Environmental Hearing Board

Adjudications and Opinions

2006
VOLUME II

COMMONWEALTH OF PENNSYLVANIA
Michael L. Krancer, Chairman

JUDGES

OF THE

ENVIRONMENTAL HEARING BOARD

2006

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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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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: September 7, 2006**

ADJUDICATION

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Board holds that the Department issued an NPDES permit without compliance with the antidegradation regulations of 25 Pa. Code Chapter 93.4a-d with respect to High Quality Waters. Compliance with special protection Best Management Practices provisions of 25 Pa. Code Chapter 102 erosion and sediment control regulations for High Quality Waters in and of itself does not constitute compliance with the antidegradation regulations with respect to High Quality Waters. Specific and particular analyses are required to be undertaken as part of antidegradation regulation compliance which are not part of the Chapter 102 regulations. Moreover, the antidegradation regulations cover a broader scope of concerns than the Chapter 102 regulations. In addition, as a matter of fact in this particular case, compliance with the special protection Chapter 102 Best Management Practices to control erosion and sediment pollution did not constitute compliance with the requirements of the antidegradation regulations.

The Department's issuance of the NPDES permit is overturned.

INTRODUCTION

This matter presents the question of the relationship between the Chapter 102 stormwater discharge erosion and sediment control regulations and the Chapter 93.4a-d antidegradation regulations. In this case the Department of Environmental Protection (DEP or Department) granted an individual NPDES (National Pollution Discharge Elimination System) stormwater discharge permit to Alpine Rose Resorts, Inc. (Alpine) in connection with Alpine's construction of a road course for sports cars and high performance vehicles. The stormwater discharge will be to the Aquashicola Creek (Creek), a High Quality, Cold Water Fishery of this Commonwealth.

Blue Mountain Preservation Association (BMPA) appealed the granting of the permit to the Board. It raised various arguments but the only one it has taken through to this stage is its claim that the permit was granted in contravention of the antidegradation regulations.

Chief Judge Michael L. Krancer presided over the trial in this matter for four consecutive days from March 28, 2006 through March 31, 2006 in Norristown, Pennsylvania.

FINDINGS OF FACT

1. Appellant Blue Mountain Preservation Association, Inc. (BMPA) is a nonprofit organization located in Eldred Township, Monroe County, Pennsylvania. Stip. ¶ 1.

2. Frank O'Donnell is the President of BMPA. Stip. ¶ 2.

3. Appellee DEP is an agency of the Commonwealth of Pennsylvania responsible for issuing NPDES Stormwater Permits. It has the duty and authority to administer and enforce the Pennsylvania Clean Streams Law, 35 P.S. § 691.1 *et seq.*, the Pennsylvania Sewage Facilities Act, 35 P.S. §750.1 *et seq.*, Section 1917-A of the Administrative Code, 71 P.S. § 510-17, and

the rules and regulations thereunder. Stip. ¶ 3.

4. Permittee Alpine Rose Resorts (Alpine) is a Pennsylvania corporation with offices at 100 Ivy Hill Circle, Reading, PA 19606. Stip. ¶ 4.

5. The property which is the subject of the permit in this appeal is approximately a 350 acre tract on the north slope of Blue Mountain, on Upper Smith Gap Road in Eldred Township, Monroe County, Pennsylvania (Subject Property). Stip. ¶ 5.

6. The Aquashicola Creek flows through the northeast corner of the Subject Property. Stip. ¶ 6.

7. The Aquashicola Creek is designated as a High Quality, Cold Water Fishery, Migratory Fishes pursuant to 25 Pa. Code § 93.9d. Stip. ¶ 7.

8. The Subject Property project site is located within the drainage area of Aquashicola Creek. 3/30/06 Blechschmidt, p. 49. [1]

9. Alpine is proposing to utilize the Subject Property to construct a road course for sports cars and high performance vehicles, as well as support facilities, including a welcome center, garages with 52 bays, paddock areas, a self-service fuel station and car wash, food service, classrooms, a pro-shop, lavatories, and supervision and control facilities. Stip. ¶ 8.

10. The Subject Property will be serviced by an on-site sewage system and treatment facility. This treatment facility will include a sewer system, a pump station, two aerated lagoons, ultraviolet disinfection and a 3.5 acre spray irrigation field with 54 nozzles in the northeast corner of the Subject Property. Stip. ¶ 9.

11. On September 17, 2002, Alpine submitted to DEP an NPDES Permit Application for stormwater discharges to the Aquashicola Creek associated with construction activities at the

[1] References to trial testimony shall be in this form, the date of the testimony, followed by name of the witness, followed by the page cite from the transcript.

Subject Property. Stip. ¶ second 8.[2]

12. On October 26, 2002, notice of the NPDES Permit Application was published in the *Pennsylvania Bulletin*. Stip. ¶ second 9.

13. Due to comments and concerns received after the *Pennsylvania Bulletin* notice, DEP scheduled a public hearing to discuss the Permit and project. Notice of the public hearing was published in the *Pennsylvania Bulletin* on December 14, 2002. Stip. ¶ 10.

14. On January 23, 2003, DEP held a public hearing on Alpine's application for an NPDES permit. Stip. ¶ 11.

15. Forty-one individuals and associations who attended the public hearing provided testimony as well as written comments. Stip. ¶ 12.

16. DEP subsequently issued a Comments and Response Document addressing the issues raised in the public hearing testimony and the written comments. Stip. ¶ 13.

17. On August 5, 2003, Alpine submitted to DEP a second NPDES Permit Application for stormwater discharges to the Aquashicola Creek associated with construction activities at the Subject Property. Stip. ¶ 14.

18. During the review process, Alpine was required to submit additional technical and scientific information to justify issuance of an NPDES permit for the Project. Stip. ¶ 32.

19. On August 27, 2004, Alpine submitted its revised Erosion and Sedimentation Control Plan (E&S Plan) to the Monroe County Conservation District (MCCD). Stip. ¶ 34.

20. The Monroe County Conservation District was given authority to review and approve the Erosion and Sedimentation Control Plans submitted as part of the NPDES Permit Application. 3/29/06 Mayer, p. 57.

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[2] The Stipulation of Facts filed by the parties to the Board mis-numbered two stipulations by providing two number eights and two number nines. Here, we will signify them as second 8 and second 9.

