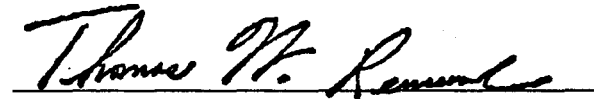
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DENNIS GROCE, NATIONAL PARKS CONSERVATION ASSOCIATION, GROUP AGAINST SMOG AND POLLUTION and PHIL COLEMAN	:	
v.	:	**EHB Docket No. 2005-246-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WELLINGTON DEVELOPMENT – WDYT, LLC, Permittee	:	

ORDER

AND NOW, this 2nd day of June 2006, the motions in limine are granted to the extent set forth in this Opinion.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Judge

DATE: June 2, 2006

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MARC YOSKOWITZ	:	
	:	
v.	:	**EHB Docket No. 2003-172-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and THOMPSON BOROUGH, Intervenor	:	**Issued: June 5, 2006**

ADJUDICATION

By Michelle A. Coleman, Judge

Synopsis:

The Board dismisses an appeal of the Department's denial of a private request under the Sewage Facilities Act where Appellant failed to establish that the Department erred in denying his request to order Thompson Borough to revise its Official Sewage Facilities Plan. Appellant failed in his burden of proving that the Official Plan was inadequate to meet his sewage disposal needs.

INTRODUCTION

This appeal by Marc Yoskowitz (Appellant) challenges the Department of Environmental Protection's (Department) denial of Appellant's private request, submitted in accordance with Sections 5(b) and (b.1) of the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20(a) (Sewage Facilities Act). The private request sought to revise Thompson Borough's (Borough) Official Plan to include Appellant's property in the Borough's sewage service area.

The roots of this dispute date back to the Department's approval on November 6, 1998 of

the Borough's Sewage Facilities Plan Update Revision (1998 Plan Revision). The 1998 Plan Revision allowed for the construction of a centralized sewage collection and conveyance system and sewage treatment plant to serve portions of the Borough. Appellant did not file an appeal challenging the 1998 Plan Revision at that time. Appellant owns and operates a gas station, automobile service facility, and convenience store on his property, which is located within the Borough's parameters, but outside the service area for sewage collection established in the 1998 Plan Revision. On December 21, 2002, Appellant requested that the Borough revise its Official Plan to extend the Borough's sewer system to serve Appellant's property. On January 28, 2003, the Borough denied Appellant's request. Thereafter, Appellant submitted a private request to the Department dated February 6, 2003 requesting that the Department order the Borough to revise its Official Plan to include his property in the Borough's sewage service area. On July 1, 2003, the Department issued a letter to Appellant refusing to take the requested action.

The Board has issued a prior opinion in this matter granting in part and denying in part a motion for summary judgment. *Yoskowitz v. DEP and Thompson Borough*, EHB Docket No. 2003-172-C (Opinion issued April 22, 2005). In our opinion, we found that most of the objections raised in Appellant's Notice of Appeal challenged the Department's approval of the 1998 Plan Revision and not the propriety of the Department's denial of Appellant's private request. We determined that those contentions were outside the scope of the appeal of the Department's denial of the private request. *Id.* at 5-6, (*citing Scott Township Environmental Preservation Alliance v. DEP*, 2001 EHB 90).[1] Thus, we granted partial summary judgment against the Appellant and dismissed all objections challenging the 1998 Plan Revision, allowing

[1] In *Scott Township Preservation Alliance* we stated: "Allowing a party to use a private request to reopen Scott Township's sewage facilities planning process at this point in time would have the effect of an appeal of the municipality's original official plan. Neither the Act nor the private request regulations provide a means to challenge a previous Department approval of an official sewage facilities plan." 2002 EHB at 96.

Appellant to proceed to trial on the sole objection that the Official Plan does not adequately meet his sewage needs.

At the request of the parties involved in this matter, Judge Michelle A. Coleman conducted a site view of the premises in controversy on July 29, 2005.

Judge Coleman presided over a trial on the merits on the remaining objection on October 18, 2005. Filing of post-hearing briefs was completed on February 15, 2006, and the matter is now ripe for adjudication. The record consists of: a stipulation of fact admitted as a Board exhibit, a 310-page transcript, and 28 exhibits. After careful review of the record, the Board makes the following findings of fact.

FINDINGS OF FACT

1. Appellant is Marc Yoskowitz, an individual who resides at RD #2, Box 15, Thompson, Pennsylvania 18465. (N.T. at 7.)[2]

2. Appellee is the Department, the agency with the duty and authority to administer and enforce the Sewage Facilities Act, the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1 *et seq.* (Clean Streams Law); Section 1917-A of the Administrative Code of 1929,[3] and the regulations implementing these statutes. (B. Ex. 1, at ¶ 2.)

3. Intervenor is Thompson Borough, a legally incorporated Borough in Susquehanna County. (B. Ex. 1, at ¶ 2.)

4. The property involved in this appeal is located in Thompson Borough, Susquehanna County. (Notice of Appeal.)

5. Appellant purchased this property in November of 2002. (B. Ex. 1, at ¶ 1; N.T. at

---

[2] The following abbreviations will be used: "N.T. __" for the Transcript; "A. Ex. __" for Appellant's Exhibits; "B. Ex. __" for the Joint Stipulation of Facts admitted into evidence as a Board Exhibit 1; "C. Ex. __" for Commonwealth Exhibits; "I. Ex. __" for the Intervenor's Exhibits.

[3] Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17.

8.)

6. Appellant uses his property as a gas station, service station, and convenience store. (N.T. at 13.) There is also a rental unit located on the second floor, which has been vacant since Appellant purchased the property. (N.T. at 14.) The property is bordered by a detached garage, which Appellant uses for storage. (N.T. at 17.)

7. Appellant's property features the only gas station and automobile service facility in Thompson Borough. (N.T. at 55.)

8. Appellant's property is served by a "wildcat" system, which directly discharges untreated sewage from Appellant's property into Starucca Creek. (N.T. at 22, 28.)

9. A wildcat system is a system of pipes where residents have tapped in and disposed of their wastewater from their property but at the end of the piping there is no treatment. (N.T. at 105.)

10. Appellant was aware that his property was served by a malfunctioning sewage disposal system when he purchased it. (N.T. at 72, 75, 76.)

11. Appellant was aware that he could connect to the Borough's sewer system at his own expense when he purchased the property. (N.T. at 73.)

12. On November 6, 1998, the Department approved Thompson Borough's Plan Update Revision to its Official Plan. The 1998 Revision to the Official Plan allowed for the construction of a centralized sewage collection and conveyance system and a sewage treatment plant to serve portions of Thompson Borough and has since been implemented. (B. Ex. 1, at ¶ 4.)

13. On or about December 21, 2002, Appellant requested that the Borough revise its Official Plan to connect his property to the Borough's sewer system. (B. Ex. 1, at ¶ 5.)

14. On January 28, 2003, Thompson Borough denied Appellant's request to revise its Official Plan. (B. Ex. 1, at ¶ 6.)

15. At a Borough council meeting held on November 4, 2002, Appellant was informed that he reserved the right to connect his property to the Borough's sewer system at his own expense. (C. Ex. 10.)

Appellant's Private Request to the Department for Sewage Service

16. On February 11, 2003, the Department received Appellant's private request, in accordance with section 71.14(c) of the Department's regulations, to revise the Borough's Official Plan to include his property in the sewage service area. (B. Ex. 1, at ¶ 7.)[4]

17. By a February 20, 2003 letter, the Department informed the Borough that Appellant had filed a private request and that the Borough may submit in writing comments regarding its denial of Appellant's request. (B. Ex. 1, at ¶ 9; C. Ex. 7.)

18. On March 3, 2003, the Borough filed its comments with the Department, which included estimates obtained from Nassaux-Hemsley, Inc. of the projected cost of revising its Official Plan to connect Appellant's property to the Borough's sewer system. (B. Ex.1, at ¶ 10; C. Ex. 8.)

19. By a May 13, 2003 letter, the Department requested additional information from the Borough regarding Appellant's private request. (B. Ex. 1, at ¶ 11; C. Ex. 9.)

20. On June 10, 2003, the Borough supplemented its response to the Department's request for information concerning Appellant's private request in which it stated: 1) the Borough was unaware that a malfunctioning system served Appellant's property prior to statements made by Appellant at a Borough council meeting on November 4, 2002; 2) the

[4] 25 Pa. Code § 71.14(c).

Borough had adopted a Holding Tank Ordinance and was in the process of adopting an On-Lot Subsurface Storage Disposal Facilities Ordinance and a Small Flow Treatment Facility Agreement, which would address the sewage needs of residents such as the Appellant. (B. Ex. 1, at ¶ 13; C. Ex. 10.)

21. The Department reviewed Appellant's private request and the Borough's comments in response to that request and determined that the Borough's Official Plan adequately addressed Appellant's sewage disposal needs. (N.T. at 125, 143-144.)

22. The Department determined that under the Borough's Official Plan, a holding tank and a small flow treatment system are feasible alternatives to adequately address Appellant's sewage disposal needs. (N.T. at 126, 190, 192, 250-251.)

23. Appellant failed to provide the Department with cost estimates demonstrating that the sewage disposal alternatives provided under the Borough's Official Plan were not feasible. (N.T. at 165.)

24. The Department determined that Appellant failed to establish that a holding tank or small flow treatment system were inadequate alternatives to meet his sewage disposal needs. (N.T. at 126.)

25. By a July 1, 2003 letter, the Department denied Appellant's private request for failure to demonstrate that the Borough's Official Plan did not adequately address his sewage needs. (B. Ex. 1, at ¶ 14; C. Ex. 11.)

26. On August 1, 2003, Appellant, Marc Yoskowitz, appealed the denial of the private request to the Environmental Hearing Board. (Notice of Appeal.)

Estimated Cost of Connecting to the Borough's Sewer System

27. Nassaux-Hemsley estimated that the cost of extending the Borough's sewer

system to Appellant's property would be approximately $95,000 for a gravity system and $75,000 for a low pressure system with grinder pumps, and noted that the actual cost of implementation could be higher depending on the existence of unknown items on the property. (N.T. at 235-235; C. Ex. 8.)

28. Appellant did not obtain an independent estimate of the cost of connecting to the Borough's sewer system. (N.T. at 73.)

Estimated Cost of Operating a Holding Tank

29. Appellant estimated that the daily flow of sewage from his property is about 1,200 gallons per day for the 3 EDUs located on his property. (N.T. at 33.)[5] This estimate is based on the peak daily flow figures for the design of community onlot sewage systems provided in the Department's regulations. 25 Pa. Code § 73.17(b).

30. Appellant obtained an estimate from Hallstead Sanitary, which calculated his monthly operating costs of pumping out a holding tank on his property at $175.00 per 1,000 gallons. (N.T. at 37-38; A. Ex. 5.)

31. Based on Hallstead Sanitary's estimate of Appellant's projected costs, he estimated that the cost of operating a holding tank on his property is at least $6,000 per month. (N.T. at 37-39.)

32. Appellant testified that the cost of operating a holding tank on his property would require him to close his business. (N.T. at 39, 57.)

33. Andrew D'Agati is employed as the Sewage Enforcement Officer for Thompson Borough. (N.T. at 88-89.)

34. Mr. D'Agati testified that installing a holding tank on Appellant's property is a

[5] The term "EDU refers to "equivalent dwelling unit" which is a measurement of volume of sewage flow.

feasible alternative of addressing his sewage needs. (N.T. at 90-91.)

35. Mr. D'Agati testified that estimating the cost of installing a holding tank requires obtaining an actual measurement of the daily flow by placing a meter on the well and measuring daily usage and Appellant did not obtain this information. (N.T. at 92.)

Estimated Cost of Operating a Small Flow Treatment System

36. Appellant did not obtain cost estimates for installing a small flow treatment system on his property. (N.T. at 74-75, 85.)

37. Darryl Fritz is employed as a Sewage Plant Specialist Supervisor in the Department's Planning Section and Water Management Program. (N.T. at 187.)

38. Mr. Fritz testified that a small flow treatment system is a feasible alternative to address Appellant's sewage disposal needs. (N.T. at 190, 192.)

39. The Department has not received an application to install a small flow treatment system on Appellant's property. (N.T. at 193.)

40. Until Appellant undergoes an evaluation of his property, it is uncertain whether a small flow treatment system is a feasible sewage alternative. (N.T. at 208.)

DISCUSSION

The Board reviews all Department final actions *de novo*. *See, e.g., Pequea Township v. Herr*, 716 A.2d 678, 686-87 (Pa. Cmwlth. 1998); *Warren Sand & Gravel Co., Inc. v. Dept. of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975). In *Smedley v. DEP*, 2001 EHB 131, 155-160, Chief Judge Krancer clarified our duty in every case that comes before the Board:

> We must fully consider the case anew and we are not bound by prior determinations made by DEP. Indeed we are charged to "redecide" the case based on our *de novo* scope of review. The Commonwealth Court has stated that "*de novo* review involves full consideration of the case

> anew. The [EHB], as a reviewing body, is substituted for the prior decision maker, [the Department], and redecides the case." *Young v. Dept. of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth.1991); *O'Reilly v. DEP*, 2001 EHB 19, 32. Rather than deferring in any way to findings of fact made by the Department, the Board makes its own factual findings based solely on the evidence of record in the case before it. *See, e.g., Westinghouse Electric Corporation v. DEP*, 1999 EHB 98, 120 n.19.

In this appeal, Appellant bears the burden of proof and the burden of proceeding since he is the party asserting the affirmative of the issue. 25 Pa. Code § 1021.122 (a). In order to sustain this burden Appellant must prove by a preponderance of the evidence that the Department erred when it denied Appellant's private request. *Gasbarro v. DEP*, 1998 EHB 1264, 1272.

Our review of this matter is governed by Section 5(b) of the Sewage Facilities Act, 35 P.S. § 750.5(b), which states that "any person who is a resident ... in a municipality may file a private request with the department requesting that the department order the municipality to revise its official plan *if the resident ... can show that the official plan is not being implemented or is inadequate to meet the resident's ... sewage disposal needs.*" (Emphasis added.) The private request must include a list of reasons why the official plan is believed to be inadequate and contain evidence demonstrating that the official plan is not being implemented. 25 Pa. Code § 71.14.

Appellant's private request dated February 6, 2003, alleged that the Borough's Official Plan was inadequate to meet his sewage disposal needs because his property is served by a wildcat system, which directly discharges untreated sewage into Starucca Creek. Appellant also asserted that the Borough failed to identify each type of sewage disposal system within the Borough and any problems associated with those systems when preparing and revising its Official Plan.

In correspondence dated May 3, 2003 and June 5, 2003, the Borough provided the

following comments to the Department in response to Appellant's request: (1) The Borough was not aware of the wildcat system serving Appellant's property until he informed the Borough council of the matter in November of 2002; (2) the Official Plan allows for the use of a holding tank and small flow treatment system which are viable alternatives to meet Appellant's sewage disposal needs; (3) the additional expense of extending its sewer system to Appellant's property would be overly burdensome on both the Borough and its residents.

By letter dated July 1, 2003, after considering Appellant's private request and the comments of the Borough, the Department rejected Appellant's request to order the Borough to revise its Official Plan on two grounds: (1) Appellant's failure to prove that the sewage disposal alternatives provided under the Borough's Official Plan were inadequate to meet his sewage needs and (2) the additional cost the Borough and its residents would incur by including Appellant in the Borough's sewage service area.

In his appeal, Appellant argues that the Borough's Official Plan is inadequate to meet his sewage disposal needs for a number of reasons. He contends, first, that his property and malfunctioning sewage system are either not identified or are mischaracterized on the maps contained in the Official Plan and, second, that the Official Plan does not provide sewage service to the entire Borough. In response, the Department asserts that Appellant is barred from raising these objections because they are beyond the scope of his appeal. On this point, we agree with the Department. The aforementioned objections challenge the Official Plan, not the Department's denial of Appellant's private request, and thus are clearly outside the scope of this appeal as per our earlier ruling. *See Yoskowitz supra*, slip op. at 6.

Next, Appellant argues that the sewage disposal alternatives provided under the Official Plan are inadequate to meet his sewage needs. The Borough's Official Plan allows for the use of

a holding tank and small flow treatment system as alternatives to connecting to the Borough's sewer system.

Appellant asserts that a holding tank is not a feasible alternative of addressing his sewage needs due to the cost of maintaining a holding tank on his property. Appellant obtained an estimate from Hallstead Sanitary, which calculated his operating costs of pumping a holding tank at $175 per 1,000 gallons. (N.T. at 37-38, A. Ex. 5.) Appellant claims that his property generates wastewater flows in excess of 1,200 gallons per day. (N.T. at 33.) Based on these estimates, Appellant testified that the monthly cost of operating a holding tank on his property would be at least $6,000. (N.T. at 37-39.) In response, the Department and Borough (Appellees) argue that Appellant's estimate of the cost of operating a holding tank on his property is flawed because Appellant never obtained a measurement of the actual daily flow from his property.

We agree with the Appellees. Appellant's estimate of the cost of operating a holding tank on his property is based on peak daily flow figures for the design of community onlot sewage systems provided in the Department's regulations. *See* 25 Pa. Code § 73.17. However, these flow figures are not intended to be used for estimating daily flow in conjunction with a holding tank. 25 Pa. Code § 73.17(a). As Andrew D'Agati, the Borough's Sewage Enforcement Officer testified, estimating the cost of installing a holding tank requires a resident to obtain an actual measurement of their daily usage. (N.T. 88-89, 92.) Thus, without actually measuring his daily flow for the 3 EDUs on his property, Appellant's estimate of the cost of pumping out a holding tank on his property is purely speculative. Furthermore, Appellant failed to provide us with documentation such as an estimate of the cost involved in installing a holding tank on his property or an engineering report assessing the feasibility of placing a holding tank on his property. At trial, Mr. D'Agati testified that a holding tank is a feasible alternative of addressing

Appellant's sewage needs. (N.T. at 90-91.) Having received no evidence from Appellant to the contrary, we have reached the same conclusion.

Appellant also argues that a small flow treatment system is inadequate to address his sewage disposal needs. He contends that a small flow treatment system is not a viable alternative because the Department cannot guarantee him that he will receive a permit to implement a small flow treatment system on his property.

As the Appellees argue in their post-hearing briefs, Appellant seems to confuse who has the burden of proof in this case. The Appellees are under no obligation to assess whether a small flow treatment system or holding tank can adequately meet Appellant's sewage needs. Rather, it is the Appellant's burden to demonstrate that they are not feasible alternatives. Appellant has a duty to investigate and assess the feasibility and costs associated with these sewage systems in order to determine whether these systems provide feasible alternatives to address his sewage needs, which he has neglected to fulfill in this case. *See Shuey* v. *DEP*, EHB Docket No. 2002-269-R, (Adjudication issued August 10, 2005) slip op. at 52 (Appellants have a duty to come forward and prove their allegations by a preponderance of the evidence).

Furthermore, Appellant has provided us with no evidentiary support for the assertion that a small flow treatment system is inadequate to meet his sewage needs. Appellant has not obtained a cost estimate for installing and maintaining a small flow treatment system on his property. (N.T. at 74-75, 85.) Appellant did not conduct a feasibility study to determine whether a small flow treatment system is suitable for his property. Appellant has not submitted an application to the Department for the purpose of conducting a preliminary evaluation of a discharge source on his property. (N.T. at 193-196.) Mr. Fritz, a Sewage Planning Specialist for the Department, testified that there is, in fact, adequate space on Appellant's property for a small

flow treatment system. (N.T. 202-203.) Thus, Mr. Fritz opined that a small flow treatment system is a viable alternative to address Appellant's sewage needs. (N.T. 192-193.) Ultimately, we are unable to conclude that a small flow treatment system is inadequate to address Appellant's sewage needs because Appellant has presented us with no evidence which would lead us to that conclusion.

Having provided us with *no evidence* that the alternatives available under the Borough's Official Plan are inadequate to meet Appellant's sewage needs, we cannot find that the Department erred in denying Appellant's private request.

Our review of the record in this case reveals that Appellant's real objection to the sewage alternatives provided under the Borough's Official Plan is that he believes that the cost of implementing and maintaining a small flow treatment system or holding tank is too expensive.[6] Thus, Appellant seeks to have us order the Borough to revise its Official Plan to extend the sewer system to his property at no cost to him. The Board addressed the same scenario in *Force et al. v. DEP*, 1998 EHB 179.

In *Force*, the Board dismissed an appeal of the Department's denial of the private request of Lower Pottsgrove Township residents (Residents) who wanted to connect to the Township's sewer system "without prohibitive costs." *Id.* at 12. The Residents' properties were served by malfunctioning onlot sewage systems. The Township's Official Plan allowed the Residents to connect to the Township's sewer system to remedy the problem but the Residents did not want to absorb the cost of connecting to the sewer system. The Board declined to grant the Residents' request because the "[t]he question of the allocation of costs for the connection to the public

[6] The Borough has estimated that the cost of extending its sewer system to Appellant's property would be approximately $95,000 to implement a gravity system and $75,000 to install a low pressure system with grinder pumps. (N.T. at 232-235; C. Ex. 8.)

sewer system is a local government issue over which the Department has no power under the Sewage Facilities Act." *Id.* at 15. Applying this rationale to the situation at hand, we find no basis for ordering the Borough and its residents to bear the cost of connecting Appellant's property to the public sewer system. Appellant has presented us with no evidence that would warrant us to take such action. Moreover, the Borough has presented evidence that it would be an extreme burden to require its residents to finance the cost of connecting Appellant's property to the public sewer system.

Appellant insists that he will be forced to close his business if his property is not connected to the Borough's sewer system without cost, because he cannot afford any of the sewage alternatives provided under the Official Plan. This outcome would certainly be regrettable for both him and the residents who utilize his services. While we sympathize with Appellant's plight, he knew that the property was served by a malfunctioning system when he purchased it and thus assumed the risk of future problems associated with the system nonetheless.

In light of the fact that Appellant has presented us with no evidence demonstrating that the alternatives available under the Borough's Official Plan are inadequate to address his sewage disposal needs, we are disinclined to hold otherwise.

CONCLUSIONS OF LAW

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

2. Appellant has the burden of proving by a preponderance of the evidence that the Department acted unlawfully in denying Appellant's private request for a revision of Thompson Borough's Official Sewage Facilities Plan. 25 Pa. Code § 1021.122(a).

3. Appellant failed to show that the Department erred in concluding that the

Borough's Official Plan was adequate to meet Appellant's sewage disposal needs.

4. Appellant failed to demonstrate that a holding tank and small flow treatment system were not viable alternatives to meet his sewage needs.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MARC YOSKOWITZ	:	
	:	
v.	:	**EHB Docket No. 2003-172-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and THOMPSON BOROUGH, Intervenor	:	

ORDER

AND NOW, this 5th day of June 2006, it is hereby ORDERED that the appeal of Marc Yoskowitz is dismissed.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

GEORGE J. MILLER
Judge

THOMAS W. RENWAND
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: June 5, 2006

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

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2005-011-CP-K**
NOAH HOSTETLER, d/b/a AMERICAN LUMBER COMPANY	:	
	:	**Issued:** June 8, 2006

ADJUDICATION

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Board assesses a civil penalty of $20,500 for a timber harvesting operator's violations of the Clean Streams Law in failing to implement any erosion and sedimentation controls. The conduct was intentional and resulted in damage to a High Quality-Cold Water Fishery stream and destruction of springs feeding the stream.

PROCEDURAL BACKGROUND

The Department of Environmental Protection (Department or DEP) filed a Complaint on January 12, 2005 for civil penalties against Noah Hostetler, d/b/a American Lumber Company (Hostetler). The Complaint requests that the Environmental Hearing Board (Board) assess a civil penalty in the amount of $4,500 against Mr. Hostetler under the Clean Streams Law.[1]

Mr. Hostetler did not file an Answer to the Department's Complaint. The Department filed a "Motion for Deemed Admissions" (Motion). The Motion asked that the allegations in the

[1] The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended* by the Act of July 31, 1970, P.L. 653, 35 P.S. § 691.1, *et seq*.

Complaint be deemed admitted. Mr. Hostetler filed no response to the Motion. On January 23, 2006, the Board issued an Order Granting the Department's Motion for Deemed Admissions, ordering that all relevant facts set forth in the Department's Complaint were deemed admitted and providing that a trial would be scheduled to determine liability and hear evidence regarding the amount of the civil penalty to be issued.[2] Legal conclusions in the Complaint were not deemed admitted. *DEP v. Hostetler*, EHB Docket No. 2005-011-K (Order issued January 23, 2006).

A schedule for pre-trial submissions and trial was set by Pre-Trial and Trial Scheduling Order dated January 21, 2006. Mr. Hostetler did not file a pre-trial memorandum or any pre-trial documents of any type. He did not attend the trial, although it was duly noticed, held before Chief Judge Michael L. Krancer on March 27, 2006 in the Environmental Hearing Board's Courtroom in Harrisburg, Pennsylvania. At trial, the Department presented testimony of four witnesses and offered 21 exhibits into evidence, all of which were admitted. Based upon the Order dated January 18, 2006, which deemed admitted all relevant facts set forth in the Complaint and the trial testimony and exhibits, we make the following:

FINDINGS OF FACT

The Parties

1. The Commonwealth of Pennsylvania, Department of Environmental Protection (Department), is the agency with the duty and authority to administer and enforce the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, No. 325, *as amended*, 32 P.S. § 693.1, *et seq.* (Dam Safety and Encroachments Act or DSEA); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended* by the Act of July 31, 1970, P.L. 653, 35 P.S. §

[2] As will be discussed in more detail, it is the Environmental Hearing Board, not the Department, which has the authority, indeed the duty, to assess civil penalties under the Clean Steams Law. Thus, the Department's Civil Complaint is merely an advisory recommendation in that regard. *Westinghouse v. DEP*, 705 A.2d 1349, 1353 (Pa. Cmwlth. 1998).

691.1, *et seq.* (Clean Streams Law); the Rules and Regulations promulgated thereunder at 25 Pa. Code § 102.1, *et seq.* (Erosion and Sediment Control Regulations); and 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). Complaint, ¶ 1.

2. Noah Hostetler (Hostetler) is an adult individual doing business as American Lumber Company who maintains a business address in Beaver Springs, Snyder County, Pennsylvania. Complaint, ¶ 2.

Timber Harvesting Operations

3. Since June 3, 2003, Mr. Hostetler has conducted timber harvesting operations at a site located approximately 0.25 miles west of the SR 4003 and SR 4012 interchange along SR 4003 in West Beaver Township, Snyder County (Ulsh Gap Timber Harvesting Site). Complaint, ¶ 4.

4. On June 3 and 24, 2003, Mr. Hostetler did not develop, implement or maintain erosion and sedimentation control measures to effectively minimize accelerated erosion and sedimentation at the Ulsh Gap Timber Harvesting Site. Complaint, ¶ 5.

5. On June 3 and June 24, 2003, Mr. Hostetler caused or allowed sedimentation, which resulted from the accelerated erosion of the timber harvesting operation at the Ulsh Gap Timber Harvesting Site, to Ulsh Gap Run. Complaint, ¶ 6.

6. Ulsh Gap Run is a waterway of the Commonwealth designated as a High Quality–Cold Water Fishery. Complaint, ¶ 6; N.T. 40; *see also* 25 Pa. Code § 93.9m.

7. The classification of High Quality–Cold Water Fishery is determined by the Pennsylvania Fish and Boat Commission for streams that support the natural reproduction of wild trout. N.T. 40; *see also* 25 Pa. Code §§ 93.1, 93.3.

8. On June 3 and 24, 2003, Mr. Hostetler failed to incorporate appropriate erosion and sedimentation control measures for earth-moving activities at the Ulsh Gap Timber Harvesting

Site. Complaint, ¶ 7.

9. On June 3 and 24, 2003, Mr. Hostetler failed to implement best management practices for his timber harvesting operation at the Ulsh Gap Timber Harvesting Site. Complaint, ¶ 8.

10. Additionally, on June 13 and 19, 2003, Mr. Hostetler failed to establish best management practices at the Ulsh Gap Timber Harvesting Site. N.T. 12, 17, 18, 27, 28, 35, 36; Department's Exhibits, P-1 – P-17 (DEP Exs.).

11. On June 3, 13, 19 and 24, 2003, special protection best management practices were not implemented at the Ulsh Gap Timber Harvesting Site, even though the Ulsh Gap Timber Harvesting Site is designated as a special protection area. N.T. 13, 17.

12. Also on June 13, 2003, the Department observed encroachments over waterways at the Ulsh Gap Timber Harvesting Site. N.T. 27, 28, 39, 40; DEP Exs. P-2, P-9 – P-11.[3]

13. These encroachment violations were still present on June 19, 2003. DEP Exs. P-3, P-20.

14. During an inspection by DEP personnel on July 18, 2003 it was discovered that Mr. Hostetler had ameliorated the encroachment violations that existed at the Ulsh Gap Timber Harvesting Site by seeding and mulching the disturbed areas. Complaint, ¶ 16.

15. A water sample taken from Ulsh Gap Run near the Ulsh Gap Run Timber Harvesting Site at the time of the violations showed excessive turbidity and suspended solids in Ulsh Gap Run. N.T. 42-46; DEP Exs. P-18, P-19, P-21.

16. Department personnel met with Scott Chubb, an agent of Mr. Hostetler, at the Ulsh Gap Timber Harvesting Site on July 18, 2003; contacted Mr. Hostetler via letter on August 26, 2003 and July 12, 2004; and contacted Mr. Hostetler via telephone on February 20, March 9, March 11

[3] *See* Dam Safety and Encroachments Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1-693.27. An encroachment is defined as, "[a]ny structure or activity which in any manner changes, expands or diminishes the course, current or cross-section of any watercourse, floodway or body of water." 32 P.S. § 693.3; *see also* N.T. 27.

and July 6, 2004. Complaint, ¶ 15.

17. Pollution as defined by the Clean Streams Law, 35 P.S. § 691.1, occurred at the Ulsh Gap Timber Harvesting Site on June 3, 13 and 19. N.T. 13, 14, 26, 27, 36; DEP Exs. P-1–P-3, P-5–P-17.

18. Springs feeding Ulsh Gap Run at the Site were destroyed by Hostetler's conduct. N.T. 13, 14.

19. Approximately 2,000 feet of Ulsh Gap Run were adversely impacted by the operations of the logging operation due to the lack of appropriate controls. N.T. 41.

20. A water sample taken from Ulsh Gap Run in the vicinity of the Site and affected by the Site showed excess turbidity and suspended solids in Ulsh Gap Run to an extent that there would, as a result, be excessive mortality in the naturally reproducing trout population. N.T. 44-46; DEP Ex. P-21.

21. The violations of the Clean Streams Law as described in the paragraphs above subject Mr. Hostetler to civil penalties under 35 P.S. § 691.605. Complaint, ¶ 18.

22. The Department uses a Penalty Matrix to determine the recommended amounts for civil penalties. N.T. 63, 64; DEP Ex. P-21.

23. The Department used the pertinent excerpt of its Penalty Matrix to determine a recommended penalty amount range for the violations that occurred at the Ulsh Gap Timber Harvesting Site. N.T. 56, 57; DEP Ex. P-21.

24. For violations that occurred at the Ulsh Gap Timber Harvesting Site, the Department determined on its civil penalty matrix worksheet that the maximum penalty amount applicable to Hostetler was $14,500 but that it was seeking an amount of $4,500 from Mr. Hostetler. N.T. 56, 57; DEP Ex. P-20.

25. The record shows that Mr. Hostetler's conduct in violation of the law was calculated

and intentional.

26. The Complaint filed by the Department on January 12, 2005 against Mr. Hostetler requested the award to the Department of civil penalties in the amount of $4,500. *See* Complaint.

27. Prior to trial, Hostetler had actual notice that it is the Board, not the Department, that assesses civil penalties under the Clean Streams Law and the Dam Safety and Encroachments Act. DEP Pre-Hearing Memorandum, p. 5.

28. A trial was held in this matter on March 27, 2006 in front of the Honorable Chief Judge Michael L. Krancer of the Environmental Hearing Board.

29. The trial was duly noticed by Pre-Trial and Trial Scheduling Order issued January 26, 2006 as amended on February 1, 2006. *See* EHB Docket, Docket No. 2005-011-CP-K.

30. Mr. Hostetler declined to appear at the trial, and did not file any of the required pre-trial filings, such as a pre-trial memorandum, in preparation for trial.

DISCUSSION

The Board's duty and role in a civil penalty complaint case under the Clean Streams Law was well summarized by Judge Labuskes in *DEP v. Leeward Construction*, 2001 EHB 870, 885-86 as follows:

> Our role where the Department has filed a complaint for penalties under the Clean Streams Law is slightly different than our review in an appeal from the Department's assessment of a civil penalty. In an appeal from a civil penalty assessment, we determine whether the underlying violations occurred, and then decide whether the amount assessed is lawful, reasonable, and appropriate. *Farmer v. DEP*, EHB Docket No. 98-226-L (Adjudication issued March 26, 2001) *slip op.* at 13. Although our review of an assessment is *de novo*, we do not start from scratch by selecting what penalty we might independently believe to be appropriate. Rather, we review the Department's predetermined amount for reasonableness. *Stine Farms and Recycling, Inc., v. DEP*, EHB Docket No. 99-228-L (Adjudication issued September 4, 2001) *slip op.* at 18; *202 Island Car Wash, L.P. v. DEP*, 2000 EHB 679, 690.
>
> In contrast to an appeal from an assessment, the Board must make an independent determination of the appropriate penalty amount in a complaint action. The Department suggests an amount in the complaint, but the suggestion is

> purely advisory. *Westinghouse v. DEP*, 705 A.2d 1349, 1353 (Pa. Cmwlth. 1998) ("*Westinghouse I*"); *DEP v. Whitemarsh Disposal Corporation*, 2000 EHB 300, 346; *DEP v. Silberstein*, 1996 EHB 619, 637; *DEP v. Landis*, 1994 EHB 1781, 1787.
>
> The Board may assess a penalty of up to $ 10,000 per day for each violation of the Clean Streams Law. 35 P.S. § 691.605; *DEP v. Carbro Construction Corp.*, 1997 EHB 1204, 1227. In determining the penalty amount, the Board is to consider the willfulness of the violations, damage or injury to the waters of the Commonwealth or their uses, costs of restoration, and other relevant factors. *Id.* The deterrent value of the penalty is a relevant factor. *Westinghouse v. DEP*, 745 A.2d 1277, 1280-81 (Pa. Cmwlth. 2000) ("*Westinghouse II*"); *Whitemarsh*, 2000 EHB at 346. The Department bears the burden of proof. 25 Pa. Code § 1021.101(b)(1).

DEP v. Leeward Construction, 2001 EHB 870, 885-86. Echoing Judge Labuskes's words from *Leeward*, the Department in its Pre-Hearing Memorandum which the Department served upon Hostetler well before trial, reminded us and Hostetler that it is the Environmental Hearing Board, not the Department, which has the authority, and indeed the duty, to assess civil penalties under both the Clean Steams Law and the Dam Safety and Encroachments Act. DEP Pre-Hearing Memorandum, p. 5.

The record shows that Mr. Hostetler committed 13 separate violations of the law on four separate days. There were nine violations of the Clean Streams Law; four violations on June 3, 2003 and then five repeat violations on June 24, 2003. In between there were four violations of the Dam Safety and Encroachments Act's regulations on June 13th and June 19th. A catalogue of the violation history is as follows: June 3, 2003 (violation of 25 Pa. Code §§ 102.4, 102.11, 102.22 and CSL Section 402); June 13, 2003 (violation of 25 Pa. Code §§ 105.11, 105.46, regulations of the Dam Safety and Encroachments Act); June 19, 2003 (repeat violations of 25 Pa. Code §§ 105.11, 105.46); June 24, 2003 (violations of 25 Pa. Code §§ 102.4, 102.11, 102.22 and CSL Sections 401 and 402). DEP Ex. P-20.

It is clear that the violations were intentional and calculated. Hostetler showed no regard whatsoever for the law, nor any effort to comport his conduct of logging operations with the law.

Indeed, Mr. Hostetler, basically, openly and notoriously flouted the law. Mr. Hostetler's belated seeding and mulching of the disturbed areas involved in the violations of the Dam Safety and Encroachments Act and its regulations was a hollow gesture at best. At all times he performed his logging operations in complete disregard for the legal requirements of the Clean Streams Law and its regulations, which are aimed at ensuring that commercial or other activities which take place are done in a manner which will protect Ulsh Gap Run. As a result, the logging operations were performed at the cost to the Commonwealth and its citizens of needless and significant pollution of the stream and the destruction of springs which feed the stream.

The violative conduct resulted in significant, measurable and tangible environmental harm. Some springs feeding Ulsh Gap Run were destroyed. About 2,000 feet of Ulsh Gap Run was polluted with sediment and suspended solids. That pollution caused conditions to be ripe for excessive mortality of fish. As explained to the Board by a Department witness:

> The important thing about a wild trout stream and a high quality cold water fishery is that you have clean substrate, clean gravel. The wild trout are very dependent on clean water passing through the interstitial spaces between the gravel and rocks.
>
> They need well oxygenated water to be passing through this substrate. If you have silt deposition in the gravel, in the spaces between the gravel, that cuts down on the passage of well oxygenated water and the fish are no longer able to reproduce.
>
> The eggs have excessive mortality. Not only that, most of the organisms that these fish are dependent on to eat, the immature aquatic insects and larvae and other organisms that live in this space are also dependent on clean, well oxygenated water flowing in the interstitial space and, of course, the silt diminish that capability. So basically, the gravel becomes clogged and the critters can't live there anymore.

N.T. 45-46.

For these reasons, we find that the Department's penalty of $4,500 proposed in its Complaint is too inconsequential to fit the conduct and its consequences. Also, such an insignificant penalty would have no impact at all of deterring anyone, including even Hostetler

himself, from acting in the very same manner again in the future. Nor does the penalty take into account Mr. Hostetler's recidivism.

The Department characterizes the amount of $14,500 on its civil penalty matrix work sheet in this case as the "maximum" penalty potential for the total of the nine violations of the Clean Steams Law and the four violations of the Dam Safety and Encroachments Act regulations. DEP Ex. P-20. Apparently from this, it proposes in its post-trial brief that the Board assess a penalty of "at least $14,500." That is not the maximum potential civil penalty under the Clean Steams Law. The Clean Streams Law authorizes a penalty of $10,000 per day per violation. That would authorize a penalty of $90,000 for the Clean Steams Law violations alone. The Dam Safety and Encroachments Act also provides for a maximum penalty of $10,000 per violation plus $500 for each day of continued violation. 32 P.S. § 693.21. This adds another $26,000 to Hostetler's potential liability, leading to a total potential liability for his pattern of violations of $116,000.[4] A penalty of $14,500 in this case would still be too inconsequential in light of the circumstances of these violations and their result.

As I noted in a concurring opinion in *Leeward* in words that we think are applicable here,

> ...I think that a prominent theme of the civil penalty imposed in cases like this one, which involve such a flagrant and volitional course of chronic violative conduct, should be, at a minimum, to make sure that any and all profit that the violator may have made on the job on which it engaged in its pattern of illegal conduct is totally disgorged. We do not really know here whether, even after the imposition of the $ 258,500 penalty, Leeward still goes away from this job with a profit. It should not be allowed to retain any profit at all. Allowing Leeward in these circumstances to have profited at all from this transaction is not only wrong, but also it puts at a competitive disadvantage companies that take the steps and incur the costs to perform their activities in a law abiding fashion. This latter situation creates a synergy of adverse effect by simultaneously promoting the degradation of the environment and undermining the competitive free market system. Thus, I would have liked to have seen much more evidence elicited and

[4] There were two DSEA violations noted first on June 13, 2006 which had continued to at least June 19, 2003, a period of 6 days. That is ($10,000 x 2 violations) + ($500 x 2 violations x 6 days) for a total of $26,000. We note that it was on its next inspection of July 18, 2003 that the Department found these violations ameliorated by seeding and mulching, so these violations may have continued for additional days between June 19th and July 18th.

> presented on the economic aspects of the contract or contracts including, but not limited to, the base contract payment amount, costs to perform and profit earned. In addition, I would have also liked to have been in the position to have been able to have considered whether to add an appropriate additional amount of civil penalty, over and above the amount of the profit earned, for punishment and deterrence.

Id. at 918-19 (Krancer, J., concurring). Hostetler's conduct here certainly involves a flagrant and volitional course of chronic violative conduct.

Based on the nature of the conduct we have in this case and the damage caused by such conduct, we assess a penalty of $20,500. We calculate this by assessing $2,000 per violation for the first set of four Clean Streams Law violations on June 3, 2003 and assessing $2,500 per violation for the second set of five repeat violations on June 24, 2003. This is only a fraction of Hostetler's potential liability under just the Clean Streams Law. We have not assessed any penalty for the violations of the Dam Safety and Encroachments Act regulations.

Every day in this Commonwealth, timbering operations are conducted in full compliance and respect for the law by law-abiding business people. Not so with Mr. Hostetler. He made the decision to conduct his logging operations with complete disregard and disrespect for the norms of civilized commercial behavior. In so doing, he showed contempt for all of the citizens of Pennsylvania, including, incidentally, those loggers who conduct their operations legally. Moreover, Mr. Hostetler's operation was conducted at great cost to the citizens of Pennsylvania, which he intended to externalize completely to them to bear.

Assessment of a $20,500 penalty is reasonable and appropriate given the flagrant disregard for the law and the consequences which resulted. The stream was damaged and springs were destroyed. The penalty amount serves the purposes of deterring both Mr. Hostetler directly and others from engaging in such a course of conduct in the future. Also, the penalty calculation recognizes enhanced consequences for the repeat Clean Streams Law violations which ought to accompany recidivism.

We continue to invite the Department to delve into the information which I discussed in my concurring opinion in *Leeward.* We are not sure, given the absence of the evidence referred to, that the penalty of $20,500 may still be insufficient. We would not have hesitated to have imposed a higher penalty had we been presented appropriate evidence as outlined above, and if we thought a higher penalty would have been appropriate in light of that evidence.

CONCLUSIONS OF LAW

1. Pollution as defined by the Clean Streams Law, 35 P.S. § 691.1, occurred at the Ulsh Gap Timber Harvesting Site on June 3, 13 and 19. N.T. 13, 14, 26, 27, 36; DEP Exs. P-1–P-3, P-5–P-17.

2. Mr. Hostetler's failure to develop an erosion and sedimentation control plan constitutes a violation of the Clean Streams Law, 35 P.S. § 691.611, and the Erosion and Sediment Control Regulations at 25 Pa. Code § 102.4. Complaint, ¶¶ 5, 10.