21. Erosion and sedimentation control is governed by regulations at 25 Pa. Code § 102.

22. Section 102 regulates accelerated erosion and sedimentation control. 3/29/06 Mayer, p.59-60, 103; 3/30/06 Blechschmidt, p. 24.

23. Chapter 102 outlines Best Management Practices (BMPs) to provide for protection against accelerated erosion and sedimentation runoff and requires the implementation of BMPs aimed at preventing accelerated erosion and sedimentation runoff. 3/30/06 Blechschmidt, p. 23-24; 3/29/06 Mayer, p. 59-60.

24. Chapter 102 regulations provide for special BMPs to control accelerated erosion and sedimentation where earth disturbance activities may result in a discharge to a water of the Commonwealth classified as High Quality or Exceptional Value pursuant to Chapter 93. 25 Pa. Code § 102.4(b)(6); 3/29/06 Mayer, p. 57, 59-60.

25. These special BMPs are outlined at 25 Pa. Code § 102.4(b)(6). 3/29/06 Mayer, p. 59-60, 94-95; 3/30/06 D'Onofrio, p. 115-16, 121.

26. As with all BMPs in 25 Pa. Code § 102, the special BMPs of 25 Pa. Code § 102.4(b)(6) are aimed at control of accelerated erosion and sedimentation. 3/29/06 Mayer, p. 59-60, 103; 3/30/06 D'Onofrio, p. 115-116.

27. Infiltration of precipitation and/or stormwater into the soil is a BMP for stormwater management. 3/30/06 Donofrio, p. 116, 125-28; 3/31/06 Murin, p. 80-83,119-25.

28. The Revised E&S Plan included erosion and sedimentation control BMPs, which are required by 25 Pa. Code Chapter 102. Stip. ¶ 35; *see also* 3/29/06 Mayer, p. 103; 3/31/06 Murin, p. 36.

29. Special protection BMPs, such as sediment basins, are designed to dewater between four to seven days, rather than basins located near non-high quality water which dewater within

two to seven days, resulting in water being held longer in a high quality watershed sediment basin. 3/29/06 Mayer, p. 60.

30. Skimmers are also used as a special protection BMP to skim the water from the surface of the pond which contains the smallest amount of dirt. 3/29/06 Mayer, p. 60-61.

31. Alpine's proposed BMPs for its E&S Plan included the following: topsoil stockpiles; stabilized construction entrance; a silt fence; benches; sediment basins; baffles installed in the basins; skimmer for discharge from basins; erosion control lining placed in swales; filtration device; water quality inlet structures (Stormceptors); planting of grasses, plants and trees; dry and wet ponds; swales or lined channels to direct runoff; and a riparian buffer. Alpine Ex. 52, sheet 42.

32. On August 31, 2004, the MCCD determined that the Revised E&S Plan adequately met the requirements of the Department's Chapter 102 regulations. Stip. ¶ 36.

33. Alpine's proposed BMPs do meet the requirements of 25 Pa. Code § 102(b)(6) with regard to prevention of accelerated erosion and sedimentation. 3/30/06 D'Onofrio, p. 115-16; *see also* Alpine Ex. 52, sheet 42.

34. There will be a net increase in post construction stormwater runoff, i.e., discharge into the Aquashicola Creek, as a result of the construction of the Alpine project. 3/30/06 Blechschmidt, p. 30.

35. The Aquashicola Creek is a High Quality water receiving an increase in discharge as a result of the project, thus triggering the requirement of compliance with the antidegradation regulations for the Alpine Permit. 3/30/06 Blechschmidt, p. 19, 21, 30; 3/30/06 D'Onofrio p. 136.

36. The antidegradation regulations outline a process and procedure which an applicant

proposing a new, additional or increased discharge to High Quality or Exceptional Value Waters must follow in making certain affirmative demonstrations to the Department as a prerequisite to the Department's granting of a permit for such a new, additional or increased discharge to High Quality or Exceptional Value Waters. 25 Pa. Code § 93.4c(b)(1)(i).

37. First, a person proposing a new, additional or increased discharge to High Quality or Exceptional Value Waters shall evaluate nondischarge alternatives to the proposed discharge and use an alternative that is environmentally sound and cost-effective when compared with the cost of the proposed discharge. 25 Pa. Code § 93.4c(b)(1)(i)(A) (first sentence).

38. In the event that a nondischarge alternative is demonstrated to be not environmentally sound and cost-effective, the proponent of the discharge is to show that the new, additional or increased discharge shall be subject to the best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies (Antidegradation Best Available Control Technologies or ABACT). 25 Pa. Code § 93.4c(b)(1)(i)(A) (second sentence).

39. Finally, a person proposing a new, additional or increased discharge to High Quality or Exceptional Value Waters, who has demonstrated that no environmentally sound and cost-effective nondischarge alternative exists is to demonstrate that the discharge will maintain and protect the existing quality of the receiving surface waters with an exception which is not relevant in this case. 25 Pa. Code § 93.4c(b)(1)(i)(B).

40. As just noted, one of the requirements of the antidegradation regulation is that the applicant shall undertake an evaluation of nondischarge alternatives to the proposed discharge. *See* 25 Pa. Code § 93.4c(b)(1)(i)(A).

41. Some nondischarge alternatives are: (1) pollution prevention and process changes; (2) alternative project siting; (3) land application of wastewater; (4) recycle/reuse of water; (5)

alternative discharge locations; (6) holding facilities and wastewater hauling; and (7) constructed treatment wetlands. BMPA Ex. 55.

42. Alpine did not undertake an analysis of non-discharge alternatives. 3/28/06 Crowley, p. 117-18.

43. Alpine and the Department considered only *one* measure that would involve non-discharge in connection with the proposing, reviewing and granting of the Permit and that was infiltration (also known as land application of wastewater). 3/30/06 D'Onofrio, p. 116, 122, 129, 135.

44. Infiltration was considered in the context of being a potential Chapter 102 erosion and sedimentation control BMP. 3/30/06 D'Onofrio, p. 116, 122, 125-26, 127.