3. Mr. Hostetler's actions in failing to incorporate appropriate erosion and sedimentation control for earth-moving activities constitutes unlawful conduct under the Clean Streams Law, 35 P.S. § 691.611, and the Erosion and Sediment Control Regulations at 25 Pa. Code § 102.11. Complaint, ¶¶ 7, 12.

4. Mr. Hostetler's actions in failing to implement best management practices for timber harvesting constitutes unlawful conduct pursuant to the Clean Streams Law, 35 P.S. § 691.611, and the Erosion and Sediment Control Regulations at 25 Pa. Code § 102.4. Complaint, ¶¶ 8, 13.

5. Mr. Hostetler's actions constitute unlawful conduct pursuant to Section 401 and 611 of the Clean Streams Law, 35 P.S. §§ 691.401, 691.611. Complaint, ¶¶ 6, 11.

6. Assessment of a $20,500 penalty is reasonable and appropriate given the flagrant disregard for the law and the damage caused thereby, and serves the purpose of deterring both Mr. Hostetler directly and others from engaging in such a course of conduct in the future.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2005-011-CP-K**
NOAH HOSTETLER, d/b/a AMERICAN LUMBER COMPANY	:	

ORDER

AND NOW, this 8th day of June, 2006, it is hereby ORDERED that civil penalties are assessed against Noah Hostetler, d/b/a American Lumber Company in the total amount of $20,500.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

GEORGE J. MILLER
Judge

THOMAS W. RENWAND
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: June 8, 2006

c: **DEP Bureau of Litigation Library**
Attention: Brenda K. Morris

For the Commonwealth, DEP:
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Office of Chief Counsel

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ROBACHELE, INC.	:	
	:	
v.	:	**EHB Docket No. 2005-091-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 14, 2006**

OPINION AND ORDER ON MOTION TO AMEND APPEAL

By Bernard A. Labuskes, Jr.

Synopsis:

The Board denies a motion to amend an appeal that would have had the effect of adding an untimely appeal from a previously unappealed Department action. The Board also denies a motion to amend an appeal to include a governmental estoppel/waiver defense filed after the hearing on the merits because the movant failed to prove that the nonmoving party would suffer no undue prejudice as required by the Board's rules at 25 Pa. Code § 1021.53(b).

OPINION

Robachele, Inc. filed this appeal from an April 8, 2005 order issued by the Department of Environmental Protection (the "Department") directing Robachele to cease mining without a license or a permit. We held a hearing on the merits of the appeal on May 2, 2006. At the hearing, the Department moved to limit Robachele from presenting any evidence challenging a second order, which the Department issued to Robachele on April 12. (Notes of Transcript pp.

("T.") 3-4.) The April 12 order was not identified in Robachele's notice of appeal as the action being appealed, but it was included in a packet of materials supplied by Robachele in response to our order to perfect its initially incomplete appeal papers. We granted the Department's motion in limine, at which point Robachele orally moved to amend its appeal to include the April 12 order. (T. 5-6.) We denied that motion. (T. 6.)

Robachele filed a written motion to amend two weeks later. Notwithstanding our ruling at the hearing, Robachele seeks to amend its appeal to include (1) an appeal from the April 12 order, and (2) an argument that "the Department should be estopped and/or has waived the ability to issue and/or pursue the April 8, 2005 and/or April 12, 2005 Order." With regard to the April 12 order, Robachele argues that it "inadvertently" failed to name the order in its notice of appeal. It reminds us that it did include a copy of the April 12 order, along with the April 8 order and various inspection reports, in its response to the Board's failure-to-perfect order. It notes that the Department did not allege at the May 2 hearing that it would be prejudiced by an amendment to the appeal to include the April 12 order. With respect to the request to add an estoppel/waiver defense, Robachele contends that it argued extensively that the Department was estopped from issuing the April 8 order at the May 2 hearing. The Department opposes the motion, asserting among other things that it would be prejudiced by such a late amendment.

April 12 Order

As previously noted, Robachele first moved to amend its appeal to include the April 12 order at the May 2 hearing. (T. 5-6.) We denied the motion at that time. (T. 6.) Robachele's written motion does not reference our May 2 ruling, but it should have. Robachele's latest motion is actually a petition for reconsideration. The motion in no way explains how Robachele has satisfied the prerequisites for granting a petition for reconsideration of an interlocutory order

that are set forth at 25 Pa. Code § 1021.151. The petition was late. 25 Pa. Code § 1021.151(a) (petition must be filed within 10 days of the ruling). The petition did not demonstrate or even reference any "extraordinary circumstances" justifying reconsideration of the matter. *Id.*; *Earthmovers Unlimited, Inc. v. DEP*, 2003 EHB 577, 578-80 (discussing need for extraordinary circumstances). To the extent we generally consider the criteria for granting reconsideration of final orders as a floor for considering reconsideration of interlocutory orders, *Earthmovers*, 2003 EHB at 578, those criteria also have not been alleged, let alone satisfied. *See* 25 Pa. Code § 1021.152.

Secondly, if we assume *arguendo* that a motion to amend is the appropriate procedural vehicle for obtaining the relief that Robachele seeks, the motion must be denied because it is not verified and supported by affidavits as required by our rules. 25 Pa. Code § 1021.53(c). Supporting affidavits are mandatory. *CNG Transmission Corp. v. DEP*, 1998 EHB 1, 3.

Third, and perhaps most importantly, an appeal may be amended to add additional grounds or objections challenging a Departmental action, but it may not be used as a device to file an untimely appeal from an entirely separate Departmental action. *Hopwood v. DEP*, 2001 EHB 1254, 1258. *Accord, Gemstar Corporation v. DEP*, 1997 EHB 367, 369 (appeal may not be amended after 30 days to add additional appellants). Robachele may not amend its appeal from the April 8, 2005 order to include a challenge to the April 12, 2005 order after the 30-day appeal period has expired for the April 12 order. Although we recently revised our rule on amendment of appeals to create a more liberal standard for allowing amendments, 25 Pa. Code § 1021.53; *see generally*, *Groce v. DEP*, EHB Docket No. 2005-246-R (May 26, 2006), the rule revision was not intended to eliminate the jurisdictional requirement that there be a timely appeal from each Departmental action.

Whether the Department would suffer undue prejudice from Robachele's back-door attempt to challenge the April 12 order is irrelevant. The amendment is impermissible because it would improperly expand our jurisdiction. Prejudice is not a factor.

We feel that it is appropriate to distinguish the instant situation from the circumstances presented in *Clabbatz v. DEP*, EHB Docket No. 2004-216-L (January 26, 2005). In *Clabbatz*, a *pro se* appellant filed an appeal from the Department's approval of a neighbor's package plant. We issued an order directing the appellant to perfect its appeal by describing the action for which review was sought and to file copies of the action. The appellant responded by filing copies of three Department actions relating to approval of the plant. The Department and the permittee moved to dismiss the appeal as untimely. In the context of interpreting a vague notice of appeal in the course of ruling on a motion for dismiss, we gave the appellant the benefit of the doubt and interpreted the appeal to refer to all three actions. We denied the motion to dismiss.

It is true that Robachele submitted inspection reports and the April 8 and April 12 orders in response to our failure-to-perfect order. It is there, however, that the similarity with *Clabbatz* ends. The motion before us involves a request to amend the appeal, not a request to interpret the notice of appeal as originally filed. (Robachele advanced such a theory at the May 2 hearing, but it has not pursued that approach here.) This matter does not involve a *pro se* appellant. This case does not involve a motion to dismiss wherein all doubts must be resolved in favor of the nonmoving party. Our immediate attention is not directed at interpreting the appeal; it is directed at whether to amend an appeal. Perhaps most to the point, Robachele's notice of appeal very clearly referenced the April 8 order and that order alone. The notice of appeal in the *Clabbatz* case was much more vague. Finally, *Clabbatz* involved the three-part approval process necessary for package plants. This case involves two distinct enforcement actions. None of

Robachele's objections in its notice of appeal specifically address the April 12 order. Robachele itself concedes that it "inadvertently" failed to list the April 12 order in its appeal. There is no way that we can consider Robachele's appeal, which clearly specified the "April 8, 2005 compliance order," to also have substituted for or served as an appeal from the April 12 order.

Of course, the proper vehicle for challenging the April 12 order was an appeal from that order. Robachele did not do that. Robachele might also have been able to challenge the fact of the violations in appeals from the two assessments of penalties that the Department issued against it for the violations giving rise to the orders. Robachele did not do that. Robachele also had the right to pursue an appeal *nunc pro tunc* if it believed that the circumstances warranted it. It did not do that. Having failed to take advantage of all of the proper avenues for an administrative challenge of the April 12 order, Robachele cannot now seek to remedy its mistakes by attempting to "amend" its appeal of the April 8 order. That avenue is simply not available.

Estoppel/Waiver Defense

Robachele does not ask to reopen the record in connection with its motion, so it is not entirely clear what it hoped to accomplish with respect to its request to amend its appeal to include a claim of governmental estoppel. It would appear that Robachele essentially seeks to comport its pleadings to the evidence produced, or at least arguments made, at trial. Such a maneuver is authorized under Pennsylvania Rule of Civil Procedure 1033, but this Board has not adopted that rule and it has never recognized such a maneuver. Allowing such a maneuver would be somewhat inconsistent with the preponderance of Board case law, which speaks of narrowing the issues in dispute starting with the notice of appeal and ending with post-hearing briefs. *Goheen v. DEP*, 2003 EHB 92. It is difficult to reconcile this so-called winnowing

process, *Wood v. DER*, 1993 EHB 299, 302, to the mid-trial (or as proposed here, post-trial) procedure described in Pa.R.Civ.P. 1033.

Although we stop short of saying that there can *never* under any circumstances be a post-hearing amendment, Robachele has certainly not shown that such an amendment would be appropriate here. Robachele claims that it argued the issue of governmental estoppel and/or waiver extensively at the hearing. We do not believe that characterization is entirely accurate. Robachele has argued, consistent with its notice of appeal, that it had the *landowner's* and the *permittee's* permission to be on the subject site, but it did not fairly articulate a claim of *governmental* estoppel. (*See, e.g.*, T. 58.) Robachele has consistently maintained that it had "permission" to mine the site, but that permission theory is drawn from the portions of the Department's enforcement documents that referred to the *permittee's* permission. (T. 54.) Obviously, the permittee cannot estop the Department or waive Robachele's duty to comply with the law. As recently as Robachele's pre-trial memorandum, Robachele only claimed that it had the permission of the *landowner*. (Pre-Trial Memorandum Section II ¶ 2.) There is no similar allegation regarding the Department. In short, Robachele's latest claim of governmental estoppel comes out of the blue.

A party who seeks to comport pleadings to developments at trial usually does so during trail because of surprises at trial and/or the absence of objection, prejudice, or surprise. Here, Robachele did not clearly raise governmental estoppel at trial, it makes no effort to explain why it could not have raised its theory in advance, there were no surprises, and the Department had no opportunity to object or develop its own case because the theory was never clearly articulated.

Furthermore, Robachele's proposed amendment is not in fact consistent with any evidence produced at trial. Robachele put on absolutely no evidence of governmental estoppel.

The sole Department witness repeatedly denied knowing that Robachele was ever on the site prior to the order under appeal. (T. 36-44.) Robachele did not call any of its own employees, who presumably would have been in the best position to provide testimony that the Department gave Robachele permission to mine without a license or a permit.

Thus, Robachele's post-trial motion presents a new theory and there is no existing evidence to support it. It represents nothing less than an effort to skirt our rules and case law regarding the delineation of issues in dispute in notices of appeal and pre-hearing disclosures.

Regardless of when a motion to amend is submitted, whether to allow an amendment after the period for amendments as of right is, of course, within the Board's discretion. 25 Pa. Code § 1021.53(b). The Board *may* grant such a motion where the nonmoving party will not suffer any under prejudice. *Id.* The burden of proving that no undue prejudice will result to opposing parties is on the party seeking to amend. *Id.* Robachele has clearly not met that burden here.

Our new rule regarding amendments to appeals does not establish a deadline for filing motions to amend. Late pre-hearing amendments may be entirely appropriate, *Groce, supra*, or not, *Achenbach v. DEP*, EHB Docket No. 2004-202-C (April 28, 2006), depending upon the circumstances of each individual case. The timing of a motion is certainly not dispositive, *Global Ecological Services, Inc. v. DEP*, 2001 EHB 74, 77-78, but we imagine that it will be the very rare amendment that will be allowed after the hearing on the merits is closed.

Here, Robachele filed its motion to amend its appeal to include an estoppel/waiver defense on May 16, fourteen days *after* the hearing on the merits. To repeat, Robachele has made no attempt to explain why it did not raise its theory earlier. It has not specified why the Department would not be prejudiced by this late addition. There were no surprise revelations at

the hearing by the Department that make the proposed amendment necessary or appropriate. If we were to allow the amendment, the Department would be required to brief an issue never previously raised in this case. The Board would be required to address an important legal issue without an adequate record.

In assessing prejudice, we must also look at the substance of the proposed amendment and consider the extent to which it diverges from the original appeal. Here, estoppel and waiver are generally considered affirmative defenses. *DEP v. Whitemarsh*, 1998 EHB 832, 835. In some settings, they must be specifically pled. The facts, circumstances, and legal principles relevant to an estoppel or waiver defense are usually distinct from the facts, circumstances, and legal principles that pertain to the primary case. Robachele's attempt to add these types of claims this late in the game is another indication of prejudice. The Department's complaint that it would be prejudiced if Robachele were permitted to add an governmental estoppel claim is entirely credible. We conclude that Robachele has fallen far short of proving to us that no undue prejudice would result to the Department if we were to grant its motion to amend.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBACHELE, INC.	:	
	:	
v.	:	**EHB Docket No. 2005-091-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 14th day of June, 2006, it is hereby ordered that Robachele's motion to amend is denied.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: June 14, 2006

c: **DEP Bureau of Litigation:**
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

GEORGE AND MELANIE DEVAULT	:	
	:	
v.	:	**EHB Docket No. 2006-083-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND UPPER MILFORD TOWNSHIP, Permittee	:	**Issued: June 29, 2006**

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Judge

Synopsis:

The Board denies a motion to dismiss an amended Notice of Appeal on the basis of untimeliness where Appellants' alleged untimely filing was a result of Board error.

OPINION

This matter was initiated with the March 10, 2006 filing of a Notice of Appeal by George and Melanie DeVault (Appellants) seeking review of the Department of Environmental Protection's (Department) January 27, 2006 approval of Upper Milford Township's (Permittee) proposed Official Sewage Facilities Plan revision. On March 14, 2006, the Board issued an Order directing Appellants to perfect their appeal pursuant to 25 Pa. Code § 1021.51 by filing with the Board on or before April 3, 2006 the following information: proof of service that the proper officials at the Department and Township were served with the Notice of Appeal. Also included in the Order was a statement informing Appellants that the time allowed for amendment of their appeal as of right expired on March 31, 2006, 20 days from the date their Notice of

Appeal was docketed by the Board. On March 31, 2006, Appellants filed an amended Notice of Appeal raising additional objections to the Department's action along with proof of service that the proper officials at the Department and Township were served with the amended Notice of Appeal. As a result of Appellant's submission of this information, the Board issued an Order to Appellants deeming their appeal perfected.

Presently before the Board is the Permittee's motion to dismiss the amended Notice of Appeal filed by Appellants on March 31, 2006. The Department joins in this motion. The Department and Permittee (Appellees) seek to dismiss the amended Notice of Appeal on the basis that more than 20 days elapsed between the filing of Appellants' original Notice of Appeal and their amended Notice of Appeal and thus the amended Notice of Appeal was not filed in a timely manner. Appellees also argue that dismissal of the amended Notice of Appeal is appropriate here because Appellants failed to seek relief from the Board to amend their appeal to raise additional objections beyond those stated in their original Notice of Appeal. *See* 25 Pa. Code § 1021.53(b). In response, Appellants contend that their amended Notice of Appeal was timely as it was filed by the deadline for amendment specified in the Board's March 14, 2006 Order.

The Board evaluates motions to dismiss in the light most favorable to the non-moving party. *Solebury Township v. DEP*, 2004 EHB 23, 28; *Neville Chemical Co. v. DEP*, 2003 EHB 530-531; *Ainjar Trust v. DEP*, 2000 EHB 505, 507. The Board treats motions to dismiss the same as motions for judgment on the pleadings: a motion to dismiss will only be granted where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282.

Pursuant to the Board's Rules of Practice and Procedure, "an appeal ... may be amended as of right within 20 days after the filing thereof." 25 Pa. Code § 1021.53(a). Subsequent to the "20-day period for amendment as of right, the Board upon motion by the appellant ... may grant leave for further amendment of the appeal." *Id.* at (b). Appellees argue that Appellants' filing of their amended Notice of Appeal on March 31, 2006 was beyond the 20-day period during which Appellants had the right to amend their appeal without seeking leave of the Board to do so. Thus, Appellees insist that this filing did not effectuate amendment of the Notice of Appeal. Conversely, Appellants assert that their amended Notice of Appeal was not untimely because they followed the terms stated in the Board's March 14, 2006 Order, which states that the 20-day period for amendment of the appeal as of right expires on March 31, 2006.

The Pennsylvania Supreme Court has recognized that a breakdown in a court's operations occurs when an administrative board or body is negligent, acts improperly, or unintentionally misleads a party. *Union Electric Corp. v. Board of Prop. Assessment et al.*, 746 A.2d 581, 584 (Pa. 2000). There are instances where courts have declined to dismiss appeals for untimeliness where the problem arose as a result of the trial court's misstatement of the appeal period, which by the Supreme Court's definition, operated as a breakdown in the court's operations. In *Commonwealth v. Parlante*, 863 A.2d 927, 929 (Pa. Super. 2003), a trial judge informed Parlante at sentencing that she had 30 days to file a post-sentence motion and if that motion was denied, then she would have 30 days from the date of the denial to appeal to the Superior Court. Parlante filed a motion to modify her sentence on October 29, 2001, and the motion was denied on the same day. Parlante filed an appeal of this decision 29 days after the denial of her petition for modification. However, under the applicable Pennsylvania Rule of Criminal Procedure, motions seeking modification of a sentence in circumstances similar to Parlante's must be filed within 10 days of the date of the imposition of the sentence. Pa.R.Crim.P. 708(D). The filing of a motion

to modify does not toll the 30-day appeal period. *Commonwealth v. Coleman*, 721 A.2d 798 (Pa. Super 1998); Pa.R.Crim.P. 708(D). Although Parlante's appeal was facially untimely, the court declined to quash her appeal because it determined that "Parlante's error resulted from the trial court's misstatement of the appeal period, which operated as a breakdown in the court's operations." *Parlante, supra* at 929. *See* also *Commonwealth v. Coolbaugh*, 770 A.2d 788, 791 (Pa. Super. 2001) (the trial court declined to quash appeal as untimely where it gave appellant erroneous information as to the appeal period). Applying the same rationale to the facts presented in the instant case, we are not inclined to dismiss Appellant's amended Notice of Appeal.

Appellant's original Notice of Appeal was filed on March 10, 2006, thus, the 20-day filing period to amend as of right expired on March 30, 2006. Since Appellant's amended Notice of Appeal was received on March 31, 2006, on its face, the amended appeal is untimely. However, Appellants' tardy filing of their amended Notice of Appeal was a result of the Board's misstatement of the amendment period in its March 14, 2006 Order, which incorrectly stated that the 20-day period for amendment expired on March 31, 2006. The Board's misstatement of the amendment period obviously led Appellants to believe that they had until March 31, 2006 to amend their appeal, and this operated as a breakdown in the Board's process. *See Thomas v. DEP*, 2000 EHB 598, 601-608, *recon. denied* 2000 EHB 728; *Washington Township v. DER*, 1995 EHB 403; *JEK Construction Co. v. DER*, 1987 EHB 643. Since Appellants' tardy filing of their amended Notice of Appeal was a result of a breakdown in the Board's operations, we will not dismiss the amended Notice of Appeal on the basis of untimeliness.

In light of the foregoing, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GEORGE AND MELANIE DEVAULT	:	
	:	
v.	:	**EHB Docket No. 2006-083-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND UPPER MILFORD TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 29th day of June, 2006, upon consideration of Upper Milford Township's motion to dismiss, in which the Department joins, it is hereby ORDERED that the motion to dismiss is **DENIED**.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Judge

DATED: June 29, 2006

c: **DEP Bureau of Litigation:**
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

LOWER MILFORD TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2006-109-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GERYVILLE MATERIALS, INC., Permittee	:	**Issued:** June 29, 2006

OPINION AND ORDER DENYING DISMISSAL ON ACCOUNT OF MOOTNESS

By Michael L. Krancer, Chief Judge and Chairman

Synopsis

The Board denies motions to dismiss an appeal as moot since the questions raised are capable of repetition and would evade review and involve questions of important public interest under the Noncoal Surface Mining Conservation and Reclamation Act and its regulations and their impact on noncoal mining exploration activities.

Factual and Procedural Background

Lower Milford Township appeals in this action the Department's issuance to Geryville Materials, Inc. of a letter dated March 1, 2006 which states that: "[y]ou [Geryville Materials] are hereby granted a waiver from the requirement to obtain a permit to conduct noncoal exploration under 25 Pa. Code § 77.109." We will refer to the letter as the Permit Waiver Letter. We have already issued an opinion and order denying Lower Milford's Petition for Supersedeas of the

Permit Waiver Letter. *Lower Milford Township v. DEP*, Docket No. 2006-109-K (Opinion issued May 3, 2006). We refer the reader to that opinion for a full explanation of the facts underlying this case.

The Department's Permit Waiver Letter was in response to Geryville's filing with the Department on February 17, 2006 a completed document bearing the title, "Noncoal Exploration Notice of Intent To Explore Or Request For Permit Waiver" (Geryville NOI/RFPW). The Geryville NOI/RFPW specifically provides that the period of intended exploration is from March 1, 2006 to May 31, 2006. The Permit Waiver Letter states that, "[t]he period of exploration shall be limited to May 31, 2006." The Board issued an Order dated May 16, 2006 asking the parties to address in briefs whether the May 31, 2006 limiting date resulted in the matter being moot for that reason as of that date. The parties have submitted those briefs and that is one issue before us today.

Before us also are the Department's Motion to Dismiss in which Geryville joins, Geryville's Motion to Dismiss and Geryville's Motion For Summary Judgment, all of which argue that the matter is moot from another perspective. The Department, and Geryville by joining the Department's Motion, contend that the case is moot because the Department, in a letter dated April 25, 2006, rescinded the "permit waiver" aspect of the original Permit Waiver Letter. Thus, the appealed from action stands modified in such a way that it is of a different character and consequence. We described the Department's Motion to Dismiss in our opinion denying the supersedeas petition because the Motion had been filed in the interim between the April 20, 2006 supersedeas trial and the issuance on May 3, 2006 of our opinion. In our supersedeas opinion we described the circumstances underlying the Department's Motion to Dismiss as follows:

> On April 28, 2006, the Department filed a Motion to Dismiss the Notice of Appeal on the basis that the Permit Waiver is not an appealable action. The

> Department argues that no DEP action is involved with respect to the exploration aspect of the letter and that a permit waiver to allow removal of minerals solely for the purposes of testing the minerals is an unappealable exercise of the Department's enforcement discretion. However, underlying the Department's motion are these events which followed the supersedeas trial in close order. On April 21, 2006, the day after the supersedeas trial, Geryville's consultant submitted a letter to DEP which says that the drilling of the boreholes was completed on April 1, 2006 and that the holes were finished into groundwater monitoring wells. The letter goes on to say that "exploration activities are now complete." Finally, the letter states that a groundwater pumping test will be completed within the next several weeks. The Department immediately responded to that letter with a letter dated April 25, 2006 to the consultant. The Department's letter acknowledges the April 21, 2006 letter from the consultant and says that it understands that exploration activities have been completed at that site and that no minerals were removed from the site under the Permit Waiver. The letter goes on to say that "[t]he Department's March 1, 2006 letter...is modified to rescind the permit waiver in the first instance, as no minerals were removed from the site."

Id., slip op. at 3 n.1. On May 26, 2006, Lower Milford filed an appeal of the Department's April 25, 2006 letter and that appeal is pending as EHB Docket No. 2006-147-K.

Geryville joined in the Department's Motion to Dismiss in the instant case. Geryville's own Motion to Dismiss argues that the matter should be dismissed as moot because all the exploration intended to be covered by the NOI/RFPW and the Permit Waiver Letter is now over. Moreover, the Permit Waiver Letter as appealed has been withdrawn and modified and does not exist anymore.

Lower Milford argues that the matter is not moot or that it falls within one or more of the traditional exceptions to the mootness doctrine. It argues in conclusory fashion that the initial action of DEP, *i.e.*, the Permit Waiver Letter is not moot in that it "is still ongoing" and that representations to the effect that the exploration is completed and no mineral material was removed from the site are "thus unavailing because it is an error of law and an abuse of discretion." Lower Milford Brief In Opposition To Department of Environmental Protection Motion to Dismiss, p. 5. Lower Milford also argues, apparently based on its reading of the

Noncoal Surface Mining Conservation and Reclamation Act and its regulations, that whatever activities Geryville disclosed it was intending to undertake in its NOI/RFPW, and that it did undertake on the site, required a surface mining permit. Thus, it argues that a "waiver" or "permit waiver" for any or all of those activities is illegal under the governing statute and/or the regulations. Lower Milford also argues that we should not treat the matter as moot since the Geryville NOI/RFPW and the resultant Permit Waiver Letter are of such short duration that the situation is quite capable of repetition and the statutory and regulatory contentions it makes in this case would evade review each time. Moreover, the issues it presents through its statutory and regulatory theories are of such high public importance that we ought to keep the matter and issue a decision.

Statutory and Regulatory Background

Nobody disagrees that a permit is required to operate a surface mine. Section 3307(a) of the Noncoal Surface Mining Conservation and Reclamation Act, 52 P.S. § 3301—3324, provides as follows in that regard:

> **Permit Required.** Except as provided in section 24, no person shall operate a surface mine or allow a discharge from a surface mine unless the person has first obtained a permit from the department in accordance with this act and unless the person is operating in accordance with the conditions provided in the permit as well as the applicable statutes and regulations. The department may impose such permit conditions as are necessary to carry out the purposes of this act. The department is authorized to charge and collect from persons a reasonable filing fee, which shall not exceed the cost of reviewing, administering and enforcing the permit.

52 P.S. § 3307(a).[1] The Noncoal Surface Mining Conservation and Reclamation Act also provides for a very broad definition of "surface mining." *See* 52 P.S. § 3303; 25 Pa. Code § 77.1; *Holbert v. DEP*, 2000 EHB 796, 811-17. Part of Lower Milford's argument in this appeal

[1] Section 24 of the Noncoal Surface Mining Conservation and Reclamation Act is a "grandfather" clause relating to pre-existing permits. 52 P.S. § 3324.

and in this motion practice is that the Permit Waiver Letter, whether viewed as allowing material to be removed for testing, or just the drilling for monitoring wells, since that activity also involves the removal of material from the ground, involves "mining activity" for which a permit is required.

The Department's Permit Waiver Letter rests on the purported authority of 25 Pa. Code § 77.109. Section 77.109 appears to cover two different types of activity: (1) "exploration only" in which no noncoal minerals are removed for which only notice to the Department is required, 25 Pa. Code § 77.109(a); and (2) exploration in which noncoal minerals are removed, 25 Pa. Code § 77.109(e), for which a surface mining permit is required but the Department may waive the permit requirement if only testing and analysis of the properties of the material is being done, 25 Pa. Code § 77.109(e). Under the "exploration only" provisions of Section 77.109(a), the party is required to notify the Department of its intent to conduct the activities within 10 days prior to commencement thereof, provide certain information about the nature and purpose of the exploration and conduct such activities in conformance with certain performance standards. 25 Pa. Code § 77.109. The party may commence exploration in the absence of any request from the Department for additional information. 25 Pa. Code § 77.109(c).

Again, Lower Milford challenges the legal basis for this dichotomy in 25 Pa. Code § 77.109 as being unsupportable by either the Noncoal Surface Mining Conservation and Reclamation Act or 25 Pa. Code § 77.101 which defines "noncoal surface mining activity." The definition of "noncoal surface mining activities" under 25 Pa. Code § 77.101 is:

> *Noncoal surface mining activities*—The extraction of minerals from the earth, from waste or stockpiles or from pits or from banks by removing the strata or material that overlies or is above or between them or otherwise exposing and retrieving them from the surface. The term includes strip mining, auger mining, dredging, quarrying and leaching and the surface activity connected with surface or underground mining, including, but not limited to, exploration, site preparation,

entry, tunnel, drift, slope, shaft and borehole drilling and construction and activities related thereto. The term does not include mining operations carried out beneath the surface by means of shafts, tunnels or other underground mine openings. The term does not include the following:

(i) The extraction of minerals by a landowner for the landowner's noncommercial use from land owned or leased by the landowner.

(ii) The extraction of sand, gravel, rock, stone, earth or fill from borrow pits for highway construction purposes of the Department of Transportation or the extraction of minerals under construction contracts with the Department if the work is performed under a bond, contract and specifications that substantially provide for and require reclamation of the area affected in the manner provided by the act.

(iii) The handling, processing or storage of slag on the premises of a manufacturer as a part of the manufacturing process.

(iv) Dredging operations that are carried out in the rivers and streams of this Commonwealth and in Lake Erie.

(v) The extraction, handling, processing or storing of minerals from a building construction excavation on the site of the construction if the minerals removed are incidental to the building construction excavation, regardless of the commercial value of the minerals. For purposes of this section, the minerals removed are incidental if the excavator demonstrates that:

(A) Extraction, handling, processing or storing are conducted concurrently with construction.

(B) The area mined is limited to the area necessary to construction.

(C) The construction is reasonably related to the use proposed for the site.

(vi) The removal and sale of noncoal materials from retail outlets.

25 Pa. Code § 77.101.

Unfortunately, the form developed by the Department under 25 Pa. Code § 77.109, and provided to DEP by Geryville in this case, conflates the two activities treated by that Section. The NOI/RFPW form is entitled, "Noncoal Exploration Notice of Intent To Explore Or Request For Permit Waiver." Mr. Laslow, who supervises the mining engineers in the Department's

Pottsville office, agreed that the NOI/RFPW packages together the notification of the intent to explore on the one hand and the request for permit waiver for exploration, involving removal of mineral material for testing and analysis, on the other hand. Supersedeas Tr. 267. This conflation is unfortunate and confusing. The confusion arises because, under the Department's theory of 25 Pa. Code § 77.109, the former activity would be beyond the ambit of the surface mining permit program and requires only notice, while the latter activity is within the mining permitting program but subject to the Department's discretion to grant a waiver of the requirement that a surface mining permit be obtained.

The Permit Waiver Letter of March 1, 2006 continues and compounds the conflation just mentioned since it provides that, "[y]ou are hereby granted a waiver from the requirement to obtain a permit to conduct noncoal exploration under [25 Pa. Code §] 77.109." In this case Geryville anticipated conducting and conducted only exploration activities, *i.e.*, drilling boreholes for hydrogeologic purposes. It neither planned to nor did remove any minerals for testing or analysis. Thus, the language just quoted from the Permit Waiver Letter would seem to be superfluous if not a *non sequiter*.

Discussion

We have said before that, "[t]his Board repeatedly has stated that where an event occurs during the pendency of an appeal before the Board which deprived it of the ability to provide effective relief, the matter becomes moot." *Braxton Cooley v. DEP*, 2005 EHB 761, *citing Valley Forge Chapter of Trout Unlimited v. DEP,* 1997 EHB 1160, 1163 (appeal of original NPDES permit dismissed as moot because amended NPDES permit was issued that superseded the specific condition in the original NPDES permit challenged in the appeal). As is very well established and as so observed in *Harriman Coal Corporation v. DEP*, 2000 EHB 1295,

> However, exceptions to the mootness doctrine exist "where the conduct complained of is capable of repetition yet likely to evade review, where the case involves issues important to the public interest, or where a party will suffer some detriment without the court's decision." *Sierra Club v. Pennsylvania Public Utility Commission*, 702 A.2d 1131, 1134 (Pa.Cmwlth.1997), *aff'd*, 731 A.2d 1133, 1134 (Pa. 1999).

Id. at 1298. As we also said in *Solebury Township v. DEP*, 2004 EHB 23, the *Sierra Club* exception to the mootness doctrine "is still very much alive and well in Pennsylvania." *Id.* at 32.

We think this case falls under the *Sierra Club* exception to mootness. By its terms the Permit Waiver Letter expires 60 days upon its issuance. Others do the same we would think. Thus, these permit wavier letters are inherently of a fleeting nature. Their lifespan is certainly shorter than the time it takes to litigate a challenge to their terms or their legality. Thus, the questions posed and challenges made by Lower Milford to the Department's action in this case in issuing the Permit Waiver Letter would recur and would seemingly always evade review.

We cannot agree that the Department's letter dated April 25, 2006 impacts our analysis. To so hold would be to, in essence, hold that the Department's bifurcated treatment of the activities described in 25 Pa. Code § 77.109 is indeed the correct view and that would be putting the rabbit in the hat. All of those questions are and should be preserved for review.

We also believe that this appeal presents questions of important public interest about the relationship between the Noncoal Surface Mining Conservation and Reclamation Act and its regulations and how both affect mining exploration activities. *In Re: Canvass of Absentee Ballots of November 4, 2003*, 843 A.2d 1223, 1226 (Pa. 2004)(matter not moot since it is an important issue, of general concern beyond the instant case, which is capable of repetition and of escaping review). The conflicting views on that subject presented by Lower Milford on the one hand and Geryville and the Department on the other hand impact everyday activities in the Commonwealth. Noncoal mining is a widespread activity and these conflicting views are of

such import with respect to that activity that the public, the regulated community and the regulators ought to have answers.

Accordingly, we deny the various pending motions seeking dismissal of this appeal on the grounds of mootness. Moreover, we will consolidate this appeal with the extant appeal at EHB Docket No. 2006-147-K because, as we have already alluded to, the matters are inextricably intertwined. An order consistent with this opinion follows.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

LOWER MILFORD TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2006-109-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GERYVILLE MATERIALS, INC., Permittee	:	

ORDER

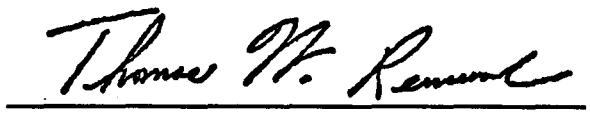
AND NOW, this 29th day of June, 2006, the Motion to Dismiss of the Department and the Motion to Dismiss and Motion for Summary Judgment of Geryville are **denied**. IT IS FURTHER ORDERED that EHB Docket Nos. 2006-109-K and 2006-147-K are consolidated at the following docket number, which should be reflected on all future filings with the Board:

LOWER MILFORD TOWNSHIP	:	
v.	:	**EHB Docket No. 2006-109-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GERYVILLE MATERIALS, INC., Permittee	:	**(Consolidated with 2006-147-K)**

ENVIRONMENTAL HEARING BOARD

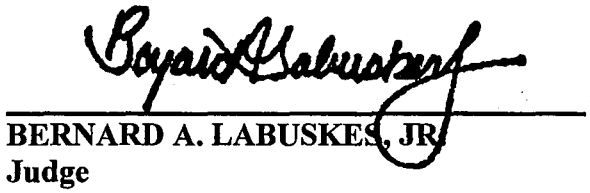
MICHAEL L. KRANCER
Chief Judge and Chairman

GEORGE J. MILLER
Judge



THOMAS W. RENWAND
Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

DATED: June 29, 2006

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

PETER R. SWISTOCK, JR.	:	
	:	
v.	:	**EHB Docket No. 2005-158-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMFIRE MINING CO., Permittee	:	**Issued: June 29, 2006**

OPINION AND ORDER ON MOTION FOR SANCTIONS

By George J. Miller, Judge

Synopsis

The Board dismisses an appeal of a pro se appellant because the pattern of the appellant's failure to respond to discovery requests and abide by orders of the Board evidences a refusal to comply with the appeals process before the Board.

OPINION

Before the Board is a motion for sanctions filed by Amfire Mining Co. (Permittee), which seeks sanctions against Peter Swistock (Appellant) for failing to answer discovery and comply with orders of the Board. For the reasons described below, we will grant the Permittee's motion.

This matter was commenced with the filing of a notice of appeal by the Appellant on June 7, 2005, which challenged the issuance of a surface mining permit by the Department to the Permittee. After granting the Appellant a substantial period of time in

which to secure the representation of counsel, the Board extended prehearing deadlines and by order dated January 2, 2006, set a discovery deadline of May 10, 2006. The Permittee served the Appellant with interrogatories on February 17, 2006, and with a notice of deposition for April 5, 2006. The Appellant failed to respond to the interrogatories, and on March 31, 2006, the Permittee filed a motion to compel. The Board contacted the Appellant to arrange a conference call to discuss the motion but the Appellant said he could not be available for a call. Accordingly by order dated April 11, 2006, the Board ordered the Appellant to answer the interrogatories on or before May 1, 2006 and to appear for a deposition the week of May 11, 2006. All other discovery was to be completed by May 30, 2006.

Because the Appellant failed to answer the Permittee's interrogatories by May 1, 2006, his deposition properly was cancelled. On May 9, 2006, the Permittee filed a motion for sanctions requesting the Board to compel answers to the discovery requests or, among other proposed sanctions, dismiss the Appellant's appeal. The Appellant also did not respond to the Permittee's motion for sanctions, even after being requested by the Board to do so. Accordingly, on June 14, 2006, the Board issued a rule to show cause to the Appellant directing a response to the motion for sanctions or suffer dismissal of his appeal on or before June 26, 2006. The Appellant did file an answer as required by the June 14 Order, but offered no excuse for failing to answer the discovery, except to style the Permittee's requests as "harassment." The Appellant contends that the information requested by the Permittee is in the permit application and that all motions "appear to be

an attempt to further harass the Appellant."[1] His answer, nevertheless, requests a hearing, but does not offer to respond to discovery in any way.

The Board has broad powers under its rules of procedure to impose sanctions for failure to comply with orders of the Board:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding the introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including those permitted under [Pennsylvania Rule of Civil Procedure] 4019 (relating to sanctions regarding discovery matters.[2]

Accordingly, the Board has dismissed an appeal for a failure to file answers to interrogatories or respond to discovery requests.[3] The Board recently dismissed an appeal for failing to comply with orders of the Board signifying an intent not to pursue an appeal.[4]

We are well aware that the Appellant in this matter has been unsuccessful in securing the services of an attorney. We permitted some departure from the strict application of the rules of procedure because of his *pro se* status. However, as we have warned this Appellant and others who represent themselves, those who proceed without counsel assume the risk that their lack of legal training may prove their undoing.[5] The

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[1] Appellant's Answer, ¶ 7.

[2] 25 Pa. Code § 1021.161; *RJM Manufacturing Inc. v. DEP*, 1998 EHB 436.

[3] *E.g., Potts Contracting v. DEP*, 1999 EHB 959; *Recreation Realty, Inc. v. DEP*, 1999 EHB 697.

[4] *Sri Venkateswara Temple v. DEP*, EHB Docket No. 2003-385-R (Opinion issued February 2, 2005).

[5] *E.g., Goetz v. DEP*, 2002 EHB 976 (noting that *pro se* appellants are not excused from following the rules of procedure); *Kleissler v. DEP*, 2002 EHB 737; *Van*

Appellant is absolutely correct that he has a right to lodge an appeal of an action of the Department pursuant to the Surface Mining Act. Yet by doing so, it is also required that he submit to a legal process that includes the right of the Permittee to seek information from the Appellant in accordance with the Board's rules and the discovery rules in the Pennsylvania Rules of Civil Procedure.[6] A hearing before the Board is not akin to a public meeting where a petitioner simply stands before the Department and raises his concerns relating to a permit application without regard to the rules of evidence or procedure. Instead, proceedings before the Board are in the nature of an adversarial trial before a court. The parties are expected and required to exchange information through the process of discovery in order to assemble a body of admissible evidence for use at a trial to support the allegations made in a notice of appeal. The Appellant engaged in a pattern of behavior which amounts to a steadfast refusal to participate in the process.

The Appellant states in his answer that the Permittee's discovery requests are harassment. If the Appellant had objections to the scope of the Permittee's discovery, he should have participated in a conference call related to the Permittee's motion to compel, or filed a motion for protective order with the Board. The Appellant availed himself to neither of these remedies. The integrity of the appeal process before the Board is dependent upon the willingness of the parties to follow the rules of procedure and the orders of the Board. Because of his repeated failure to abide by those rules this Board will dismiss his appeal as a sanction for that failure.

We therefore enter the following:

Tassel v. DEP, 2002 EHB 625. The Board also sent a letter to the Appellant describing the pitfalls of self-representation, its resulting frustration and unlikelihood of success.

[6] 25 Pa. Code § 1021.102.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PETER R. SWISTOCK, JR.	:	
	:	
v.	:	**EHB Docket No. 2005-158-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMFIRE MINING CO., Permittee	:	

ORDER

AND NOW, this 29th day of June, 2006, the motion for sanctions filed by Amfire Mining Co. is hereby GRANTED. The appeal of Peter R. Swistock, Jr. in the above-captioned appeal is hereby DISMISSED.

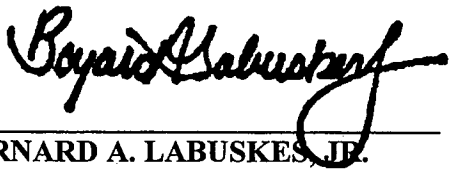
ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

GEORGE J. MILLER
Judge

THOMAS W. RENWAND
Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

DATED: June 29, 2006

c: **DEP Bureau of Litigation:**
Attention: Brenda K. Morris, Library

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Southcentral Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ONYX GREENTREE LANDFILL, LLC	:	
	:	
v.	:	**EHB Docket No. 2006-073-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** June 30, 2006

OPINION AND ORDER
DENYING MOTION TO DISMISS

By Michael L. Krancer, Chief Judge and Chairman

Synopsis

The Board denies the Department of Environmental Protection's Motion to Dismiss an appeal which argues that the appeal was untimely. In November 2005 Onyx had filed a petition for a refund of certain disposal fees paid from July 2002 forward. The December 16, 2005 letter to Onyx that the Department argues is the final disposition of that petition, on its face, deals only with disposal fees paid after March 14, 2005. The letter does not refer to the pending Onyx petition nor does it refer to the period of time from July 2002 to March, 14, 2005. Thus, the letter is ambiguous on the subjects of Onyx's pending petition and fees paid after July 2002 to March 14, 2005. The Board, thus, cannot conclude at this stage of the proceedings on a Motion to Dismiss that the letter unequivocally and unmistakably communicated the Department's denial of Onyx's petition for refund of fees paid from July 2002 to March 14, 2005.

Introduction

This case is an initial skirmish, particular to Onyx Greentree Landfill, in the multi-party

litigation filed by numerous landfills or other facilities in the aftermath of the recently completed *Brunner* litigation. The *Brunner* litigation was over the landfill disposal fee section of Act 90 of 2002, 27 Pa. C. S. 6301(a), which became effective in July 2002. *See Brunner v. DEP*, 2004 EHB 684, *rev'd* 869 A.2d 1172 (Pa. Cmwlth. 2005), *appeal denied*, 885 A.2d 44 (Pa. 2005). Basically, Section 6301(a) imposed a $4.00 per ton disposal fee upon all waste deposited in a landfill. Section 6301(b)(1) excepted from this fee "process residue and nonprocessible waste that is permitted for beneficial use or for use as alternate daily cover (ADC) at a municipal waste landfill." 27 Pa. C. S. 6301(b)(1).

Before the *Brunner* litigation, the Department of Environmental Protection (DEP or Department) applied the Section 6301(b)(1) exception only to resource recovery material which was used as ADC and no other type of material used as ADC. Brunner was using foundry sand at its landfill as ADC and withheld payment of the fee for that material from the inception of the fee in July 2002. Brunner received a notice of deficiency of payment from the Department and appealed to this Board. Brunner argued that the restriction of the exception to resource recovery material used as ADC was contrary to the plain words of Section 6301(b)(1).

In a 3 to 2 decision issued on September 1, 2004, the majority of the Environmental Hearing Board agreed with the Department's interpretation. *Brunner v. DEP*, 2004 EHB 684. Chief Judge Krancer and Judge Renwand dissented. On appeal to the Commonwealth Court, that Court reversed the majority opinion of the Board in a decision issued on March 14, 2005. The Commonwealth Court held, as would have the dissenters at the Board, that the plain language of the Section 6301(b)(1) exception did not provide for the limitation of the exception which the Department had championed. *Brunner v. DEP*, 869 A.2d 1172 (Pa. Cmwth. 2004). The Department sought leave from the Supreme Court to hear the case but, on September 8,

2005, the Supreme Court denied the Department's petition for allowance of appeal. *Brunner v. DEP*, 885 A.2d 44 (Pa. 2005). Thus ended the *Brunner* litigation.

As might be expected, in response to the *Brunner* litigation, numerous landfills or other parties filed requests or petitions with the Department asking for refunds of the $4.00 per ton fee they had paid for non-resource recovery material used as ADC since the imposition of the fee in 2002. Most of these requests came in April 2005, in the weeks just after the Commonwealth Court decision. Some parties, including Onyx, filed a bit later. Onyx's Petition For Refund was filed on November 21, 2005. DEP Reply; Beatty Affidavit, ¶ 4.

The Department granted refunds to all who requested same, but only as far back as the date of the Commonwealth Court decision in *Brunner*, March 14, 2005. The Department declined to refund fees paid from the inception of Act 90 based on its reading of Chapter 7 of the Municipal Waste Planning, Recycling and Waste Reclamation Act, 53 P.S. § 4000.701-706. According to the Department, that law provides that no such refund shall be made unless a petition is filed with the Department within six months of the date of overpayment. A host of landfills, including Onyx, filed appeals of that decision claiming that the refunds should be granted for the entire time the fee was collected back to its inception in 2002. The Board issued a Rule To Show Cause why all these appeals should not be consolidated. That consolidated multi-appellant litigation is now pending at *Seneca Landfill, Inc. v. DEP*, EHB Docket No. 2006-012-K.

We did not, however, consolidate Onyx's appeal with the others into the *Seneca* consolidated case and we maintained it separately as *Onyx Greentree, LLC v. DEP*, EHB Docket No. 2006-073-K. In response to the Rule To Show Cause regarding consolidation, the Department had requested that this case not be consolidated with the rest because it told us that it

planned to allege that Onyx was the only appellant which had filed an untimely appeal. The Department wanted the case kept separate so it could file a motion to dismiss on the basis of untimeliness. We honored the Department's request and before us today is the promised Department Motion To Dismiss.

Factual Background For The Motion to Dismiss

Onyx filed its "Petition for Refund" of disposal fees paid for non-resource recovery material ADC on November 21, 2005 (November Petition). Onyx's November Petition requested a refund of the $4 disposal fee for solid wastes used as ADC at its landfill for the time period all the way back to the inception of the fee, *i.e.*, July 2002. Department's Motion To Dismiss, Ex. F. Of the twenty-four parties that filed such petitions, Onyx's was the latest one filed. DEP Reply to Onyx's Response to the Department's Motion To Dismiss, Beatty Affidavit, ¶ 4. The Department's Kenneth R. Reisinger, Director of the Bureau of Waste Management, directed a letter to Onyx dated December 16, 2005 (December Letter), which states as follows:

> On March 14, 2005, the Commonwealth Court reversed the order of the Environmental Hearing Board in *Joseph J. Brunner, Inc. v. Department of Environmental Protection,* No. 2081 C. D. 2005 (Pa. Commw. March 14, 2005), that addressed the application of the $4 disposal fee imposed by 27 Pa. C. S. A. §6301 on solid waste used as alternate daily cover at municipal waste landfills. The Commonwealth Court concluded that solid waste used as alternate daily cover is exempt from payment of the $4 disposal fee. The Department sought allowance of appeal with the Pennsylvania Supreme Court. The Supreme Court refused to accept the appeal on September 8, 2005.
>
> The Department is refunding all fees collected on solid wastes used as alternate daily cover since March 14, 2005. The quarterly reports that you submitted to us since March 14, 2005, indicate that you paid disposal fees on solid waste that was used as alternate daily cover in the total amount of $93,552.48. These fees are being returned to you with interest at a rate that has been set by the Secretary of the US Treasury for each calendar year, less 2%, for a total amount of $94,798.94.
>
> In view of the Court's decision, please do not continue to include payment of the $4 disposal fee on solid waste that is used as alternate daily cover with your

quarterly reports.

> Any person aggrieved by this action may appeal . . . . Appeals must be filed with the Environmental Hearing Board within 30 days of receipt of written notice of this action unless the appropriate statute provides a different time period. . . . This paragraph does not, in and itself, create any right of appeal beyond that permitted by applicable statutes and decisional law.
>
> If you have any questions regarding this letter, please contact Jeffrey Beatty, Chief, Division of Reporting and Fee Collection . . . .

DEP Motion To Dismiss, Ex. C. It is the December Letter which the Department contends is the final appealable Department action on the Onyx November Petition. Since Onyx did not file its appeal until March 2, 2006, as the argument goes, the case has to be dismissed as having been filed well beyond the 30-day window for appeal.

Importantly for our analysis of the pending motion and its defense, the December Letter specifically provides that the Department's payment of $94,798.94 to Onyx applies to the period since March 14, 2005. The letter does not specifically state that it deals with the period of time before March 14, 2005, *i.e.*, the time from July 2002 to March 14, 2005. As already noted, Onyx's November Petition had specifically requested a refund for the entire period from July 2002 forward.

All of the landfills that had requested refunds received letters dated December 16, 2005 from the Department addressing the impact and consequences of the *Brunner* litigation. At the same time as he sent the December 16, 2005 letter to Onyx, Mr. Reisinger also sent letters dated the same date to various other landfills. The letters, of course, outlined the same position of DEP that it would refund only payments made since March 14, 2005. In other letters to other parties which had filed petitions, however, Mr. Reisinger specifically wrote that his letter was in response to their pending petitions for refunds. For example, in the December 16, 2005 letter to Tullytown Resource Recovery Facility, Mr. Reisinger's letter states, "[o]ur records indicate that

you filed a petition for a refund of disposal fees paid on solid waste used as [ADC] on April 15, 2005." Onyx Response To DEP Motion To Dismiss, Ex. A. Other December 16, 2005 letters to other landfills specifically state that the letter is responsive to the pending petition by the landfill for a refund. *Id.*

DEP admits that this oversight in the December Letter to Onyx was an "administrative faux pas". DEP Reply, ¶ 26. The Department's Jeffrey Beatty, Chief, Division of Reporting and Fee Collection, Bureau of Waste Management, had developed three different form letters on this subject, one for landfills which had filed a petition and paid the fees, another for petitioning landfills that did not pay the fee, and a third for landfills that paid the fees but, presumably, had not petitioned for a refund. *Id.*, Beatty Affidavit, ¶ 13. Mr. Beatty had prepared his spreadsheet from which he determined which landfill fell into which of the three categories before Onyx filed its November Petition and, therefore, Onyx inadvertently was put in the list of landfills which had not filed a petition. *Id.*, ¶ 14-15. Onyx erroneously was not reclassified in the proper category and, thus, received the wrong version of the form letter and its letter did not reference its November Petition. *Id.*, ¶ 16-17.

On January 31, 2006 counsel for Onyx sent an email letter to Mr. Reisinger inquiring about the status of Onyx's November Petition. DEP Motion To Dismiss, Ex. A. The same day Mr. Reisinger responded with an email which states, "[i]n reference to your email below, please be advised that the Department sent a letter to Onyx Greentree Landfill on December 16, 2005 to address refunds of the $4.00 disposal fee paid on solid waste used as [ADC]." *Id.* (January Email). Mr. Reisinger followed the January Email with a letter to Onyx's counsel dated February 3, 2006 which states as follows,

> As you are aware, the Commonwealth Court decided on March 14, 2005 that solid waste used as alternate daily cover at municipal waste landfills is

> exempt from the $4 disposal fee imposed by 27 Pa. C.S.A. § 6301. In consideration of this decision, the Department developed an approach to collectively address refund payments to landfill operators that filed petitions in accordance with the procedures set forth in the Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. § 4000.101 – 4000.1904 and to landfill operators that did not file petitions, but were eligible for refunds. The comprehensive approach also addressed situations where refunds were due, but no petitions for refunds were filed.
>
> In carrying out this general approach, the Department sent letters on December 16, 2005 to numerous landfill operators, including your client, Onyx Greentree Landfill, LLC, to address all issues surrounding refund payments. These letters resolved all outstanding issues related to $4 disposal fee refund payments, including those of your client and the other landfills. This letter that was received by your client on December 19, 2005 was the Department's response to the petition that you filed on its behalf on November 21, 2005.
>
> If you have any additional questions, kindly contact me at 717-783-2388 or Susan Seighman at (717) 787-7060.

DEP Motion To Dismiss, Ex. B. (February Letter).

Onyx filed its Notice of Appeal (NOA) with the Board on March 2, 2006, which is within 30 days of the February Letter. The Department argues that the NOA was untimely since the December Letter was the final, appealable action relating to the entirety of Onyx's claim, including that part relating to the period before March 14, 2005. The Department further argues that neither the January Email, nor the February Letter can be the Department's final action, since the December Letter was the final, appealable action of the Department. The Department maintains that the January Email and the February Letter are "purely descriptive in nature and not appealable . . . . [and that they] merely referenced the Department's prior decision on December 16, 2006." DEP Brief, p. 4.

Onyx, on the other hand, argues that the February Letter was the final action of the Department since the December Letter never identified Onyx's November Petition, nor does the December Letter state that it is the Department's action thereon. Onyx Brief, p. 7. Onyx states

that it assumed the December Letter "did not affect its pending [November] Petition." *Id.*, at 8.

Discussion

"The Board evaluates motions to dismiss in the light most favorable to the non-moving party. A motion to dismiss may only be granted where there are clearly no material factual disputes and the moving party is entitled to judgment as a matter of law." *Neville Chemical Co. v. DEP*, 2003 EHB 530, 531 (citations omitted); *see also Cooley v. DEP*, 2004 EHB 554, 558.[1] Based on that standard we are not able to grant the Department's Motion and the question will have to wait further development of facts and evaluation of the credibility of witnesses.

We quite recently addressed the issue of whether a particular DEP action is a final action in *Eljen Corp. v. DEP*, 2005 EHB 918. In *Eljen*, we reiterated, as we have stated many times, that formulation of a strict rule is not possible and the determination must be made on a case-by-case basis. *Id.* at 926-27 *citing Donny Beaver v. DEP*, 2002 EHB 66. The dominant factor and where we start is the specific wording of the communication. However, also in the equation is its purpose and intent, the practical impact of the communication, its apparent finality, the regulatory context, and the relief which the Board can provide. *See Borough of Kutztown v. DEP*, 2001 EHB at 1121-24.

Here, the wording of the December Letter is ambiguous at best. It does not specifically

---

[1] The parties have submitted exhibits and affidavits with the motion papers. As we noted in *Beaver v. DEP*:

> As a matter of practice the Board has authorized motions to dismiss as a "dispositive motion" and has permitted the motion to be determined on facts outside those stated in the appeal when the Board's jurisdiction is an issue. *Florence Township and Donald Mobley v. DEP*, 1996 EHB 282, 301-03; *Felix Dam Preservation Association v. DEP*, 2000 EHB 409, 421 n.7; *see also Grimaud v. DER*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994) ("Where there are no facts at issue that touch jurisdiction, a motion to quash may be decided on the facts of record without a hearing"). Accordingly, the Board has considered the statements of fact and the exhibits contained in the parties' pleadings when resolving these motions to dismiss.

Donny Beaver, 2002 EHB 666, 671 n.4.

mention that it is dealing with Onyx's November Petition nor does it specifically say that it has anything to do with the time period before March 14, 2005. In fact, DEP admits that the December Letter to Onyx does not say what it should have said. Clearly, DEP knew how to make such a communication unambiguous by addressing specifically in the letter that it dealt with a pending petition for a refund. This is shown by the other letters to other petitioners which did just that. But this particular letter, the December Letter, failed to do so. We do not question that the oversight was accidental; an "administrative faux pas", as DEP honestly calls it. That, of course, is beside the point. The "administrative faux pas" had a direct impact on the objective meaning of the December Letter.

Thus, this case stands on much different footing than *Eljen* where the communication DEP pointed to as being final specifically said that the proposed Eljen In-Drain system, "will not be approved as an alternate technology in Pennsylvania. Any further evaluation of this experimental technology will be conducted under the Department's *Experimental Onlot Technology Verification Program.*" *Eljen*, 2005 EHB at 923. That language led us to conclude there that,

> This language unequivocally and unmistakably communicates that the Eljen application is denied under ESG and that any further application will have to proceed under TVP. There can be no doubt based on the language that this was the intent of Mr. Franklin's letter. Objectively, no other conclusion can be drawn from that letter with respect to whether the letter was a decision rejecting Eljen's application under ESG and whether that decision was final.

Id. at 927.

Here, by contrast, the language does not unequivocally and unmistakably communicate that Onyx's November Petition is denied or that the subject of fees Onyx paid after July 2002 and before March 14, 2005 is being addressed at all. Nor can it be said that there is no doubt that this was the intent of Mr. Reisinger's December Letter or that no other conclusion can be drawn

from the December Letter with respect to whether it was a decision rejecting Onyx's pending November Petition. This is especially so in light of the other December letters from Mr. Reisinger to other parties with pending petitions which did specifically address each of those parties' pending petitions. Again, the Department knew how to and did use specific, direct, unambiguous and unmistakable language addressing pending petitions for refunds in letters to other petitioners. It did not do so with the December Letter to Onyx. The December Letter to Onyx does not say it deals with Onyx's November Petition. Thus, the December Letter, on its face, can be objectively interpreted, quite reasonably, to not deal with the pending Onyx November Petition. Likewise, the December Letter can reasonably be read to deal only with fees paid after March 14, 2005, because that is all it says it deals with on its face.

Quite tellingly, the Department's Motion and supporting brief does not focus on the December Letter in its arguments. DEP does not offer much of an explanation of exactly how the December Letter operates as a final action on the pending Onyx November Petition which requested a refund from July 2002. Instead, the Department focuses on the January Email and the February 2006 Letter as somehow showing that the December Letter was the final appealable action. We cannot accept that argument because of its obvious bootstrapping nature. Moreover, to say that the January Email and/or the February Letter were reaffirmation of the December Letter is well short of convincing because the first time that the Department specifically referred to the pending Onyx November Petition was in the February Letter.

That the Department has to hit the December Letter from the oblique by arguing that the January Email and/or the February Letter are not the final actions on the pending Onyx November Petition but supposed reaffirmations of the purported action taken on the pending Onyx November Petition by the December Letter confesses the weakness of that position. The

December Letter is ambiguous on that subject. If the December Letter had mentioned the pending Onyx November Petition, if it were not ambiguous on that subject, then there would be no need to interpose the January Email and the February Letter as supposed confirmatory reaffirmations of an action already taken.

The Department tells us, especially in its Reply through the affidavit of Jeffrey Beatty, that the "Department addressed all refunds pending through the letters issued December 16, 2005." There are numerous problems with that line of argument, at least as it might apply to Onyx. First, that point is general and not specific to Onyx. It may very well be that the Department intended to address all refunds with its spate of December 16, 2005 letters. That, however, does not address the December Letter to Onyx and its particular features. Second, the Beatty affidavit does not say that explicitly. This appears to be DEP's interpretation of Mr. Beatty's affidavit. Third, even if Mr. Beatty did so state explicitly, he was not the author of the December Letter, Mr. Reisinger was. Fourth, Mr. Reisinger, the author of the December Letter, does not explicitly state in his affidavit that he intended to treat the pending Onyx November Petition *via* the December Letter or that the December Letter was intended to constitute an action on Onyx's November Petition. Paragraph No. 8 of Mr. Reisinger's affidavit merely rehearses what the December Letter says. Paragraph 11 of Mr. Reisinger's affidavit does nothing more than contain Mr. Reisinger's conclusory assertion, after the fact, that the January Email characterizes the December Letter as addressing refunds, presumably all refunds, due. Even in that paragraph, though, Mr. Reisinger does not state that the December Letter addresses <u>all</u> refunds. Fifth, and most fundamentally, the plain language of the December Letter does not explicitly communicate that it deals with the pending Onyx November Petition or fees paid before March 14, 2005. Sixth, even if the author had stated that it was his subjective intent to

deal with the pending Onyx November Petition in the December Letter, as can be derived from the reference to *Eljen* above, the standard is an objective standard, not a subjective one. That Mr. Reisinger may have subjectively intended to communicate a denial of Onyx's November Petition with the December Letter does not carry the day where the words he wrote to communicate what was in his mind did not, objectively, do so. Though DEP says that its "administrative faux pas" should not impact the outcome of the case, as we have already said, in this case this so-called "administrative faux pas" had a substantive impact on the objective meaning of the December Letter.

Insofar as the Department argues that the "appeal language" found in the December Letter created a final appealable action, such argument is misguided. The Board stated in *Eljen*, "the presence of such words would not in itself make a non-appealable communication appealable. There is no such rule, nor should there be, which makes the presence or absence of such language be the definitive determinate whether an action is appealable or not." *Eljen*, 2005 EHB at 927-28. The December Letter informed Onyx of appeal rights, but as stated in *Eljen*, this alone does not make an action appealable. *Id.* Even so, DEP's "appeal language" argument begs the question of whether the December Letter is the final appealable action with respect to the pending Onyx Petition or Onyx's request for a refund of fees it paid before March 14, 2005. If the December Letter does not objectively communicate a denial of Onyx's November Petition or that it deals with pre-March 14, 2005 fees, then the announcement of appeal rights in the December Letter would have no impact on Onyx's November Petition or its claim for fees paid before March 14, 2005 because the December Letter does not, on its face, deal with those issues.

DEP points out that there is no affidavit from any Onyx personnel stating that Onyx did, in fact, take the December Letter as not dealing with the pending Onyx November Petition.

Contrary to the Department's view, this cannot be dispositive in DEP's favor on its motion because of the burden placed upon it in motion practice as the movant and the standards applicable to our review of a motion to dismiss. Onyx does not have to prove this point at this time. However, it may have to prove it later in order to prevail ultimately and we would not close the door to the possibility that evidence may be uncovered later which might support a finding that Onyx did indeed consider the December Letter as dispositive with respect to its pending November Petition.

Along the same lines, DEP makes a nice argument to the effect that the absence of specific reference to Onyx's November Petition or the time before March 14, 2005 in the December Letter actually cuts the other way, against Onyx. DEP points out that Onyx, with its pending November Petition asking for a refund back to July 2002, should have known, or at least been put on sufficient notice to trigger inquiry, that the December Letter dispensed with its pending November Petition for the very reason that the December Letter spoke, specifically, only about the post-March 14, 2005 time frame. This discrepancy or anomaly, which would have been plain to Onyx from the language of the December Letter to Onyx, should have reasonably put Onyx on notice that its November Petition was denied insofar as it requested a refund for the period before March 14, 2005. Or, at least, the anomaly should have reasonably given rise to a duty on Onyx's part to inquire at the time about the status of its November Petition or whether the December Letter dealt with its pending November Petition. On the other hand, though, as Onyx says, it is equally plausible that since the December Letter contained no reference whatsoever to the pending Onyx November Petition, or the time period before March 14, 2005, that no such implication could reasonably be taken from the December Letter and no inquiry was warranted and that to say otherwise would be to require Onyx to have read Mr.

Reisinger's mind. This argument of the Department's will need further discovery, probably trial, and further briefing based thereon to flesh out.

In the meantime, we will deny the Department's Motion To Dismiss and an appropriate Order follows which denies the Motion and consolidates the *Onyx* case into the *Seneca* consolidated case.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

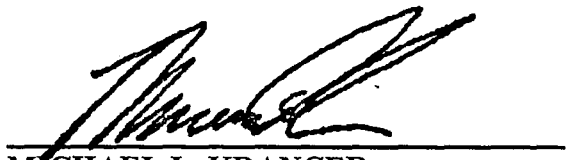
ONYX GREENTREE LANDFILL, LLC	:	
	:	
v.	:	**EHB Docket No. 2006-073-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 30th day of June, 2006, the Motion To Dismiss of the Department is **DENIED**. IT IS FURTHER ORDERED that this case is consolidated into *Seneca Landfill, Inc. v. DEP*, Docket No. 2006-012-K at the following caption and docket number, which must be included on all future filings with the Board:

SENECA LANDFILL, INC.; ARDEN LANDFILL, INC.; WASTE MANAGEMENT DISPOSAL SERVICES OF PENNSYLVANIA, INC.; WASTE MANAGEMENT OF PENNSYLVANIA; LAUREL HIGHLANDS LANDFILL, INC.; CHAMBERS DEVELOPMENT COMPANY, INC.; PINE GROVE LANDFILL, INC.; USA SOUTH HILLS LANDFILL, INC.; USA VALLEY FACILITY, INC.; CHRIN BROTHERS, INC.; REPUBLIC SERVICES OF PENNSYLVNIA, LLC; NEW MORGAN LANDFILL COMPANY, INC.; GREENRIDGE RECLAMATION, LLC AND GREENRIDGE WASTE SERVICES, LLC; LANCASTER COUNTY SOLID WASTE; MANAGEMENT AUTHORITY; and ONYX GREENTREE LANDFILL, LLC	:	**EHB Docket No. 2006-012-K (Consolidated with 2006-013-K through 2006-028-K, 2006-073-K and 2006-098-K)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ENVIRONMENTAL HEARING BOARD



MICHAEL L. KRANCER
Chief Judge and Chairman

DATED: June 30, 2006

c: **DEP Bureau of Litigation**
Attention: Brenda K. Morris, Library

For the Department:
Dennis A. Whitaker, Esquire
Southcentral Region – Office of Chief Counsel
and
Susan M. Seighman, Esquire
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Service list continued on next page.

For Arden Landfill, Inc.; Waste Management Disposal Services of Pennsylvania, Inc.; Waste Management of Pennsylvania, Inc.; Laurel Highlands Landfill, Inc.; Chambers Development Company, Inc.; Pine Grove Landfill, Inc.; USA South Hills Landfill, Inc.; USA Valley Facility, Inc.; Chrin Brothers, Inc.; and Republic Services of Pennsylvania, Inc.:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JASON TAPLER	:	
	:	
v.	:	**EHB Docket No. 2006-078-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND UPPER MILFORD TOWNSHIP, Permittee	:	**Issued: June 30, 2006**

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Judge

Synopsis:

The Board denies a motion to dismiss an appeal for lack of jurisdiction. Failure to timely serve a copy of Appellant's factual or legal objections to the Department's action on the opposing parties does not deprive the Board of jurisdiction over an appeal.

OPINION

This matter was initiated with the March 6, 2006 filing of a Notice of Appeal by Jason Tapler (Appellant) seeking review of the Department of Environmental Protection's (Department) January 27, 2006 approval of Upper Milford Township's (Permitttee) proposed Official Sewage Facilities Plan revision. On March 7, 2006, the Board issued an Order directing Appellant to perfect his appeal pursuant to 25 Pa. Code § 1021.51 by filing with the Board on or before March 27, 2006 the following information: a copy of the Department action being appealed and proof of service that the proper officials at the Department and Township were

served with the Notice of Appeal. Appellant did not comply with this Order. On April 4, 2006, the Board issued Appellant a Rule to Show Cause why his appeal should not be dismissed for failure to comply with the Board's March 7, 2006 Order. The Rule was returnable by April 19, 2006. Appellant responded to the Rule on April 19, 2006 providing the information necessary to perfect his appeal. Thereupon, the Rule to Show Cause was discharged.

Presently before the Board is the Permittee's motion to dismiss the Notice of Appeal filed by Appellant on March 6, 2006, in which the Department joins. The motion to dismiss and brief in support thereof argues that Appellant failed to serve a copy of his factual or legal objections to the Department's action in separate, numbered paragraphs on the Department and Permittee (Appellees) in a timely manner. Appellees further argue that Appellant's failure to cure this defect within the 30-day appeal period deprives the Board of jurisdiction over this appeal. Appellant counters that dismissal is inappropriate here because he did, in fact, serve a copy of his objections to the Department's action on Appellees in a timely fashion.

The Board evaluates motions to dismiss in the light most favorable to the non-moving party. *Solebury Township v. DEP*, 2004 EHB 23, 28; *Neville Chemical Co. v. DEP*, 2003 EHB 530-531. The Board treats motions to dismiss the same as motions for judgment on the pleadings: a motion to dismiss will be granted only where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282.

Section 1021.51 of the Board's Rules of Practice and Procedure, 25 Pa. Code § 1021.51, contains the commencement, form, and content requirements for Notices of Appeal. It provides, in pertinent part:

(a) An appeal from an action of the Department shall commence with the filing of a

written notice of appeal with the Board.

...

(e) The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal.

...

(g) Concurrent with or prior to filing the notice of appeal, the appellant shall serve a copy thereof on each of the following:

(1) The office of the Department issuing the notice of Departmental action.

(2) The Office of Chief Counsel of the Department or agency taking the action appealed.

(3) In a third party appeal, the recipient of the action.

Appellant filed a Notice of Appeal with the Board on March 6, 2006. In this Notice of Appeal, he notes "[a]ttachments and letter being mailed" under the heading "Objections to the Department's action in separate, numbered paragraphs." Appellant's objections to the Department's action were included in a letter dated March 2, 2006, which was attached to Appellant's Notice of Appeal. Appellant maintains that he served both the Notice of Appeal and letter specifying his objections to the Department's action on Appellees. However, Appellees insist that this letter was never served upon them, and thus they contend that the Board is deprived of jurisdiction over this appeal.

Based on our review of the record at this point in the case, it remains unclear whether Appellant failed to serve the letter specifying his objections to the Department's action on Appellees. However, Appellant did file both a Notice of Appeal and the letter in controversy with the Board. He filed a certificate of service that the Notice of Appeal and its attachment

were served on Appellees, which he still maintains. However, Appellees insist that they never received the letter and ask us to dismiss his appeal on this basis. Viewing this matter in the light most favorable to Appellant, we must resolve this ambiguity in his favor. Even assuming *arguendo* that we accept Appellees' assertion that Appellant never served a copy of the letter on them as true, this finding, in and of itself, would not deprive us of jurisdiction over this appeal, because timely service of a Notice of Appeal is not a jurisdictional requirement. *Clabbatz v. DEP*, 2005 EHB 370, 373; *Ainjar Trust v. DEP*, 2000 EHB 505, 509-17; *Thomas v. DEP*, 2000 EHB 598, 601-608, *recon. denied*, 2000 EHB 728. Further, the issue of whether an appeal is timely is determined by the date of filing, not the date of service. *Associated Wholesalers v. DEP*, 1997 EHB 1174, 1178. Thus, Appellees have not asserted a legal basis upon which dismissal of this appeal can be deemed appropriate.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JASON TAPLER	:	
	:	
v.	:	**EHB Docket No. 2006-078-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND UPPER MILFORD TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 30th day of June, 2006, upon consideration of Upper Milford Township's motion to dismiss, in which the Department joins, it is hereby ORDERED that the motion to dismiss is **DENIED**.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Judge

DATED: June 30, 2006

c: **DEP Bureau of Litigation:**
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

ROBERTA A. CAPPELLI	:	
	:	
v.	:	**EHB Docket No. 2005-035-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MAPLE CREEK MINING, INC., Permittee	:	**Issued: July 7, 2006**

OPINION AND ORDER ON PERMITTEE'S MOTION FOR EXTENSION OF TIME TO FILE EXPERT REPORT

By Thomas W. Renwand, Judge

Synopsis:

The Pennsylvania Environmental Hearing Board grants a Motion for Extension of Time to File Expert Report. The Appellant will not be prejudiced as she will have ample time to review the expert report prior to the trial.

OPINION

Presently before the Pennsylvania Environmental Hearing Board is the Permittee Maple Creek Mining, Inc.'s (Maple Creek) Motion for Extension of Time to File Expert Report (Motion for Extension). The Pennsylvania Department of Environmental Protection (Department) does not oppose the extension while the Appellant Roberta A. Cappelli (Mrs.

Cappelli) opposes the Motion for Extension.

This Appeal was filed by Mrs. Cappelli in February 2005. Mrs. Cappelli claims that mining operations conducted by Maple Creek resulted in subsidence damage to her property. Maple Creek and Mrs. Cappelli, according to their numerous status reports and filings, have been engaged in lengthy but unsuccessful settlement negotiations. During the pendancy of these negotiations the parties evidently agreed to extensions of various deadlines. Maple Creek claims that Mrs. Cappelli will not be prejudiced by a further extension of time to serve its expert report while Maple Creek will be greatly prejudiced if it can not present expert testimony in support of its position at trial. Mrs. Cappelli opposes the extension because she claims that Maple Creek did not conduct settlement negotiations in good faith.

This appeal is an excellent example of the dangers inherent in allowing parties too much time to conduct settlement negotiations. The issues, although certainly important, are not very complex. A settlement, if one was to be reached, certainly could have been reached long ago. It is our responsibility and duty to oversee discovery and pretrial proceedings and to assure that litigation moves forward to settlement or trial. *Groce v. DEP and Wellington Development-WDYT, LLC*, EHB Docket No. 2005-246-R (*Slip. Op.* issued March 1, 2006), page 3. Indeed, we have already cancelled one trial in this matter at counsels' request so that they could further pursue settlement. Trial is scheduled and will be held in October.

If Mrs. Cappelli's counsel's summary of the settlement negotiations is accurate, we certainly understand her opposition to the extension requested by Maple Creek.

Nevertheless, Mrs. Cappelli's counsel evidently did agree to further extensions while awaiting additional settlement information from Maple Creek. We see no prejudice to Mrs. Cappelli in granting Maple Creek a short extension to file its expert report. To deny Maple Creek's Motion for an Extension would preclude it from presenting an important part of its case. As aptly pointed out by Judge Labuskes "we cannot lose sight of the fact that our basic objective is to arrive at a proper resolution of the appeal on its merits." *Kleissler v. DEP and Pennsylvania General Energy Corporation*, 2002 EHB 617, 620. Our ultimate decision in this matter will likely rely on expert testimony. Therefore, we will issue an Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERTA A. CAPPELLI	:	
v.	:	**EHB Docket No. 2005-035-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MAPLE CREEK MINING, INC., Permittee	:	

ORDER

AND NOW, this 7th day of July, 2006, following review of Permittee Maple Creek's Motion for Extension, it is ordered as follows:

1) The Motion is ***granted***.

2) Maple Creek shall file its *expert report* on or before **Friday, July 28, 2006**.

3) Maple Creek and the Pennsylvania Department of Environmental Protection shall file their *pre-hearing memoranda* on or before **Friday, July 28, 2006**.

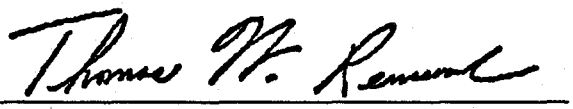
4) *Motions in Limine*, if any, shall be filed on or before **Friday, August 25, 2006**.

5) *Responses* to Motions in Limine shall be filed on or before **Friday,**

September 8, 2006.

6) *Stipulations*, if any, shall be filed on or before **Friday, September 22, 2006.**

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Judge

DATED: July 7, 2006

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

ENERGY RESOURCES, INC.	:	
	:	
v.	:	**EHB Docket No. 2005-074-R**
	:	**(Consolidated with 2005-075-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 10, 2006**

OPINION AND ORDER ON APPELLANT'S MOTION TO REOPEN DISCOVERY AND CONTINUE THE HEARING

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Pennsylvania Environmental Hearing Board denies a party's request to reopen discovery and continue the trial shortly before the scheduled trial dates when it failed to conduct discovery during the discovery periods set by earlier Orders of the Board. Parties have a right to rely on our Orders and the deadlines they impose.

OPINION

Presently before the Pennsylvania Environmental Hearing Board is Appellant Energy Resources, Inc.'s (Energy Resources or Appellant) Motion to Reopen Discovery and

Continue the Hearing (Motion). The Motion is strongly opposed by the Pennsylvania Department of Environmental Protection (Department).

This consolidated appeal arises from two separate but related Department actions. In EHB Docket No. 2005-074-R, Energy Resources appealed the Department's demand for additional bond for Energy Resources' Mine 30 to cover the costs to treat a post-mining discharge. Likewise, in EHB Docket No. 2005-075-R, Energy Resources appealed the Department's demand for additional bond for Energy Resources' Mine 21 to cover the costs to treat a post-mining discharge. Both appeals were filed in April 2005 and consolidated by Board Order in December 2005.

Following the filing of the Appeals the Board entered pre-hearing Orders setting discovery deadlines. In late July 2005, the parties asked for additional discovery. By Order of August 1, 2005 the Board granted the discovery extension. In late September 2005 the Board granted a joint request to further extend the discovery and pre-hearing deadlines until November 11, 2005. Although ordered to do so, neither party filed a joint status report with the Board on November 14, 2005. Thereafter, on December 9, 2005, the Board consolidated the two appeals and scheduled the case for trial on August 1, and 2, 2006.

According to the Department, neither party conducted any discovery despite ample time to do so. Although the parties did engage in some settlement discussions, it appears that settlement was not diligently pursued. In fact, although we provided nearly eight months notice to the parties of the trial date we heard nothing from them until Energy Resources filed

its Motion to Reopen Discovery and Continue the Hearing on the same day it filed its Pre-Hearing Memorandum. In its Motion, Energy Resources argues that "without the ability to engage in any discovery, Energy Resources will suffer prejudice and will be prevented from presenting relevant evidence to support its burden in appealing the Department's additional bond requests for Mines 21 and 30." Energy Resources' Motion to Reopen Discovery and Continue Hearing, paragraph 15.

The Department vigorously opposes the Motion. The Department contends that Energy Resources has failed to prosecute its appeal. It further states that it has also failed to respond to the Department's settlement proposals and that its eleventh hour request for a continuance of the trial and to reopen discovery is too late to merit the relief requested.

On July 5, 2006, Energy Resources filed a Reply to the Department's Response to its Motion. Energy Resources claims that any additional bond required for Mine 21 cannot be definitely determined until a manganese treatment system at Mine 21 is installed and fully evaluated after several months in operation. It also argues, based on Pennsylvania's Surface Mining Conservation and Reclamation Act, 52 P.S. Section 1396.4, that the Department lacks legal authority to require additional bond based solely on potential increasing costs associated with post-mining water treatment.

In a plethora of decisions in recent years the Pennsylvania Environmental Hearing Board has emphasized the importance of following our pre-hearing Orders and the deadlines they impose. See *Groce v. DEP and Wellington Development-WDYT, LLC*, EHB Docket No.

2005-246-R (*Slip. Op.* issued March 1, 2006), page 3; *DEP v. Neville Chemical* Company, 2005 EHB 1; *Kleissler v. DEP and Pennsylvania General Energy Corporation*, 2002 EHB 617; and *Petchulis v. DEP*, 2001 EHB 673.

Discovery before the Environmental Hearing Board is governed by our Rules of Practice and Procedure in conjunction with the Pennsylvania Rules of Civil Procedure. 25 Pa. Code Section 1021.102(a). The purpose of discovery is so both sides can gather information and evidence, plan trial strategy, and discover the strengths and weaknesses of their respective positions. *George v. Schirra*, 814 A.2d 202 (Pa Super 2002). The Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required. *Stern v. Vic Snyder, Inc.*, 473 A.2d 139 (Pa. Super 1984). As part of this responsibility, the Board sets discovery deadlines almost immediately after an Appeal is filed by our issuance of Pre-Hearing Order No. 1. *DEP v. Neville Chemical Company*, 2005 EHB 1, 3-4. Moreover, it is certainly very important to the integrity of the litigation process and part of the due process rights afforded to all the parties that the deadlines we set are viewed as meaningful and important. Parties have a right to rely on our Orders and the deadlines they impose.

Chief Judge Krancer echoed this concept in *Petchulis v. DEP*, 2001 EHB 673, where he noted our duty to enforce our deadlines:

> As for litigation obligations, they have to be followed in order to maintain the integrity of and respect for our legal process.

2001 EHB at 678.

Likewise, this sentiment was underscored by Judge Labuskes, in *Kleissler v. DEP and General Energy Corporation*, 2002 EHB 617, where he stated:

> The Board has an independent interest in maintaining the integrity of the litigation process and respect for the Board by enforcing compliance with its orders and rules.

2002 EHB at 619.

In the recent case of *DEP v. Neville Chemical Company*, 2005 EHB 1, we denied the Department's Motion to Extend Discovery. We found that the Department offered no justification to reopen discovery so that it could depose two earlier identified witnesses.

Of course, in the interests of justice, we have frequently extended discovery. We are well aware of the fact that counsel and clients lead busy lives and that it is sometimes necessary to adjust deadlines so that the parties can complete discovery. *Pennsylvania Trout v. DEP and Orix-Woodmont Deer Creek Venture*, 2003 EHB 354, 356. Therefore, in the proper case, where counsel have acted diligently in pursuing their pretrial obligations, we will look more favorably on such requests.

This is not one of those cases. Here, Appellant conducted no discovery despite two extensions granted by the Board. Energy Resources could have conducted ample discovery during these time periods. It chose not to do so which is certainly its right. Neither counsel filed a required status report last November. Then despite nearly eight months notice of the trial dates, counsel for Energy Resources did not move to reopen discovery and postpone the

trial until the day it was required to file its pre-hearing memorandum. Indeed, Energy Resources knew in December 2005 when it received our Order scheduling the appeal for trial that it had not conducted any discovery and that if it needed to do so there was still sufficient time to request the Board to allow additional discovery which could have been conducted over the winder and spring. Part and parcel to the right to a fair hearing is the right to conduct adequate discovery. *Pennsylvania Trout*, 2003 EHB at 356. Energy Resources can not now allege prejudice for its own choice not to conduct discovery. It is not a denial of a party's due process rights to refuse to allow a third extension of the discovery period when a party has not engaged in any discovery despite ample opportunity to do so.

Parties have a right to rely on our Orders and the deadlines they impose. By denying Appellant's Motion, we are upholding the integrity of the litigation process.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ENERGY RESOURCES, INC.	:	
	:	
v.	:	**EHB Docket No. 2005-074-R**
	:	**(Consolidated with 2005-075-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

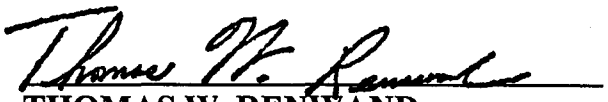
ORDER

AND NOW, this 10th day of July, 2006, following review of the Appellant's Motion to Reopen Discovery and Continue the Hearing, it is ordered as follows:

1) The Motion is ***denied.***

2) The trial will ***proceed as scheduled.***

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: July 10, 2006

EHB Docket No. 2006-074-R
(Consolidated with 2005-075-R)

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

EAGLE ENVIRONMENTAL II, L.P. and CHEST TOWNSHIP	:
	: **EHB Docket No. 2006-043-MG**
v.	: **EHB Docket No. 2001-198-MG**
	: **(consolidated with 2001-201-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	: **Issued: July 17, 2006**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By George J. Miller, Judge

Synopsis:

The Board denies a Petition for a Supersedeas because the petitioner has failed to demonstrate any probability of success on the merits of its claim that the Department improperly denied its application for renewal of a permit for a residual waste landfill. The permit was issued in 2001. The Department properly denied the application for a renewal permit because the petitioner has done very little of the work required to construct the landfill. There is no need to preserve petitioner's right to a final hearing in its appeal because the reasons it is unlikely to prevail on the merits are based on our interpretation of the Department's reasonable regulations.

Background

By Petition for Supersedeas filed by Eagle Environmental II, L.P. (Eagle) on June 30, 2006, we are asked to supersede the Department's denial of Eagle's application for a

renewal permit for construction and operation of the Royal Oak residual waste landfill in Chest Township, Clearfield County, Pennsylvania. The Board's order scheduling the hearing has designated that the record of proceedings in the appeals from the issuance of the original permit in 2001 by both Eagle and Chest Township will be utilized by the Board.

The central problem for Eagle is that the original permit may become void after August 3, 2006, by operation of the Department's regulation at 25 Pa. Code § 287.211(e), because no waste has been processed or disposed at the landfill within five years from the issuance of the original permit. That regulation provides in relevant part as follows:

> (e) If no residual waste is processed or disposed under a permit within 5 years of the date of issuance by the Department of a permit for the facility, the permit is void.[1]

Eagle filed its application for renewal of the permit on August 1, 2005 to provide for a permit expiration date of August 3, 2006. As a generality, this application is substantially the same as the landfill proposed in the application for the original permit with some changes made in highway approach and the timing of construction of the landfill.[2] The Department denied the application for renewal by letter dated January 3, 2006 because Eagle had not met the construction schedule set forth in the original permit application. Specifically, Eagle had not built the leachate treatment plant or landfill stages 1 through 3. Under the schedule set forth in the original permit application, these facilities should have been completed by August 3, 2005.[3] Since Eagle had not done work

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[1] In an appeal involving Eagle's predecessor the Board and the Commonwealth Court held the permit void for failure to meet this five-year requirement. *Eagle Environmental L.P. v. Department of Environmental Resources,* 833 A.2d 805 (Pa. Cmwlth. 2003), *appeal denied,* 854 A.2d 968 (Pa. 2004).