45. Infiltration was rejected as a BMP at this site due to adverse geological conditions. 3/30/06 D'Onofrio, p. 122, 127, 129; 3/30/06 Blechschmidt, p. 29, 61; Alpine Ex. 12; BMPA Ex. 21.

46. Alpine did not perform a nondischarge alternatives analysis in this case as called for in 25 Pa. Code § 93.4c(b)(1)(i)(A); 3/28/06 Crowley, p. 118-119.

47. Alpine did not demonstrate that other nondischarge alternatives such as pollution prevention and process changes; alternative project siting; recycle/reuse of water; alternative discharge locations; holding facilities and wastewater hauling; and constructed treatment wetlands were not environmentally sound and cost effective.

48. In order to show that the applicant will be subjecting the proposed discharge into a High Quality water to the best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies, the applicant must undertake an analysis of the alternatives available (i.e., an ABACT analysis). 25 Pa.Code § 94.4c(b)(1)(i)(A); 3/28/06

Crowley, p. 120.

49. Ms. Crowley, the Water Program Manager of the Department's Northeast Regional Office, whose responsibilities at the time her office issued the Permit included issuance of this and other like permits, did not know whether an analysis of alternatives as outlined in 25 Pa. Code § 93.4c(b)(1)(i)(A), *i.e.*, an ABACT analysis, had been undertaken in connection with this permit application. 3/28/06 Crowley, p. 120-21.

50. The post-construction erosion and sedimentation control plan submitted by Alpine to the Department which ultimately was approved by the Department includes the following:

a Drainage Area No. 1, Basin No. 1: This area is serviced by a water quality basin that includes wetland plantings, an aquatic beach, a micro-pool area, and a forebay for sediment removal. The outlet discharge structure is also equipped with a "snout"/water quality inlet to protect the discharge and to maintain water quality in the receiving watershed.

b Drainage Area No. 2, Basin No. 2: This area contains a basin designed with sediment forebays, micro-pools, and a "snout" which serves as a secondary treatment device. A downstream "sumped" area below Basin No. 2 is equipped with a snout with plantings around the perimeter. This sumped area is designed to intercept runoff not collected by Basin No. 2. Two other "sumped" areas are located among the other drainage areas providing additional treatment.

c Drainage Area No 3, Basin No. 3: Basin No. 3 captures the runoff from both sides of the East Paddock and the site access road areas. This area includes seven (7) Stormceptor units that pre-treat the stormwater run-off prior to collection in B asin No. 3. As with the other basins, the outlet structure is equipped with a "snout." A snout is also located on a stormwater inlet in this area for pre-treatment of stormwater discharge generated by the Welcome Center and lower access road prior to its conveyance to Basin No. 3.

d Drainage Area No. 4 and a downstream portion of Drainage Area No. 5, Basin No. 4: Basin No. 4 is located below the West Paddock area. It utilizes three (3) Stormceptor

units and a snout to separate out the solids, trash and organic components captured by the runoff and removes those pollutants from the water prior to discharging into the basins. Basin No. 4 includes two forebays north and south of the micro-pool and an aquatic bench planted with wetland species of plants for nutrient uptake.

e Drainage Area No. 5 and 3 (upstream portions) Basin No. 6: This portion of the site collects, treats and conveys runoff from the noise berm area to Basin No. 6 where treatment is provided prior to discharge including a micro-pool, forebay, and a snout. DEP Ex. 18.

51. Among the measures proposed is a wet pond. 3/30/06 Blechschmidt, p. 27.

52. The wet ponds used as post construction BMPs at the Project Site hold water to allow sediment to settle out of the water before it flows from the pond. 3/30/06 Blechschmidt, p. 27; *see also* Alpine Ex. 52, sheet 71-80.

53. Wet ponds should be used with caution near High Quality waters because of the temperature sensitivity of special protection waters. BMPA Ex. 58, Ch. 6, p. 154.

54. Alpine did not demonstrate that the steps it proposed to implement with respect to the discharge to the Aquashicola Creek were the best combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies. 3/28/06 Crowley, p. 121.

55. Alpine did not undertake an analysis of potential thermal impacts of stormwater leaving the site. 3/30/06 Blechschmidt, p. 56-57.

56. Alpine did not determine or show that the discharge would maintain the thermal character of the Aquashicola Creek. 3/30/06 Blechschmidt, p. 56-57.

57. Alpine did not determine or show that stormwater discharge leaving the site would maintain and protect the existing water quality of Aquashicola Creek as required by antidegradation regulations.

DISCUSSION

This case involves the Department's issuance of an NPDES permit for the discharge of stormwater associated with the construction of a road course by Alpine. The discharge would be to Aquashicola Creek, a High Quality Cold Water Fisheries water. Being a stormwater discharge to a High Quality Water, Alpine was required to have an individual NPDES permit for the discharge. As such, the permit was subject to review under the Chapter 102 Erosion and Sediment Control regulations. 25 Pa. Code §§ 102.1—102.51. As a discharge to a High Quality water, the Commonwealth's so-called "antidegradation regulations" are also implicated. 25 Pa. Code §§ 93.4a—93.4d. Thus, the case involves the interplay and intersection of the NPDES stormwater permitting program regulations and the antidegradation regulations.

The Department and Alpine proffer two basic theories, one a legal theory and the second a factual theory. First, they maintain that, as a matter of law, compliance with the special protection BMP provisions of Chapter 102 constitutes compliance with the antidegradation regulations. They say that the 2000 amendments to the Chapter 102 regulations which incorporated the special protection BMPs for High Quality Waters were meant to and did thereby incorporate the various analyses and steps set forth in the antidegradation regulations therein. Thus, the argument goes, if the permit was issued in compliance with Chapter 102 it is thereby in compliance with the antidegradation regulations. Their second but related argument is that, as a factual matter, in this case, the permit application, in following the Chapter 102 requirements, also followed the proper antidegradation regulations requirements.

We cannot accept either of those basic arguments or their dependent supports. The Chapter 102 special protection BMP provisions were not intended to nor do they incorporate fully the Chapter 93.4a-d antidegradation requirements. Also, as a factual matter, the application

did not satisfy the antidegradation requirements and the Department did not fulfill its mandate to require that it did.