[2] Exhibit 3 to Petition for Supersedeas.

[3] P-2 (Petitioner's hearing exhibits are designated as P-).

at the site since 2004, the Department concluded that Eagle had not complied with the requirements of 25 Pa. Code § 288.201(c)(2).[4]

Eagle's notice of appeal charges that this denial was an abuse of discretion when the reason for the delay in construction was caused by litigation, that this action is unreasonable and inconsistent, and that application of this regulation to Eagle is unlawful, and unconstitutional as applied to Eagle. As a result, the Department's action deprives Eagle of due process.

Appeals by Eagle and Chest Township from the issuance of the original permit resulted in extensive litigation over the Department's "harms/benefit" regulation culminating in a decision by the Pennsylvania Supreme Court on October 27, 2005 rejecting Eagle's challenge to that regulation.[5]

The Supersedeas Hearing

Eagle's Evidence and Arguments

Eagle first contends that the Department's denial of its application for a renewal permit must be superseded to protect Eagle's right to a meaningful hearing before the Board. In absence of a supersedeas preserving the status quo pending final disposition of Eagle's appeal, it is likely that the permit will become void under 25 Pa. Code §

---

[4] 25 Pa. Code § 288.201(c)(2) provides:

> (c) A person or municipality that operates a residual waste landfill shall comply with the following:
>
> . . .
>
> (2) The plans and specifications in the permit, the terms and conditions of the permit, the environmental protection acts, this title and orders issued by the Department.

This denial also appears to rely on the provisions of Section 503 of the Solid Waste Management Act that applies to the Department's authority to deny a permit where the permittee has shown a lack of ability to comply with, among other things, any condition of a permit as indicated by past or continuing violations. Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.503.

[5] *Eagle Environmental II, L.P. v. Department of Environmental Resources*, 884 A.2d 867 (Pa. 2005).

287.211(e). In this event Eagle will be deprived of due process since the Department will argue that a void permit cannot be renewed. If, however, the Department's denial of the renewal application is superseded, Eagle will prevail on the merits of its claim that it should be given a renewal of the permit. In that event, since a "renewal permit" is a "permit" under the Department's regulations, in Eagle's view it would have an additional five years in which to deposit waste because the five-year period under 25 Pa. Code § 287.211(e), begins to run from the date of the issuance of the permit.

Eagle contends that it is likely to prevail on the merits of its claim that the Department improperly denied the application for renewal of the permit because the Department's action cannot be supported by the Solid Waste Act or the Department's regulations thereunder. First, Eagle contends that as a matter of law, 25 Pa. Code § 228.201(c)(2), requiring adherence to construction schedules, cannot apply to Eagle because Eagle was not operating a landfill at the time of the Department's denial of the permit renewal application. Indeed, the Department's complaint against Eagle is that it was not operating a landfill by constructing it in accordance with the schedules under the permit and permit application. Eagle believes that the Department's interpretation of Section 228.201(c)(2), to the contrary is not justified and leads to absurd results.

Eagle called David W. Garg of the Department as a witness on this point. Mr. Garg prepared the denial letter. He testified that the regulation cited in the letter, 25 Pa. Code § 288.201(c)(2), applied to Eagle because the work Eagle had done and was yet to do was the operation of a residual waste landfill. The Department's interpretation of this regulation is that operation of the landfill begins when the first spade of earth is dug until required closure is completed. He said that in 2004 Eagle had done some cutting and site

preparation, installed E&S controls, had done work on wetland replacement and had installed some monitoring wells. This work affected the land at the facility, but no closure had taken place and the wells had not been abandoned in accordance with the Department's requirements.

Eagle believes that this interpretation cannot be sustained because it is an unreasonable interpretation of the regulation. Garg appeared to concede that if there were no landfill permit, Eagle could have done all of this work without any permit from the Department. He also acknowledged that under this interpretation Eagle would be operating a landfill during closure even if the permit became void.

Eagle also further argued that the denial of the permit renewal is inconsistent with the actions of the Department with respect to the air quality permit. Mr. Garg acknowledged that the Air Quality Division of the Department had extended the air quality permit by letter dated August 1, 2005.

Eagle also contends that the Department erred when it determined that Eagle's proposed construction schedules created binding deadlines by which the designated activities must be completed. Eric J. Chiado, an engineer with Civil and Environmental Consultants, Inc., testified that construction schedules in permit applications are rarely met because reality spreads far from the anticipated schedule. He knows of no case in which the construction schedule had been met or in which the Department had brought an enforcement action for a failure to meet the construction schedule. He cited a Lanchester landfill where there was a delay of several years in constructing a treatment facility that has not yet been accomplished. The site manager filed no amendment to the schedule and has not yet determined when it will be constructed. The site manager informed the

Department of this, but the Department has taken no action. He also testified that the Department frequently accepts applications without specific date deadlines but accepts estimates based on average daily volume as contrasted to total air space. Based on this testimony Eagle contends that the Department's treating the construction schedule as mandatory is unreasonable and arbitrary.

Eagle claims that the failure of the Department to take any enforcement action for failure to meet construction schedules Eagle claims is proof that these schedules are not mandatory. Neither Mr. Garg nor Mr. Chiado knew of a case in which the Department instituted an enforcement action for failure to meet these schedules.

In the testimonial phase of the hearing Eagle attempted to prove that the reason the landfill had not been built was because of the opposition of Chest Township. Arthur Streeter, an attorney for Northeast Waste Services, now a general partner of Eagle, testified on the basis of his review of Eagle's documents and his conversation with Mr. Khodara that Eagle was unwilling to move forward with construction in absence of a clear agreement with Chest Township involving the use of Township roads and an agreement to run leachate lines under the Township roads.

There is no question about the Township's opposition to the landfill. In its appeal from the issuance of the original permit, the Township claimed that the permit should not have been issued because, among other things, it was not clearly to the benefit of the Township, there was no legal Host Community Agreement between Eagle and the Township and Eagle had no right to use Township roads.

In addition, the Township had obtained a declaratory judgment from the Court of Common Pleas of Clearfield County that the Host Community Agreement between Eagle

and the Township was void.[6] While Eagle has obtained a favorable and contrary result in litigation initiated by Eagle against the Township in federal court, that determination is not final.[7] Mr. Streeter testified that because of this resulting uncertainty, it is not clear that Eagle will ever proceed with construction of the facility.

The Department's Evidence and Arguments

The Department presented the testimony of James Miller who signed the letter denying the application for a permit renewal. He described the limited work Eagle had done to construct the landfill and said the work done by Eagle was only about five percent of the work that had to be done. No enforcement action had been taken because no environmental harm was being done at the site. On two occasions he told Mr. Khodara that the landfill had to be constructed with waste deposited there by August 3, 2006. He also met with Eagle's engineer who told him that he believed there was no financial backing to construct the landfill.[8]

The Department's argument on the merits of the denial of the application for a renewal permit centers on the testimony of Messrs. Garg and Miller that the permit denial was proper because Eagle was operating a landfill and had not kept up with the construction schedule. The Department claims that any harm Eagle may suffer is caused by Eagle's conduct in electing not to proceed with the construction of the landfill while Eagle engaged in litigation. Accordingly, no action of the Department has deprived Eagle of due process. Never before, says the Department, has an applicant requested a renewal permit when so little work had been done under the permit and when five years remained

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[6] Township Exhibit 1.

[7] P-25 and 26.

[8] This testimony was not admitted for the truth of the matter stated. However, Eagle's answers to interrogatories contained in P-15 indicated that Eagle did not have cash sufficient to construct the landfill. The financial resources of Eagle's new general partner were not made of record.

on the permit's term. The Department also believes that Eagle has no financial capability to construct the landfill. From the Department's point of view, it is in the business of seeing that landfills are constructed within five years of the issuance of a permit. The Department views the five-year period as being a reasonable period for the disposition of litigation.[9] In addition, the Department believes that it should not be embroiled in the details of litigation difficulties or whether financing is available for construction. From an administrative point of view, applications for renewal should not be submitted more than a year before the expiration date to conserve on staff time and effort.

Finally, the Department argues that Eagle is barred from contesting the construction schedules as a matter of administrative finality because Eagle took no appeal from the original permit issuance related to the construction schedules.

Chest Township's Evidence

The Township's case rested primarily on the argument that the standards for a supersedeas have not been met by Eagle's presentation. The Township says that any harm Eagle may suffer in the absence of a supersedeas is because it chose to litigate rather than to construct. It claims that Eagle never had the financial capability to build the landfill. The Township also contends that Eagle has no right to use the Township roads and that the Host Community Agreement is void.

[9] This is based on the comment documents submitted to the Environmental Quality Board in connection with the promulgation of the five-year requirement contained in 25 Pa. Code § 287.211(e) admitted into evidence as C-1 and 2.

DISCUSSION

The Standards for a Supersedeas

The standards for granting petitions for supersedeas are set forth in Section 4(d)(1) of the Environmental Hearing Board Act:

> (i) Irreparable harm to the petitioner.
>
> (ii) The likelihood of the petitioner prevailing on the merits.
>
> (iii) The likelihood of injury to the public or other parties, such as the permittee in third party appeals.[10]

The petitioner bears the burden of proof.[11] When assessing the three factors set forth in the Environmental Hearing Board Act, the Board balances the factors collectively and interests of the parties and the public.[12] A petitioner's chance of success on the merits need not be established as an absolute certainty, but must be more than speculative.[13]

Based on all the evidence and arguments of counsel, we conclude that Eagle has failed to prove that it can succeed on the merits of its claim that the Department improperly denied its application for a renewal permit. Eagle's argument that the Department's denial of this application was improper because Eagle was not operating a landfill within the meaning of 25 Pa. Code § 288.201(c)(2), simply cannot be sustained. David W. Garg's testimony with respect to the application of this provision to Eagle is persuasive. In addition, the Department's definition of "Operate" in its regulations

---

[10] Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. § 7514(d)(1). *See also* 25 Pa. Code § 1021.63(a); *Tinicum Township v. DEP*, 2002 EHB 822; *Global Eco-Logical Services, Inc. v. DEP*, 1999 EHB 93.

[11] *Pennsylvania Fish & Boat Commission v. DEP*, 2004 EHB 473.

[12] *UMCO Energy, Inc. v. DEP*, 2004 EHB 797; *Global Eco-Logical Services, Inc. v. DEP*, 2000 EHB 829; *see also Harriman Coal Corp. v. DEP*, 2001 EHB 234.

[13] *Global Eco-Logical Services, Inc. v. DEP*, 2000 EHB 82.

strongly supports Mr. Garg's testimony. Section 287.1 of the Department's regulation provides this definition:

> *Operate*—To construct a residual waste management facility in anticipation of receiving solid waste for the purpose of processing or disposal; to receive, process or dispose of solid waste; to carry on an activity at the facility that is related to the receipt, processing or disposal of waste or otherwise uses or affects land at the facility; to conduct closure and postclosure activities at a facility.[14]

Unless operating a landfill is interpreted to be from the first spade full of earth until closure, the Department will be unable to properly address violations so as to properly administer the Solid Waste Act. While Eagle contends that it could have done the work of site preparation that it did without any permit from the Department, the fact is that Eagle was doing this work under a residual waste permit from the Department as part of the process of constructing the landfill. While it sounds strange that it could be operating a landfill even in conducting closure activities after the permit becomes void, the work Eagle has done at the site under the permit is still affecting the land according to Mr. Garg's testimony. It would be unreasonable to interpret this regulation to mean that Eagle could avoid proper closure of the site after the permit terminates. We therefore find the Department's interpretation to be most reasonable.

Eagle's contention that it would be entitled to another five years to construct the landfill if the renewal permit were issued is also unlikely to succeed. We agree that the definition of a "permit" includes a "renewal permit"[15] and the language of the five-year rule specifies that the five years begins with the issuance of the permit.[16] However, the interpretation of these provisions of the regulations to mean that Eagle could delay indefinitely constructing the landfill by obtaining successive renewal permits is

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[14] 25 Pa. Code § 287.1.
[15] 25 Pa. Code § 287.1.
[16] 25 Pa. Code § 287.211(e).

unreasonable because this interpretation would subvert the purpose of § 287.211(e). This conclusion is supported by a Commonwealth Court opinion. In the case of another Eagle landfill both the Board and the Commonwealth Court found a similar interpretation of the Department's regulations to be unreasonable.[17] In that case Eagle contended that its application for a modification of a suspended permit would give it another five years to process or deposit waste in that landfill. The Court's opinion quoted with approval the Board's opinion finding that it would be unreasonable to interpret the regulations to conclude that Eagle's right to a modification of the permit could go on indefinitely.[18] Of course a different conclusion might be reached if the applicant had substantially completed construction so that successive 10-year renewals would be unlikely. Here, however, Eagle has done only a small fraction of the required work and has done nothing at the site since 2004.

Nothing in the evidence presented by Eagle leads us to believe that the Department's denial of Eagle's application was done for any reason other than its interpretation of the Department's regulations. Indeed, Mr. Miller told both Mr. Khodara and Eagle's engineer that the landfill had to be completed by August 3, 2006, or the permit would be void. Mr. Miller also advised Eagle's counsel, Mr. Overstreet, before the application was filed that he believed that a renewal permit would not give Eagle additional time to complete construction of the landfill.

Eagle argues that the Department's extension of Eagle's air quality permit to July of 1997 is inconsistent with its denial of the application for a renewal permit of its residual waste permit. This is hardly an indication of inconsistency under all the

---

[17] *Eagle Environmental, L.P. v. Department of Environmental Protection*, 833 A.2d 805 (Pa. Cmwlth. 2003).

[18] 833 A.2d at 810.

circumstances. While the Department's letter dated August 1, 2005 granted an extension of Eagle's waste water management permit for construction of the leachate treatment plant, it was expressly conditioned on Eagle's ability to meet the requirement of its residual waste permit that waste be processed and deposited at the landfill by August 3, 2006. The letter advised Eagle that if this condition was not met, the water quality permit would expire and no further construction would be authorized.[19] The Department did deny an application for the extension of Eagle's air plan approval because no construction had occurred in the past 18 months.[20]

Eagle's contention that the Department knew that construction was delayed by litigation with Chest Township does not indicate that the Department's denial of the renewal application was improper. Chest Township certainly has opposed the construction of this landfill. Its appeal from the issuance of the original permit objected to its issuance on the grounds, among others, that the Township had no Host Community Agreement, there had been an improper assignment of rights to Eagle and that Eagle had no right to use the Township roads so it could not access the proposed facility. In addition, Chest Township obtained a declaratory judgment from the Court of Common Pleas of Clearfield County on July 30, 2002, declaring that the agreement became void on November 26, 1996. These agreements included both the Host Community Agreement and the Road Access Agreement.

Eagle did tell Mr. Miller that construction had been delayed because of litigation, but that Eagle had obtained a successful result that would justify Eagle's application for a

[19] P-8.
[20] P-21.

renewal permit.[21] On May 24, 2005 the United States District Court for the Western District of Pennsylvania entered an order granting summary judgment to Eagle on its claim that it had a valid easement to build the leachate treatment plant under specified Township roads and that the Host Community Agreement with Chest Township is valid.

Even if the Department knew of all of this at the time it denied the application for a renewal permit, we see no impropriety in the Department's action. Opposition to landfills by local citizens and municipal bodies is, in our view, a normal risk of the business in permitting, construction and operation of landfills and is not an excuse for doing extremely limited work under a waste permit over a five-year period.

In sum, we see no need to issue a supersedeas to preserve the status quo as Eagle requests. Eagle believes it will be deprived of due process of law if it is not given a final hearing on its claim because after the permit becomes void the Department will say the issues involved in the appeal are moot as a valid permit cannot be renewed. However, we believe that Eagle has failed to prove any likelihood of success because the proper interpretation of the relevant regulations lead us to conclude that the Department properly denied the application for a renewal permit, and that even if a renewal permit were issued it would not be effective to prevent a lapse of the permit under the Department's regulations.

Because we have concluded that Eagle has failed to demonstrate a likely success on the merits of its claim that the Department improperly denied its application for a renewal permit, we need not to reach other issues such as irreparable injury, injury to the

[21] The evidence of this favorable result is contained in a Memorandum Order of the United States District Court for the Western District of Pennsylvania marked as P-25. This order granted summary judgment to Eagle on its claim that it had a valid easement to build the leachate treatment plant under specified Township roads and that the Host Community Agreement with Chest Township is valid. This litigation is further explained by the Report and Recommendation of the Magistrate marked as P-26.

public or the Department's contentions with respect to administrative finality. With respect to injury, it appears that if Eagle's permit becomes void by operation of the five-year rule, the cause will not be any action of the Department, but will be Eagle's decision not to construct but to pursue litigation.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EAGLE ENVIRONMENTAL II, L.P. and CHEST TOWNSHIP	:	
	:	**EHB Docket No. 2006-043-MG**
v.	:	**EHB Docket No. 2001-198-MG**
	:	**(consolidated with 2001-201-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 17th day of July, 2006, it is hereby ORDERED that Eagle's Petition for Supersedeas is **DENIED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Judge

DATED: July 17, 2006

c: **DEP Bureau of Litigation:**
Attn: Brenda K. Morris, Library

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Amy Ershler, Esquire
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SOLEBURY TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-183-MG**
	:	**(consolidated with 2006-116-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW HOPE CRUSHED STONE & LIME COMPANY	:	**Issued: July 19, 2006**

OPINION AND ORDER ON MOTION TO DISMISS and STRIKE

By George J. Miller, Judge

Synopsis

The Board denies a motion to dismiss and to strike portions of a township's notice of appeal relating to the renewal of the permittee's NPDES permit. The paragraphs objected to by the permittee are either statements of fact or are related to hypothetical bases of relief that might be offered by the Board in the event that the Board rules in the township's favor. There is no reason to strike the alleged factual statements, and ruling upon the relief that the Board might fashion is premature. Accordingly, the permittee's motion is denied.

Background

This consolidated appeal involves the operation of a stone quarry by New Hope Crushed Stone and Lime Company (Permittee) in Solebury Township, Bucks County. As the result of the 2002 appeal of the Department's renewal of the Permittee's NPDES

permit, the Board's adjudication issued on March 5, 2004 vacated and remanded the renewal of the permit subject to the Department's (1) further consideration of appropriate discharge limits to minimize disturbance to the hydrologic balance of the Primrose Creek Basin in which the quarry is located, (2) requiring the Department or the Permittee to conduct an in depth study of the basin to determine what additional limits should be placed on the discharge from the quarry particularly during times of drought, and (3) amending the permit renewal to authorize the Permittee to discharge no more than necessary to keep the pit dry enough to meet production needs but no more than four mgd per day on a monthly average until the Department completes the review ordered in the adjudication. The Board's order further provided that all other conditions and requirements of the Permittee's NPDES permit remain in full force and effect.[1]

Nearly a year later, the Department issued an administrative order on May 19, 2005, requiring the Permittee to complete the hydrologic study required by the Board's adjudication. Following completion of this study, the Department issued a letter to the Permittee on October 11, 2005 that "discharged" the Department's administrative order since the required study had been submitted and approved by the Department.

Solebury Township filed an appeal on June 10, 2005 at EHB Docket No. 2005-183-MG, challenging the Department's compliance with the Board's previous adjudication and order. In particular, this notice of appeal claims, among other things, that the Department has not complied with the Board's order, that the Permittee is unlawfully discharging water without a permit, and that the Township has been excluded

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[1] *Solebury Township v. DEP*, 2004 EHB 95.

from the Department's consideration of compliance with the Board's order. The Board has twice denied the Permittee's motions to dismiss this appeal.[2]

Thereafter, on March 16, 2006, the Department issued a revised renewal of the Permittee's NPDES permit. The Township filed an appeal from this revised renewal at EHB Docket No. 2006-116-MG, and the Board consolidated these two appeals by order dated May 10, 2006.

Presently before the Board is the Permittee's motion in the 2006 permit appeal to "Strike and to Dismiss Those Components of the Appeal of Solebury Township Over Which the Environmental Hearing Board Has No Jurisdiction." This motion seeks a determination by the Board that the only issue before the Board is whether the Department committed an error of law or abused its discretion in issuing the 2006 revised renewal permit with the special conditions contained in that permit. It also seeks to strike a number of paragraphs of the notice of appeal, including a request for counsel fees, and that the Township's prayer for relief seeking (1) a permanent injunction against the Permittee's further operations and (2) a direction to the Department to take enforcement action be stricken. The Township also requests that the Board appoint a Special Master to monitor the Permittee's compliance with its permit.

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[2] *Solebury Township v. DEP*, 2005 EHB 898 (denying the motion to dismiss on the basis of mootness); EHB Docket No. 2005-183-MG (Opinion issued May 10, 2006 (denying the motion because the issuance of the new permit did not moot the appeal of the administrative order and holding that the Board has jurisdiction to consider the Township's claims with respect to the adequacy of the Department's compliance with our 2004 Order.)

DISCUSSION

While the motion presently before the Board relates only to the notice of appeal filed at EHB Docket No. 2006-116-MG, we remind the parties that in this consolidated appeal there are a number of issues for adjudication in the appeal at Docket No. 2005-183-MG relating to whether the Department acted properly in complying with the Board's order of March 5, 2006, as well as its apparent unwillingness to involve the Township in the Department's consideration of the investigation ordered by the Board and the terms of a new permit. In addition to these issues, the 2006 appeal raises the question of whether the Department acted properly in issuing the 2006 renewal permit under all of these circumstances.[3]

The Permittee's motion to strike paragraphs 6-8, 10-12, 14-16, 18, 20 and 37 of the notice of appeal are simply statements of the history of the Department's actions and of the appeals. We see no reason to strike those paragraphs of the appeal, and the Permittee's brief in support of its motion does not discuss any impropriety in these statements in the notice of appeal. Accordingly, the motion with respect to these paragraphs of the notice of appeal will be denied.

The Permittee's brief does attack much of the relief sought in the 2006 notice of appeal as set forth in paragraphs 42-50. These paragraphs, however, are not substantive objections to the Department's action that ordinarily might be a basis for dismissal of a substantive claim to avoid unnecessary discovery. Instead, these paragraphs of the notice of appeal prematurely raise hypothetical issues as to whether or not the Board has

[3] Opinion and Order issued May 10, 2006, slip op. at 4-5.

jurisdiction to grant the relief sought if the Board were to determine that the Township's substantive claims have merit. Of course, the Board has no jurisdiction to directly enjoin the Permittee's operation of the quarry, but as the Township's brief in response points out, the Board might have jurisdiction to grant much of the relief sought if the Board's adjudication in these appeals found that the Department and the Permittee were acting unlawfully.[4] Specifically, under appropriate circumstances the Board would have the power to direct the Department to revoke or suspend the NPDES permit, an action that would, as a practical matter, effectively stop the operation of the quarry. However, we can make no determination as to what relief might be appropriate until after a hearing on the merits of the Township's claims. Since the issues of remedy are pure issues of law and our failure to grant the motion will not in any way affect the course of discovery on the merits of the Township's substantive claims, we decline to strike or dismiss the Township's claims for relief at this early stage of the proceedings.

Having said that, we advise counsel that the Board's view of its remand order of March 5, 2004 is that all provisions of the existing NPDES permit other than the limitation on the volume of discharge were to continue in full force and effect pending the completion of the study ordered by the Board and the issuance of a revised permit.[5] Accordingly, it may be difficult to persuade us that the Permittee did not have an effective NPDES permit during this period. In addition, we think it is unlikely that we have jurisdiction to appoint a master to oversee the activities of the Department and the

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[4] *Pequea Township v. Herr,* 716 A.2d 678 (Pa. Cmwlth.1998)(The Board's power to substitute its discretion for that of the Department includes the power to modify the Department's action and to direct the Department in what is the proper action to be taken); *see also Environmental & Recycling Services, Inc. v. DEP*, 2002 EHB 461; *People United to Save Homes v. DEP,* 1999 EHB 457.

[5] See Paragraphs 3 and 4 of Order, 2004 EHB 95.

permittee. It is the Department's function to oversee the activities of water dischargers, and we ordinarily must give due respect the Department's prosecutorial discretion in overseeing these activities. That principle also applies to the request that we direct the Department to initiate enforcement activity. Whether or not counsel fees and expenses may or should be awarded must also be deferred until after the adjudication in these appeals is issued and an appropriate application for such fees and expenses is submitted to the Board.

Accordingly, we issue the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SOLEBURY TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2005-183-MG**
	:	**(consolidated with 2006-116-MG)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW HOPE CRUSHED STONE & LIME COMPANY	:	

ORDER

AND NOW, this 19th day of July, 2006, it is hereby **ORDERED** that the motion to dismiss and strike is hereby **DENIED.**

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Judge

DATED: July 19, 2006

c: **DEP Litigation:**
Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JASON TAPLER	:	
	:	
v.	:	**EHB Docket No. 2006-078-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND UPPER MILFORD TOWNSHIP, Permittee	:	**Issued: July 19, 2006**

OPINION AND ORDER ON MOTION TO AMEND APPEAL

By Michelle A. Coleman, Judge

Synopsis:

The Board grants in part and denies in part a Motion to Amend a Notice of Appeal. Appellant is granted leave to numerate his objections to the Department's action in accordance with the form requirements set forth in the Board's Rules of Practice and Procedure. The Board denies Appellant's motion to incorporate objections contained in another Appellant's Notice of Appeal where the inclusion of those objections would significantly expand the scope of his appeal and impose undue prejudice on the Appellees.

OPINION

Presently before the Board is the motion by Jason Tapler (Appellant) to amend his appeal of the Department of Environmental Protection's (Department) January 27, 2006 approval of Upper Milford Township's (Permittee) proposed Official Sewage Facilities Plan revision. Appellant moves to amend his Notice of Appeal in order to supplement his basis for objection to

the Department's action. He seeks to numerate his objections to the Department's action, which were contained in a letter dated March 2, 2006, and attached to his Notice of Appeal. Appellant then wants to incorporate additional objections contained in a different appeal filed by George and Melanie DeVault at EHB Docket No. 2006-083-C, which challenges the same Department action.

Both the Department and Permittee (Appellees) oppose the Motion to Amend Appeal. The Department argues that Appellant never perfected his appeal because it was not served with a copy of the letter specifying his objections to the Department's action. The Board addressed this issue in a prior opinion in this matter denying a motion to dismiss. *Tapler v. DEP and Upper Milford Township*, EHB Docket No. 2006-078-C (Opinion issued June 30, 2006). In that opinion, we determined that even if Appellant neglected to serve the letter in controversy on the Department, dismissal of the instant appeal was not appropriate because timely service of a Notice of Appeal is not a jurisdictional requirement. Thus, this argument and any related contentions are deemed moot and will not be revisited in this opinion.

The Department contends that Appellant's Statement of Objection is not in conformance with the form requirements set forth in the Board's Rules because Appellant's objections to the Department's action are not formatted into separate, numbered paragraphs. *See* 25 Pa. Code § 1021.51(e). Also, the Department argues that it is prejudiced by Appellant's request for relief because Appellant is seeking to add objections that are beyond the scope of his appeal. The Department insists that most of the objections that Appellant seeks to incorporate into his Notice of Appeal are specific to the DeVaults' interests and thus, are not appropriate for amendment. The Permittee agrees that prejudice would result from the amendment of Appellant's Notice of Appeal because Appellant seeks to raise approximately sixty additional objections to those stated

in his Notice of Appeal. In the converse, Appellant argues that neither the Department nor Permittee would be prejudiced by the amendment of his appeal because the same objections have already been raised in the DeVaults' Notice of Appeal. Appellant contends that no party has begun discovery of any of the issues raised in this matter, so no prejudice will arise.

The issue of whether to allow a party to amend its appeal after the period for amendment has expired rests firmly within the Board's discretion. *Robachele, Inc. v. DEP*, EHB Docket No. 2005-091-L (Opinion and Order issued on June 14, 2006). The Board may grant a party leave to amend its appeal if no undue prejudice will result to the nonmoving parties. 25 Pa. Code § 1021.53(b). When assessing prejudice, we look at the substance of the proposed amendment and consider the extent to which it diverges from the original appeal. *Robachele, Inc., supra*, slip op. at 8. The burden of demonstrating that no undue prejudice will result to the opposing parties is on the party seeking the amendment. 25 Pa. Code § 1021.53(b). In the case at bar, Appellant has not met this burden.

Our review of the record at this point in the case reveals that most of the objections Appellant seeks to incorporate into his appeal are particular to the DeVaults' interests and unrelated to the objections raised in his Notice of Appeal. Also, as the Permittee persuasively argues, allowing Appellant to add nearly sixty objections to his Notice of Appeal would severely expand the scope of this appeal. Thus, we cannot conclude that the Appellees would not be prejudiced by the inclusion of the proposed amendments. In the interest of clarity, however, we will grant Appellant leave to revise his Notice of Appeal in order to numerate his objections to the Department's action. Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JASON TAPLER	:	
	:	
v.	:	**EHB Docket No. 2006-078-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND UPPER MILFORD TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 19th day of July, 2006, upon consideration of Appellant's Motion to Amend Appeal in the above-captioned matter, it is hereby ORDERED as follows:

1. Appellant is granted leave to numerate his objections to the Department's action in accordance with 25 Pa. Code § 1021.51(e).

2. The Motion to Amend Appeal is DENIED in all other respects.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Judge

DATED: July 19, 2006

c: **DEP Bureau of Litigation:**
Attention: Brenda K. Morris, Library

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CHARLES W. TANNER	:	
	:	
v.	:	**EHB Docket No. 2005-223-R**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 25, 2006**

OPINION AND ORDER ON MOTION TO DISMISS

By Thomas W. Renwand, Judge

Synopsis:

The Department's motion to dismiss is granted where an appeal was filed more than 30 days beyond the receipt of the action being appealed and where the appellant failed to respond to a Board order to perfect and to the Department's motion.

OPINION

This matter involves an appeal filed by Charles W. Tanner from a compliance order issued by the Department of Environmental Protection (Department) on June 6, 2005. The Department seeks to dismiss the appeal on the grounds that it was filed more than 30 days after Mr. Tanner was served with the compliance order and that Mr. Tanner failed to perfect the appeal in accordance with the Environmental Hearing Board's (Board) order of July 19, 2005. Mr. Tanner filed no response to the motion.

According to the affidavit of Brian Mummert, a solid waste supervisor at the

Department's Meadville office, he hand-delivered a copy of the compliance order to Mr. Tanner on June 6, 2005. Mr. Tanner's appeal was filed on July 8, 2005, 32 days after receipt of the compliance order. Pursuant to the Board's rules of practice and procedure, appeals must be filed within 30 days of receipt of the action being appealed; otherwise, the Board's jurisdiction does not attach. 25 Pa. Code § 1021.52 (a) (1).

Mr. Tanner's appeal also did not indicate that he had served a copy of the appeal on the Department's Office of Chief Counsel and Meadville Solid Waste Office, as required by the appeal form and 25 Pa. Code § 1021.52 (g) (1) and (2). Therefore, on July 19, 2005 the Board ordered Mr. Tanner to provide copies to those offices and file a proof of service with the Board on or before August 8, 2005. He did not do so.

The Department seeks to dismiss the appeal on the grounds set forth above. Mr. Tanner has filed nothing in response to the Department's motion. The Board may deem a party's failure to respond to be an admission of all properly-pleaded facts contained in the motion. 25 Pa. Code § 1021.91 (f); *Gary Berkley Trucking, Inc. v. DEP*, EHB Docket No. 2005-199-R (Opinion and Order on Motion to Dismiss issued June 2, 2006).

We find that dismissal of the appeal is warranted. It is untimely and, therefore, outside the Board's jurisdiction. Moreover, Mr. Tanner's failure to comply with the July 19, 2005 order to perfect and his further failure to respond to the Department's motion to dismiss indicate an unwillingness to participate in the appeal process. As noted by Judge Miller in *Swistock v. DEP*, EHB Docket No. 2005-158-MG (Opinion and Order on Motion for Sanctions issued June 29, 2006), *slip op.* at 4, "The integrity of the appeal process before the Board is dependant upon the willingness of the parties to follow the rules of procedure and the orders of the Board."

We enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHARLES W. TANNER	:	
v.	:	**EHB Docket No. 2005-223-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 25th day of July 2006, the Department's motion to dismiss is **granted** and the appeal docketed at **EHB Docket No. 2005-223-R** is ***dismissed***.

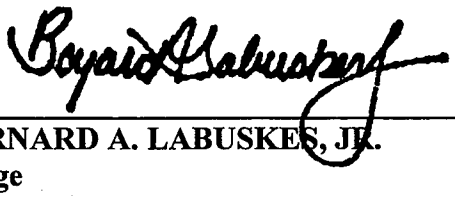
ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge

GEORGE J. MILLER
Judge

THOMAS W. RENWAND
Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

DATE: July 25, 2006

c: **DEP Bureau of Litigation:**
Attention: Brenda K. Morris, Library

For the Commonwealth, DEP:
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Northwest Regional Counsel

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BLUE MOUNTAIN PRESERVATION ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2005-077-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ALPINE ROSE RESORTS, INC., Permittee	:	**Issued: July 26, 2006**

OPINION AND ORDER GRANTING APPELLANT'S PETITION TO REOPEN RECORD

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

Appellant's Petition to Reopen Record to add a DEP Stormwater Best Practices Manual is granted. No detailed analysis of 25 Pa. Code § 1021.133(b) need be or will be undertaken since the Department's Post-Trial Brief, filed after the Appellant's Petition was filed, quotes the Manual at length. Thus, we will grant the Petition.

Discussion

Before us today is Blue Mountain Preservation Association's (BMPA or Appellant) post-trial Petition to Reopen Record (Petition). This litigation is BMPA's challenge to the Department's issuance of a stormwater management permit to Alpine Rose Resorts, Inc. (Alpine or Permittee) in connection with Alpine's construction of a road course for sports cars and high performance vehicles. The sole issue is whether the Department followed the requirements of the "antidegradation" regulation, 25 Pa. Code § 93.4c(b)(1), in issuing the permit to Alpine. The trial started on March 28, 2006 and ran four consecutive days ending on March 31, 2006.

Alpine's June 8, 2006 Petition seeks to add to the record as BMPA Ex. 58 a document entitled "Pennsylvania Stormwater Best Practices Manual" which is DEP Document No. 363-0300-002 (Manual). BMPA submitted a copy of the Manual as its proposed Exhibit 58.[1]

The standards governing a petition to reopen the record are set forth in 25 Pa. Code § 1021.133(b) which provides:

> (b) The record may be reopened upon the basis of recently discovered evidence when all of the following circumstances are present:
>
> (1) Evidence has been discovered which would conclusively establish a material fact of the case or would contradict a material fact which had been assumed or stipulated by the parties to be true.
>
> (2) The evidence is discovered after the close of the record and could not have been discovered earlier with the exercise of due diligence.
>
> (3) The evidence is not cumulative.

25 Pa. Code § 1021.133(b). The April 15, 2006 *Pennsylvania Bulletin* contained an announcement of the availability of various technical guidance documents, the Manual being one, on DEP's website. The Manual appeared on DEP's website on or about the same date. Alpine alleges that for that reason it could not have been discovered before the trial ended and that the document is so seminal and important that it fits the other requirements for reopening a trial record after the trial is over. *See* 25 Pa. Code § 1021.133(b).

The Department and the Permittee filed their oppositions to the Petition on June 22, 2006 and June 23, 2006 respectively. They argue that the BMPA has not satisfied the requirements of Rule 1021.133(b) because, among other reasons, the Manual is merely a draft, that BMPA could have discovered prior versions of this draft prior to the trail, and the Manual is irrelevant to any material fact in the case. Alpine points out that several trial witnesses discussed

---

[1] As BMPA acknowledges, its proposed Exhibit 58 is about two-hundred pages of an over six-hundred page document. BMPA does not object to DEP or Alpine including additional sections of the Manual in the record if they so desire.

the Manual and, thus, it must have been available before April 15, 2006. The essence of the Department's irrelevancy argument is that the Manual deals with post-construction Best Management Practices (BMPs), not construction phase BMPs. Alpine's Post-Trial Brief, filed on July 20, 2006, says that the Manual has "extremely limited probative value as that document has not been finalized and is subject to substantial change." Alpine Post-Trial Brief, p. 53.

We will not and need not conduct a deep analysis of 25 Pa. Code § 1021.133 here because, as it turns out, the Department's own Post-Trial Brief, filed on July 20, 2006, contains an almost two page single spaced quote from the Manual. DEP Post-Trial Brief, pp. 25-26. This is the longest quote in the Department's Post-Trial Brief. Well, so much, one would think, for Alpine's concomitant statement in its Post-Trial Brief that the Manual has "extremely limited probative value . . . . " So much also, we do think, for the question whether the record should be reopened to add the Manual. The record will be reopened to include the Manual.

We also note before we close that both the Department, and especially Alpine, seem to rely heavily in their respective post-trial brief arguments on the post-construction stormwater management measures as showing, or being part of a showing, of compliance with some or all of the components of the antidegradation regulation. Thus, the point that the Manual is irrelevant because it covers post-construction control measures and not construction period control measures is hard to comprehend.

An order consistent with this opinion follows.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

BLUE MOUNTAIN PRESERVATION ASSOCIATION, INC.	:	
	:	
v.	:	**EHB Docket No. 2005-077-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ALPINE ROSE RESORTS, INC., Permittee	:	**Issued: July 26, 2006**

ORDER

AND NOW, this 26th day of July 2006, IT IS HEREBY ORDERED that Appellant's Petition to Reopen Record is **GRANTED** and Appellant's proposed Exhibit No. 58 is added to the record. It is further ordered that the Department and/or Alpine may, if either so desires, add any other portions of the Manual to the record by simply forwarding those provisions to the Board for inclusion in the record.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

DATED:

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

VICTOR KENNEDY	:	
	:	
v.	:	**EHB Docket No. 2005-332-L**
	:	**(Consolidated with 2005-333-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 26, 2006**

OPINION AND ORDER ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board dismisses consolidated appeals and awards costs as a sanction for failing to comply with the Board's orders and rules.

OPINION

Victor Kennedy ("Kennedy") filed these two appeals from actions of the Department of Environmental Protection (the "Department") regarding sewage and water supply issues at his mobile home park. The Department issued an order to Kennedy to address sewage issues and denied a public water supply permit application. We consolidated the two appeals.[1]

When Kennedy failed to appear for a duly noticed deposition on March 7, 2006, the Department filed motions to compel his attendance in both appeals. Kennedy did not respond to

[1] The Department has also filed a complaint for civil penalties regarding the sewage issues, which is docketed separately at EHB Docket No. 2005-299-CP-L. The Department filed a motion for default judgment in that action based upon Kennedy's failure to file a response to the Department's complaint. Kennedy did not respond to the motion for default judgment. The Board granted the Department's motion.

the motions. We granted the motions. In our opinion and order we stated that "Kennedy's failure to respond to the Department's motions signifies that he has no objection to the motions and is willing to appear for deposition as demanded by the Department." Our Order read as follows:

> AND NOW, this 20th day of April 2006, it is hereby ordered that Victor Kennedy will submit to a deposition beginning at **10:00 a.m.** and continuing until completed on **May 2, 2006** at the Department's Meadville office in compliance with the terms of the Department's notices of deposition dated March 29, 2006. The parties may jointly petition the Board to take the deposition at a different, mutually agreeable time. An unexcused failure to comply with this Order will likely result in the imposition of sanctions, including a possible dismissal of the appeals.

The Department retained the services of a court reporter in preparation for the May 2, 2006 deposition. The court reporter appeared for the deposition as requested by the Department. Kennedy did not. At no time prior to the time of the scheduled deposition did Kennedy inform the Department that he would not attend the deposition. The Department incurred costs of $175 for the court reporter's appearance fee and preparation of a brief record.

The Department has now filed a motion to dismiss these consolidated appeals as a sanction. The Department has also asked us to issue an order directing Kennedy to reimburse the Department for the costs incurred at both of the depositions. Kennedy has again filed no response.

Our rules authorize us to impose sanctions:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence or documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including those permitted under Pa.R.C.P. 4019 (relating to sanctions regarding discovery matters).

25 Pa.Code § 1021.161. Pa.R.Civ.P. 4019(g)(1) authorizes us to require a party whose conduct necessitated discovery motions to pay the moving party's reasonable expenses unless we find that the opposition to the motions was substantially justified or other circumstances make an award of expenses unjust.

As we recently explained in *Swistock v. DEP*, EHB Docket No. 2005-158-MG (June 29, 2006),

> The Board has broad powers under its rules of procedure to impose sanctions for failure to comply with orders of the Board. . . . Accordingly, the Board has dismissed an appeal for a failure to file answers to interrogatories or respond to discovery requests. *E.g., Potts Contracting v. DEP*, 1999 EHB 959; *Recreation Realty, Inc. v. DEP*, 1999 EHB 697. The Board recently dismissed an appeal for failing to comply with orders of the Board signifying an intent not to pursue an appeal. *Sri Venkateswara Temple v. DEP*, [2005 EHB 54, 56].

Kennedy has given every indication that he has no serious interest in pursuing these appeals. He has ignored his discovery obligations, and inexcusably failed to comply with our order, even after we expressly warned him that failure to comply would likely result in dismissal. He has provided us with no explanation and no reason to do anything other than grant the Department's request.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

VICTOR KENNEDY	:	
	:	
v.	:	**EHB Docket No. 2005-332-L**
	:	**(Consolidated with 2005-333-L)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 26th day of July, 2006, it is hereby ordered as follows:

1. These consolidated appeals are dismissed.
2. Kennedy shall reimburse the Department $175.00 for the reporting costs incurred by the Department for the second deposition.