25 Pa. Code Chapter 102, Erosion and Sedimentation Control

Regulation in Pennsylvania of erosion and sedimentation associated with stormwater discharges relating to earthmoving activities goes back to 1972 when the Commonwealth adopted the first version of the Chapter 102 erosion and sedimentation control regulations under the authority of the Clean Streams Law. 25 Pa. Code § 102.1 *et seq.* (citation of authority and source). The Chapter 102 regulations aim to prevent accelerated erosion and sedimentation associated with earth moving activities. "Erosion" is defined as "the natural process by which the surface of the land is worn away by water, wind or chemical action." 25 Pa. Code § 102.1. "Accelerated erosion" is defined as "the removal of the surface of the land through the combined action of human activities and the natural processes, at a rate greater than would occur because of the natural process alone." *Id.* "Sediment" is defined as "soils or other materials transported by surface water as a product of erosion" and "sedimentation" is defined as "the action or process of forming or depositing sediment in waters of this Commonwealth." *Id.*

As Judge Labuskes pointed out in *O'Reilly v. DEP*, 2001 EHB 19, federal law requires that runoff from construction activity be treated as a point source requiring an NPDES permit. *Id.* at 33, *citing* 40 CFR §122.26; *Valley Creek Coalition v. DEP*, 1999 EHB 935, 949. Chapter 102 regulates discharges associated with stormwater not by imposing discreet numerical effluent limitations but, instead, through the requirement of the application of "best management practices" known commonly as "BMPs." Again, Chapter 102 BMPs focus on control of accelerated erosion of sediment. BMPs are defined as,

> Activities, facilities, measures, or procedures used to minimize accelerated erosion and sedimentation to protect,

> maintain, reclaim and restore the quality of waters and the existing and designated uses of waters within this Commonwealth.

25 Pa. Code § 102.1.

In 2000, the Chapter 102 erosion and sediment control regulations were amended to provide that special enhanced BMPs are to be used on projects affecting High Quality Waters to protect High Quality Waters from the adverse impacts of accelerated erosion and sedimentation. These special enhanced BMPs are outlined in 25 Pa. Code § 102.4(b)(6) which provides as follows,

> (6) Where an earth disturbance activity may result in a discharge to a water of this Commonwealth classified as High Quality or Exceptional Value pursuant to Chapter 93, the person proposing the activity shall, as applicable, use the following Special Protection BMPs to maintain and protect the water from degradation:
>
> (i) Special sediment basin requirements.
>
> (A) Principal spillways shall be designed to skim water from the top 6 inches (15 centimeters) of the dewatering zone, or shall have permanent pools greater than or equal to 18 inches (46 centimeters) deep.
>
> (B) The basin shall be designed with a flow length to basin width ratio of 4:1 or greater.
>
> (C) The basin shall be designed so that it dewaters in at least 4 days and no more than 7 days when at full capacity.
>
> (ii) Channels, collectors and diversions shall be lined with permanent vegetation, rock, geotextile or other nonerosive materials.
>
> (iii) BMPs that divert or carry surface water shall be designed to have a minimum capacity to convey the peak discharge from a 5-year frequency storm.
>
> (iv) Upon completion or temporary cessation of the earth disturbance activity, or any stage thereof, the project site shall be immediately stabilized.
>
> (v) The Department or county conservation district may approve alternative BMPs which will maintain and protect existing water quality and existing and designated uses.

25 Pa. Code § 102.4(b)(6).

Antidegradation Regulations

The antidegradation regulations of 25 Pa. Code Chapter 93.4a-d were passed in 1999 and apply to high quality surface waters of the Commonwealth of which Aquashicola Creek is one. The regulations provide that "existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected" and high quality waters "shall be maintained and protected." 25 Pa. Code §§ 93.4a(b), (c).[3] As the Alpine project impacts the Aquashicola Creek, a high quality waterway, it is subject to the antidegradation regulations.

The antidegradation regulations outline a very specific and particular process and procedure which an applicant proposing a new, additional or increased discharge to High Quality or Exceptional Value Water must follow in making certain affirmative demonstrations to the Department as a prerequisite to the Department's granting of a permit for such a new, additional or increased discharge. 25 Pa. Code § 93.4c(b)(1). The pertinent regulation states as follows:

> (b) *Protection of High Quality and Exceptional Value Waters.*
>
> > (1) *Point source discharges.* The following applies to point source discharges to High Quality or Exceptional Value Waters.

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[3] Section 93.4a provides as follows:

> (a) *Scope.* This section applies to surface waters of this Commonwealth.
>
> (b) *Existing use protection for surface waters.* Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.
>
> (c) *Protection for High Quality Waters*—The water quality of High Quality Waters shall be maintained and protected, except as provided in § 93.4c(b)(1)(iii) (relating to implementation of antidegradation requirements).
>
> (d) *Protection for Exceptional Value Waters*—The water quality of Exceptional Value Waters shall be maintained and protected.

25 Pa. Code § 93.4a.

(i) *Nondischarge alternatives/use of best technologies.*

> (A) A person proposing a new, additional or increased discharge to High Quality or Exceptional Value Waters shall evaluate nondischarge alternatives to the proposed discharge and use an alternative that is environmentally sound and cost-effective when compared with the cost of the proposed discharge. If a nondischarge alternative is not environmentally sound and cost-effective, a new, additional or increased discharge shall use the best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies.
>
> (B) A person proposing a new, additional or increased discharge to High Quality or Exceptional Value Waters, who has demonstrated that no environmentally sound and cost-effective nondischarge alternative exists under clause (A), shall demonstrate that the discharge will maintain and protect the existing quality of receiving surface waters, except as provided in subparagraph (iii).

25 Pa. Code § 93.4c(b)(1)(i). The Environmental Quality Board in this regulation has established what the EHB has very accurately and appropriately described as a "hierarchical structure." *Zlomsowitch v. DEP*, 2004 EHB 756, 782. As the EHB further noted, "the scheme devised in Section 93.4c(b)(1)(i) to prevent degradation is to require all those who propose to discharge into an Exceptional Value Water to engage in an alternatives-analysis process before obtaining a NPDES permit." *Id.*

First, a person proposing a new, additional or increased discharge to High Quality or Exceptional Value Waters shall evaluate nondischarge alternatives to the proposed discharge and use an alternative that is environmentally sound and cost-effective when compared with the cost of the proposed discharge. 25 Pa. Code § 93.4c(b)(1)(i)(A)(first sentence). In the event that a nondischarge alternative is demonstrated to be not environmentally sound and cost-effective, the proponent of the discharge is to show that the new, additional or increased discharge shall be subject to the best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies (Antidegradation Best Available Control

Technologies or ABACT). 25 Pa. Code § 93.4c(b)(1)(i)(A)(second sentence). Finally, a person proposing a new, additional or increased discharge to High Quality or Exceptional Value Waters who has demonstrated that no environmentally sound and cost-effective nondischarge alternative exists is to demonstrate that the discharge will maintain and protect the existing quality of receiving surface waters with an exception which is not relevant in this case. 25 Pa. Code § 93.4c(b)(1)(i)(B).

Since the Alpine project involves an increased discharge into Aquashicola Creek, Alpine was subject to these provisions and required to undertake the required analyses and to make the requisite showings, and the Department was obligated to police Alpine's compliance therewith before granting the permit in this case. The Department, to be compliant with the antidegradation regulations, "must compel the discharge proponent to first evaluate whether environmentally sound 'nondischarge alternatives' are available under the circumstances, and if so, to compare the cost of such an alternative with the cost of the method proposed to discharge into the [waterway]." *Zlomsowitch*, 2004 EHB at 782, *citing* 25 Pa. Code § 93.4c(b)(1)(i)(A). Then, if "an environmentally-sound, cost-effective, nondischarge alternative is not available, the proponent of the discharge shall instead use the best available combination of pollution control methods under the circumstances." *Id.* Also, and in all cases, the proponent, in this case, Alpine, was obligated to demonstrate that the discharge will maintain and protect the existing quality of receiving surface waters. *Zlomsowitch*, 2004 EHB at 783, *citing* 25 Pa. Code § 93.4c(b)(1)(i)(B).

Burden of Proof

This is an appeal by a third party of the Department's issuance of an NPDES permit. Thus, it is axiomatic that the Appellant has the burden of proof. The Appellant must show by a preponderance of the evidence that the Department acted contrary to the law in issuing the

permit. 25 Pa. Code § 1021.122(a), (c)(2). However, the dictates and principles outlined above regarding the antidegradation regulations have relevance with respect to what it is that the Appellants have the burden of proof to show in this case. It is clear that the antidegradation regulations require an applicant to undertake certain process and make certain showings as a prerequisite to the Department's granting of an NPDES permit. By the same token, the Department is obligated to see to it that the applicant has done so before it may grant a permit. This is nothing new. The Board in *Shuey v. DEP*, 2005 EHB 657 put it this way,

> At the *permitting* stage, the burden is on the permit applicant to convince the Department that it meets all the requirements necessary for issuance of the permit. . . . At the permitting stage, the Department receives input from the public, including concerned citizens. Those citizens are provided with an opportunity to come forward with their concerns which are then investigated by the professional staff at the Department. Many times concerns are raised by citizens that must be addressed by the technical staff and other professionals hired by the permit applicant. In some cases, issues raised by concerned citizens are such that, after more investigation by the Department and further response by the professionals employed by the permit applicant, the Department decides not to issue the permit or imposes substantial conditions in the permit.
>
> If the Department issues the permit, third parties, including concerned citizens, have the right to appeal the permit issuance to the Pennsylvania Environmental Hearing Board. The Environmental Hearing Board is the state trial court for environmental matters. At this stage in cases involving the issuance of a permit, the burden of proof is no longer on the permit applicant but on the *party challenging the permit* to show the permit should not have been issued. Appellants, therefore, must prove by a preponderance of the evidence that the permit should not have been issued.

Shuey v. DEP, 2005 EHB 657, 710-11 (footnote omitted).

So it is plain to see that the Department's and Alpine's suggestion that the Appellant's case must necessarily fail because they have not proven that there will be a degradation of Aquashicola Creek or because they have not proven that there will be an environmental harm is not so. Certainly, if Appellants made such showings at trial they would prevail, but the converse is not true. They do not need to make such showings in order to prevail. What they need to

show by a preponderance of the evidence is that Alpine did not undertake the antidegradation regulations' requisite analyses or make the appropriate showings thereunder and/or that the Department did not require that Alpine do so and issued the permit in the absence of such analyses and showings.

The Zlomsowitch Case

Much of the parties' briefing has focused on the Board's decision in *Zlomsowitch v. DEP*, 2004 EHB 756. Appellants view *Zlomsowitch* as on all fours with this case and Appellees argue it is off point. *Zlomsowitch* involved a non-coal surface mining permit. The Department had considered the applicant's proposal in that case to be a nondischarge alternative. The Board found this conclusion unreasonable. Thus, the Board remanded the case to the Department for full consideration of the antidegradation requirements. The Board said this:

> By labeling the water pollution control system for the site as a "nondischarge alternative" DEP short-circuited the alternatives-analysis process prescribed by § 93.4c(b)(1)(i). The evidence at hearing did not show that alternatives in which no point source discharge into UNT Lizard Creek would be permitted were evaluated by either Lehigh or DEP. For example, there was no evidence that DEP required Lehigh to consider conveying accumulated surface water runoff into Lizard Creek, a designated warm water fishery, rather than discharging into UNT Lizard Creek, the exceptional value water. There was also no substantial evidence presented: (1) that DEP made an express finding that a cost-effective environmentally-sound nondischarge alternative does not exist for the proposed mining operation; (2) that Lehigh demonstrated, and DEP found, that Lehigh would employ the best available combination of water pollution control methods for this site; and, (3) that Lehigh properly demonstrated--with water quality monitoring data and scientific analysis of the effects on the stream from the addition of identified and quantified pollutants in a permitted discharge--that the selected control methods will maintain and protect the existing quality of UNT Lizard Creek. In short, the evidence did not show that the alternatives analysis required by the antidegradation regulation was performed here. Process, however, is the critical means of accomplishing the antidegradation regulation's fundamental purpose of maintaining and protecting the existing quality of the exceptional value water. 25 Pa. Code § 93.4c(b)(1)(i)(B). *Cf. Lathan v. Brinegar,* 506 F.2d 677, 693 (9th Cir. 1974) (the history of environmental protection may prove to largely be the 'history of observance of procedural safeguards').