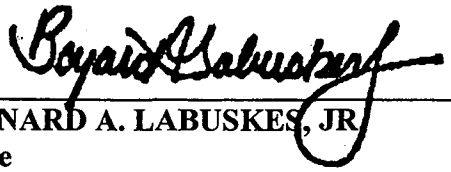
ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

GEORGE J. MILLER
Judge

THOMAS W. RENWAND
Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

DATED: July 26, 2006

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

FOUNDATION COAL RESOURCES CORPORATION and PENNSYLVANIA LAND HOLDINGS CORPORATION, PPL CORPORATION and REALTY COMPANY OF PENNSYLVANIA	:	
v.	:	**EHB Docket No. 2006-067-R (Consolidated with 2006-068-R; 2006-069-R; 2006-070-R and 2006-071-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNECO OIL COMPANY, INC., Permittee	:	**Issued: August 4, 2006**

OPINION AND ORDER ON MOTION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE

By Thomas W. Renwand, Judge

Synopsis:

The Pennsylvania Environmental Hearing Board finds that a trade association representing industry members has sufficient interest to participate as *amicus curiae* in appeals challenging the issuance of oil and gas permits.

Background

The first of these consolidated appeals was filed on February 27, 2006. Appellants Foundation Coal Resources Corporation and Pennsylvania Land Holdings Corporation

(Foundation Coal or Appellants) have filed appeals from oil and gas well drilling permits issued by the Pennsylvania Department of Environmental Protection (The Department). The very detailed Notices of Appeal object to the Department issuing permits which will allow drilling through workable coal seams. Appellants request this Board to rescind the applicable drilling permits. The Permittee, Penneco Oil Company, and the Department take a different view.

The Motion

Presently before the Pennsylvania Environmental Hearing Board is the Motion of the Independent Oil and Gas Association of Pennsylvania to participate as *amicus curiae* in the matter. According to the Motion, the "Independent Oil and Gas Association of Pennsylvania is a non-profit trade association representing Pennsylvania's independent oil, natural gas, and coalbed methane producers, marketers, service companies, and related business." Motion for Leave to Participate as Amicus Curiae, (page 1, ¶ 1). It further contends that the members of the Independent Oil and Gas Association of Pennsylvania will be substantially affected by the resolution of the consolidated appeal and that it has a significant interest in the legal issues raised in the appeal.

The Independent Oil and Gas Association of Pennsylvania expects that its *amicus* brief will address four legal issues it believes are raised in the consolidated appeal:

1) whether the permits were validly issued in accordance with Pennsylvania law;
2) Whether the Department attached legally valid conditions to the permit and

whether it was under a further duty to attach additional conditions as alleged by Foundation Coal;

3) whether the issuance of the permits in question constituted a regulatory taking of Foundation Coal's property; and

4) whether the issuance of the permits was unconstitutional under the Pennsylvania Constitution.

The Motion for Leave to Participate is "not objected to" by the Department. Penneco Oil Company urges us to grant the Motion while Foundation Coal vigorously opposes the Motion.

Foundation Coal argues that the Motion for Leave is premature since there are no pending motions and the consolidated appeal has not been scheduled for trial. It contends that the Independent Oil and Gas Association of Pennsylvania misstates the legal issues and overstates its interests in several important ways.

Standard for Participation as Amicus Curiae

The Pennsylvania Environmental Hearing Board's Rules of Practice and Procedure specifically allow for *amicus curiae* participation. The specific regulation states:

> a) Anyone interested in legal issues involved in a matter pending before the Board may request leave to file an *amicus curiae* brief or memorandum of law, in regard to those legal issues. The *amicus curiae* shall state in its request the legal issues to be addressed in the brief and shall serve a copy of the request on all parties.
>
> b) If the Board grants a request the *amicus curiae* shall file the brief within the time prescribed by the Board and shall serve a copy on all parties.

Any party may file a response to a brief *amicus curiae* which is adverse to its interests.

c) The *amicus curiae* may present oral argument only as the Board may direct.

25 Pa. Code § 1021.25.

The regulation's broadly inclusive language reflects its purpose to insure that the Environmental Hearing Board be more accessible to the citizens of Pennsylvania. "The Environmental Hearing Board believes that to better serve the citizens of this Commonwealth and to have the Environmental Hearing Board's practice more closely track judicial practice in other courts of the Commonwealth its procedural rules should include a section for *amicus curiae* briefs." 29 *Pa. Bull.* 1024.

It is certainly understandable for a party to oppose such a request when the petitioner will be arguing a contrary position. Nevertheless, the beacon that guides our decision is whether the petitioner has an interest in the legal issues raised in the appeal. *See TJS Mining, Inc. v. DEP*, 2003 EHB 507, 511. It is without question that the Independent Oil and Gas Association of Pennsylvania has an interest in the issues before the Environmental Hearing Board in this consolidated appeal. *Wheeling and Lake Erie Railway v. DEP and Maple Creek Mining, Company*, 1999 EB 293, 295 (The Board, over the objection of the Railroad, allowed the Pennsylvania Coal Association to participate as *amicus curiae* based on its claim that "as the voice of Pennsylvania's bituminous mining industry, it is vitally interested in the implementation of Pennsylvania's program for regulating the surface impacts of bituminous

underground coal mining" and because the issues raised in this appeal are of vital importance to the Pennsylvania Coal Association and its member companies.) We certainly have no reason to doubt that the Independent Oil and Gas Association of Pennsylvania also believes that the issues raised in this appeal are of vital importance to its members. Therefore, they are entitled to participate as *amicus curiae*.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FOUNDATION COAL RESOURCES CORPORATION and PENNSYLVANIA LAND HOLDINGS CORPORATION, PPL CORPORATION and REALTY COMPANY OF PENNSYLVANIA	:	
v.	:	**EHB Docket No. 2006-067-R (Consolidated with 2006-068-R; 2006-069-R; 2006-070-R and 2006-071-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNECO OIL COMPANY, INC., Permittee	:	

ORDER

AND NOW, this 4th day of August 2006, after review of the Independent Oil and Gas Association of Pennsylvania's Motion for Leave to Participate as Amicus Curiae and the Appellants' Response in Opposition, it is ordered as follows:

1) The Motion for Leave to Participate as Amicus Curiae is ***granted***.

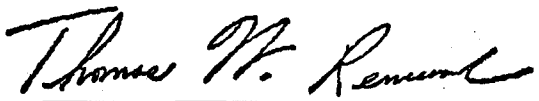
2) The Independent Oil and Gas Association of Pennsylvania may participate in this matter as *amicus curiae*.

3) The parties are directed to serve counsel for the Independent Oil and Gas Association of Pennsylvania with 1) copies of any dispositive motions and responses if any such documents are filed; and 2) copies of

any pre-hearing memoranda and post-hearing briefs.

4) The Board will issue appropriate orders as the case progresses and motions are filed.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Judge

DATED: August 4, 2006

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

UMCO ENERGY, INC.	:	
	:	
v.	:	**EHB Docket No. 2004-245-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CITIZENS FOR PENNSYLVANIA'S FUTURE, Intervenor	:	**Issued: September 5, 2006**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis:

In an appeal from a Department order restricting an underground mine operator to room-and-pillar mining in one of its eleven mining panels, the Board holds that the Department has the legal authority to prohibit longwall mining in the panel where it is very likely that longwall mining will completely and permanently eliminate all flow in a perennial stream and the springs, seeps, and wetlands appurtenant to that perennial stream. The operator's commitment to perform stream flow replacement with city water from a hydrant does not prohibit the Department from issuing an order protecting the stream from permanent damage. The Board, however, reopens the record to allow the operator to present previously excluded evidence in support of its claim that it was denied equal protection vis-à-vis shopping centers and highway builders.

Procedural History

On November 12, 2004, the Department of Environmental Protection (the "Department")

issued an order restricting UMCO Energy, Inc. ("UMCO") to room-and-pillar mining in the 6 East (6E) panel of its High Quality Mine in Fallowfield Township, Washington County (the "Order"). That same day, UMCO filed an appeal from the Order with this Board.

On November 15, 2004, UMCO filed a petition for temporary supersedeas and a petition for supersedeas. The day after the petitions were filed, the Board held a conference call with the parties. As a result of the discussions, the Board scheduled a supersedeas hearing to begin three days later, on November 19, 2004. In light of the Board's immediate attention to UMCO's petition for supersedeas, UMCO withdrew its petition for temporary supersedeas. Prior to the hearing, Citizens for Pennsylvania's Future ("PennFuture") and the United Mine Workers of America ("UMWA") intervened. PennFuture intervened on the side of the Department and UMWA intervened on the side of UMCO.

The supersedeas hearing began on November 19, 2004 and continued over the course of three days. The Board conducted a site visit on Saturday, November 20, 2004. We denied UMCO's petition for supersedeas in an Opinion and Order dated November 30, 2004. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797. We found that there would have been an immediate threat to the environment had the supersedeas been issued, the short-term harm being suffered by UMCO was resulting in significant part from its own business decisions and course of conduct, and UMCO had a very low likelihood of prevailing on the merits because it did not appear that UMCO would be able to establish the factual predicate to its legal theories.

On December 2, 2004, UMCO filed a petition to amend the Board's Order to allow for an interlocutory appeal to the Commonwealth Court. As before, UMCO requested the Board's expedited consideration. One day later, on December 3, 2004, UMCO filed a motion for stay of appeal in anticipation of the Commonwealth Court's review. This motion was denied as

premature on December 10, 2004 because the Board had not yet ruled on UMCO's petition to amend the Board Order. On December 13, 2004, we denied UMCO's petition to amend the Board Order. *UMCO Energy, Inc. v. DEP*, 2004 EHB 832. We held that a supersedeas ruling is an inappropriate vehicle for bringing issues before the Commonwealth Court. UMCO nevertheless filed a petition for review with the Commonwealth Court on December 22, 2004. The Commonwealth Court rejected UMCO's petition on January 4, 2005.

On February 2, 2005, UMCO filed a motion to amend its notice of appeal. UMCO dramatically reduced the number of objections contained in its original appeal in order to streamline the proceedings as much as possible. Among other things, UMCO deleted its objection that the Department had acted unreasonably and abused its discretion in issuing the Order. UMCO's amended appeal was limited to three legal issues, which will be discussed in detail below. We granted UMCO's unopposed motion to amend on February 23, 2005.

On February 14, 2005, the Board issued a Pre-Hearing Order requiring all discovery including expert discovery to be completed by May 20, 2005. We scheduled a hearing on the merits for June 20, 2005.

A week later, on February 23, 2005, UMCO filed a petition for extraordinary relief with the Pennsylvania Supreme Court. UMCO asked the Court to assume King's Bench jurisdiction over the case. The Court denied UMCO's petition for extraordinary relief on May 23, 2005.

After filing the petition for extraordinary relief, UMCO publicly announced that it would be closing the High Quality Mine. As a result, the Department filed a motion to dismiss UMCO's appeal as moot. The Board denied the Department's motion to dismiss on May 2, 2005.

Meanwhile, on May 20, 2005, the date by which all discovery was to be completed in the

Board's proceedings, UMCO had failed to designate any expert witnesses, provide any expert reports, or otherwise respond to the Department's expert interrogatories. On June 8, 2005, the Department filed a motion in limine to preclude UMCO from presenting any testimony from experts that it had failed to identify by the discovery deadline. At no time before or after the deadline did UMCO seek an extension from the Board. On June 13, 2005, one week before the scheduled hearing date, UMCO designated several experts for the first time. On June 15, 2005, we denied the Department's motion in limine, but we postponed the hearing until September 19, 2005 in order to provide the Department with an opportunity to conduct discovery regarding the newly identified experts.

On June 28, 2005, UMCO filed a petition with the Commonwealth Court to review the Board's June 15, 2005 Order postponing the hearing until September. The Department and PennFuture wrote to the Board to state their understanding that UMCO's interlocutory appeal stayed all activity in the Board's proceedings. They pointed out that a further postponement of the hearing on the merits would be required pending the Commonwealth's Court review of whether the Board had erred in postponing the hearing due to UMCO's discovery violations. Before we had a chance to react, UMCO voluntarily withdrew its petition for review with the Commonwealth Court.

We held a hearing on the merits from September 19 through 30, 2005. The parties stipulated and we agreed that the supersedeas record would be incorporated in its entirety into the record on the merits. Altogether, there were thirteen days of testimony resulting in 2,464 pages of transcript and dozens of exhibits. The last post-hearing brief was filed on May 12, 2006.

On April 10, 2006, UMWA, which had actively participated in the Board proceedings

throughout the entire course of the litigation, filed a motion to withdraw as intervenor without explanation. We granted the unopposed motion.

FINDINGS OF FACT

The Parties

1. The Department is the agency of the Commonwealth that has the duty and authority to administer and enforce the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. § 1406.1 *et seq.* ("Mine Subsidence Act"), the Clean Streams Law, 35 P.S. § 691.1 *et seq.* ("Clean Streams Law"), Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17 ("Administrative Code"), and the rules and regulations promulgated under those statutes. (Joint Stipulation ("J.S.") ¶ 13.)

2. UMCO is a Pennsylvania corporation with a mailing address of 981 Route 917, Bentleyville, Washington County, Pennsylvania 15314. UMCO engaged in the mining of coal by the underground method in Pennsylvania pursuant to License No. 5121. (J.S. ¶ 14.)

3. UMCO is a wholly owned subsidiary of Maple Creek Mining, Inc., a Pennsylvania corporation. Maple Creek Mining is a subsidiary of Murray Energy, Inc. (Notes of transcript from the hearing on the merits, page (hereinafter "T.") 772; Notes of transcript from the supersedeas hearing, page (hereinafter "S.T.") 20; PennFuture Exhibit ("P.F.Ex.") 10.)

4. PennFuture is a Pennsylvania nonprofit corporation with a mailing address of 425 Sixth Avenue, Suite 2770, Pittsburgh, Pennsylvania 15219. (J.S. ¶ 15.)

The Site

5. UMCO operates the High Quality Mine, an underground bituminous coal mine located in Fallowfield Township, Washington County, pursuant to Coal Mining Activity Permit No. 63921301. P.F.Ex. 10; UMCO Hearing Exhibit ("U.Ex.") 55.

6. UMCO mined the Pittsburgh Coal Seam at the High Quality Mine. (S.T. 295; T. 1010.)

7. The Department initially issued Permit No. 63921301 on June 8, 1994. At that time, the permit authorized coal extraction by the room and pillar method. (S.T. 824, 827.) When the permit was first issued, UMCO was not owned by Maple Creek. (S.T. 23-24, 824; T. 174; P.F.Ex. 10.)

8. On June 2, 1997, the permit was revised to reflect the sale of UMCO to Maple Creek. The permit was renewed in November 1999. (T. 72; P.F.Ex. 10; UMCO Supersedeas Exhibit ("U.S.Ex.") I.)

9. The permit was revised on May 6, 2002 to add acreage and allow both full extraction longwall mining and room and pillar mining. (S.T. 824, 827, 890; T. 176, 265, 743; U.S.Ex. I; U.Ex. 55.)

10. Although room and pillar mining is still authorized by the permit, UMCO has concentrated on longwall mining, except for development mining needed to perform longwall mining. (S.T. 66-67, 827; U.Ex. 14V.)

11. Longwall mining involves full extraction of virtually all of the coal by large machines within a defined rectangular area known as a panel. The machine moves through the panel and the mine roof collapses immediately behind the machine. (S.T. 265-66; T. 1770-71.)

12. UMCO proposed as part of the 2002 permit revision that longwall mining would be conducted in panels designated 1 through 11 (with subdesignations of east or west), and that room and pillar mining would be conducted in other designated areas within the permit boundary. (Commonwealth Hearing Exhibit ("C.Ex.") 12; U.Ex. 14V.)

13. The permit revision imposed "no subsidence zones" on certain segments of

streams above the mine. The "no subsidence zones" were created because UMCO was anxious to begin mining but lacked sufficient information about the streams to evaluate the impact of subsidence from longwall mining on those streams. (S.T. 215, 491-93; T. 172-74, 274-75.)

14. The zones were represented as crosshatched areas on six-month mine maps submitted to the Department by UMCO for the mine as "no subsidence pending further hydrologic review." (S.T. 491, 493.)

15. Longwall mining was not allowed within no subsidence zones until hydrologic information for that portion of the stream to be undermined was submitted to the Department and the Department agreed to lift the no subsidence zone. (S.T. 491; P.F.Ex. 1, 2, 8, 10, 19, 25.)

16. No subsidence zones were designated for streams that were depicted as perennial streams on United States Geologic Survey topographic maps. (S.T. 492; T. 172-74, 275; P.F.Ex. 2.)

17. There are two key streams in this case. The first, which is indirectly relevant, is an unnamed tributary to Maple Creek that runs north to south across Panels 3E, 4E, and 5E (the "4E/5E Stream"). (T. 31-32; C.Ex. 18.)

18. The second stream, which is directly at issue, is another unnamed tributary to Maple Creek that originates at the Rakosky Spring on the 4E Panel, flows in a southerly direction across Panel 5E, and then flows approximately west to east along the length of Panel 6E (the "6E Stream"). There are several springs, seeps, and wetlands that feed into the stream. (S.T. 690-91, 801; T. 33-34; Commonwealth Supersedeas Exhibit ("C.S.Ex.") 12; C.Ex. 18.) The 4E/5E and 6E Streams join to form a single stream south and east of the 6E Panel. That third unnamed tributary in turn flows into Maple Creek. (C.S.Ex. 12; C.Ex. 18.)

19. The 4E/5E and 6E Streams are first-order streams, also known as headwaters

streams or upland valley streams. (S.T. 350; T. 245, 256.)

20. The 6E Stream is at least 2,600 feet long. (U.Ex. 16.)

21. The entire length of the 4E/5E Stream was designated as a no subsidence zone. (P.F.Ex. 1, 2, 8, 10, 19, 25.)

22. The 6E Stream was not designated as a "no subsidence zone" and it was not shown on some of the early permit maps. (T. 101; C.Ex. 26.)

23. The streams above the mine are classified as warm water fisheries. (25 Pa. Code § 93.9; T. 249.)

24. In addition to being a warm water fishery, the 6E Stream serves as a drinking water source for cattle and wildlife. (T. 281.) Although the 6E Stream contributes to the flow of Maple Creek, it is too small itself to be used for swimming or boating, and it does not serve as a source of drinking water for human consumption. (T. 250.)

The 3E Panel

25. UMCO submitted an "informal permit revision" to the Department asking to eliminate the no subsidence zone for the 4E/5E Stream above the 3E Panel. UMCO's submission was based upon photographic evidence depicting the stream above the 3E Panel as ephemeral to intermittent. (T. 276-77; P.F.Ex. 2.)

26. On November 14, 2003, the Department granted UMCO's "informal permit revision" and eliminated the no subsidence zone for the portion of the stream above the 3E Panel. The Department did not require a mitigation plan for the stream. (P.F.Ex. 1.)

27. There was no perennial flow in the section of the 4E/5E Stream above the 3E Panel and there was not much of a stream channel over the 3E Panel. (T. 276.)

28. The Department lifted the no subsidence zone in the 3E Panel because UMCO's

photographs showed that there was no flow in the 4E/5E Stream at that location at the time the photographs were taken, the Department believed there was sufficient cover (overburden) between the coal seam and the stream to protect the stream (approximately 320-330 feet), and the characteristics of the stream at that location were not consistent with perennial flow. (S.T. 139, 143-45, 500-02, 513-14; T. 175-76, 276; U.S.Ex. AA.)

29. UMCO longwall mined the 3E Panel. (S.T. 145.)

30. UMCO's longwall mining in Panel 3E created more subsidence damage on the surface than expected, as exhibited by extensive damage to several homes and substantial surface distortions. (S.T. 692-96; 876-77; C.S.Ex. 15A, B, C & D.)

31. These effects attracted the Department's attention regarding the potential threat to streams and other potential impacts from longwall mining at the site, particularly because the cover on Panel 3E where the damage was first observed was deeper than the cover on panels proposed for future longwall mining. (S.T. 876.)

The 4E Panel

32. UMCO next applied for an "informal permit revision" to eliminate the no subsidence zone for the section of the 4E/5E Stream above the 4E Panel. (P.F.Ex. 8, 11.)

33. Part of the 4E/5E Stream over the 4E Panel was perennial prior to mining. (S.T. 146, 153, 668; T. 62-64; C.Ex. 18; U.S.Ex. 1.)

34. Two small intermittent tributaries flowed from the east into the 4E/5E Stream in Panel 4E prior to mining. (T. 62-64; C.Ex. 18.)

35. Cover in the 4E Panel ranged from 255 to 320 feet. (T. 1010; U.S.Ex. AA.)

36. Nothwithstanding its heightened concern given the events that occurred in the 3E Panel, the Department agreed to accept UMCO's representation that there would be no damage

to the stream from mining the 4E Panel. The Department lifted the no subsidence zone on April 16, 2004. (S.T. 893-94; P.F.Ex. 10, 11, pp. 8-11 to 8-16, 11; U.S.Ex. I.)

37. Longwall mining occurred beneath the 4E/5E Stream over Panel 4E in April and May 2004. (S.T. 147, 204.)

38. As longwall mining occurred beneath the stream, flow was reduced and ultimately eliminated in the stream and in the two intermittent tributaries to the stream. (S.T. 148, 696-98; T. 41; C.S.Ex. 9, 16; C.Ex. 19; P.F. Ex. 19; U.S.Ex. AA.)

39. The stream segment remained dry for 18 days between April 30, 2004 and May 17, 2004. (S.T. 698; T. 41; C.Ex. 19.)

40. UMCO attempted to restore flow in the stream by filling cracks with bentonite clay and adding water pumped from wells to the stream. UMCO's efforts failed to restore flow. (S.T. 148; C.Ex. 19.)

41. On May 20, 2004, the Department issued an order that required UMCO to develop a plan to restore the 4E/5E Stream above the 4E Panel. (T. 744.) UMCO appealed that order to this Board at EHB Docket No. 2004-140-L. That appeal is pending.

42. Notwithstanding its appeal, beginning on or about May 20, 2004, UMCO artificially reestablished stream flow by adding public water from a Charleroi Water Authority hydrant to the 4E/5E Stream channel. (S.T. 809; T. 56-57; C.Ex. 19, 23.) Except for several months in early 2005 (discussed further below), UMCO added public water to the stream from the hydrant on an almost daily basis from May 20, 2004 to the time of the hearing. (The record in this case closed on the last day of the hearing, September 30, 2005.) The rate of public water flow into the stream has typically been between 60 and 80 gallons per minute. (S.T. 809; T. 56-57; C.Ex. 19, 20, 23.)

43. Since April 2004, the two intermittent tributaries to the 4E/5E Stream over Panel 4E have exhibited no flow except in direct response to significant precipitation events. (S.T. 687; T. 62-64, 155; C.Ex. 18, 19.)

44. UMCO installed piezometer PZ-1 in the area of the stream above the 4E Panel. (P.F.Ex. 11.) UMCO sheared off PZ-1 when it longwall mined the 4E Panel, eventually replacing it with another piezometer designated PZ-1R. (T. 181.)

The 5E Panel

45. The Department advised UMCO as early as April 2004 that it might not be allowed to longwall beneath streams above subsequent panels if its mining activities in Panel 4E adversely affected the 4E/5E Stream. (S.T. 877-78; T. 195.)

46. In May 2004, the Department advised UMCO that, based upon the impacts of mining on the stream segment above Panel 4E, the Department would not allow further longwall mining beneath the 4E/5E Stream, specifically, the "continuous flow streams in panels 5 or 6 East." (S.T. 368, 878-80; T. 195, 304; C.S.Ex. 7, 8.)

47. UMCO asked for the opportunity to demonstrate that it could longwall mine while preserving the 4E/5E Stream's uses and hydrology. The Department granted that request. (C.S.Ex. 8.)

48. UMCO's mine plan for the 5E Panel contained a no subsidence zone for the section of the 4E/5E Stream above the panel. (P.F.Ex. 19.)

49. The entire length of the 4E/5E Stream above the 5E Panel was perennial prior to mining. (S.T. 152-53; C.Ex. 18.)

50. On June 9, 2004, UMCO submitted an "informal permit revision application" to allow longwall mining under the 4E/5E Stream in the 5E Panel. (P.F.S.Ex. F; P.F.Ex. 19.)

51. The cover between the coal and the stream on 5E was between 225 and 255 feet. (T. 1010; U.S.Ex. AA.)

52. UMCO's informal submission indicated that the 4E/5E Stream was supported by perched groundwater aquifers created by fractured zones of bedrock that existed above relatively impermeable strata. This shallow groundwater system is separate and distinct from the regional water table, i.e. the deeper groundwater system. That is why the shallow system is referred to as "perched." (P.F.Ex. 19, p. 8-1.)

53. UMCO's submission concluded that the potential existed for a temporary loss of flow to the stream above the 5E Panel, but that mining could occur without long-term adverse impacts. (P.F.Ex. 19, p. 8-11.)

54. UMCO conceded that the stream above the 4E Panel experienced an ongoing flow loss as a result of its prior mining, but it argued that flow would eventually recover. (P.F.Ex. 19, p. 8-16.)

55. The Department asked UMCO what it meant by a "temporary" flow loss. On June 23, 2004, UMCO submitted additional information regarding the stream. UMCO predicted that flow in the 5E section of the stream would be lost, but it would return to premining conditions within eight to sixteen weeks. (C.Ex. 32; P.F.Ex. 16.)

56. On July 7, 2004, the Department's hydrogeologist and lead permit reviewer, John Kernic, recommended against lifting the no subsidence zone. Kernic referred to the lack of sufficient groundwater data to properly characterize premining hydrologic conditions for the 5E Panel. Kernic expressed concern that the dewatering that had occurred as a result longwall mining under the stream in the 4E Panel would repeat itself in the 5E Panel. (T. 224; P.F.Ex. 46.)

57. On July 8, 2004, the Department denied UMCO's application to revise its subsidence control plan to allow longwall mining beneath the 4E/5E Stream within the 5E Panel (i.e. it refused to lift the no subsidence zone). (T. 308; P.F.Ex. 45.)

58. After meetings with the Department locally and in Harrisburg, UMCO submitted additional materials in an effort to obtain the Department's approval to longwall mine under the 4E/5E Stream in the 5E Panel. (S.T. 494; T. 974.)

59. On July 22, 2004, the Department reversed itself and revised UMCO's permit to authorize longwall mining beneath the 4E/5E Stream in 5E Panel. (S.T. 894; P.F.Ex. 25.)

60. The Department allowed the mining of Panel 5E to go forward because some Departmental personnel, particularly in Harrisburg, accepted UMCO's representation that the stream dewatering would last only three to six months and UMCO submitted a mitigation plan that included (i) temporary flow augmentation with dechlorinated public water during that period, (ii) premining grouting of the stream channel, (iii) a $250,000 bond, (iv) continuous flow monitoring during subsidence of the stream, and (v) stream channel repairs as required. (T. 155, 164-65, 308-312, 354-55; C.Ex. 19-20; U.Ex. 119.)

61. Mining in the 5E Panel began on July 30, 2004. (C.Ex. 20.) Mining occurred beneath the stream on or about August 14-18, 2004. (C.Ex. 19.)

62. Because of the ongoing flow loss in the 4E/5E Stream above the previously mined 4E Panel upstream of the 5E Panel, UMCO continued to augment flow to the 4E/5E Stream during the mining of the 5E Panel. (C.Ex.20.)

63. As predicted, UMCO's longwall mining of Panel 5E damaged the portion of the 4E/5E Stream over Panel 5E and caused the stream segment to lose natural flow. (C.Ex. 19 (August 2004 reports), 20; U.S.Ex. AA.) UMCO carried out its commitment to maintain flow

with city water, seal surface cracks with grout, and monitor the flow of the 4E/5E Stream above the 5E Panel. (S.T. 154; T. 313.)

64. Premining stream grouting was not successful in preventing stream damage and flow loss in the 4E/5E Stream above the 5E Panel. (T. 311; C.Ex. 19, 20.)

65. Almost all flow was lost at the southern edge of the 5E Panel (in the vicinity of a railway culvert) even though UMCO was adding up to 120 gpm of public water to the stream and UMCO had engaged in premining mitigation efforts. (S.T. 817; T. 50-51, 133; C.Ex. 19, 20.)

66. UMCO constructed a small dam and piping system in an effort to convey water through a railway culvert through which the stream formerly flowed in order to maintain flow in the downstream section of the 4E/5E Stream. (C.Ex. 19.)

The 6E Panel

67. The 4E/5E Stream flows perennially across the eastern end of the 6E Panel as the panel was originally depicted in UMCO's mining plan. The 6E Stream runs roughly west to east along the length of the panel. (S.T. 589, 892; C.Ex. 18.) There was a no subsidence zone for that portion of the 4E/5E Stream that is within the 6E Panel. In contrast, the 6E Stream was not designated with a "no subsidence zone." (S.T. 454, 463, 892.)

68. Cover in the 6E Panel where the 6E Stream is located ranges from 210 to 315 feet. (S.T. 683, 685-86, 812-13; C.Ex. 18; U.Ex. AA.)

69. Given the absence of a "no subsidence zone" designation, the permit did not restrict UMCO's ability to longwall mine beneath the 6E Stream as of August 2004. (T. 264, 316, 320.)

70. In order to avoid the no subsidence zone associated with 4E/5E Stream in the 6E

Panel, UMCO modified its mine plan and shortened the 6E Panel to begin mining west of that zone. In other words, UMCO did not seek permission to longwall mine the portion of the 6E Panel beneath the lowest reaches of the 4E/5E Stream. (S.T. 454, 463, 489, 560, 892-93; T. 315.)

71. The Department told UMCO that it had continuing concern regarding mining of the 6E Panel. In response, UMCO submitted a request at a July 22, 2004 meeting with the Department to characterize the 6E Stream as ephemeral. (S.T. 168, 462-63; 839-40; T. 316-20; U.Ex. 76, 102.)

72. An intermittent stream flows off and on. An ephemeral stream has even less regular flow than an intermittent stream and only flows in direct response to precipitation events. Ephemeral streams typically do not have a well defined channels. (S.T. 167, 733; T. 276.)

73. UMCO submitted photographs to the Department in support of its claim that the 6E Stream was ephemeral. (T. 317.) The pictures showed that there was no flow in one previously disturbed section of the stream.

74. The Department rejected UMCO's claim that the 6E Stream was ephemeral. It decided that the 6E Stream was perennial, with the exception of the section depicted in UMCO's photographs. That particular segment appeared to have been previously affected by third-party construction activity. The Department requested that UMCO submit a hydrologic study to predict the effects of mining on the 6E Stream. (S.T. 168, 462-63, 640, 758-60, 881-82, 897, 902; T. 319-20; U.S.Ex. Y; U.Ex. 102.)

75. UMCO did not argue with the Department regarding the perennial designation. (T. 318.) Instead, on or about October 18, 2004, UMCO submitted a hydrologic report for the 6E Panel prepared by Moody and Associates. (S.T. 486, 567-68; U.Ex. AA.)

76. UMCO's study stated that subsidence effects on hydrology in the 6E Panel would be similar to those experienced in the 4E and 5E Panels. (U.Ex. AA p. 10.) The study concluded that temporary flow loss could be expected, but there would be no permanent loss of values and uses. (S.T. 176, 203-04; U.S.Ex. AA.)

77. At the time it sought approval to mine 6E, UMCO's consultant reported that the 4E/5E Stream continued to experience a loss of flow across the panel. The consultant surmised that the water was flowing somewhere in the shallow subsurface. It predicted a similar result in the 6E Panel. (U.S.Ex. AA.)

78. UMCO committed to employ basically the same mitigation measures to the 6E Stream as it employed for the 4E/5E Stream. (T. 330, U.Ex. 11.)

79. The Department and UMCO had numerous meetings, telephone calls, correspondence, and other deliberations regarding the threat to the 6E Stream. (S.T. 452, 486, 562-63, 833, 881-85, 901-03; T. 314-20, 332-40.)

80. The Department concluded that longwalling would cause permanent, irreparable damage to the 6E Stream and the 6E hydrologic regime. (S.T. 817-21; T. 332-33; U.Ex. 120.)

81. The Department issued the order that is the subject of this appeal on November 12, 2004 (the "Order"). The Order modified UMCO's permit by prohibiting longwall mining in Panel 6E. Other methods of mining the panel are permitted. (UMCO Notice of Appeal Exhibit.)

82. UMCO would not have been able to satisfy preexisting contractual time commitments with coal extracted entirely from the High Quality Mine using only room-and-pillar mining of the 6E Panel (i.e. mining with continuous miners). (T. 786, 800-01.)

83. UMCO's business and mining plans were based upon longwall mining, and it is safer and much more profitable to longwall the Pittsburgh Coal Seam at the High Quality Mine

than it is to use other methods. (S.T. 110-13, 344; T. 324, 791-92.)

84. The Order did not prevent UMCO from longwall mining other panels at the site, and UMCO subsequently began mining Panel 9E. (T. 736-37, 785; U.Ex. 122.)

85. UMCO ceased mining of the 9E Panel when it encountered adverse geological conditions. (T. 738; C.Ex. 42-43.) In shutting down the entire mine, UMCO cited the geological conditions and its frustration in dealing with the Department. (T. 992; C.Ex. 42-43.)

86. Although it would not be a physical impossibility to overcome the adverse geological conditions (T. 794), it is questionable whether UMCO would reopen the High Quality Mine if it were allowed to longwall the 6E Panel. Overcoming the adverse geologic conditions could result in tremendous costs. (T. 739.) UMCO's mining engineer has never overcome such conditions to the degree discovered at the High Quality Mine. (T. 739.) UMCO's unwillingness to deal with the Department in obtaining approval to mine additional panels at the site has not subsided. (T. 789.) UMCO has permanently closed the nearby Maple Creek Mine, through which UMCO previously conveyed its High Quality Mine coal. Therefore, it would need to truck 12,000 tpd of material to its prep plant. (T. 809-10.) UMCO has removed almost all of its mining equipment from the High Quality Mine, ceased ventilating and pumping the mine, relocated its administrative functions, and erected mine seals. (T. 789-91, 808-09, 813.)

Additional Findings of Fact Regarding UMCO's Mining of Panels 3E through 5E

87. It is scientifically appropriate to consider the effect of mining on the 5E watershed as a predictor of what would happen to the 6E watershed if the 6E Panel were longwall mined because the surface and subsurface characteristics and features of the two contiguous watersheds are very similar. (S.T. 309, 316, 726, 808-09, 885, 917, 927; T. 147, 239, 1029; U.Ex. 120.)

88. UMCO and its consultant proposed the 4E/5E Stream as a comparison stream

when making predictions at the 6E Panel because the 4E/5E and 6E flows tended to mimic each other and the geology, hydrology, and biological characteristics of the streams and the areas of mining were about the same. (S.T. 157; U.S.Ex. AA.)

89. The 4E/5E Stream, like the 6E Stream, is an upland valley headwater stream fed by precipitation and shallow groundwater manifested as springs, seeps, and baseflow. (S.T. 808; T. 147, 885, 917.) From the Panel 4E segment downstream, the 4E/5E Stream is recharged by precipitation runoff and shallow groundwater from springs, seeps and baseflow emanating from perched aquifers. (S.T. 807-08; T. 140-41, 147, 160, 192-93, 885, 916-17, 1730-31, 1782; P.F.Ex. 19 p. 8-1.)

90. UMCO acknowledged in its submissions to the Department that the 4E/5E Stream was perennial prior to mining. (P.F.Ex. 19.)

91. The Department has required and continues to require significantly more premining hydrologic and biological stream data at other deep mines than it required from UMCO before allowing mining beneath the 4E/5E Stream. (S.T. 211-13; T. 1548-50, 1826-27.) The absence of sufficient baseline data will make it difficult to determine whether the 4E/5E Stream has ever fully recovered. (S.T. 172, 205-09, 215,224, 455, 941; T. 1340, 1380, 1451-52, 1549-54, 1561-62; P.F. Ex. 46.)

92. One premining flow monitoring result taken downstream of the confluence of the 6E and 4E/5E Streams but just upstream of the unnamed tributary's confluence with the main branch of Maple Creek (Monitoring Point MC-3R-01) exhibited one flow rate of 3 gallons per minute ("gpm") premining. (T. 291-93, 390, 867-68; U.Ex. 132.)

93. Although this one datum is not particularly meaningful (S.T. 180; T. 150, 333, 910), it does suggest that there must have been dry sections somewhere in the watershed before

mining. (T. 290, 867-69.)

94. The cause of the single, low-flow result is not known. (T. 83, 150-53, 292, 296-97.)

95. The result is not consistent with other sampling results, which otherwise range from 18.99 to 2,539.5 gpm at that location. (T. 149-50; U.Ex. 132.)

96. All of the springs and seeps overlying Panel 2E dried up following UMCO's mining. (S.T. 689.)

97. All of the springs and seeps overlying Panel 3E dried up immediately following UMCO's mining. (S.T. 689.)

98. With the possible exception of a spring that has some flow by the railroad culvert near the headwaters of the 6E Stream, all of the other numerous springs and seeps in the 4E and 5E Panels dried up immediately following UMCO's mining. Some of the springs/seeps have short periods of flow after heavy rain, but flow stops after three days or so. None of the springs/seeps in these panels have recovered as of the close of the record in this case. (S.T. 682-92, 724-35, 750-54, 806-07, 811, 818-20; T. 60-61, 64-68, 155, 161, 1835; C.S.Ex. 14, 18; C.Ex. 19.)

99. The springs have not returned despite periods of high precipitation. (S.T. 779, 811; T. 43, 115-18, 733-34, 812; C.S.Ex. 10; C.Ex. 25, 28; U.Ex. 9.)

100. The springs include springs on the 4E/5E gate roads, a spring known as the "horse spring" above the 4/5 gate entry, a spring in the 5E Panel near the railroad culvert, the Rakosky Spring on the 4E Panel, three springs on the Woodward property above the 4E Panel, a spring on the Witherspoon property over the 2E Panel, and a spring on the Coulter property over the 3E Panel. (S.T. 687-88, 751; T. 64-68; C.S.Ex. 14.)

101. UMCO's predictions that the springs, seeps, and streams overlying its former mining would fully recover and that they would do so in short order have not proven to be accurate. (T. 160-65; C.Ex. 31.)

102. The two small formerly intermittent tributaries over the 4E Panel flowing into the 4E/5E Stream now only flow ephemerally, which is to say after precipitation events only. (T. 62, 72; U.Ex. 9.)

103. UMCO's mining caused subsidence damage that dewatered the 4E/5E stream. (S.T. 218, 390, 402-03, 749-50, 768, 817; T. 50-51, 133; C.Ex. 19, 20.)

104. The 4E/5E Stream has not as yet recovered. Perennial flow has not as of the close of the record returned to the 4E/5E Stream. (S.T. 944-47, 988; T. 154-55, 162, 1114, 1323-24, 1534-35; C.Ex. 19-21, 41, P.F.S.Ex. G, H (See also S.T. 808-09).)

105. UMCO is required to maintain 25 gpm of flow at a downstream monitoring point on the 4E/5E Stream. (T. 1351-52, 1650, 1660.)

106. UMCO must discharge as much as 80 gpm of city water into the channel at the stream's former headwaters on a regular basis in order to obtain 25 gpm at the downstream monitoring point. (S.T. 405.)

107. UMCO pumped a total of 28,340,000 gallons of public water into the 4E/5E Stream between May 20, 2004 and September 16, 2005. (T. 57, 778; C.Ex. 20.)

108. There is currently insufficient data or research to assess the protracted, long-term impact of augmenting a stream with dechlorinated municipal drinking water. (S.T. 665, 1327-28, 1344-45, 1352, 1497-98, 1508.)

109. UMCO discontinued city water augmentation on September 8, 2004 because of heavy rainfall caused by the remnants of Hurricane Francis. Although 4.2 inches of rain fell on

the area in a 24-hour period, the 4E/5E Stream was dry on the morning after. (S.T. 748-50, 768; C.S.Ex. 9; C.Ex. 20.) UMCO thereafter resumed city water augmentation. (S.T. 468; C.S.Ex. 9; C.Ex. 19-20.)

110. In January 2005, UMCO asked the Department if it could discontinue augmentation of the stream to demonstrate that the stream had recovered. (T. 45-46.)

111. The Department agreed to the demonstration. (T. 45-46.)

112. UMCO turned off the hydrant. It appeared for a time that there might be natural flow, but beginning in mid-April 2005, the 4E/5E Stream began to lose flow. (T. 49-50; C.Ex. 19 (April 1, 2005 – April 19, 2005), 20-21.)

113. By late April/early May 2005, portions of the 4E/5E Stream were barely flowing. (T. 131-36; C.Ex. 19 (April 27, 2005 – April 28, 2005), 20.)

114. Dry stream segments appeared by early May, and increased in length until May 16, 2005 when the entire stream over the 4E Panel and 5E Panel was dry except for a 90-foot segment on the southern part of Panel 4E and a few odd puddles. (S.T. 202, 749-50, 768; T. 51-54, 1341-43, 1350, 1653-59, 1670; C.S.Ex. 9; C.Ex. 19 (May 2, 2005 – May 17, 2005), 20-22-A, 23, 27; U.Ex. 220.)

115. The 4E/5E Stream went dry along virtually its entire length over the 4E Panel and 5E Panel in May 2005 despite higher than normal precipitation as evidenced by precipitation records and lush vegetation. This period is the only period of any length to date that the 4E/5E Stream was not continuously augmented, and the absence of significant natural flow during this period indicates that, so far, the stream is entirely dependent on augmentation. (T. 54-55, 118-19; C.Ex. 21, 23, 25, 27; P.F.S.Ex. G, H.)

116. The 6E Stream continued to flow during this period. (T. 50, 55, 112, 136-37;

C.Ex. 2, 19, 20, 21E.)

117. Other similar streams in the vicinity of the mining (C.Ex. 26) continued to flow during the period that the 4E/5E Stream dried up. (T. 55, 107, 135-36; C.Ex. 19-21, 23, 26-27.)

118. UMCO resumed public water augmentation of the 4E/5E Stream on May 18, 2005. (T. 46, 56; C.Ex. 19-20.)

119. Although surface cracks from subsidence that are not visible to the naked eye can drain a stream (T. 147), fractures were in fact visible in the 4E/5E Stream channel. (S.T. 697, 939; T. 160; C.S.Ex. 16.)

120. Headwater streams like the 4E/5E Stream naturally go dry in some sections from time to time. (T. 256, 1332-39, 1379, 1466-72, 1645; U.Ex. 280.)

121. A sewer line running parallel to the 4E/5E Stream predated UMCO's mining. (T. 299.) The sewer line was replaced or repaired in April 2005. The sewer line trench may or may not intercept some shallow groundwater or surface flow that might otherwise find its way into the 4E/5E Stream before and after mining. (T. 131, 296-99, 404, 408, 860-62, 899, 920.)

122. UMCO's "premining" biological survey of the 4E/5E Stream over the 4E Panel was actually conducted after mining of the 3E Panel. (T. 1552.)

123. UMCO's "premining" biological survey of the 4E/5E Stream over the 5E Panel actually occurred after the mining of 3E and 4E. (T. 1554.)