Id. at 787-88 .

Many of the attempts to distinguish *Zlomsowitch* and relegate it aside are specious. For example, *Zlomsowitch* is not beside the point because that permit was a mining permit and this one an NPDES permit. *Zlomsowitch* is not irrelevant because it involved an entirely new discharge whereas here we have an increased discharge, as are most stormwater discharges associated with construction which have some preexisting pre-development discharge. The antidegradation regulations apply alike to mining cases and NPDES cases where the discharge is into a High Quality Water regardless of whether it is new or increased discharge into a High Quality Water.

Zlomsowitch's discussion of the antidegradation regulations is applicable to this case, it is its facts which are not. *Zlomsowitch* involved an entirely different structural setting. There, the Department had found that the applicant had proposed a nondischarge alternative. Neither the applicant nor the Department had taken the antidegradation process analysis any further since they relied on the notion that compliance with the antidegradation regulations had been accomplished at the starting gate by adoption of the nondischarge alternative. The Board held that conclusion to be unreasonable. Thus, the case had to go back to undergo all steps of the antidegradation analysis which had never occurred in the first place and no party had contended had occurred. Here, Appellees contend that all steps of the antidegradation process did occur.

BMPA focuses on the language of *Zlomsowitch* which they say lays down the rule that the Department must make specific findings on the various steps of the antidegradation process. They point to the language which states,

> There was also no substantial evidence presented: (1) that DEP made an *express finding* that a cost-effective environmentally-sound nondischarge alternative does not exist for the proposed mining operation; (2) that Lehigh demonstrated, *and DEP found*, that Lehigh would employ the best available

combination of water pollution control methods for this site...

Id. at 788 (emphasis added). From that language, BMPA argues that DEP must make specific findings and, in the absence of evidence of those specific findings, compliance with the antidegradation regulations is not complete. We would not go so far and we do not read *Zlomsowitch* or the antidegradation regulations as going that far either. Immediately after the language from *Zlomzowitch* quoted above the Board continued in the same sentence,

> . . . (3) that Lehigh properly demonstrated--with water quality monitoring data and scientific analysis of the effects on the stream from the addition of identified and quantified pollutants in a permitted discharge--that the selected control methods will maintain and protect the existing quality of UNT Lizard Creek.

Id. There is no talk there of any "finding" in any particular form or format on the subject. The key was the absence of evidence that the applicant had made the required demonstrations. Also, the antidegradation regulations require the applicant to make the required showings as a prerequisite to obtaining a permit. While such showings must necessarily be made to the Department since it is the permit granting authority, the regulations do not speak of the Department making findings in any particular form nor do they require that the Department follow any particular documentation method in its permit review process. We recognize that it could be argued that DEP's making findings is a necessary implication of the regulation's requiring that showings be made to DEP as a prerequisite to DEP's granting the permit. We will, however, adhere to the specific terms of the regulation on this question which do not specifically require that the Department produce "findings" in any particular form or format.

For future cases though, it seems that the presence of such Department "findings" would be substantially helpful. If the question is, as it is in this case, was the permit issued in compliance with the antidegradation regulatory process, the presence of such findings might help shed light on the answer. Also, the discipline and routine of the Department's making such

findings and having them in the record would serve to routinize and police compliance with the antidegradation regulations.

The Chapter 102/Chapter 93.4a-d Relationship

There is no question that the NPDES permit in this case is faithful to the requirements of 25 Pa. Code § 102.4(b)(6) and that the special BMPs for High Quality waters are to be implemented. Alpine and the Department claim that this alone constitutes compliance under the Chapter 93 antidegradation regulations. We cannot agree.

As we have discussed, the Chapter 102 regulations are focused on accelerated erosion and sedimentation control. The language of the Chapter 102 regulations makes this plain to see. The antidegradation regulations, on the other hand, apply to all physical, chemical and biological characteristics of the receiving water. In other words, the antidegradation regulations, applying as they do to preserving and protecting existing uses, cover more than do the Chapter 102 erosion and sedimentation regulations.

DEP itself recognizes that Chapter 102 is an erosion and sedimentation oriented regulation. As DEP puts it, BMPs of Chapter 102 are "aimed at keeping the soil on the site and preventing sedimentation runoff pollution." DEP Post Trial Brief., p. 13. The Department also tells us that, "the stormwater construction program is aimed at preserving an existing discharge while keeping the sediment out of that discharge, and maintaining its natural rate and volume flow." *Id.*, p. 17.

Judge Labuskes provided an excellent description of the Chapter 102 program in *O'Reilly v. DEP*, 2001 EHB 19, which underscores the "sediment-centric" nature of the Chapter 102 program. The Board said there, "the overriding purpose of NPDES permits is to ensure that pollutants in discharges are controlled in the interest of protecting the quality of receiving

streams." *Id.* at 32 *citing* 25 Pa. Code § 92.3. Furthermore, "the pollutant of primary concern for construction projects is sediment." *Id.* at 33 *citing* 25 Pa. Code § 102.2. The Chapter 102 program, noted the Board, "is designed to minimize the potential for accelerated erosion and sedimentation." *Id.* at 33. Thus,

> [t]he permits are designed almost exclusively to control the discharge of sediment because that is what has proven to be the potential pollutant at construction sites. *See* 25 Pa. Code Chapter 102. The permits are not specifically designed to control the discharge of any pollutants not associated with sediment (beyond ensuring that spills are managed).

Id. at 33. Indeed, it was on this basis that the Board in *O'Reilly* rejected O'Reilly's contention that the permit should have contained limits for pollutants other than sediment, saying that such a contention has "no basis in fact or law." *Id.* at 34.

DEP maintains that the special BMPs of Section 102.4(b)(6) incorporate the process and analyses of the antidegradation program into the Chapter 102 program. DEP says that the antidegradation regulations, in the stormwater management permit context, are implemented in full through Chapter 102. DEP Post Trial Brief, p. 12. Thus, its argument goes, proper adherence to Chapter 102 also constitutes full adherence to the antidegradation regulation. However, that is not the case.