124. UMCO's biological surveys of the 4E/5E Stream have shown that the 4E/5E Stream channel, when filled with city water, is currently supporting a warm water fishery. (T. 1321, 1412-13, 1489-97, 1505-07; U.Ex. 169, 171-73, 176-77.) Fish have been observed in the artificially maintained stream. (T. 1320, 1412, 1505.)

125. No meaningful conclusions can be drawn as yet from UMCO's biological data

regarding the long-term ability of the 4E/5E Stream to support a warm water fishery because of (a) the dearth of premining data, (b) the lack of long-term data, and (c) UMCO's nearly constant augmentation. (T. 1317, 1342-43, 1502, 1516, 1549, 1561-62, 1564, 1569.)

126. Augmentation must be turned off for an extended period of time for the results to accurately reflect natural trends, and that has not occurred. (S.T. 947; T. 1560.)

127. Although UMCO's "premining" survey results must be qualified as not true background, they nevertheless show that the 4E/5E Stream supported a warm water fishery even after having suffered subsidence effects from upstream mining. (T. 1489-90, 1511.) This is consistent with the Department's biology expert's opinion, which we find credible, that the 4E/5E Stream was a perennial stream that supported a warm water fishery prior to mining. (T. 1316-17; U.Ex. 130.)

128. UMCO's expert hydrogeologist, Joseph Bonetti, did not dispute that UMCO's mining adversely affected the 4E/5E Stream. (T. 888.)

129. There is insufficient flow data to assess whether the 4E/5E has recovered at this time. (S.T. 945-46; P.F.S.Ex. G, H.)

130. Dr. Bonetti's opinion is based in part on UMCO's flow monitoring data (T. 1690-96, 1719-21), but those flow monitoring results contain many deficiencies, including failures to follow proper procedures and protocols, errors, anomalies and poor practices. The flow monitoring results are admissible, but they can be accorded little weight. The data are particularly suspect where they were obtained at sampling locations that had less than two inches of flow. (T. 484-90, 506, 528-89, 622-30, 632-41; C.Ex. 36-38; U.Ex. 17-18, 212.)

131. UMCO installed piezometers on the site. (C.Ex. 30; P.F. Ex. 66; U.Ex. 14 C, D.)

132. The piezometers were installed in an effort to measure the effects of mining on

the *regional* groundwater table. (The deeper, more extensive regional groundwater table is to be distinguished from the *local* shallow perched aquifers and surface waters that are at issue in this appeal.) (S.T. 821-22; T. 139-43, 327-28, 454, 916-18.)

133. The piezometer data provides no meaningful information regarding the perched aquifers or the recovery of the shallow water systems at issue in this case. The regional groundwater table does not recharge the 4E/5E or 6E Streams. (S.T. 821-22; T. 140-43, 327-28, 454, 916-18, 1114, 1777.)

134. The piezometer data is essentially meaningless because it does not appear that the piezometers were properly installed, and there is insufficient data to allow for a meaningful interpretation of long-term trends or to distinguish between natural and mining-induced effects. (T. 893, 915, 1152, 1236, 1779-80.)

135. Accepting for purposes of discussion that the piezometer data is valid, the data does not reveal that deep groundwater is recovering at the 5E site as measured over the long-term. A plot of existing groundwater data after application of linear regression analysis shows that groundwater elevations in the PZ-1R, PZ-2 and PZ-3 piezometers were trending downward for the period January 2005 through August 2005. (T. 1776-77, 1794; P.F.Ex. 66.)

136. Dr. Bonetti's opinion that the piezometer data suggests that the groundwater system is recovering "as a whole" (T. 857-58, 917-22), coupled with his concession that the piezometer data has no connection to stream conditions (T. 917-18), negatively affects his credibility.

137. Dr. Bonetti's opinion that the 4E/5E Stream "is recovering and may be fully recovered" (T. 867-71) is not consistent with the evidence, is inconsistent with UMCO's expert biologist's opinion that it is too early to tell, and is otherwise not credible. (Finding of Fact

("FOF") 98-108, 125, 129-36.)

138. The long-term dewatering of the 4E/5E watershed provides compelling evidence that the 6E watershed will also be dewatered long term if UMCO longwall mines underneath it. (S.T. 219, 808-09, 988; T. 147, 239, 929; FOF 87-137.)

The 6E Stream is a Perennial Stream

139. The 6E watershed is approximately 185 acres. (T. 106; C.Ex. 12.)

140. Of those 185 acres, 76 acres have already been longwall mined and 33 acres have been development mined. (S.T. 810-11; T. 106; C.Ex. 12, 18.) UMCO has already mined under approximately 58 percent of the 6E Stream's watershed. (T. 106.) In comparison, the 5E watershed is 118 acres, 75 percent of which was mined. (T. 107; C.Ex. 26.)

141. UMCO's mining to date has caused that headwater portion of the 6E Stream that is above the railway culvert to dry up much of the time. (S.T. 724, 766, 780; T. 59, 110-11; C.Ex. 12, 18.)

142. UMCO's mining in the 6E Stream's watershed has already diminished the flow of the 6E Stream. (T. 156-57.)

143. After the Department rejected UMCO's initial attempt to characterize the stream as ephemeral, UMCO agreed to treat the 6E Stream as a perennial stream. (T. 463; U.Ex. 119.)

144. The 6E Stream is designated on the USGS map and in Soil Conservation Service documents as an intermittent stream. (T. 318.) Designations on USGS topographic maps are usually not based on ground surveys and are not controlling in assessing whether a stream is actually ephemeral, intermittent, or perennial. (S.T. 199, 955.)

145. There are 11 springs and seeps in the 6E Panel. (S.T. 185-87; T. 1729.) The springs are above the elevation of the 6E Stream and flow into the stream. (T. 1729-30.)

146. Some but not all of the springs and seeps that contribute part of the flow of the 6E Stream dry up seasonally. (S.T. 128, 130, 185-89, 196; T. 60, 400-01, 406, 923; C.Ex. 19; U.Ex. 142, 219.)

147. There are wetlands adjacent to the 6E Stream. (S.T. 129, 183, 371-72, 755; U.Ex. 102.)

148. The wetlands contain obligate plant species, which require hydric soils or standing water and are found in wetlands the vast majority of the time. (S.T. 647.)

149. The 6E Stream, springs, and wetlands have historically been used to water livestock, even through periods of drought. (S.T. 129-130, 188; T. 333.)

150. The 6E Stream has a well-defined channel about two to three feet wide and about one to three feet deep, which lays within a broader, shallower channel that is 20 to 30 feet wide. (S.T. 167; T. 1061; C.S.Ex. 17; U.Ex.142, 219.)

151. The appearance of the 6E Stream's channel is indicative of perennial flow. (S.T. 645-46; C.S.Ex. 17.)

152. The bed and substrate of the 6E Stream is indicative of perennial flow, as evidenced by erosion marks and characteristic deposition of gravel and silt. (S.T. 645-46; C.S.Ex. 17.)

153. There are fish in the 6E Stream, even during periods of drought. (T. 1331-32, 1412, 1414, 1504.)

154. The 6E Stream is supporting a warm water fishery. (T. 1414, 1500-06, 1509, 1528, 1531, 1558, 1561, 1569.)

155. The Department has observed long-lived macroinvertebrates in the 6E Stream that require flow in the stream for two to three years in order to go through their observed life cycle.

There are also fish of different year-groups. (S.T. 645-46, 658, 661.)

156. The 6E Stream supports a benthic macroinvertebrate community which is composed of two or more recognizable taxonomic groups of organisms which are large enough to be seen by the unaided eye and can be retained by U.S. Standard No. 30 sieve and live part of their life cycles within or upon available substrates in a body of water or other water transport system. (S.T. 640-41; T. 1516.)

157. The fact that the 6E Stream supports a diverse and long-lived benthic community is scientifically appropriate evidence that water flows continuously in the stream and the stream is perennial. (T. 1516.)

158. Portions of the 6E Stream in fact flow continuously throughout the calendar year, even during periods of drought. (S.T. 128, 130, 803; T. 156-57, 400-01, 407, 766, 1331, 1340, 1409, 1503; C.S.Ex. 17; U.Ex. 102, 142, 219.)

159. There is a man-made disturbance near the downstream end of the 6E Stream. The disturbed section is approximately 200 to 300 feet long. The disturbance was probably associated with the installation of a municipal sewer line. (S.T. 171, 173, 230, 514, 648-49, 657, 758; T. 357; U.Ex. 14-CC.)

160. The disturbed section of the streambed goes dry. Except during periods of high flow, some or all water flowing down the stream channel goes underground at the point of the disturbance. It is not known where the water resurfaces. (S.T. 150, 166-67, 758, 770, 775-76, 948; T. 73-74, 90, 93; U.Ex. 14-CC, 76, 142, 157, 215, 219.)

161. In addition to the disturbed area, other portions of the 6E Stream have gone dry during periods of drought (S.T. 128, 131, 136; T. 62, 92-93, 1331, 1340, 1409), but the entire stream has not been seen to go dry even in periods of drought (FOF 146, 158).

162. Up to the point of the man-made disturbance, the 6E Stream loses some flow through its porous channel to the subsurface, but it usually picks up more flow from the perched aquifer than it loses back to the ground, which makes it a net gaining stream. (T. 246-47, 299, 846.)

163. The Department's well-qualified biologist's credible expert opinion is that the 6E Stream is perennial. (S.T. 640.) UMCO offered no contradictory expert opinion.

164. The 6E Stream is a perennial stream. (FOF 146-163.)

The Height of the Coal Seam

165. The height of the Pittsburgh Coal Seam in the 6E Panel ranges from approximately seven to ten feet. (S.T. 74, 295; T. 1010, 1242, 1803; P.F.Ex. 65; U.S.Ex. AA.)

166. Some UMCO witnesses stated that UMCO might mine only six or seven feet of the coal at some or all points on the panel. (S.T. 297, 367, 424; T. 1024, 1242; U.Ex.14L, 14M, 14P, 14R.) That supposition is not grounded on anything in any permit, order, regulation, or other enforceable document. The six-foot mining assumption is not included in UMCO's stream mitigation measures, and there is no binding or enforceable limitation on the height of UMCO's mining. (S.T. 823-24; T. 1107, 1831.) The only actual limitation on the height of the mining is the height of the coal seam. (T. 1831.)

167. UMCO's proposal at the hearing to mine only six feet of coal is not consistent with its past mining practices or future plan or industry longwalling practice, it is not reflected in any reserve estimates, and it has not been shown to be enforceable as a practical matter. (S.T. 307.)

168. The opinion of UMCO's subsidence expert, Robert Bruhn, regarding the extent and reach of anticipated subsidence effects above the 6E Panel was based in part on an

inaccurate assumption that only six or seven feet of coal would be mined throughout the panel. (U.Ex. 14L, 14M, 14-O, 14R.)

Hydrogeology of the 6E Panel

169. The 6E system is known as an upland valley hydrologic regime. (T. 141; C.Ex. 29.)

170. The 6E Stream, springs, seeps, and wetlands are all surface manifestations of perched aquifers, i.e. shallow groundwater and some precipitation runoff. (S.T. 321, 803; T. 140-42, 168, 189, 234-37, 242-43, 454, 843, 873, 885, 916, 925, 1095, 1216-18, 1730-31, 1758, 1769, 1829; U.S.Ex. AA; U.Ex. 120.)

171. Rainwater and shallow groundwater in 6E percolates downward in the 6E Stream's watershed until it encounters a zone of relatively reduced permeability known as an aquitard or a confining layer. (T. 141, 234-37, 242, 842-43, 872-73, 916, 925, 1095, 1216, 1730-31.)

172. Some of the groundwater encountering an aquitard then moves laterally. If the groundwater intercepts the ground surface, it is manifested as a spring, seep, wetland, or stream baseflow. It is all the same system, part of which is underground and part of which is above the surface. This is the basic hydrologic cycle or hydrologic balance at issue in this case. (T. 187-88, 841.)

173. Some water also moves laterally through the soil horizon. (T. 141.)

174. The movement of water in the 6E Panel tends to be through soils, the soil/rock interface, and secondary fractures in the rock strata, not through pores in the rock itself. (T. 183, 842, 1217.)

175. The secondary fractures, and therefore the direction of shallow groundwater flow,

tend to mimic topography. (T. 183, 848; C.S.Ex. 13 (illustration).)

176. The larger regional groundwater system does not contribute recharge to the perched 6E system. The regional water table is significantly below the shallow 6E system that is at issue in this case. (T. 142-43, 285, 335, 846, 915-17, 1769; C.S. Ex. 13; U.Ex. 120.)

177. In evaluating and predicting the potential effects of subsidence on the 6E upland valley hydrologic regime, there is no reason to distinguish what percentage of the flow in the 6E Stream channel comes from springs, seeps, or wetlands, where water happens to flow over the surface immediately before entering the stream, and groundwater that happens to flow directly into the stream itself through the bottom and sides of the stream channel (i.e. baseflow). (S.T. 823, 830; T. 873, 916.)

178. There is no scientific or other reason to differentiate the relative contribution of surface and subsurface water flowing into the 6E Stream because it is the impact of mining on the perched system as a whole that matters. (T. 235, 873, 916, 1782-83.)

179. UMCO's consultant reported that "[t]he base flow for the unnamed tributary of the 6 East panel is derived primarily from the upland local shallow perched groundwater flow system. This is supported by the number of springs and wet areas observed above the stream valley that contribute flow to the stream." (U.S.Ex. AA.)

180. In the 6E hydrologic regime, it is the effect of the mining subsidence on the aquitards that has the most significance because it is those aquitards that are responsible for the formation and continuation of the perched groundwater system. (T. 1731; U.Ex. 120.)

181. The continuing existence and vitality of the 6E Stream depends upon the integrity of the aquifer and the shallow groundwater system as a whole, not the ability of the stream channel to function as a ditch capable of transporting water across the ground. (T. 1783; U.Ex.

120.)

Subsidence Generally

182. The 6E Panel is approximately 775 feet by 2730 feet. (T. 1010.)

183. Longwalling on the 6E Panel would have proceeded from east to west. (T. 731, 1010.)

184. As a longwall machine cuts into a panel, the lithologies and soils above the coal subside. This process begins at the start gate and moves through the entire panel. (S.T. 374, 921; T. 1205-07, 1752; U.S.Ex. DD.)

185. In longwall mining, the roof above the coal seam collapses and subsidence occurs almost immediately. (S.T. 926.)

186. The void spaces in the rubbleized zone at and above the former coal seam gradually fill in to some extent as the material settles in a longwall mine. (T. 1047, 1050, 1113.)

187. This settling can result in some residual subsidence, but most of the subsidence that results from longwall mining tends to occur immediately. (S.T. 926; T. 1033.)

188. Longwall mining does not typically create a big, lingering, open sink as opined by UMCO's subsidence expert, Robert Bruhn. (T. 1772.)

189. Bruhn relied upon a photograph of room-and-pillar mining in expressing his opinion regarding the "mine void" caused by the longwall mining proposed for the 6E Panel. (T. 1032, 1112, 1771; U.Ex. 14Q.)

190. Mining 7 feet of coal in the 6E Panel would result in as much as four feet of subsidence at the surface. (U.S.Ex. AA; U.Ex. 14L, 14R.)

191. The elevation and configuration of the 6E Stream would have changed and dropped several feet. (P.F.S.Ex. C, D; U.Ex. 14P.)

192. Subsidence caused by mining creates new cracks or fractures and opens up or exacerbates existing natural fractures. These fractures and cracks are the primary pathways for intercepting water and increasing vertical permeability, which can in turn result in the loss or diminution of surface waters features and/or groundwater at certain stratigraphic levels. (T. 182-83, 1751, 1768-69, 1784.)

193. In general, the greater the overburden thickness and percentage of soft rocks in the overburden sequence, the less the predicted adverse impacts from longwall mining. (U.S.Ex. AA.)

194. The overburden thickness (cover) on the 6E Panel ranges from approximately 210 feet in the east to as much as 450 feet in portions of the west. Cover under the stream ranges from 210 to 315 feet. (S.T. 296, 683-85, 812-13, 957; T. 1010; C.Ex. 18; U.S.Ex. AA.)

195. The 6E Panel is considered a very low cover mine. Anything less than 400 feet of cover is cause for heightened concern regarding subsidence damage. (S.T. 681, 803, 812-13, 820-21; T. 1592, 1629.)

196. There has been no known longwalling beneath streams in western Pennsylvania with cover as shallow as the High Quality Mine, and very little in the United States documenting the effects of such shallow longwall mining using modern methods. (U.Ex. 9.)

197. When attempting to predict the surface effects of subsidence, it is important to look at site-specific information, including but not limited to the subsidence effects of mining previous panels at the site. (T. 1762-63.)

198. UMCO's subsidence expert, Mr. Bruhn, did not consider any information regarding the 4E/5E Panels and the 4E/5E Stream in making his predictions regarding the 6E Panel and the 6E Stream. (T. 1059-60.)

199. The presence of preexisting natural fracturing increases the potential that there will be adverse subsidence effects to surface waters. (T. 1173-74.)

200. Drilling logs for boreholes installed in 6E show preexisting, open fractures in the lithologies above the coal seam. Although some of the fractures may have been caused by the drilling itself, some of the fractures were observed to be "weathered," which indicates a long-term preexisting condition. (T. 1007, 1140, 1173-74, 1749-51, 1791; U.S.Ex. AA Appendix B; U.Ex. 191.)

Subsidence Viewed Vertically

201. Subsidence effects may be thought of conceptually in two ways: vertically, i.e. slicing through the strata; and aerially, i.e. from a bird's eye view. As to subsidence viewed vertically, two types of subsidence cracks are relevant: (1) surface cracks and (2) subsurface cracks propagating up from the depth of the mined-out coal seam. (T. 108-09, 144, 375-78, 1121, 1751-52, 1764-67.)

Surface Cracks

202. Surface cracks from mine subsidence are relevant because they may divert both surface water and groundwater that feeds the 6E Stream. (T. 143-44, 377-78, 1766-67.)

203. Surface cracks are of concern not only in the stream channel itself but in any areas that contribute to the flow in the stream as well because the cracks tend to rob flow from the stream. (S.T. 956-57.)

204. Very small cracks can completely drain a stream. (S.T. 697, 939; T. 147.)

205. Fracturing in the so-called surface fracture zone will occur throughout the entire 6E Panel. (S.T. 923, 934-35; T. 238, 1114, 1121, 1751-52.)

206. Surface fractures have varying depths, but the surface fracture zone tends to

extend down about 50 feet, which is deep enough to disrupt the shallow groundwater that feeds the 6E Stream. (T. 108-09, 144, 238, 1130.)

207. The surface fracture zone is generally independent of the depth of cover. (T. 377-78; U.Ex. 14-O.)

208. Surface cracks on the 6E panel would likely have dewatered the 6E Stream and the other surface water features. (U.S.Ex. AA.)

Subsurface Cracks

209. In predicting how far subsurface cracks will propagate up from the mining, it is important to consider the height of the seam to be mined, known as "t." That depth relative to the amount of overburden cover over the mine is a key factor in predicting whether adverse subsidence effects will manifest on the surface or at key stratigraphic levels within the cover. (T. 178-79.)

210. Experts multiply "t" by a theoretical number to calculate the risk. Subsidence is based on numerous variables, so there is no brightline number that can be guaranteed to accurately predict the actual vertical propagation of the subsurface cracks, but the range is 24t to 60t. (T. 232, 1761-62; U.S.Ex. AA.)

211. The Department uses 45t as a benchmark. Any mine where 45t intercepts the horizons of concern is not necessarily prohibited, but it is cause for heightened scrutiny. (S.T. 805; T. 231-32.) The 6E Panel qualified for heightened scrutiny under this standard, even assuming as little as six feet of coal would be mined. ($45 \times 6 = 270 > 210$.)

212. Francis S. Kendorsky did not testify, but his work regarding subsidence fracturing is generally accepted and was discussed by all the subsidence experts in this case. Kendorsky has devised a conceptual construct of how far up subsurface cracks can be expected to propagate.

(T. 232, 1026, 1123; C.Ex. 40; U.Ex. 23.)

213. Kendorsky worked at one time for John Morgan, PennFuture's expert. Morgan has worked closely with Kendorsky and has consulted Kendorsky in connection with rendering his opinions in this case. (T. 1759-64.)

214. Kendorsky's construct was primarily designed to assess the safety of mining under the ocean. (T. 1761; C.Ex. 40; U.Ex. 23.)

215. Kendorsky's work was not intended as a precise predictive model. It is conceptual in nature. (T. 1122, 1760-62; C.Ex. 40; U.Ex. 23.)

216. Kendorsky postulates the following four zones going from the bottom up:

Zone	Description	Height above coal seam
Caved Zone	Rock rubbleizes and comes to rest on mine floor	6t
Fracture Zone	Height of fracturing	6t – 30t
Middle Zone: 2 subzones:		
1) Zone of dilation	Increase in porosity of rock but no increase in throughgoing fractures	remainder
2) Zone of continuous deformation	Some deformation but no fractures	remainder
Surface Zone		50 feet or so down from the surface

(T. 1022, 1212-15; C.Ex. 40; U.Ex. 23.)

217. The absence of fractures in the "zone of continuous deformation" means that, all other things being equal, the zone can theoretically serve as an intact aquitard arresting further

downward migration of groundwater found above it into the mine workings. (T. 1027-28, 1147.)

218. In applying Kendorsky's work, Bruhn incorrectly concluded that the fracture zone extends up from the top of the coal seam (T. 1022-26, 1145), when in fact Kendorsky intended the fracture zone to start at the cave zone. In other words, the fracture zone is 24t, but that 24t must be added on to the 6t cave zone to determine the conceptual vertical reach of the subsurface cracking. (T. 1759-65, 1794; C.Ex. 40; U.Ex. 23.) UMCO itself has referred to 30t as the appropriate number in its submissions. (C.Ex. 31.)

219. Assuming the Pittsburgh Coal Seam is 6'10" at the east end of the 6E Panel and cover is 210 feet, Kendorsky's postulated fracture zone will extend to within five feet of the surface. (6.833 x 30t). Because the surface zone extends down 50 feet, anywhere that cover is less than 260 feet is problematic. (T. 1767-68.)

220. Even if Bruhn's use of 24t instead of 30t was appropriate, Kendorsky's theoretical middle zone would be four feet thick. (6.833 x 24t)/(210–50).

221. Bruhn's speculation that a middle zone of as little as one foot could stop the downward migration of water over the entire panel is not credible. (T. 1145-46, 1760.)

222. In order to function as an aquitard, the postulated middle zone would ideally be composed of shale or be otherwise conducive to impeding flow under natural conditions (T. 1213-14), but there is no evidence that the rock strata found at Bruhn's postulated middle zone on the 6E Panel is of a type that would be conducive to acting as an aquitard. (P.F.Ex. 65.)

223. The subsurface fractures propagating up from the coal seam and the surface fractures propagating down from the surface will both intersect and compromise the strata serving as aquitards supporting the perched aquifer system manifesting itself as the stream, springs, and wetlands on the 6E Panel, thereby resulting in the elimination of flow to the 6E

Stream. (S.T. 804-817; T. 844; C.S.Ex. 13 (illustration); P.F.Ex. 65; U.Ex. 120; U.S.Ex. AA.)

224. There is unlikely to be any single fracture that extends all the way from the coal seam to the surface, but such throughgoing fractures are rare and their absence is largely irrelevant in this case. (T. 144, 1768-69.)

225. UMCO's piezometer data provides no legitimate support for the theory (T. 1030) that there would be a middle zone on the 6E Panel. (T. 1152.)

226. UMCO's expert damaged his credibility by opining that recovering water levels, static water levels, and water levels decreasing in the piezometers could all be evidence of a functioning middle zone. (T. 1153.)

227. UMCO's longwall mining of the 6E Panel would have caused extensive fracturing of the aquitards that support the upland valley hydrologic regime. (T. 844, 1770.)

228. UMCO's longwall mining in the 6E Panel would have intercepted the shallow groundwater flow system. (S.T. 804-17, 958; T. 231, 233, 1770; C.S.Ex. 13 (illustration); P.F.Ex. 65; U.S.Ex. AA; U.Ex. 11.)

229. The fracturing of the aquitards would have compromised the entire perched system, which in combination with surface fracturing would to a reasonably degree of scientific certainty have eliminated all or nearly all of the remaining surface component of the system; to wit, the springs, seeps, wetlands, and the 6E Stream itself. In other words, longwall mining of the 6E Panel would dewater the 6E Stream. (S.T. 804-818; T. 441-42, 1770; U.Ex. 120.)

230. Instead of flowing outward to create and support surface water features, the groundwater in the 6E panel would percolate downward after mining. It is not known and it does not matter exactly where it would emerge beyond the known fact that it will emerge too low to contribute to the shallow flow system. It may or may not infiltrate into the mine workings. (S.T.

804-817; T. 357, 369-70, 392-93; C.S.Ex. 13 (illustration); U.S.Ex. AA; U.Ex. 120.)

231. The water that is lost from the shallow groundwater regime does not disappear; it simply flows deeper and possibly emerges at some unknown point downdip or downgradient, in this case somewhere in the Maple Creek and/or Pigeon Creek watersheds. (T. 233, 244, 290; U.Ex. 120.)

Subsidence From a Bird's-Eye View

Temporary Zones

232. It is also possible to conceptualize subsidence from an aerial perspective. As longwalling progresses across a panel, the waive of subsidence creates a temporary tensional zone where cracks are opened up. (S.T. 923; T. 378, 1204-06, 1752.)

233. As longwalling passes, there is a temporary compressional zone where the cracks close up. (S.T. 930-35; 1204, 1752.)

234. The temporary deflection or inflection point--the border between the temporary tensional and temporary compressional zones--moves through the panel along with the longwall machine. (T. 1205.)

235. The warping of the ground surface caused by the subsidence creates a saucer-like depression. (T. 1011-13.)

Permanent Zones

236. After the initial subsidence wave passes, the panel settles into its final state ground strain condition. This includes a tension zone, where the earth is pulled apart, a compression zone where the earth is pushed together, and a neutral zone where there is neither long-term compression nor tension. (S.T. 928; T. 1016-17, 1751-53.)

237. After mining, the middle of the panel, or saucer, constitutes the permanent neutral

zone. The temporary cracks opened, then closed, then tension is relieved. The cracks do not go away, but there are neither long-term compressional nor tensional stresses. (T. 325, 1122, 1752-53.)

238. As one moves outward from the middle of the panel, mining results in a permanent compression zone, in which the temporary cracks tend to be forced together. (T. 325, 1752.)

239. Moving still further outward around the edge of the saucer, mining creates a permanent tension zone, where the difference between the subsided area and the nonsubsided area creates an area where cracks are pulled apart and tend to remain open for the long term. (S.T. 924; T. 189, 238, 1128-29, 1753.)

240. The permanent inflection point, or the point of the "edge effect," is the border between the permanent compression and permanent tension zones. (T. 1015, 1740.)

241. The permanent tension zone can affect both surface and subsurface cracks. (T. 1128-29.)

242. Once formed, subsidence cracks do not disappear. The difference between the zones is the extent to which the cracks remain open over the long term. Open cracks are the most problematic. (T. 325, 1129.)

243. The permanent tension zone is of the most concern in predicting long-term subsidence effects because ground forces tend to keep the cracks caused by subsidence open, which creates a conduit for water to move downward rather than laterally toward the surface water features. (S.T. 930-32; T. 189-90, 238, 1021, 1044, 1129, 1199.)

244. Although there are many factors at play, all other things being equal, surface water features in the permanent compression zone and neutral zone tend to suffer less long-term

damage than surface water features located above the permanent tension zone. (T. 189-90, 325, 1043-44.)

245. The more area of a stream or other surface water feature that overlies the permanent tension zone, the greater the risk of severe and/or long-term surface flow loss. (U.S.Ex. AA.)

246. As the height of cover increases, the horizontal extent of the permanent tensional zone increases. (T. 1134, 1137, 1741-45; P.F.Ex. 62.)

247. In order to calculate the point of the edge effect, i.e. the aerial extent of the permanent tension zone, it is critically important to know the vertical location of the coal seam, factoring in its dip relative to the topography of the surface in order to calculate overburden thickness. (T. 1740.)

248. The coal seam on the 6E Panel dips 1.9 percent from east to west. (T. 731, 1743.)

249. The angle of draw is the angle coming out from a vertical line extending up toward the surface from the coal panel. (T. 1132-34, 1739.)

250. The experts in this case assumed that there would be a 23 degree angle of draw. (T. 1134, 1740.)

251. Using .25h, with "h" being the height of the overburden, combined with the assumed 23 degree angle of draw, PennFuture's expert accounted for actual site conditions and credibly predicted the scope of the permanent tension zone that would occur at the 6E Site. (T. 1740-44; P.F.Ex. 62.)

252. As a result of the dipping coal seam and topography, there is a larger predicted permanent tensional zone on the west end of the 6E Panel than east end. (T. 1137, 1743; P.F.Ex. 62.)

253. A substantial percentage of the perched aquifer, the 6E Stream itself, and the other surface manifestations of shallow groundwater flow in the 6E Panel are in the predicted permanent tension zone. (S.T. 932, 935; T. 238-39, 1045, 1744; P.F.S.Ex. B; P.F.Ex. 62-63; U.Ex. 14K, 14M.)

254. The percentage of the 6E Stream that is in the predicted permanent tension zone is higher than the percentage of the 4E/5E Stream that was in that zone. (S.T. 932-34.)

255. The fact that a significant portion of the shallow groundwater and surface water system overlies the predicted permanent tension zone is a strong indicator that the adverse subsidence impacts to that system will be severe and long-term. (T. 189-90, 238.)

256. The permanent tension zones for two adjacent panels may overlap, such as the zones for the 5E and 6E Panels, which can result in proportionately greater long-term subsidence damage in that area. (T. 1747-48.)

257. UMCO's subsidence expert did not account for the overlapping permanent tension zones of the 5E and 6E Panels in rendering his opinions. (T. 1106, 1747-48.)

258. Bruhn's opinion regarding the aerial extent of the permanent tension zone was largely based upon typical, generic average and default values which did little to account for specific conditions at the 6E site. (T. 1093-1106, 1134, 1175, 1230-40, 1744-45; P.F.Ex. 62-63.)

259. Whether one considers subsidence effects vertically through the strata (FOF 201-231) or from a bird's-eye view (FOF 232-258), there is a very strong likelihood that subsidence fractures resulting from UMCO's longwall mining of Panel 6E would completely and permanently eliminate flow in the 6E shallow groundwater/surface water system including the 6E Stream.

Other Factors Regarding the Threat to the 6E Hydrological Regime

260. Hard rock fractures more easily than soft rock. (T. 185.)

261. Soft rock tends to have smaller cracks dispersed throughout the unit rather than the larger open cracks that tend to form in hard rock. (T. 911, 1063.)

262. All other things being equal, fractures in hard rock are more likely to remain open than fractures in soft rock. (T. 845-47, 911, 925, 1801.)

263. The more hard rock in the cover, the more likely that adverse subsidence effects will be severe and last a long time. (T. 1759; U.S.Ex. AA.)

264. There is a significant amount of hard rock in the strata below the elevation of the springs (≈ 1040 msl) and above the coal seam on 6E, which is another indication that the adverse subsidence effects of longwall mining in that panel would have been severe and long term. (S.T. 957; T. 383, 1119-20, 1755-59; P.F.Ex. 64; U.S.Ex. AA.)

265. There is a greater percentage of hard rock overlying the 6E Panel than there is in the 5E Panel. (U.S.Ex. AA.)

266. UMCO's consultant reported that the overburden type present in 6E is considered "less than favorable to reduce the potential for a lowering of the ground water table that contributes to stream flow over the 6E panel." (U.S.Ex. AA.)

267. As a general rule, the larger the watershed, the more water is available for recharge. At 185 acres, the 6E watershed is relatively small. (S.T. 810-11; T. 99-100, 108.)

268. As a general rule, the higher the percentage of a watershed that is mined, the greater the likelihood that mining will upset the hydrologic balance and damage the stream in the watershed. (S.T. 810; T. 109; U.S.Ex. AA.)

269. If the 6E Panel is mined, all but a small remnant of the 6E watershed will have

been undermined. (S.T. 810-11; T. 109; C.S.Ex. 12; C.Ex. 18.)

270. All other things being equal, a stream that runs along the length of a longwall panel is more prone to adverse effects than a stream that crosses perpendicularly to a panel. (T. 1210-11.)

271. The 4E/5E Stream crossed perpendicularly; most of the length of the 6E Stream runs parallel to the 6E Panel. (C.Ex. 12; U.Ex. 14E.)

272. In general, the more times a stream is undermined, the greater the overall cumulative impact will be to the stream. (U.S.Ex. AA.) Longwall mining the 6E panel would have been the third pass because the stream originates in the 4E panel. (C.S.Ex. 12.)

273. There is an average of approximately 5.75 feet of soils on the 6E site. (T. 1051, 1096; U.Ex. 14T.)

274. Mine subsidence is not expected to change the characteristics of the soil. (T. 891, 1164-65.)

275. There are a significant amount of clays in the soils on the 6E Panel. Clays have relatively low permeability. (T. 853, 942, 944, 1053; U.Ex. 9, 14B, 14T.)

276. There are also a fair amount of sands and gravels, which have high permeability. (T. 1227.)

277. Clays would be helpful in resisting initial surface damage and be conducive to repairing surface cracks through erosion and deposition. (T. 325-26, 853, 944, 1053-59, 1200.)

278. Some of the baseflow to the 6E Stream flows through the soils. (T. 1168.)

279. Soils are roughly analogous to rocks in that there are areas, such as sandy areas, where there is more flow, and other areas, such as clayey areas, where there is less water flow. (T. 1168, 1228.)

280. It is the layers or zones of permeable material in the soil horizons that allow for more baseflow to the stream. (T. 1228.)

281. The 6E Stream channel and watershed contain areas of clay, but also sandy areas and rocky areas. (T. 927, 1228.)

282. The 6E Stream's use as a warm water fishery is vulnerable to being lost because the stream has already been stressed by flowing through an open field that is used for agricultural purposes and the stream has suffered damage from preexisting construction activity. (S.T. 648; T. 1503, 1561.)

283. The 6E Stream is more susceptible to damage and less likely to recover than the 4E/5E Stream. If the 4E/5E Stream eventually recovers, it does not follow that the 6E Stream, if lost, would also recover because (a) a higher percentage of the 6E watershed would have been mined, (b) the 6E Stream is already stressed, (c) the 6E Stream has less flow, (d) the area of the 6E Stream has less cover, (e) more of the 6E Stream is above permanent tensional zones, (f) most of the 6E Stream runs parallel to the panel, (g) there is more hard rock in the pertinent lithologies in 6E, and (h) the 6E watershed would have been mined repeatedly on separate passes. (T. 236-37; FOF 17-18, 68, 139-40, 211, 219, 256-57, 265, 267-72, 282.)

Recovery of the System

284. There is no dispute among *all* of the experts that longwall mining the 6E Panel would have disrupted flow in the 6E Stream, springs, seeps, and wetlands. (Compare T. 843-44, 872, 1011, 1768; U.Ex. 120.) The difference in expert opinion is whether and when the system would have recovered, i.e. when natural flow would return to levels sufficient to restore premining values and uses.

285. Although UMCO's experts opined that the 6E Stream will eventually recover,

they were unwilling to predict when that recovery would take place. They did not adopt the conclusion of UMCO's prior consultant that recovery would occur in a matter of weeks. (T. 914, 1109.)

286. UMCO's hydrogeologist conceded that many variables contribute to how soon a hydrologic regime will recover, many factors are unknown and unknowable, and it is impossible to predict when the 6E Stream will recover. (T. 914.)

287. UMCO's hydrogeologist concedes that it is possible that the 6E Stream will never recover. (T. 914.)

288. As a general rule, the same factors that affect whether there will be subsidence damage in the first place also control whether the subsidence damage will last a long time. (*See*, e.g., FOF 263, 264.)

289. Some streams that suffer from the adverse effects of mine subsidence do recover postmining on their own. (S.T. 722; T. 85, 302, 874, 990-91, 1647-48; U.Ex. 196-97.)

290. Streams that recover typically intercept a larger water table, have larger watersheds, and overlay mines with deeper cover than 6E. (U.Ex. 120.)

291. Recovery of shallow systems is more likely in deep cover mines because subsurface fractures will not propagate upward far enough to damage the critical aquitards that support the systems. (U.Ex. 120.)

292. The High Quality Mine is unique because there are no other mines in Pennsylvania where an operator has attempted to longwall coal using modern methods with such shallow cover. Therefore, drawing comparisons with other streams that may have recovered at other Pennsylvania longwall mines has little predictive value. (S.T. 681-85.)

293. For example, streams at the Eighty-Four Mine have recovered, but they were

bigger streams and there was twice the amount of cover. (T. 443.)

294. The Department permitted another operator, RAG, to mine under a stream that it had already damaged because that mine had deeper cover, and it was a bigger, second-order stream than the 6E Stream. That stream has not recovered. (T. 304, 380-81, 1609-10, 1830.)

295. When longwalling at a Consol mine created unanticipated heaving in a stream channel, Consol was required to show that future panels would not cause harm. The Consol mine did not have the unique problematic characteristics of UMCO's High Quality Mine. (T. 1824-27.)

296. UMCO's hydrogeologist is not aware of any other case where a stream similar to the 6E Stream has recovered after having been dewatered by mining. (T. 914.)

297. Bruhn pointed to two streams in West Virginia that still flow after being undermined by shallow cover mines, but the characteristics of those streams make them very different from the 6E Stream and they have no predictive value in this case. (T. 1073-84, 1154-64; C.Ex. 45, 47.)

298. No testifying expert was aware of any successful operator-assisted stream flow restoration to date. (T. 302.) Operator efforts to restore lost natural flow at other mines have not been shown to be successful. (T. 380-81, 1830.)

299. Kernic has never seen a stream like the 6E Stream heal once it has been taken by subsidence. (T. 1828; U.Ex. 120.)

300. To some extent, some surface cracks can fill in over time through erosion and deposition of sediment. (T. 847, 1176-77, 1200.)

301. Erosion and deposition of sediment does little to help repair subsurface cracks. (T. 911, 1200-01.)

302. *Surface* cracks may fill up over time. *Subsurface* cracks, particularly in a permanent tensional zone, are less likely to close up over time. In other words, surface cracks apparent in the 6E Stream channel may clog with sediment in time, but no such mechanism operates underground. (T. 912, 1176-77, 1199-1200, 1828-29, 1831.)

303. There is no credible evidence to support UMCO's experts' opinions (T. 845, 872, 1732) that the cracks in the 6E aquitards will "heal." (T. 911, 1176-78.)

304. UMCO's hydrogeologist testified that he "can't really explain" the mechanism for healing. It is "just his understanding that is what happens with soft rocks." (T. 911.)

305. Underground fracturing caused by mine subsidence and the mine workings themselves create increased storage space for groundwater. As that storage space fills up again with groundwater after mining passes through the area, the deep water table may tend to rebound. (T. 1066-67.) The rise in water table does not indicate that the cracks have disappeared or closed up. (T. 145, 397.)

306. By definition, this recovery effect is less likely to occur in a formerly perched system that has been compromised. The cracks cannot fill up with groundwater because the system is perched in isolation above the water table. Water will simply continue to percolate through the damaged aquitard. (T. 145-47, 1828-29.)

307. The settling and concomitant reduction of void spaces that occurs after the longwalling passes may assist somewhat in the recovery of the regional groundwater table, but it will not contribute materially to a recovery of a very shallow perched aquifer such as the 6E system, which is located well above and separate from the water table. (T. 1114.)

308. Assuming for discussion purposes that there has been a rise in the regional water table in the area of 4E/5E system, that observation provides no meaningful information regarding

the future of the 4E/5E Stream. It does not suggest that underground cracks have "healed" or ever will "heal." (T. 145-47.) It could actually indicate that the *shallow* system has not recovered and more groundwater is available for deep recharge. (T. 1780.)

309. The opinions of the Department and PennFuture's experts that the 6E hydrologic balance will not be restored at any time in the foreseeable future are credible. (FOF 100, 104, 283, 288.)

310. There would be no foreseeable recovery from the damage to the 6E shallow hydrologic regime including the stream following longwall mining. The loss of the stream and its appurtenant surface water features will be severe and permanent, in the sense that it will be very long term as measured in human terms. (S.T. 818, 820; T. 154-55, 178-79, 223, 239-40, 334-35, 381, 396, 1782, 1828; U.Ex. 120.)

Mitigation Plan

311. UMCO has committed to take several mitigation measures when the predicted damage to the 6E Stream is realized, including such measures as sealing cracks with bentonite, replacing lost flow in the stream channel with public water, and supplying a bond in an amount adequate to cover short-term costs of mitigation. (S.T. 410, 862, 867; T. 778-80, 1069-70; U.S.Ex. AA.)

312. The Department believes that UMCO's mitigation plan contains the measures that are currently available for repairing unexpected stream damage. (S.T. 828-29, 862, 867; T. 778-80, 1662-63, 1811.)

313. UMCO's mitigation measures would probably allow the stream to function as a warm water fishery on at least a short term basis. (T. 1321, 1412-13, 1489-97, 1505-07.) There is insufficient research or evidence to know whether it could maintain such a use over the very

long term. (T. 1327-28, 1344-45, 1352, 1489-98, 1505-08.)

314. This is not a case where only temporary and/or partial city water augmentation would have been necessary. Permanent and total replacement of natural flow with city water would have been required in the 6E Stream. (FOF 310.)

315. UMCO's proposed mitigation measures would not restore or repair the damage to the perched aquifers in the 6E watershed. (S.T. 856, 1783; T. 302, 338.)

316. The mitigation measures proposed by UMCO would not prevent the damage that will occur to the 6E Stream or hydrologic regime or restore the resource at any time in the foreseeable future. (T. 1270, 1672, 1783, 1830-31.)

317. Although it is theoretically conceivable that a damaged aquitard could be repaired *in situ*, the witnesses were not aware of it ever having been tried. UMCO has not proposed to do so as part of its mitigation plan. (T. 1270, 1783.)

318. UMCO has employed nearly identical mitigation measures in the 4E/5E watershed and they have neither prevented the subsidence damage nor resulted in the restoration of natural conditions in stream to date. (S.T. 154, 202, 311-13, 697, 849; T. 1411, 1672, 1778.)

319. The Department has never by law, regulation, policy, or practice allowed permanent or long-term augmentation with public water or other alternative sources as a mitigation measure. Augmentation is typically thought of as a temporary measure to be used until a stream recovers where it is expected that the stream will in fact recover naturally. It is also typically thought of as a way of supplementing, not replacing, natural flow. (T. 970, 983; U.Ex. 93, 99.)