The express language of Chapter 102 does not provide that the entirety of the antidegradation regulations' process or analyses are incorporated therein. Chapter 102 does not provide for the process, analyses and showings required by the antidegradation regulation. Moreover, Chapter 102 does not include the entire panoply of physical, chemical, biological and thermal parameters that are involved in the antidegradation regulation.

As we have already discussed, Chapter 102 covers sediment pollution and the rate and volume of stormwater runoff. Special BMPs for High Quality waters cover, in an enhanced

manner, erosion and sediment control. Again, BMPs are defined as "activities, facilities, measures, or procedures used to minimize accelerated erosion and sedimentation to protect, maintain, reclaim and restore the quality of waters and the existing and designated uses of waters within this Commonwealth." 25 Pa. Code § 102.1. Thus, the special BMPs of Section 102.4(b)(6) are enhanced measures used to "minimize accelerated erosion and sedimentation" to protect, maintain, reclaim and restore the quality of waters and the existing and designated uses of waters from an erosion and sediment pollution perspective. 25 Pa. Code § 102.4 (b)(6).

That Chapters 102 and 93 are different and not a union is obvious by putting the two side by side. Chapter 102 is about BMPs which are "activities, facilities, measures, or procedures" aimed at controlling erosion and sedimentation while Chapter 93 is about a detailed and specific preferential hierarchical process and procedure aimed at arriving at an outcome which will prevent degradation by all physical, chemical, biological parameters. The Chapter 93 process not only drives to a particular result depending on the circumstances, it also requires that a particular process or procedure be followed which leads to the result. Nowhere in Chapter 102 is the preferential "hierarchical process" of Chapter 93 included. Nowhere in Chapter 102 is an applicant directed to first evaluate nondischarge alternatives. Nowhere in Chapter 102 is the applicant allowed to use a discharge alternative only when it demonstrates that the nondischarge alternatives studied are not environmentally sound and cost-effective. Chapter 102 does not even mention or discuss evaluation of a nondischarge preference. Chapter 102 does not even contemplate a nondischarge situation since it assumes a discharge and outlines BMPs aimed at controlling erosion and sedimentation pollution from such discharges. Nowhere in Chapter 102 is the applicant then required to demonstrate that the discharge will be subject to the best available combination of cost-effective treatment, land disposal, pollution prevention and

wastewater reuse technologies such that the existing use of the receiving water will not be maintained. Nowhere in Chapter 102 is an applicant required to demonstrate that the discharge will maintain and protect the existing quality of receiving surface waters as to all parameters such that the water's designated use will not be degraded.

The 2000 Preamble to the Chapter 102 regulations shows that those regulations were not intended to be a complete implementation of the antidegradation regulations. The Preamble says that the Chapter 102 regulations are to "work *in conjunction with* the Department's antidegradation program," not that Chapter 102 works to cover the whole of the Department's antidegradation program or works as an incorporation of the antidegradation regulations. 30 *Pa. Bull.* 111, 118. (emphasis added). Even the Department admits that this reference in the Preamble "does not directly articulate [the] intention" to integrate the antidegradation regulations' requirements fully and directly into the Chapter 102 regulation. DEP Post Trial Brief, p. 20-21. That is an understatement. It is the opposite intention which is "directly articulated."

BMPA points out that DEP in its post-trial brief cites three documents which are not even in evidence to try to support its notion that the antidegradation regulations are incorporated into Chapter 102. Those documents include the 2002 Comprehensive Stormwater Management Policy Comment/Response (DEP Post Trial Brief., p. 21); 2001 Erosion and Sedimentation Control Program Manual (DEP Post Trial Brief., p. 22); and the 2006 Instructions for a General (PAG-2) or Individual NPDES Permit for Stormwater Discharges Associated with Construction Activities (DEP Post Trial Brief., p. 22, 23, 24). These documents are not in evidence and we will not consider them. Even if they were, they would stand in opposition to the express language of Chapter 102 itself, the contemporaneous memorialization of its framers in the

Preamble, and the express language of Chapter 93.

The Department argues that its interpretation of Chapter 102 as encompassing lock, stock and barrel, the Chapter 93 antidegradation regulations should be granted deference citing *NARCO v. DEP*, 791 A.2d 461, 466 (Pa. Cmwlth. 2002). However, as we have just demonstrated, that interpretation is unreasonable and contrary to the language of both regulations. Also, the framers of the 2000 amendments to the Chapter 102 regulations expressed clearly that the Chapter 102 regulations were to be read in conjunction with the antidegradation regulations not as the conjunction of or the conjoining of them.

The Factual Question of Antidegradation Regulation Compliance

DEP and Alpine argue that the antidegradation analysis was done in this case, as a matter of fact, *via* their mutual compliance with the special BMP requirements of Chapter 102. In short, DEP and Alpine try to make Chapter 102(b)(6) compliance fit Chapter 93.4a-d antidegradation regulation compliance as a factual matter in this case. While DEP's and Alpine's Chapter 102(b)(6) compliance may be close to Chapter 93 compliance, especially with respect to degradation by accelerated erosion and sedimentation, the fit is not complete at all. As a factual matter in this case the Appellees' compliance with Chapter 102(b)(6) does not constitute compliance with Chapter 93.4a-d.

Nondischarge Alternatives Analysis, 25 Pa. Code § 93.4c(b)(1)(i)(A)(First Sentence)

The antidegradation regulations require, as a threshold step, that the applicant "shall evaluate nondischarge alternatives to the proposed discharge and use an alternative that is environmentally sound and cost-effective when compared with the cost of the proposed discharge." 25 Pa. Code § 93.4c(b)(1)(i)(A). DEP's guidance manual on antidegradation, "DEP Water Quality Antidegradation Implementation Guidance," provides a list of common

nondischarge alternatives that are customarily evaluated. BMPA Ex. 55. According to the manual, such alternatives include: (1) pollution prevention and process changes; (2) alternative project siting; (3) land application of wastewater, *i.e*, infiltration; (4) recycle/reuse of water; (5) alternative discharge locations; (6) holding facilities and wastewater hauling; and (7) constructed treatment wetlands. *Id.* DEP and Alpine say that they considered infiltration, a nondischarge alternative, but that the geological conditions were unsuitable. DEP Post Trial Brief, p. 30; Alpine Post Trial Brief., p. 20. This they say satisfies the nondischarge alternatives analysis requirement of the antidegradation regulations. *Id* We do not agree.