320. Permanent and total supplantation of all natural flow in the former stream channel with city water does not maintain the values and uses of the stream. (T. 1000, 1342.)

321. It is the Department's policy that certain mitigation measures are acceptable temporary tools in the event of *unanticipated* impacts to streams. It does not follow from the requirement to submit a mitigation plan that a mine can be permitted where, as here, it is known that there will be a complete and permanent loss of a stream. (T. 347-48, 966, 998-99, 1006, 1617, 1636-39, 1644, 1820, 1822.)

322. If the Department determines through acid-base accounting or otherwise that a mine will cause acid mine discharges, it will not permit the mine, even if the operator promises in advance to treat the discharge. (T. 995-96.)

323. Because the damage to the 6E shallow perched system with its concomitant loss of surface water features is likely to be permanent, it is particularly important to ensure that it does not occur in the first place. The only practical way to do that at this time is to ensure that there is adequate cover over the coal seam to be mined to ensure the long-term integrity of the perched aquifer upon which the system depends. (T. 1770, 1783.)

Other Issues

324. It is the Department's longstanding policy that underground mining may cause some pollution and some disruption of the hydrologic balance so long as the values and uses of the waters in question are maintained in the long term. (T. 301, 989, 1003, 1603-07, 1637-38.)

325. The complete and permanent elimination of all surface water flow does not maintain the values and uses of waters. (T. 1000.)

326. The Department prohibited UMCO from longwall mining under the 6E Panel, not because of any personal animosity toward UMCO or its principals, but solely because it was known in advance that longwall mining would irreparably destroy the shallow groundwater and surface hydrologic system in the watershed. (S.T. 876-888, 983, 987; T. 1592; U.Ex. 80, 87.)

UMCO was permitted to and in fact continued longwall mining in another panel. (U.Ex. 80, 87.)

327. The Department has not treated UMCO any differently than any other mine where it is shown that the operator will permanently dewater a hydrologic system that includes perennial streams. (T. 303, 347-48, 1820, 1826-27; U.Ex. 181.)

328. The Department has not applied any new regulation or binding norm in this case that changes how it regulates mines where it is known in advance that the mine will permanently dewater perennial streams. (T. 983, 993-94, 999, 1636, 1644, 1820-22, 1826-27.)

DISCUSSION

As previously mentioned, UMCO has only pursued three objections to the Department's order. UMCO's objections are as follows:

1. The Department applied the law incorrectly. Specifically, the Department applied a standard of review that is unauthorized and contrary to law when issuing the order and concluding that the Clean Streams Law prohibits UMCO's longwall mining activities in the 6 East Panel after UMCO adopted measures to the extent technologically and economically feasible to maintain the uses of the 6E Trib pursuant to the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. § 1406.5(e).
2. The Department acted in a manner contrary to law in enforcing and otherwise implementing regulatory concepts or definitions of general applicability without proper rulemaking or procedures relating to the implementation of policy. These actions include but are not limited to, the Department's improper application of a Board decision in its administration and application of underground mining regulations and stream protection guidance.
3. The Department's action deprives UMCO of rights guaranteed by the Constitution of the United States of America and the Commonwealth of Pennsylvania including, but not limited to, equal protection and due process rights.

I. UMCO's First Objection: The Department Applied the Law Incorrectly Regarding Subsidence and Stream Damage

A. Description of the Issue

UMCO's first objection may be broken down into several subparts:

(1) Did the Department incorrectly apply the law in issuing an order to UMCO that
(2) allowed UMCO to room-and-pillar mine but not longwall mine
(3) one of the panels at UMCO's multipanel mine
(4) where longwall mining will eliminate permanently
(5) all flow
(6) in perennial surface waters
(7) where UMCO commits in advance
(8) to do everything that is technologically and economically feasible to maintain uses in the perennial stream in the watershed?

In this important and evolving area of the law, it is important to describe what issues are *not* before us in this appeal. As to subpart (1), UMCO has limited its case to a claim that "[t]he Department applied *the law* incorrectly (emphasis added)." Although UMCO originally argued that the Department abused its discretion, in the interest of streamlining this case for quick appellate review, UMCO amended its notice of appeal to delete that objection. Our review, of course, is limited to the issues raised in the notice of appeal. 25 Pa. Code § 1021.51; *Robachele, Inc. v. DEP*, EHB Docket No. 2005-091-L (June 14, 2006); *Bucks County Water and Sewer Authority v. DEP*, EHB Docket No. 2005-101-K, slip op. at 14-15 (April 17, 2006). Although we typically interpret notices of appeal very liberally to include any objection reasonably encompassed within the language of the notice, *Robachele; Delaware Riverkeeper v. DEP*, 2003 EHB 603, 605, UMCO made a deliberate choice to delete its specific, previously well-pled objection that the Department abused its discretion. Accordingly, our review is limited to

determining whether the Department "applied the law incorrectly."[1]

With regard to subpart (2) of UMCO's first objection, the Department's Order did not prohibit all mining in Panel 6E. It only prohibited longwall mining. UMCO is still allowed to mine the panel with continuous miners (i.e. room-and-pillar mining). Although UMCO would not have been able to meet preexisting contractual commitments with that admittedly less productive method, there is no question that coal can be mined. This is not a case where the Department has ceased all mining or denied a permit entirely.

On that note, the Department's order only related to one of UMCO's panels. For example, UMCO had already longwalled Panels 2E, 3E, 4E and 5E when the Department issued the Order. The Order did not prevent UMCO from longwall mining any of the remaining panels at the site. In fact, UMCO proceeded to mine Panel 9E after the Order was issued, but quit due to what it characterized as a combination of adverse geological conditions and frustration in dealing with the Department. The point here is that we are only reviewing one order affecting one panel in one way.

We have concluded as a matter of fact that the Department correctly determined that the longwall mining will *permanently* dewater the stream. Therefore, this case is not about a temporary flow loss.

The 6E Stream is perennial. It is perennial under every conceivable regulatory definition.[2] Thus, this appeal does not implicate the Department's authority to regulate the

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[1] A review for reasonableness adds an extra layer to our review of Departmental actions. The Department must act in accordance with the law *and* it must act reasonably. *Barra v. DEP*, EHB Docket No. 2003-038-L, slip op. at 4 (April 24, 2006); *see Baehler v. DEP*, 863 A.2d 57, 60 (Pa. Cmwlth. 2004). In other words, the Department may have the necessary legal authority to act, but its exercise of that authority in a particular case must still be reasonable. *See Shuey v. DEP*, 2005 EHB 657, 709. UMCO did not ask for this second level of review. Nevertheless, in the interest of generating a complete record, we hold that the Department acted reasonably under the facts and circumstances presented here.

[2] Whether there is any *practical* difference between the various definitions is debatable. Perhaps the most

adverse effects of subsidence on intermittent or ephemeral streams. The 6E Stream flows continuously throughout the year, year in and year out. Biological evidence supports that finding, but there is plenty of other evidence, including eyewitness testimony, to support the characterization of the stream as perennial even without the biological evidence.

UMCO states that it has committed in advance to do everything technologically and economically feasible to maintain the future designated uses of the 6E Stream. The key issue here is whether submittal of an adequate mitigation plan forces or requires the Department to issue a permit authorizing the permanent elimination of all natural flow in a perennial stream. This case is not about preparing for *unanticipated* damage. This case is not about what remedial measures the Department may require or other actions the Department may take in the event of an unanticipated stream loss. What standards apply or what approvals are necessary in such an event are not implicated in this case. Moreover, this case does not involve pooling or otherwise changing the exact flow characteristics of a stream because there will be *no* flow here. Finally, this is not an appeal from a Department action that allows temporary mitigation. UMCO's proposed measures will not restore the stream and they will need to be employed in for the foreseeable future.

Our short answer to UMCO's objection is that the Department applied the law correctly. The Department had the legal authority to issue the Order. UMCO proposed to longwall mine too close to the surface underneath vulnerable surface waters. The 6E Panel would have been the shallowest longwall mine in the history of recent coal mining in the state. There is no question that it would have caused severe, irreparable damage. The fact that UMCO was willing

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straightforward definition is set forth in Subchapter F (Subsidence Control) of Chapter 89 (Underground Mining) of Title 25 of the Pennsylvania Code, 25 Pa. Code § 89.141(b)(2) (a stream or part of a stream that flows continuously throughout the calendar year). The 6E Stream never stops flowing entirely and clearly meets this definition.

to replace all stream flow in perpetuity with city water from a hydrant is not sufficient to justify the damage.

B. Factual Summary Relating to UMCO's First Objection [3]

The Order restricts UMCO to room-and-pillar mining in the 6E Panel. The Department issued the Order because the subsidence resulting from longwall mining the 6E Panel would have completely and permanently eliminated all flow in the surface water features and shallow groundwater regime, including all flow in the perennial section of the 6E Stream.

There was surprisingly little disagreement about the impact that longwall mining would have had in the 6E watershed. We quote from UMCO's brief:

> UMCO's experts, Mr. Bruhn and Dr. Bonetti, admit that longwall mining beneath the 6E Trib will cause subsidence impacts on the surface, which will disturb the perched water tables and impact the hydrologic balance in the 6E Trib and within the 6E Trib's watershed. Stream flow loss and impacts to the channel configuration are anticipated to occur as a result of the disturbance caused by mining. (footnote omitted). (Brief 79-80.)

UMCO's hydrogeologist, Dr. Joseph Bonetti, testified as follows:

> Q: Now, it is your opinion that longwall mining beneath the 6E Stream will cause a subsidence impacts of the surface, correct?
>
> A: Correct.
>
> Q: And it's also your opinion that they may disturb the perched aquifers that Mr. Kernic and others have been talking about?
>
> A: Yes. It's my opinion that as a result of longwall mining, the hydrologic balance of the entire watershed will be disrupted primarily due to fracturing.

(T. 844.)

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[3] We will not repeat our Findings of Fact in narrative form. This discussion is intended as a brief summary, and in some instances explanation, of a few select points.

The fundamental factual disagreement in this case, then, comes down to the *duration* of the flow loss. UMCO's claim is that the flow loss, even if extensive at first, will be short lived. (T. 845, 867, 873 (Bonetti); 1031 (Bruhn).) The Department and PennFuture's experts opine that the flow loss will be permanent, with no foreseeable recovery. (S.T. 817-18; T. 153-55 (Kernic); T. 1782 (Morgan).[4]

The first problem with UMCO's position is that it never defines "short-lived." In fact, its experts conceded that they could not opine how long the flow loss would continue. (FOF 285, 286.) Their position is that the stream is likely to recover some day. In fact, Dr. Bonetti conceded that the stream may never recover. (FOF 287.) This is a major concession and must not be ignored. If UMCO's own expert admits that the stream may never recover, it is hard to see how UMCO's mining could have been allowed to go forward. The fact that the stream may recover at some unknown future date obviously provides little comfort and hardly shows that there is no presumptive evidence of pollution.

Putting that aside, in resolving the factual dispute concerning how long the flow disruption will last, the dispute comes down to choosing between contradictory expert opinions. In other words, this case presents a classic battle of the experts.

The weight to be given to an expert's opinion depends upon such factors as the expert's qualifications, presentation and demeanor, preparation, knowledge of the field in general and the

[4] In truth, UMCO's case is oriented strongly toward its *legal* argument that the impact on the stream does not matter so long as UMCO promises feasible repairs. The impact may be severe and permanent, so long as UMCO commits to acceptable mitigation, which would in this case be flow augmentation in perpetuity. Nevertheless, UMCO presented extensive testimony without objection that long-term mitigation measures will not be necessary as a matter of fact. Although this evidence seems to go beyond UMCO's notice of appeal, in the interest of creating a complete record, we find that UMCO is factually incorrect: perpetual mitigation will be required.

facts and circumstances of the case in particular, and the quality of the expert's data and other sources. Perhaps more fundamentally, we look to opinion itself to assess the extent to which it is coherent, cohesive, objective, persuasive, and well grounded in the relevant facts of a case. *Bethayres Reclamation Corp. v. DER*, 1990 EHB 570, 580-81. *See, e.g., Sunoco, Inc. (R&M) v. DEP*, 2004 EHB 191, 246, 249; *aff'd*, 865 A.2d 960 (Pa. Cmwlth. 2005); *Birdsboro & Birdsboro Municipal Authority v. DEP*, 795 A.2d 444, 447-48 (Pa. Cmwlth. 2002); *T.R.A.S.H. Ltd. v. DER*, 1989 EHB 487, *aff'd*, 1030 C.D. 1989 (Pa. Cmwlth. 1990); *Oley Twp. v. DEP*, 1997 EHB 660, 689-90, *aff'd*, 710 A.2d 1228 (Pa. Cmwlth. 1998). As the fact finder, weighing credibility and selecting among competing expert testimony is one of our most basic and important duties. *Bethayres*, 1990 EHB at 580.

The key experts who testified in this case are as follows: David Plowman (DEP biologist); James Mudge (UMCO biologist); John Kernic (DEP hydrogeologist); John Morgan (PennFuture subsidence expert); Joseph Bonetti (UMCO hydrogeologist); Robert Bruhn (UMCO subsidence expert). All of the experts were well qualified. (C.S.Ex. 2, 5; P.F.S. Ex. A; U.Ex. 16.)

We have no hesitation in accepting the opinion of both Kernic and Morgan that the 6E Stream would not recover in the foreseeable future. We reject Bonetti and Bruhn's contrary opinion. Kernic and Morgan's opinion is credible; Bonetti and Bruhn's is not.

When it comes to training and experience relative to the impact of subsidence on surface waters in general, the nod clearly goes to Kernic and Morgan. Although Bruhn has a wealth of experience regarding the mechanics of subsidence in general, he has somewhat less experience regarding subsidence impacts on streams. Dr. Bonetti never studied a stream above a longwall panel before. He never previously looked at the impact of longwall mining on streams. (T. 824-

25, 1722.) In contrast, Kernic has studied the hydrogeology of mining impacts on an almost daily basis for the last twenty years. (S.T. 498-99, 799-800; T. 95; C.S. Ex. 5.) Morgan has done extensive work in this area and is considered an international authority on this very topic.

With regard to presentation and demeanor, no one witness has the upper hand. Although they all had different styles, they all presented well and appeared to sincerely believe the opinions that they were expressing.

Although Morgan testified for PennFuture in this case, he rarely testifies for nonprofit organizations. (S.T. 976; T. 1799.) He spends the majority of his time working directly for mining companies. (S.T. 917.) And although Kernic disapproved of longwall mining UMCO's Panels 5E and 6E, he has obviously approved of many other longwall mines under streams.

Kernic was the most knowledgeable and best prepared expert regarding the facts of this particular case, which is not surprising given that he has lived, if you will, with the matter for years. (S.T. 801-08, 824; T. 97, 162, 340-41.) We find no fault with Morgan's preparation and site knowledge. Indeed, one of Morgan's most valuable roles was to explain to us how UMCO's various opinions were not particularly well prepared or grounded in the specific facts of this case.

UMCO did not call as experts the hydrogeologists that prepared its reports in dealing with the Department. Instead, UMCO identified Bonetti and Bruhn for the first time on the eve of the hearing on the merits. Neither had anything approaching the site-specific background of Kernic.

We found Bonetti's and particularly Bruhn's testimony to be somewhat generic and based in some cases on inadequate study. For example, common sense and several witnesses all suggest that the impact of longwall mining on the 4E/5E Stream is the single best real-world

indicator of what the impact of mining on the 6E Stream would have been. Yet Bruhn admitted, "I would have to say that I have not conducted any detailed study on 4E/5E." (T. 1059.) When asked: "So you haven't considered the 4E/5E East Stream in rendering your opinions whatsoever?" Bruhn answered, "That is correct." (T. 1060.) This deals a serious blow to Bruhn's credibility.

Our concern does not stop there. Bruhn used generic and/or default values for many of his calculations. (T. 1100-04.) He used whatever information his client provided to him with no independent analysis of reliability or accuracy. (T. 1240-41.) He gave vague answers in response to questions regarding his review of pertinent Departmental files. (T. 1093-95.) He used a computer model in predicting subsidence without calibrating it against known subsidence at the UMCO site. (T. 1098-99.) Bruhn used a photograph of a room-and-pillar mine in support of his theories regarding the closing of the postulated longwall mine void. (T. 1032, 1047.) (In a longwall mine, the rubbleized zone collapses immediately; there is no lingering mine void. (T. 1113.))

Bruhn relied heavily upon technical papers prepared by Francis Kendorsky (coincidentally and significantly a former employee and colleague of PennFuture's expert, John Morgan), but he misinterpreted Kendorsky's conceptualized zones of subsidence. (T. 1764-65.) Of serious concern in a case involving surface water features, he did not use the actual topography of the site. (T. 1106.) Bruhn relied upon incorrect data or perhaps oversimplified that data in opining about soft versus hard rocks in the strata. (T. 1754-57; P.F.Ex. 64.)

Bruhn relied on an assumption that only six or seven feet of the coal seam would be extracted. There is no factual basis for this counterintuitive assumption. Small differences in the amount of coal mined can make a big difference in calculating the predicted surface impacts of

subsidence. The credibility of an expert suffers greatly when he relies on inaccurate factual assumptions. *Sunoco, supra.*

In response to various questions, Bruhn testified that rising water levels in the piezometers could be evidence of deep groundwater recovery, steady water levels could be evidence of deep groundwater recovery, and lowering water levels could be evidence of groundwater recovery. Although we have explained that deep groundwater recovery is neither here nor there in this case, Bruhn's overall credibility suffers in our eyes when he shows himself willing to make statements like these. If different piezometer levels could mean anything, they essentially mean nothing.

Aside from his lack of site-specific preparation, Bruhn seemed to function best in the realm of the theoretical, regardless of whether those theories had any basis in reality at *any* actual mine site. He indicated that a functional middle zone (wherein subsidence cracks do not appear) could be as little as one foot. In other words, in a mining panel of thousands of square feet, twelve inches of strata one foot thick could isolate the surface from all subsurface cracks. (T. 1146.) Bruhn discussed "creep" and "mine void squeeze" and "residual subsidence," but his theories were rarely if ever backed up by personal observations, scientific evidence or papers, or personal experience. And to return to our original concern, none of the theories were backed up by site-specific information despite the fact that there has already been extensive mining at the site.

Kernic and Morgan did a good job of explaining why they believe the damage to the 6E Stream will be irreparable. They clearly have the facts on their side, not the least of which is the history of the 4E/5E Stream. Although all parties hope that the stream may someday recover, as of the close of the record in this case there were little positive sign that it will. Bruhn and

Bonetti did not explain convincingly why they think the aquifer will "heal." Bonetti in particular took the approach that streams can and do recover, so this one probably will too. He has no personal knowledge of any recoveries under like circumstances. In fact, he has never been involved in a stream/subsidence case before. When Dr. Bonetti was asked to explain how "soft" rock heals, he could not explain the mechanism. It was just his "understanding of what happens." (T. 911.)

Unfortunately, Bonetti's opinion that the 6E Stream will recover appears to be little more than speculation. His graphs and data do not show a recovery of *natural* flow in 4E/5E. He relies on invalid and essentially meaningless piezometer data. He described data trends without including all available information. He relied heavily on questionable monitoring data. We are also troubled by his approach of trying to distinguish the amount of flow in the 6E Stream channel itself that comes from springs as opposed to baseflow. Bonetti himself acknowledged that the spring flow and baseflow is all part and parcel of the same hydrologic system. It is the perched system as a whole that matters. When that system is compromised, the 6E Stream is compromised, regardless of what percentage of headwater flow comes from springs. Kernic and Morgan have credibly explained how *both* spring flow and baseflow will be lost. Bonetti's presentation was not altogether internally consistent.

Kernic and Morgan's opinions regarding the long term threat to the stream are highly persuasive and well grounded in the known facts. Of course, it is helpful that their opinions are entirely consistent. They credibly explained why the threat to the 6E Stream is so significant. They point to the lack of adequate cover as the bottom-line problem. They explained how subsidence fractures will affect not only the surface but the critical aquitards that support the entire system.

The 6E Stream is a highly vulnerable, already compromised upland valley stream. It is dependent upon perched aquifers. Surface fracturing would cause enough damage to dewater the stream. More seriously as relating to the duration of the problem, applying appropriate calculations to site-specific conditions, they showed that fractures from mining will intercept the perched aquifers themselves from above and from below. Groundwater flow will be lost to lower levels. The water will eventually emerge again somewhere, but it will be too far downstream to do 6E any good.

There is not enough cover over the 6E Panel. Furthermore, a dangerously high percentage of the 6E Stream and springs, their recharge zones, and supporting aquifers are located over permanent tension zones in the panel, i.e., areas where subsidence fractures tend to remain pulled apart.

The 6E and 4E/5E Streams have the same hydrogeology. The 4E/5E Stream is the best indicator of what can be expected to occur in the 6E watershed. UMCO's own consultants have stated that the 4E/5E Stream is an appropriate analog area. (U.S.Ex. AA.) UMCO's mining dewatered the 4E/5E Stream and shallow system. The stream and other surface water features have not recovered as of the time of the hearing despite the passage of considerable time and periods of above-average precipitation. Other similar streams in the area continued to flow through periods of drought as the nearby 4E/5E Stream dried up. Water did not flow in the stream even after the remnants of Hurricane Francis came through. Although the 4E/5E Stream is a good indicator of what would happen if 6E were undermined, the 6E Stream is more vulnerable to permanent damage than the 4E/5E Stream for several reasons. 6E has lower cover at places, the 6E Stream runs parallel to the panel, much of the stream is in the permanent tension zone, the stream is already stressed, there would have been multiple mining passes under the 6E

Stream, there is a greater amount of hard rock in pertinent lithologies, there is known preexisting fracturing in 6E, and other factors. Thus, even if 4E/5E eventually recovers, it does not necessarily follow that 6E would similarly recover. As of the hearing, UMCO had replaced flow in the 4E/5E Stream with 28,340,000 gallons of public water. Yet, the stream was still losing flow.

The 6E watershed is 185 acres. 108 acres have already been mined. Only a few small areas would have been unmined if the 6E Panel had been mined as planned. The panel would have undergone multiple mining passes.

Morgan explained how the limited piezometer data in this case is almost entirely meaningless and does not support a claim that the 6E shallow groundwater/surface water system could ever be restored. The piezometers appear to have been improperly constructed. Even Dr. Bonetti agreed that the piezometers only measure the regional water table, which is a separate system than the shallow system at issue here. The trends in the results are not clear. The piezometers showed a rapid rise following UMCO's stream augmentation, which could suggest what is already known--surface/shallow water is going straight to deeper levels.

To the extent that "soft" rocks tend to "heal" better than "hard" rocks, hard rocks predominate in the strata between the 6E springs/stream and the coal seam. Dr. Bonetti acknowledged that the confining rock units that were fractured by mine subsidence will remain fractured. (T. 911.)

While there is some indication that some of the fractures in the *surface* subsidence zone can fill in and/or close over time, there is no evidence that the *subsurface* cracks can or will close or otherwise stop acting as a conduit for groundwater infiltration. When deeper groundwater levels recover, it is because the new void spaces created by mining fill back up with water. As a

very rough analogy, one can think of a spring-fed quarry pit that gradually fills up with water after mining is terminated. The fact that the pit is filling up with water obviously does not mean that the pit has closed up. By definition, this recovery process does not work with a bottomless, perched system. The void spaces are isolated at a higher level and cannot fill up with water. The water will simply continue to pass through to lower levels. It is these subsurface fractures that will cause the greatest irreparable damage to the 6E Stream.

Other streams that suffer adverse effects have recovered over longwall mines, but never when there is the perfect storm of adverse risk factors that are present in the 6E Panel. UMCO was unable to point to any other similar site where flow has recovered. Kernic has never seen such recovery under circumstances like those present here.

After an exhaustive study of the record, we have been left without any doubt that the Morgan and Kernic opinions (of no foreseeable recovery) are credible, Bonetti and Bruhn's opinions (of short-term recovery) are not, and that the Department was correct in concluding that UMCO's longwalling would have permanently dewatered the previously perennial flow of the 6E Stream.

UMCO and the Department also presented the testimony of biological experts, but we detected little or no disagreement on critical points. There was no disagreement that the 6E Stream is a perennial stream supporting a warm water fishery. There was no disagreement that the same can be said of the 4E/5E Stream premining. There was no disagreement that the 4E/5E Stream is currently artificially maintaining a warm water fishery. Whether the quality of the fishery matches its premining quality is not particularly relevant in this case. UMCO's expert testified that there is not enough information and it is otherwise too early to tell to what extent, if any, the 4E/5E Stream has recovered its natural flow, and we accept that opinion. Again, that

issue is not particularly relevant here. The primary relevance of the 4E/5E Stream in this appeal is its value as a tool in predicting the subsidence effects on the 6E Stream. Finally, neither biologist opined that city water augmentation would be appropriate and/or sustainable in perpetuity, and both acknowledged the rather obvious notion that a return of *natural* flow is the desired goal.

C. The Department's Legal Authority to Issue the Order

Although UMCO attempted to prove that the stream damage would be temporary, UMCO contends that it really does not matter whether its mining will permanently eliminate all flow in the 6E Stream. UMCO's position, quite simply, is that even if its mining will eliminate a perennial stream, it *must* be allowed to mine, with only one condition: UMCO must promise that it will employ measures to the extent technologically and economically feasible to maintain uses of the stream. In other words, the Department has no discretion in this area.[5] The Department has no authority to prohibit mining so long as the operator makes the requisite promise. It does not matter whether the measures will actually work. It does not matter whether the measures must go on in perpetuity. In fact, UMCO's principal, Mr. Robert Murray, succinctly responded to questioning concerning this issue as follows:

> Q. So, as I understand what your testimony is, you believe that mining companies such as yours have the ability to mine under a stream so long as they commit to then, after the fact, committing resources to the extent economically and technologically feasible to repair any harm done to the stream. Is that accurate?
> A. Yes, sir.

(T. 814.)

UMCO argues that it has the right to eliminate any stream of its choosing so long as it

[5] UMCO's position that the Department lacks any discretion in this area might explain why UMCO dropped its objection that the Department abused its discretion. The Department cannot abuse discretion that it does not have.

promises to employ feasible mitigation measures, or, stated another way, that the Department has no legal authority to prevent such behavior. Yet, it would seem to be beyond peradventure that the Department has the legal authority to prevent the permanent elimination of the Commonwealth's streams. Section 610 of the Clean Streams Law reads as follows:

> The Department may issue such orders as are necessary to aid in the enforcement of the provisions of this act. Such orders shall include, but shall not be limited to, orders modifying, suspending, or revoking permits . . . . Such an order may be issued if the Department finds that a condition existing in or on the operation involved is causing or creating a danger of pollution of the waters of the Commonwealth . . . .

35 P.S. § 691.610. Thus, the Department has the clear legal authority to issue orders that prohibit an operation that creates a danger of pollution of the waters of the Commonwealth. *See also* Section 611, 35 P.S. § 691.611 (unlawful to commit water pollution); 35 P.S. § 691.5 (authority to issue orders); 25 Pa. Code § 86.37 (no presumptive evidence of pollution to waters of the Commonwealth); § 89.36(a) (ensure protection of the hydrologic balance and prevent adverse hydrologic consequences); § 89.52(a) (protect environmental values); § 89.142a(h) (protect values and uses of streams). There is abundant case law that confirms the Department's authority. *PUSH v. DEP*, 1999 EHB 457, 600-13, *aff'd*, 789 A.2d 319 (Pa. Cmwlth. 2001); *Rohm & Haas Co. v. Cont'l Casualty Co.*, 781 A.2d 1172, 1178 (Pa. 2001) (discussing the Department's authority to compel companies to clean up pollution and remedy environmental damage caused by their operations); *Com. v. Coward*, 414 A.2d 91, 96-97 (Pa. 1980) (discussing the Department's express authority to issue orders abating or preventing pollution).

"Waters of the Commonwealth" are defined very broadly in the Clean Streams Law as

> any and all rivers, streams, creeks, rivulets, impoundments, ditches, water courses, storm sewers, lakes, dammed water, ponds, springs and all other bodies or channels of conveyance of surface and underground water, or parts thereof, whether natural or

artificial, within or on the boundaries of this Commonwealth.

35 P.S. § 691.1. There is no question that the 6E Stream is part of the waters of the Commonwealth as so defined. (S.T. 690-91, 801; T. 33-34; C.Ex. 18.) For that matter, the appurtenant springs, seeps, and wetlands on the 6E Panel clearly fall within the statutory definition of waters of the Commonwealth. *See* 35 P.S. § 691.1; (S.T. 690-91, 801; T. 33-34; C.Ex. 18.)

"Pollution" is also defined broadly:

> "Pollution" shall be construed to mean contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance or to render such waters harmful, detrimental or injurious to public health, safety or welfare, or to domestic, municipal, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life, including but not limited to such contamination by alteration of the physical, chemical or biological properties of such waters, or change in temperature, taste, color or odor thereof, or the discharge of any liquid, gaseous, radioactive, solid or other substances into such waters. . . . .

35 P.S. § 691.1. UMCO suggests, somewhat in passing, that subsidence impacts do not cause pollution and, even if they do, they may not be regulated unless they interfere with the water's values and uses. UMCO is incorrect. Subsidence impacts can clearly cause pollution. *Consol Pennsylvania Coal Co. v. DEP ("Consol I")*, 2002 EHB 1038, 1042, and 1045; *Consol Pennsylvania Coal Co. v. DEP ("Consol II")*, 2003 EHB 239, 243; *Consol Pennsylvania Coal Co. v. DEP ("Consol III")*, 2003 EHB 792, 795, 800. *See also Tinicum Township,* 2002 EHB 822; *Oley Township v. DEP*, 1996 EHB 1098, 1117-18.

Although not directly on point, the Supreme Court's recent decision in *S.D. Warren Co. v. Maine Board of Environmental Protection*, 126 S.Ct. 1843 (2006), is worth passing comment. In that case, the court held that the term "discharge" as used in 33 U.S.C. § 1341(a)(1) (state

certification of federally licensed projects) covers releases from hydroelectric dams, even though there is no addition of pollutants. The Court's reasoning included the following discussion:

> Congress passed the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a); see also *PUD* No. 1, 511 U.S., at 714, 114 S.Ct. 1900, the "national goal" being to achieve "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." 33 U.S.C. § 1251(a)(2). To do this, the Act does not stop at controlling the "addition of pollutants," but deals with "pollution" generally, see § 1251(b), which Congress defined to mean "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." § 1362(19).
>
> The alteration of water quality as thus defined is a risk inherent in limiting river flow and releasing water through turbines. Warren itself admits that its dams "can cause changes in the movement, flow, and circulation of a river . . . caus[ing] a river to absorb less oxygen and to be less passable by boaters and fish." And several *amici* alert us to the chemical modification caused by the dams, with "immediate impact on aquatic organisms, which of course rely on dissolved oxygen in water to breathe." Then there are the findings of the Maine Department of Environmental Protection that led to this appeal:
>
> > "The record in this case demonstrates that Warren's dams have caused long stretches of the natural river bed to be essentially dry and thus unavailable as habitat for indigenous populations of fish and other aquatic organisms; that the dams have blocked the passage of eels and se-run fish to their natural spawning and nursery waters; that the dams have eliminated the opportunity for fishing in long stretches of river, and that the dams have prevented recreational access to and use of the river."

126 S.Ct. at 1852-53 (some citations omitted). Similarly, in the context of the Pennsylvania Clean Streams Law, mine subsidence can cause deleterious changes in the physical and biological integrity of streams. It can change the movement, circulation, and flow of streams, and, as this case demonstrates, it can cause stretches of a natural streambed to be essentially dry and thus unavailable as habitat.

Of course, "pollution" is an extremely broad term and not all pollution in its most literal sense can or should be regulated. UMCO contends that only pollution that interferes with values and uses may be regulated. PennFuture disagrees. These are difficult issues. *Compare PUSH*, 789 A.2d at 329 (Clean Streams Law requires that pollution affect the uses of the water) with *Machipongo Land and Coal Company v. DEP*, 799 A.2d 751, 774 (Pa.), *cert. denied*, 123 S.Ct. 48 (2002) ("[w]e believe that the public has a sufficient interest in clean streams alone regardless of any specific use thereof.") and *Commonwealth v. Barnes & Tucker Company*, 319 A.2d 871, 882 (Pa. 1974) (rejecting theory that only preexisting use must be protected). Furthermore, just as "pollution" can be defined broadly, "interference" with values and uses is an exceedingly vague term. If a formerly robust fishery is severely damaged but can sustain one or two minnows, has there been interference with use as a WWF that may be regulated? Fortunately, there is no need to define the outer limits of the Department's legal authority or responsibility in this case. UMCO's longwalling under the 6E Stream would have completely and permanently dried up every surface water feature including the stream itself and compromised entirely the shallow groundwater system in the panel.[6] We can say without fear of reasonable contradiction that the *permanent elimination* of *all* surface and shallow groundwater flow in a watershed as a result of subsidence not only constitutes "pollution," but that such pollution also completely interferes with the values and the present and reasonably foreseeable future uses of the system. The *permanent* elimination of *all* flow also constitutes a disruption of the hydrologic balance, 25 Pa. Code § 89.36, constitutes an adverse hydrologic consequence, *id.*, and does not protect fish,

[6] Throughout this opinion, when we say that the waters will be "eliminated," we have not failed to recognize that the former surface features (e.g. the former stream channel) will collect snow melt and stormwater runoff. Beyond this immediate and short-lived reaction to precipitation, however, there will be no water. We also do not fail to recognize that nothing in nature is truly "permanent." We are concerned with the foreseeable future measured in human terms.

wildlife, and related values, 25 Pa. Code § 89.142a(h). In short, the Department has not exceeded, let alone approached, the limits of its regulatory authority under the Clean Streams Law in this case. Resolution of PennFuture's theory that *any* pollution or *any* interference *must* be prohibited will need to wait another day.[7]

UMCO refers us to Judge Coleman's opinion rejecting a supersedeas petition in *Borough of Roaring Spring v. DEP*, 2003 EHB 825. We are not sure why. In *Roaring Springs,* Judge Coleman stated the rather obvious point that a mine permit applicant need not prove "with absolutely certainty" that proposed mining will not cause pollution. 2003 EHB at 841. We certainly agree, but here, the Department has required no such showing. In *Roaring Spring*, third-party appellants failed to show a hydrogeological connection between the mining and the water resource at issue. Here, the connection is not disputed and irrefutable. Furthermore, *Roaring Spring* reconfirmed the basic principle that a reduction in flow caused by mining can constitute pollution that is within the authority of the Department to regulate. 2003 EHB at 840. *See also Birdsboro v. DEP*, 795 A.2d 444, 448 (Pa. Cmwlth. 2002) (rejecting position that a mine applicant must show *no* pollution will occur; applicant only required to show "no evidence that presumptively indicates pollution will occur").

Actually, UMCO does not put much effort into arguing that the Clean Streams Law would ordinarily be inapplicable in the case of complete stream elimination. Rather, UMCO's primary contention is that the more specific provisions of the Mine Subsidence Act, 52 P.S. §

[7] We would note, however, that the Department has very broad legal authority, but it also must act with reasoned discretion. Just as the Department does not have a *mandatory* duty to allow mining as UMCO asserts, it is unlikely that it has a *mandatory* duty to disallow mining as PennFuture asserts. The Department may have legal authority to preclude longwall mining that results in only minor and/or temporary disruption, but whether doing so would be a reasonable exercise of discretion will turn on the facts of each individual case.

1401 *et seq.*, supersede the provisions of the Clean Streams Law that might have otherwise applied in this situation. UMCO's position is that, "[i]n reconciling both the Clean Streams Law and the Mine Subsidence Act as it relates to underground bituminous longwall coal mining, the only rational interpretation is: (i) planned subsidence under streams cannot be prohibited and (ii) mining operators only have to take mitigation measures to protect foreseeable uses of streams to the extent technologically and economically feasible." (Brief at 56.)

UMCO relies first and foremost on one provision in the Mine Subsidence Act; namely, Paragraph (e) of Section 5, 52 P.S. § 1406.5(e), which reads as follows:

> An operator of a coal mine subject to the provisions of this act shall adopt measures . . . that he will adopt to prevent subsidence causing material damage to the extent technologically and economically feasible, to maximize mine stability, and to maintain the value and reasonable foreseeable use of such surface land: Provided, however, [t]hat nothing in this subsection shall be construed to prohibit planned subsidence in a predictable and controlled manner or the standard method of room and pillar mining.

UMCO places particular emphasis on the last clause of the provision, which provides that "nothing in this subsection shall be construed to prohibit planned subsidence in a predictable and controlled manner." *Id.* ("Planned subsidence in a predictable and controlled manner" is longwall mining.)

UMCO is reading far too much into Section 1406.5(e). First, the cited language only refers to the subsection itself. It does not say "nothing *in this statute* shall be construed to prohibit planned subsidence." It certainly does not say "nothing *in this statute or in any other statute or regulation* shall be construed to prohibit planned subsidence." The last clause in Subsection 1406.5(e) simply states that preceding parts of "this subsection" are not to be interpreted to preclude longwall mining.

The concluding proviso of the subsection makes perfect sense after one reads the beginning of subsection 1406.5(e). It is well known that longwall mining can result in "subsidence causing material damage." Without the proviso, it is not hard to appreciate the Legislature's concern that a court would read that the duty "to prevent subsidence causing material damage" equates to a prohibition on all longwall mining. The proviso makes it clear that the Legislature had no such intent. In other words, even though longwall mining can cause material damage, it is not to be prohibited *on that basis alone.* We do not read the proviso to have any more meaning than that.

Longwall mining is permitted in Pennsylvania, but not without condition. Subsection 1406.5(e) does not provide otherwise. There are hundreds of other conditions and requirements that regulate longwall mining that are located throughout the statute itself, in other applicable statutes, and in the Environmental Quality Board's regulations. The simple proviso at the end of subsection 1406.5(e) cannot be read to trump every other legal requirement in force in Pennsylvania. UMCO's contention that one proviso was intended to trump the entire Clean Streams Law and every regulation promulgated thereunder is, with apologies, absurd. Subsection 1406.5(e), so heavily relied upon by UMCO, does not so much as mention water resources.

Although the final clause tells us that Subsection 1406.5(e) was not intended as a legislative prohibition on all longwall mining, even the subsection itself places some conditions on the right to longwall mine coal. In fact, the subsection contains three conditions. An operator is not allowed to mine unless it adopts measures that do three things:

> (1) "prevent subsidence causing material damage to the extent technologically and economically feasible";

(2) "maximize mine stability"; and

(3) "maintain the value and reasonably foreseeable use of such surface land."

We are having trouble understanding why UMCO believes that this language helps its position. Subsection 1406.5(e) does not appear to have anything to do with water resources, but to the extent that surface waters are encompassed in the value and use of "surface land" (§ 1406.5(e)(3)), Subsection 1406.5(e) requires UMCO to maintain the value and reasonably foreseeable use of the waters. *Accord*, 25 Pa. Code § 89.142a(h)(1)(underground mining to be conducted in a manner which maintains the value and reasonably foreseeable uses of perennial streams). This obligation is not consistent with UMCO's assertion that it has the right to permanently dewater any stream of its choosing. The permanent loss of a stream does not maintain its value and reasonably foreseeable uses.[8] We do not see any support whatsoever in the language of Subsection 1406.5(e) for UMCO's position that planned subsidence under streams cannot be prohibited under any circumstances.

The parties refer to us to *PUSH v. DEP*, 1999 EHB 457, *aff'd*, 789 A.2d 319 (Pa. Cmwlth. 2001). We certainly agree that that landmark litigation is helpful in this case. In the context of a discussion regarding subsidence damage to homes, we described the effect of Subsection 1406.5(e) as follows:

> The coal mining company should strive to prevent subsidence causing material damage to the extent technologically and economically feasible, to maximize mine stability, and to maintain the value and foreseeable use of such surface land. However, this section cannot be used to prevent a coal mining company from

[8] The statute does not qualify the duty to maintain the value and reasonably foreseeable use of surface land "to the extent technologically and economically feasible." That qualifying phrase only relates to the operator's duty to prevent subsidence causing material damage. Operators must prevent subsidence to the extent they can feasibly do so, but they also must maintain the value and foreseeable uses of surface land. The regulations, however, require repairs to perennial streams to be performed to the extent economically and technologically feasible. 25 Pa. Code§ 89.142a(h)(2). The appropriate standard for judging adequate mitigation, however, is not implicated in this appeal.

> longwall mining. If subsidence from longwall mining occurs and causes material damage (or *any* damage, for that matter) to a dwelling, the coal mining company is obligated to repair the damage. If mining would result in irreparable damage to the dwelling, then under Section 1406.9a(b), the Department *can* prohibit the mining.

1999 EHB at 533. If the Department can prohibit mining that will result in irreparable damage to dwellings, there is hardly anything revolutionary in the idea that the Department can, as it did in UMCO's case, prohibit irreparable damage to streams.

We also held in *PUSH* that a deep mine operator must demonstrate that the longwall mining activities are planned in such a way as so as to prevent subsidence damage to aquifers and perennial streams, citing 25 Pa. Code §§ 89.35 and 89.36. 1999 EHB at 555.[9] Somewhat prophetically, we noted that dewatering caused by underground mining occurs when the mine or fractures caused by subsidence reach the shallow groundwater zone and divert water downward. Streams can be protected if the mine is far enough away from the groundwater zone so as not to direct the water. "Dewatering of perennial streams is usually prevented if the underground mine workings are at least 400 feet below the stream. In areas where there is not 400 feet of cover, leaving 50 percent of the coal in the ground has proven successful in limiting the occurrence of fractures which would act as conduits to divert the water downward." *Id.*, 1999 EHB at 557.

It is easy to see that the record in the instant case regarding these basic principles is entirely consistent with our discussion in *PUSH*. Although most of the mine in *PUSH* had 500-600 feet and even up to 800 feet of cover, Eighty-Four planned its mining so that it would leave 50 percent of the coal in place in a small area that had less than 400 feet of cover. *Id.* Moreover, the stream in question was "one of the largest continuously flowing streams in the area," 1999 EHB at 558, and was thus much less vulnerable to dewatering than the 6E Stream. In the interest

[9] Intermittent streams were not at issue in *PUSH*, just as they are not at issue here.

of protecting the stream, Eighty-Four Mining, unlike UMCO, was apparently willing to make a reasonable accommodation in its mining plan.[10]

UMCO does not point to any provision other than Subsection 1406.5(e) in the Mine Subsidence Act that expressly limits the Department's otherwise clear and obvious authority under the Clean Streams Law and the regulations discussed above to prohibit mining that will permanently eliminate a stream. UMCO does argue that Section 9.1(c) of the Mine Subsidence Act, 52 P.S. § 1406.9a(c), supports its position by implication. That section lists the following five surface features under which longwall mining will not be permitted if it would cause material damage or reduce reasonably foreseeable uses of those features:

(i) public buildings and facilities;

(ii) churches, school or hospitals;

(iii) impoundments with a storage capacity of twenty acre-feet or more;

(iv) bodies of water with a volume of twenty acre-feet or more; or

(v) any aquifer or body of water that serves as a significant water source for any public water supply system.

52 P.S. § 1406.9a(c). We do not read this provision to imply that longwall mining can occur under anything else regardless of any harm that may occur. No such negative implication is required. If operators were to be given *carte blanche* to do whatever damage they wanted under any stream in Pennsylvania that does not serve as a public water supply, which would represent a radical departure from the Clean Streams Law, we believe that the Legislature would have said so. UMCO's argument is also inconsistent with applicable regulations. *Compare, e.g.*, 25 Pa. Code § 89.141(d)(11) (requiring description of measures to be taken to maintain value and uses

[10] As discussed more fully below, UMCO's claims that it has been treated unfairly vis-à-vis other mining companies and that the Department has enforced radically new standards in this case ring hollow.

of perennial streams) with § 89.141(d)(12) (requiring description of measures to be taken to prevent material damage to streams serving as significant water supplies).

Left with no statutory provisions that expressly support its position, UMCO is left to argue that the Mine Subsidence Act is the *exclusive*, *preclusive* source of legal authority for regulating underground mining subsidence, and since the Subsidence Act does not expressly prohibit longwall mining under streams regardless of consequences, such mining must be allowed. Again, UMCO's argument lacks any merit.

First, UMCO is correct that the Subsidence Act obviously does not contain any provision that expressly prohibits longwall mining under streams. To the contrary, UMCO itself longwall mined under streams before and after the Order was issued in this case. Longwall mining under streams is occurring throughout southwest Pennsylvania. Longwall mining, if there is sufficient cover and the conditions are right, can be performed with no damage to overlying streams. *PUSH, supra.* There also are cases where longwall mining can be performed with only limited and/or temporary damage to streams, but that situation is not implicated in this case.

The defect in UMCO's reasoning is that it somehow takes the fact that the Subsidence Act does not expressly prohibit longwall mining under streams to mean that the Department can never prohibit longwall mining under streams. This is a *non sequitor*. It simply does not follow from the lack of an express prohibition on mining in the Subsidence Act that the Department can never preclude mining where, as here, severe environmental damage will result.

UMCO argues repeatedly that the Mine Subsidence Act and the Clean Streams Law must be read in harmony. We could not agree more. Where we split company with UMCO is that we see no conflict between the two laws. We have searched the Subsidence Act in vain for any provision that limits the Department's authority to regulate water pollution. In fact, the

Subsidence Act has very little to do with water resources. It nowhere in purpose, language, tenor, or intent suggests that it was intended to override the Clean Streams Law and function as the exclusive basis for regulating subsidence impacts on water resources.

Instead, we found very much to the contrary. Section 9.1(d) of the Act reads as follows:

> Nothing in this act shall be construed to amend, modify or otherwise supercede standards related to the prevailing hydrologic balance contained in the Surface Mining Control and Reclamation Act of 1977 (Public Law 95-87, 30 U.S.C. § 1201 *et seq.*) and regulations promulgated by the Environmental Quality Board for the purpose of obtaining or maintaining primary jurisdiction over the enforcement and administration of that act nor any standard contained in the act of June 22, 1937 (P.L. 1987, No. 394) known as "The Clean Streams Law," or any regulation promulgated thereunder by the Environmental Quality Board.

52 P.S. § 1406.9a(d). When we read Section 9.1(d) and Subsection 1406.5(e) together, we see no conflict or ambiguity in concluding that, while longwall mining is generally permitted even though it causes planned subsidence, it must be performed in a way that complies with the Clean Streams Law. The permanent and complete elimination of a perennial stream is not consistent with the Clean Stream Law.

The Department makes a good point when it notes that, if UMCO is correct, there would be no need for hydrogeologic review of mining permits. Operators would simply need to list their mitigation measures, but other than that, they would be free to eliminate all surface waters of their choosing in any mining region. We cannot believe that the Legislature intended such a result when it passed the Subsidence Act.

It is much more likely that the Legislature intended a reasonable accommodation between the rights of mining companies and the protection of waters of the Commonwealth. Allowing operators to take any stream they chose does not reflect such an accommodation and is not embodied anywhere in the letter or spirit of the Mine Subsidence Act. Rather, the Act

unequivocally provides that it shall not be "construed to amend, modify or otherwise supersede" any standard related to the Clean Streams Law. 52 P.S. § 1406.9a(d).

This Board has previously addressed the interplay between the Clean Streams Law and the Mine Subsidence Act. Indeed, as far back as *Bethenergy Mines v. DER*, 1994 EHB 925, the Department's authority to regulate subsidence impacts to streams was presumed. We addressed these issues more recently in *Consol I,* 2002 EHB 1038. In *Consol I*, the operator challenged a permit provision that read in part as follows:

> If permittee wishes to conduct full extraction mining in the revision area, it must submit another permit revision application seeking approval pursuant to, among other things, 25 Pa. Code Chapters 86, 89, 93 and 105.

Pertinent to the discussion here, we held "that the water-protection regulations promulgated pursuant to the Clean Streams Law and codified in 25 Pa. Code Chapters 86 and 89 apply to the subsidence impacts of underground mining on waters of the Commonwealth. The Department, therefore, acted properly in referencing those chapters in the Condition." 2002 EHB at 1045.

Because our reasoning in *Consol I* is directly on point here, we quote it at length:

> We start with the undisputed proposition that subsidence can change the course, current or cross-section of streams. . . . Indeed, it can make portions of a stream disappear altogether. Consol admits that its proposed mining at the Bailey Mine will cause some increased pooling in overlying streams. . . . Such impacts fit within the Clean Streams Law's definition of "pollution," which includes physical alteration of surface waters such as a diminution or deviation in flow. 35 P.S. § 691.1. *See Oley Township v. DEP*, 1996 EHB 1098, 1117-18 (change in water level in wetlands that could compromise their ecological functions would constitute a violation of the Clean Streams Law). *Accord, PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 114 S.Ct. 1900 (1994) (diminution in water quantity constitutes pollution). Such impacts can also disrupt the "hydrologic balance," which refers to "[t]he relationship between the quality and quantity of water inflow to, water outflow from and water storage in a hydrologic unit such as a drainage basic, aquifer,

soil zone, lake or reservoir. It encompasses the dynamic relationships among precipitation, runoff, evaporation and changes in groundwater and surface water storage." 25 Pa. Code § 89.5. *See generally Tinicum Township v. DEP*, EHB Docket No. 2002-101-L, slip op. at 13, 15 (September 18, 2002) (Department's duty to evaluate effects of mining on waters of the Commonwealth extends beyond water-quality impacts).

* * *

There are several regulations in [25 Pa. Code] Chapter 86 and 89 that require the Department to regulate pollution and the alteration of hydrologic balance, and, therefore, the subsidence impacts of deep mining. *See* 25 Pa. Code §§ 89.35 (prediction of hydrologic consequences), 89.36 (protection of hydrologic balance) and 89.52(a) (protection of hydrologic balance). Section 86.37(a)(3) requires Consol to demonstrate that there is no presumptive evidence of potential pollution (which includes the adverse impacts of subsidence) of the waters of the Commonwealth (not just perennial streams) before it is entitled to a permit. 25 Pa. Code § 86.37(a)(3). See also 25 Pa. Code § 86.37(a)(4) (protection of hydrologic balance). Protecting the waters of the Commonwealth is a primary concern of these mining regulations. *Empire Coal Mining and Development v. DEP*, 1995 EHB 944, 987. Consol's mining activities may only be permitted in accordance with these regulations. Consol is incorrect to the extent that it suggests that none of Chapter 86 applies to underground mining. *See* 25 Pa. Code §§ 86.2; *PUSH*, 1999 EHB at 559 (applying § 86.37 to analysis of deep mining discharges). *See also* 25 Pa. Code § 86.1 (defining "coal mining activities" (regulated under Chapter 86) to include "underground mining activities," which is also defined).

Consol attempts to avoid the rather obvious application of the water-protection regulations in Chapter 86 and 89 by arguing that the subsidence impacts of mining are addressed in a more focused manner in the Subsidence Act and Subchapter F of Chapter 89. 25 Pa. Code §§ 89.141-155. If therefore follows, Consol contends, that the Department may only regulate subsidence impacts on waters of the Commonwealth pursuant to that Act and that limited set of regulations.

Consol's argument flies in the face of Section 9.1(d) of the Subsidence Act, 52 P.S. § 1406.9a(d), which expressly provides that nothing in the Subsidence Act is to be construed to amend, modify, or otherwise supersede any standard contained in the

Clean Streams Law or any regulation promulgated under the Clean Streams Law. *See also* 52 P.S. §§ 1406.2 (purposes of Subsidence Act include aiding in the preservation of surface water drainage) and 1406.5(a) (application to mine must include map showing location of all bodies of water, rivers, and streams). Such regulations as Sections 86.37 and 89.36 were promulgated under the Clean Streams Law. (*See* "Authority" notations at beginning of Chapters 86 and 89.)

Similarly, there is nothing in Subchapter F of Chapter 89 that states that it is to serve as the exclusive source of regulatory authority regarding subsidence. Indeed, in light of Section 9.1(d) of the Subsidence Act, any attempt in Subchapter F to limit the scope of the Clean Streams Law or the regulations promulgated thereunder would have been ineffective and unlawful. *See Lancaster Laboratories, Inc. v. Commonwealth*, 578 A.2d 988, 992 (Pa. Cmwlth. 1990), *aff'd*, 633 A.2d 588 (Pa. 1993); *Harmar Coal Co. v. DER*, 306 A.2d 308, 319 (Pa. 1973) (a regulatory program that is inconsistent with an implementing statute is invalid).

Even in the absence of Section 9.1(d) of the Subsidence Act, we would require rather unequivocal and convincing evidence that the Legislature exempted subsidence impacts from the operation of the Clean Streams Law and otherwise applicable regulations promulgated thereunder before we would conclude that those water-protection laws do not apply. *See Carroll v. Ringgold Education Ass'n*, 680 A.2d 1137, 1141-42 (Pa. 1996) (two statutes apply where it is possible to comply with both); *Parisi v. Philadelphia Zoning Board of Adjustment*, 143 A.2d 360, 363 (Pa. 1958) (no repeal by implication absent irreconcilable repugnancy between two statutes); *Patton v. Republic Steel Corp.*, 492 A.2d 411, 417 (Pa. Super. 1985) (same); *Duda v. State Board of Pharmacy*, 393 A.2d 57, 59 (Pa. Cmwlth. 1978) (same). *Cf. Kentuckians, supra* (no inconsistency between federal mining laws and Clean Water Act). No convincing evidence exists here. Although Subchapter F focuses on the impacts of subsidence, the subchapter is perfectly compatible with the more general but equally applicable requirements of the Clean Streams Law and the water-protection provisions of Chapters 86 and 89 of 25 Pa. Code. Consol has not shown how or why it would be impossible to comply with both Subchapter F and other water-protection provisions. We see nothing in the various provisions that make them mutually exclusive or repugnant to each other.

2002 EHB at 1045-1048. In *Consol II*, we reaffirmed that "the Department has the authority

under the Clean Streams Law and 25 Pa. Code Chapters 86 and all of 89 to regulate the impacts of subsidence on waters of the Commonwealth." 2003 EHB at 243.

We reaffirmed several of these principles yet again in our one-judge opinion in *Consol III*, 2003 EHB 792, where we repeated that subsidence impacts can constitute pollution and that a deep mine operator must show that unacceptable pollution will not occur as a result of its mining activities. 2003 EHB at 795 and 800. We repeated our holding from *Consol I* that the deep mining regulations do not preempt the Clean Streams Law and the regulations promulgated thereunder when it comes to the Department's authority to regulate the effects of mine subsidence. 2003 EHB at 800 n.7 and 806-07.

Thus, we reject UMCO's theory that planned subsidence under streams can *never* be prohibited. Turning to the second half of UMCO's argument, which is that "mining operators only have to take mitigation measures to protect foreseeable uses of streams to the extent technologically and economically feasible," UMCO seems to believe that the Department's authority is limited to making sure an operator has an adequate mitigation plan. So long as repairs are promised, the Department has no legal authority to deny a permit in UMCO's view; the Department has a mandatory duty to issue a permit.

We cannot agree that a promise to perform repairs trumps everything else in the forgoing discussion. There is nothing in the law that specifically supports UMCO's theory that it is acceptable, in UMCO's words, to "destroy" streams so long as feasible repairs are promised. The Subsidence Act contains no language supporting such a position, and the position flies in the face of the Clean Streams Law. Everything in the applicable laws points to the common sense notion that *prevention* of pollution and the *protection* and *maintenance* of values and uses. 35 P.S. §§ 691.5, 610, 611; 25 Pa. Code §§86.37(a)(3), 89.36(a), § 89.142(a). Nothing in

Subsection 1406.5(e) or any other provision of the Subsidence Act supports UMCO's position that a mitigation plan authorizes destruction of streams. We would need to see specific regulatory language before adopting an approach as radical as UMCO's, and there simply is none.

UMCO places great weight on the fact that its mitigation plan is adequate. UMCO misunderstands the purpose and function of mitigation plans. Despite the best laid plans, things do go wrong. It is perfectly sensible when permitting, not only in the mining program but in virtually every program administered by the Department, to plan for unexpected contingencies. Applicants should be made to describe how they will handle a situation if things go bad. This is not to say that it is acceptable for things to go bad, or that it is expected that things will go bad. Quite the opposite. If it is known in advance that things will go bad, the permit cannot be issued in the first place. The fact that the Department requires deep mining permit applicants to describe how they will repair streams *if* they are damaged does not mean that it is acceptable to damage the streams. Stream mitigation plans are designed to address *unanticipated* damage, not to excuse or approve damage in advance. By way of analogy, the Department will not permit a mine when it is known that it will cause acid mine discharges. (T. 995.) The mine does not become permittable because an operator promises in advance to treat the discharges in perpetuity.

Finally, we are not convinced that UMCO submitted what can fairly be considered an adequate mitigation plan. A mitigation plan that promises to do everything feasible where it is known that everything that is feasible will not fix the problem is not necessarily an adequate mitigation plan. Mitigation measures are required to *restore* the stream or at least maintain a stream's value and uses until it restores naturally. *Bethenergy*, 1994 EHB at 964. UMCO's

mitigation measures will not restore the 6E watershed in general or the 6E Stream in particular. Flow augmentation may or may not be a suitable mitigation measure if it supplements natural flow and/or is temporary in nature; that issue is not presented in this case. Here, there will be *no* natural flow. Only city water will flow down what was formerly the 6E Stream channel. In addition, city water will need to be pumped into the channel in perpetuity. This is not restoration, and it is not maintenance in anticipation of eventual natural recovery. Pumping city water in perpetuity cannot be said to return what was once a naturally flowing, productive stream to its premining value and reasonably foreseeable uses. It does not return hydrologic balance, or repair the dynamic relationships among precipitation, runoff, evaporation, and changes in groundwater and surface water storage. UMCO is conceded to have proposed everything that *can* be done, but everything that can be done will not restore (or maintain pending anticipated natural restoration) the premining values and uses of the 6E Stream given the hydrogeology of this watershed. There will be a ditch for the conduction of city water, but there will not be a stream.

Thus, we have rejected UMCO's basic argument that it may mine under *any* stream with the only limitation being that it must promise to perform feasible repairs that will maintain uses. As a fallback position, UMCO presents some theories in support of a contention that it is beyond the Department's authority to prohibit the dewatering of the 6E Stream in particular.[11] We also

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[11] PennFuture denounces the approach of analyzing the 6E Stream in isolation. We agree that it is important to not lose sight of the big picture. *See* 25 Pa. Code § 86.37(a)(4) (cumulative hydrologic impacts). UMCO's prior mining in Panels 2E through 5E has eliminated all surface waters above those panels. Not only has the 4E/5E Stream gone dry, every spring and seep in the watershed was dry as of the close of the record. Two small intermittent streams have been taken. Flow in 6E itself has already been reduced as a result of previous mining. Longwall mining of the 6E Panel would have eliminated *all* springs, seeps, and wetlands in 6E as well. UMCO has repeatedly complained that it has suffered because of one small, insignificant "ditch." (S.T. 29-30, 51-52, 69, 71, 84.) This characterization presents an incomplete and misleading picture of the true history of this site.

PennFuture is correct in asserting that there has been little or no thought given to the *cumulative*

reject these theories.

UMCO's first argument specific to the 6E Stream is that the stream is not entitled to protection under the law (even if other streams are) because "[t]here is no designated use for the 6E Trib." (Brief at 60, 78.) Somewhat contradictorily, it argues that the stream is incapable of supporting existing or designated uses such as a warm water fishery (WWF). (*Id.*) Presumably, it follows that the Department has no authority to regulate activities affecting the stream. Before mining, the 6E Stream functioned only as "a drainage swale for precipitation" (Brief p. 78) and that is the only use and value that must be protected.[12]

In numerous exhibits and filings throughout the course of this litigation, UMCO has conceded that the 6E Stream supports a warm water fishery. Its own biology expert submitted multiple studies and testified repeatedly that the 6E Stream supports a warm water fishery. It has never been disputed that fish and myriad benthic organisms live in the stream. There is no record support for UMCO's arguments. In any event, as a tributary within the basin of Maple Creek, the 6E Stream is included in the stream basin's designated use as a WWF. 25 Pa. Code § 93.9. The stream also has the other designated statewide uses noted above. *See* 25 Pa. Code §§ 93.2, 93.4(a), 93.9 and accompanying tables.

The 6E Stream in fact functions as a WWF. The 6E Stream and appurtenant springs also

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impacts of mining at the site. The 6E and 5E Streams combine to form a second-order stream, yet there was no discussion of the fate of that stream if *both* the 5E and 6E Streams were to lose all natural flow. (S.T. 954.) The delineation of the mining panels has everything to do with operational requirements but little to do with the ecology of the site, and yet the Department seemed to conduct its review of this mine as if the panels and the effects of mining those panels were completely separate and unrelated events. UMCO did the same. (S.T. 954.) Furthermore, the Department's panel-by-panel approach on an accelerated schedule resulted in a shortage of true baseline data. (S.T. 939-40.)

The segmented analysis has certainly inured to UMCO's benefit. Obviously, as one divides an environmental resource such as a watershed into smaller and smaller parts, the impact on any one disassembled part will appear less and less significant. Focusing all attention exclusively on the 6E Stream leaves out what has and will occur in the combined 6E/5E/4E watershed as a whole.

[12] All of the parties, including UMCO, assume that 25 Pa. Code Chapter 93 applies. We will do the same.

serve as a water supply for the cattle herd on the farm that the stream runs through. (S.T. 129.) Thus, among the uses listed in the regulations, the 6E Stream has been shown to function as livestock water supply (LWS). It also functions as a wildlife water supply (AWS).

UMCO has not only failed to account for all of the actual and designated uses of the stream, it disregards the *value* of the stream. Values *and* uses must be protected. 25 Pa. Code § 89.141(d)(11) and § 89.142a(h). *See also* 25 Pa. Code § 89.65(a) (protection of fish, wildlife and related environmental values). A naturally flowing shallow ground water regime has value beyond its ability to sustain warm water fish, both as an independent unit and as a contributor of flow and biological support to larger downstream waters. *Machipongo*, 799 A.2d at 774; *Barnes & Tucker*, 319 A.2d at 882.

UMCO next argues in its post-hearing brief that the 6E Stream in particular is not entitled to any protection because it is not a perennial stream. (Brief p. 69.) We believe that UMCO abandoned this claim. In its original notice of appeal, UMCO listed the following objections:

> (3)(e) DEP incorrectly revised its conclusion that the unnamed tributaries above Panel 6 East are "perennial";
> (3)(f) DEP's prior decision that the unnamed tributaries above Panel 6 East were "intermittent" was, and is, correct.

When UMCO amended its notice of appeal to "significantly limit the number of issues raised by its initial notice of appeal," it eliminated these objections from its amended notice. UMCO did not assert that the 6E Stream was intermittent in its prehearing memorandum. UMCO did not present any testimony in clear contradiction of the Department's expert's opinion that the stream is perennial. Although UMCO failed to take any of the steps necessary to preserve the issue, the issue nevertheless rears its head again UMCO's post-hearing brief. This is improper procedure. *Chippewa Hazardous Waste v. DEP*, 2004 EHB 287, 290-91, *aff'd*, 971 C.D. 2004 (Pa. Cmwlth. 2004). We deem the issue to have been waived.

Even if the issue had not been waived, UMCO's claim that the 6E Stream is not perennial has no merit on the facts or the law. The 6E Stream is a perennial stream. (FOF 139-164.)

UMCO gets into a discussion about the various definitions of perennial streams and argues that the Department applied the wrong definition.[13] Our entry into that discussion would be purely *dicta* in this case because the 6E Stream is perennial under any and all of the various definitions and criteria proposed. Regardless of which factors one looks to define perennial flow, part of the 6E Stream actually flows continuously throughout the calendar year. Even without considering biological criteria (which appears to be UMCO's primary concern), the 6E Stream has been shown through eyewitness testimony and photographic and other evidence to have actually flowed throughout the calendar year.[14]

UMCO next argues that, even if the 6E Stream is a perennial stream, is not entitled to protection (beyond implementation of feasible repairs) because (1) "it is a small stream regardless of its continuous flow characteristics," and (2) it does not flow continuously over its

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[13] *See* Brief at 70-72. UMCO sets forth three definitions for a perennial stream found in regulations and in the Department's technical guidance materials. UMCO argues that the Department incorrectly applied 25 Pa. Code § 89.5 as the controlling definition of "perennial stream." The § 89.5 definition (found in the general definitions for Chapter 89) focuses on, *inter alia*, the biologic makeup of a flowing water body. UMCO, however, claims that 25 Pa. Code § 89.141(b) should control, which defines a perennial stream as "a stream or part of a stream that flows continually throughout the calendar year." 25 Pa. Code § 89.141(b)(2). UMCO further asserts that some of the Department's technical guidance is congruent with the § 89.141 definition, providing that a stream is not perennial if "the stream experiences no flow." 1994 Program Guidance Manual; *see* Exhibit U-20.

[14] The farmer through whose land much of the 6E Stream flows testified at the supersedeas hearing. (S.T. 127-38). We described our reaction to his testimony in our supersedeas hearing as follows:

> UMCO presented the testimony of the owner of the land through which the 6E Stream flows. That witness exhibited a strong, argumentative bias in favor of UMCO. Putting that aside, that landowner never clearly testified that the entire reach of the stream went dry. Rather, he testified that the portion of the stream to the west of Route 481 historically went dry, although even the majority of that section has not dried up for the last three years. The very uppermost sections of the stream in the vicinity of the railroad tracks appear to be intermittent, but those sections overlie Panels 4E and 5E.

UMCO, 2004 EHB at 805. Our view of this testimony has not changed.

entire length over the entire calendar year. (See, e.g., Brief at. 73, 77.)

UMCO's novel argument that only "large" streams are entitled to protection is based on language in the Preamble to 25 Pa. Code § 89.142a(h), which reads as follows:

> The [Environmental Quality Board] believes that the current regulation in combination with the Department's technical guidance on perennial stream protection (TGD 563-2000-655) provides sufficient protection for perennial streams located above and adjacent to underground mines. Since implementing the guidance in January 1994, the Department has not encountered any situations when perennial streams have been adversely affected by diminution due to underground mining. The Board notes that the subsection applies only to larger streams which flow continuously throughout the calendar year, and that there are interests who believe that its application should be expanded to include smaller streams.

28 *Pa. Bulletin* 2761, 2774 (June 13, 1998) (U.Ex. 277).

We need far more than this preamble language to depart from the letter of the law itself. Preamble language has no legal effect in and of itself. 1 P.S. § 1924; *English v. Commonwealth*, 816 A.2d 382, 387 (Pa. Cmwlth. 2003). It can serve as an aid to interpretation of an ambiguous regulation, *English*, 816 A.2d at 387, but the regulations and statutes that control in this case are not ambiguous. The preamble language is unfortunate because it is, quite simply, wrong. There is no demarcation between "large" and "small" perennial streams anywhere in the law, and there never has been. There is no statute or regulation that creates such a distinction let alone defines the criteria for making such a distinction.

UMCO's argument is entirely inconsistent with the water-protection law in Pennsylvania. The Clean Streams Law contains no categorization between "large" and "small" streams. Rather, it defines "waters of the Commonwealth" to include "any and all...streams." 35 P.S. § 691.1. Water quality regulations nowhere distinguish between "large and small" streams, but instead relate to all surface waters. See, e.g., 25 Pa. Code §§ 93.1, 93.4. For example, in order

to get a mining permit, an operator must demonstrate that there is no presumptive evidence of potential pollution to "any" waters of the Commonwealth. 25 Pa. Code § 86.37(a)(3). An operator must preserve and protect the entire hydrologic balance, not simply "large" streams that make up only one part of a hydrologic regime. 25 Pa. Code § 89.36(a).

Putting all of this aside, who is to say what constitutes a "large" stream? It is difficult to picture a regime where Department personnel would need to assess whether a perennial stream is "large" or "small" as the defining criteria precedent to permitting and other regulation. The 6E Stream is not necessarily "small" stream. While it is true that it is narrow, it is fairly long--over 2,600 feet. Its headwaters consist of numerous springs, seeps, and wetlands, and portions of it manage to flow all of the time, even in periods of drought. We mention this to illustrate that, even in the context of this case, differentiating between "small" and "large" is simply too subjective to serve as a defining regulatory criterion.

UMCO's related argument to the effect that only streams that have continuous flow *over their entire length* is also wrong. Even the regulation relied upon by UMCO defines a stream as perennial if any portion of the stream is perennial:

> For the purposes of this subchapter, a perennial stream is a stream *or part of a stream* that flows continuously throughout the calendar year as a result of groundwater discharge or surface runoff. The term does not include intermittent or ephemeral streams (emphasis added).

25 Pa. Code § 89.141(b)(2).

We have as much difficulty with UMCO's proposed "entire length" standard as we did with its large/small dichotomy. Does a one-foot dry section render an entire stream intermittent? Does the "entire length" include every spring and headwater? If so, no headwater stream in Pennsylvania would be likely to be subject to protection. It is doubtless for this reason that the

Environmental Quality Board drafted the regulation to define a stream as perennial when any part of that stream is perennial.

In this connection, UMCO refers us to *Bethenergy Mines, Inc. v. DER*, 1994 EHB 925, but in that case the Board quoted the regulation relied upon by UMCO, 25 Pa. Code § 89.141(b)(2), 1994 EHB at 963 (a perennial stream is a stream *or a part of a stream* that flows continuously). We made the following conclusion of law:

> 5. Bethenergy was required to conduct its mining activities in Mine No. 33 in a manner that maintained the value and reasonably foreseeable uses of streams *or parts of streams* that flow continuously throughout the year.

2004 EHB at 978 (emphasis added).

The Board went on to sustain the appeal from a Department order that required the mine operator to restore perennial flow over the entire length of a stream because the Department failed to establish factually that the entire stream had perennial flow premining. The discussion concerning the "entire length" of the stream resulted from the terms of the Department's order. The Board did not hold that there must be continuous flow over the entire length of a stream for the stream to be considered perennial under applicable regulations. In fact, it held exactly the opposite.

Bethenergy has limited utility in this case because, most obviously, there is no doubt in our mind that the 6E Stream flows perennially premining. Furthermore, as we discussed in *Consol I*, *Bethenergy* has limited application regarding legal issues

> because the Board did not get into a detailed analysis of the law as a result of the Department's failure of proof. For example, although our focus here is upon the Clean Streams Law and the mining regulations promulgated thereunder, in *Bethenergy* we stated that, given the Department's failure of proof, there was no need to address the Department's authority to issue the order under the Clean Streams Law. [1994 EHB at 978.]

> Nevertheless, it is worth mentioning that the Board applied Section 89.52 (protection of hydrologic balance), which is not contained in Subchapter F of Chapter 89. This is inconsistent with Consol's theory that subsidence is regulated exclusively under Subchapter F. Furthermore, even though Roaring Run was found to be an intermittent stream, the Board presumed that Section 89.52 applied to the stream when it found that the order could not be sustained because the Department failed to prove *as a factual matter* that the hydrologic balance of Roaring Run had been altered. The Board also applied Section 89.52 to Howell's Run, another intermittent stream, concluding that the facts did not support a finding that Section 89.52 had been violated. While it is debatable whether too much can be read into these findings given the Department's failure of proof, *Bethenergy* is certainly not inconsistent with our holding today that the Clean Streams Law and all of Chapters 86 and 89, not just Subchapter F of Chapter 89, apply to the subsidence impacts of underground mining on all waters of the Commonwealth.

Consol I, 2002 EHB at 1050.

In any event, UMCO's longwall mining of Panel 6E would have dewatered the entire length of the 6E Stream that flowed perennially. Assuming *arguendo* that the Department needed to prove dewatering over the stream's entire length, it did so. The Department's order relates to all those portions of the 6E Stream that flow perennially.

UMCO complains that the Department required too much proof of perennial flow in this case. We are not sure what difference this makes now, but in any event, UMCO incorrectly believes that the Department had a binding policy that an operator could conclusively prove that an entire stream is intermittent by bringing in one photograph of one point on the stream showing no flow at one moment in time. Mr. Kernic testified that such photos serve as evidence, not conclusive proof. (T. 276.) In any event, such a policy, even if it existed, was not part of any binding regulation. Contrary to UMCO's argument, the Department cannot be said to have departed from a policy that never existed in the first place.

That such a policy could not be considered to be faithful compliance with applicable regulations is illustrated by this case. UMCO initially tried to convince the Department that the 6E Stream was ephemeral, i.e., a natural collection point for stormwater runoff and nothing more. In order to make its case, UMCO relied on photographs of the small section of the 6E Stream that happened to be disturbed by the installation of a sewer line. The record in this case shows that no responsible scientist, regulator, or operator would contend that such photos are truly representative of the 6E Stream as a whole.

II. UMCO's Second Objection: Improper Rulemaking

UMCO's second objection reads as follows:

> The Department acted in a manner contrary to law in enforcing and otherwise implementing regulatory concepts or definitions of general applicability without proper rulemaking or procedures relating to the implementation of policy. These actions include but are not limited to, the Department's improper application of a Board decision in its administration and application of underground mining regulations and stream protection guidance.

UMCO argues that the Department has improperly expanded the definition of a perennial stream. Under the one definition, a perennial stream flows continuously throughout the calendar year. (1994 Technical Guidance Manual.) See also 25 Pa. Code § 89.141. Under a different definition, the Department considers biological criteria among other things in determining whether a stream flows perennially. 25 Pa. Code § 89.1. UMCO seems to be arguing on principle because it has waived and/or conceded its contention that the 6E is anything other than a perennial stream. We have found abundant evidence to prove that the stream flows continuously regardless of what regulatory definition applies. We will not decide purely academic issues. *Stevens v. DEP*, 2001 EHB 653, 655.

Other than the purported change regarding perennial streams, UMCO does not direct our

attention to any other new binding norm in its brief. Of course, the Order itself is very case-specific and does not constitute a new rule. In short, we will decline UMCO's request to issue an advisory opinion with no practical significance whatsoever regarding the Department's rulemaking authority.

III. Constitutional Issues

The third objection in UMCO's Amended Notice of Appeal reads as follows:

> The Department's action deprives UMCO of rights guaranteed by the Constitution of the United States of America and the Commonwealth of Pennsylvania including, but not limited to, equal protection and due process rights.

A. Takings

UMCO fleetingly mentions a takings claim for the first time in its post-hearing brief. It was never mentioned before, not even in UMCO's prehearing memorandum. Therefore, UMCO failed to preserve this issue.

Furthermore, a takings claim has elements that are distinct from any other claim and this case was simply not tried on that basis. As we discussed at considerable length in *Davailus v. DEP*, 2003 EHB 101, a governmental action that limits a property owner from making certain uses of private property is not ordinarily considered a taking of private property for which compensation must be paid. *See* U.S. CONST. Amend. V; PA. CONST., art. I, § 10; *Machipongo Land & Coal Co. v. DEP*, 799 A.2d 751, 763, (Pa.), *cert. denied*, 537 U.S. 3 (2002). It is only where a governmental prohibition "goes too far" that it constitutes a taking. *Machipongo*, 799 A.2d at 765, (*citing Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)); *Domiano v. DEP*, 1999 EHB 408, 421. Had UMCO intended to pursue a takings claim, it would have needed to show that the Department's Order deprived it of all economically beneficial use of its property, *Machipongo*, 799 A.2d at 769; *Lucas v. South Carolina Coastal Council*, 505 U.S.

1003, 1027 (1992); *Davailus*, *supra*, or that its loss was unduly oppressive when balanced against what the public has gained, *Machipongo*, 799 A.2d at 770-71; *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124-25 (1978); *Davailus*. The latter takings balancing analysis involves consideration of such factors as the economic impact of the regulation on the claimant, particularly the extent to which the regulation has interfered with distinct investment-backed expectations, as well as the character of the governmental action, whether there has been a physical invasion, whether the regulation is reasonably related to the promotion of the general welfare, and whether the health, safety, morals, or general welfare would be promoted by prohibiting certain uses of land. *Machipongo*, 799 A.2d at 770-71. While UMCO may have incidentally touched on some of these issues in passing, it cannot be said that UMCO put forth a record necessary to support a takings claim. For example, only the most sketchy financial information was presented during the supersedeas hearing regarding the economic impact of the Order. (P.F.S.Ex. I, J, K; U.S.Ex. X.) This evidence was intended to bolster UMCO's claim of irreparable harm at the time. It was not refined or pursued at the hearing on the merits, and the evidence falls far short of the showing that would be necessary to flush out the economic-impact factor in a takings analysis. *Compare Davailus*, 2003 EHB at 142-157.

In any event, it is probably worth noting that the Department's Order hardly amounts to the sort of regulatory action that has "gone too far." Obviously, the Order did not deprive UMCO of all economically beneficial use of its property. With regard to balancing private loss against public benefit, the Order only affected one of UMCO's eleven panels. It was not one of the larger panels. The Order only precludes longwall mining in that panel. We understand that longwall mining is far more efficient and profitable (S.T. 974), but it is well settled that a taking

does not result merely because a regulation may deprive a landowner of the most profitable use of its property. *Miller & Son Paving, Inc. v. Plumstead Twp.*, 717 A.2d 483, 486 (Pa. 1998), *cert. denied*, 525 U.S. 1121 (1999); *United Artists' Theater Circuit, Inc. v. City of Philadelphia*, 635 A.2d 612, 617 (Pa. 1993) (*citing United States v. Cent. Eureka Mining Co.*, 357 U.S. 155, 168 (1958)). As to the public benefit side of the equation, the Department's action has potentially saved a perennial stream from being removed from the map.[15] The stream is the only remaining vestige of surface water in an area of the Maple Creek watershed that has already been compromised by UMCO's mining. Depriving UMCO's of a relatively small percentage of the total reserves at the site (S.T. 963-68) in order to save a stream is not sufficient to amount to a meritorious takings claim.

B. Due Process

UMCO did not pursue a due process issue in its prehearing memorandum. Like the taking claim, it has been waived. In any event, the exhaustive review of the Department's action by this Board surely satisfies UMCO's right to due process. 35 P.S. § 7514; *Department of Environmental Resources v. Steward*, 357 A.2d 255, 258-59 (Pa. Cmwlth. 1976); *DER v. Borough of Carlisle*, 330 A.2d 293, 296-97 (Pa. Cmwlth. 1974); *DER v. Derry Township*, 314 A.2d 874, 868, 874 (Pa. Cmwlth. 1973); *Solomon v. DEP*, 2000 EHB 227, 240.

C. Equal Protection

1. Vis-à-vis Surface Developers

UMCO argues that Judge Labuskes erred by excluding evidence showing that UMCO has

[15] *See* PA CONST. art. I, Section 27 ("The people has 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.").

been improperly discriminated against vis-à-vis surface developers whose activities "were known to destroy streams." UMCO has contended that the Department treats large retail developments and highway construction projects quite differently than underground coal mines when it comes to regulating impacts on streams. We ruled at the hearing that shopping malls and underground coal mines are not similarly situated parties as a matter of law and we excluded the evidence. UMCO made a proper offer of proof and has otherwise properly preserved the issue. Upon reflection, we have decided to allow UMCO to present the evidence that was offered at the hearing to support its claim. We have scheduled a hearing in the near future for that purpose. We will address this aspect of UMCO's equal protection argument following that hearing. We express no opinion here regarding the merits of the claim. There is no overlap between the elements of this claim and UMCO's other objections to the Department's Order, so there was no reason to delay issuance of this Adjudication.

2. Vis-à-vis Other Deep Mine Operators

UMCO also contended in its prehearing memorandum that it has been discriminated against vis-à-vis other deep mine operators. Judge Labuskes allowed UMCO to present evidence on this aspect of its equal protection claim at the hearing and it is ripe for adjudication. UMCO, however, has not pursued the claim in its post-hearing brief. UMCO included a few proposed findings of fact that appear to relate to its alleged disparate treatment versus other underground mines (Brief at 48-50), but it does not otherwise articulate an argument, cite any law, or develop or pursue this equal protection claim in its brief in any way. Accordingly, it has been waived.

We will note for the record that there was no evidence in UMCO's case of any fact pattern where the Department allowed a deep mine operator to mine under a perennial stream knowing in advance that the stream would be permanently dewatered, the only possible

exception being UMCO's mining of Panel 5E. The equal protection clause generally prohibits differences in treatment of similarly situated parties based upon a constitutionally suspect standard (not applicable here) or other classification lacking in rational justification. *F.R.&S., Inc. v. DEP*, 1998 EHB 947, 949. There are no similarly situated persons evident here. If there is any party who has been given an unfair advantage vis-à-vis other members of the regulated community, it is UMCO. UMCO was permitted to mine at the shallowest cover longwall mine in the state on an expedited schedule pursuant to "informal permit revisions" issued without public notice of any kind on the basis of poorly developed baseline data. Other operators have been required to submit extensive premining data. (T. 1549.) The Department witnesses testified convincingly that the Department has not and will not permit any mine where, as here, it is known that a stream will be permanently taken. (T. 970, 983.) UMCO has failed to make a case that the Department has treated similarly situated coal companies dissimilarly and its equal protection claim vis-à-vis other deep mine operators must fail.

CONCLUSIONS OF LAW

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

2. Proceedings before the Board are *de novo*. *Warren Sand & Gravel Co., Inc. v. DER*, 341 A.2d 556 (Pa. Cmwlth. 1975).

3. When a notice of appeal raises the issue, the Department would ordinarily have the burden of proving by a preponderance of the evidence that its order is supported by the facts, it is reasonable, and it is lawful.

4. A party, however, is limited to the objections set forth in its notice of appeal.

5. UMCO's carefully limited its appeal to a challenge that the Department acted unlawfully. Specifically, it objects to the Department's action because the Department (1)

applied to substantive law incorrectly, (2) engaged in improper rulemaking, and (3) violated UMCO's constitutional rights.

6. Although not included in UMCO's appeal, for purposes of creating a complete record, we hold that the Department satisfied its burden of proving by a preponderance of the evidence sufficient facts to support issuance of the Order and that the Department acted reasonably by issuing the Order.

7. The 6E Stream and appurtenant springs, seeps, and wetlands are waters of the Commonwealth.

8. The 6E Stream is a perennial stream.

9. The 6E Stream's uses are warm water fishery, agricultural and wildlife water supply, and esthetics. The stream also has value as a natural resource.

10. The complete and permanent elimination of all natural flow in the 6E Stream constitutes pollution, eliminates the value of the stream, eliminates the actual and designated uses of the stream, disrupts the hydrologic balance, constitutes an adverse hydrologic consequence, and does not protect fish, wildlife and related environmental values.

11. Neither the Clean Streams Law nor the Mine Subsidence Act supersede each other and both must be reconciled.

12. The Mine Subsidence Act does not exempt deep mines from compliance with the Clean Streams Law. To the contrary, Section 9.1 of the Mine Subsidence Act, 52 P.S. § 1406.9a(d), requires underground mine operators to comply with any and all requirements of the Clean Streams Law and regulations promulgated thereunder.

13. Longwall mining is an acceptable mining method in Pennsylvania and cannot be prohibited simply because it causes subsidence resulting in material damage. 52 P.S. §

1406.5(e).

14. An operator must adopt measures to:

a. prevent subsidence causing material damage to the extent technology and economically feasible;

b. maximize mine stability; and

c. maintain the value and reasonable foreseeable use of surface land.

52 P.S. § 1406.5(e). At a minimum, underground mining must be conducted in a manner that maintains the value and reasonably foreseeable uses of perennial streams. 25 Pa. Code § 89.142a(h)(l).

15. The Department has the legal authority to preclude longwall mining that will completely and permanently dewater a perennial stream. The Department does not have a mandatory duty to permit such mining.

16. The Department's authority to preclude such mining is not lost because an operator commits to perform mitigation measures.

17. UMCO has waived or failed to prove its claims that it was denied due process, equal protection vis-à-vis other longwall mines, or that there has been a taking without compensation.

18. UMCO has not shown that the Department has adopted any new binding norm, or if it has, that it has any significance in this case.

19. The Department had the legal authority to issue the Order. It applied the law correctly in issuing the Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UMCO ENERGY, INC.	:	
v.	:	**EHB Docket No. 2004-245-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CITIZENS FOR PENNSYLVANIA'S FUTURE, Intervenor	:	

ORDER

AND NOW, this 5th day of September, 2006, it is hereby ordered as follows:

1. The record is reopened for the limited purpose of receiving the evidence set forth in UMCO's offer of proof in support of its objection that it has been denied equal protection *vis-à-vis* surface developers. The hearing shall reconvene at 10:00 a.m. on **September 26, 2006** at the Pittsburgh offices of the Board. Jurisdiction is retained pending resolution of UMCO's remaining equal protection objection.

2. UMCO's appeal is in all other respects dismissed.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

GEORGE J. MILLER
Judge

THOMAS W. RENWAND
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: September 5, 2006

c: **DEP Bureau of Litigation:**
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