While infiltration was considered, no Section 93.4c(b)(1)(i)(A) nondischarge alternatives analysis was done. First, on a most basic level, the antidegradation regulations require an analysis of non-discharge alternatives, in the plural. Even if infiltration had been considered and ruled out on valid grounds, which does appear to be the case here, it was the only nondischarge alternative considered. The antidegradation regulations create "a hierarchical structure which prefers no new point source discharge into [High Quality waters] . . . ." *Zlomsowitch,* 2004 EHB at 782. To look at only one nondischarge alternative is not faithful to that requirement. No consideration was given to the other measures as alternatives to the discharge into Aquashicola Creek.

Kate Crowley, the Water Program Manager of the Department's Northeast Regional Office, whose responsibilities included heading the office which issued this permit, admitted that no Chapter 93 nondischarge alternatives analysis was performed in this case. In response to the question whether a nondischarge analysis was prepared in connection with this permit application Ms. Crowley admitted that, "it's my understanding that an analysis such as you inquire about was not performed *per se*..." 3/28/06 Crowley, p. 118.

We reject the testimony of Mr. D'Onofrio who testified that a nondischarge alternatives analysis was performed. Mr. D'Onofrio, at the time the permit was issued, was a senior civil hydraulic engineer in the Department's Northwest Regional Office. He reviewed the erosion and sediment control measures proposed by the applicant. He admitted that infiltration was the only nondischarge alternative he considered. 3/30/06 D'Onofrio, p.135. He limited his review to only the single nondischarge alternative, *i.e.*, infiltration, on account of his opinion that to do anything else would be to "come up with some Star Trek methodology." *Id.* At 135-36. This testimony is clearly not credible and actually preposterous since DEP's own guidance manual on antidegradation, which we just discussed, lists six nondischarge alternatives that are plainly earth-bound technologies, not "Star Trek" technologies. This testimony shows that Mr. D'Onofrio simply did not have antidegradation compliance in his mind when he was reviewing this permit application.

Mr. D'Onofrio's review and consideration was limited to Chapter 102 compliance only, *i.e.*, erosion and sedimentation control. He said that his responsibilities involved only, "to make sure all of the information required for permitting was in the permit application package or file and for the review for the post construction plans and the [erosion and sedimentation] control plans." 3/30/06 D'Onofrio, p. 113.[4] When he was asked on what basis he concluded that the nondischarge alternatives analysis had been done, his response was a mechanical, "there were no sediments leaving the site." *Id.* at 123. This answer is a *non sequitur*. A Section 93.4c(b)(1)(i)(A) nondischarge alternatives analysis is obviously an analysis, a study, a process. It is not a status or a condition and it is not described or defined as "there are no sediments

[4] This case does not present the question whether the Department has the authority under Chapter 102 to require a post-construction stormwater management plan.

leaving the site". This answer demonstrates to us that Mr. D'Onofrio is completely unfamiliar and unschooled about what a 25 Pa. Code § 93.4c(b)(1)(i)(A) nondischarge analysis is and what it involves. We credit the testimony of his superior, Ms. Crowley, who admitted that no Chapter 93 nondischarge alternatives analysis was done. She was a much more knowledgeable and creditable witness with respect to that particular question.

Also, to the extent infiltration was reviewed as an option, it was not reviewed as part of a nondischarge alternatives analysis under Chapter 93, but, instead, as a potential BMP under Chapter 102. Mr. Murin, the Chief of the Department of Environmental Protection, Central Office, Division of Waterways, Wetland and Stormwater Management, testified that "the Northeast Regional Office...recommend[ed] that infiltration not be a BMP at this site." 3/31/06 Murin, p. 111-12, 119-25. As well, Joseph England testified at length about infiltration as a Chapter 102 BMP. He said that, "there are various ways that infiltration applies to best management practices . . . the best mix of best management practices sort of composite utilizing a mix of various types of best management practices . . . ." 3/31/06 England, p. 80-83. Project documents characterize infiltration solely as a Chapter 102 BMP. The "Post Construction Stormwater Management Report for Alpine" is a narrative which details the various BMPs for the Project Site, in which it states "no infiltration is proposed for this project." BMPA Ex. 17; DEP Ex. 16; Alpine Ex. 16. Attached to that document is a "Stormwater Infiltration Investigation/Study by Alternative Environmental Solutions" dated February 2, 2004, which characterizes the study of infiltration as a BMP. *Id.* The "PCSM Plan Review" characterizes the use of infiltration at the Project Site as a PCSM-BMP, and it states that "in place of infiltration, the applicant has proposed several other PCSM-BMPs to protect and maintain the water quality." BMPA Ex. 57; DEP Ex. 34; Alpine Ex. 52. Lastly, the "Comment and Response Document for

NPDES Permit No. PAS10S119," comment 8, addressed infiltration. The response provided that "infiltration technology is an impractical BMP that will not be utilized on this proposed project ....." DEP Ex. 5; Alpine Ex. 23.

All of this tells us that Alpine and DEP are now attempting, after the fact, to say that the consideration of one nondischarge alternative, infiltration, in the content of its consideration as a potential Chapter 102 BMP constitutes a Chapter 93 nondischarge alternatives analysis. We can no more accept that now than could Ms. Crowley at trial when she told us that, "it is my understanding that [a Chapter 93.4 nondischarge alternatives analysis]...was not performed *per se*" in this case.[5] 3/28/06 Crowley, p. 118.

We do not suggest here that any of the nondischarge alternatives mentioned in the DEP manual would fit this project under Chapter 93 analysis. What we do say is that there was no consideration of that question as to anything other than infiltration. There was no demonstration here that, after consideration of nondischarge alternatives, one or more working in combination would not be environmentally sound and cost-effective. 25 Pa. Code § 93.4c(b)(1)(i)(A).

ABACT Analysis, 25 Pa. Code § 93.4c(b)(1)(i)(A)(Second Sentence)

As we have stated, the antidegradation regulations provide as the next step, "[i]f a nondischarge alternative is not environmentally sound and cost-effective, a new, additional or increased discharge shall use the *best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies*" (ABACT). 25 Pa. Code §

[5] There was much discussion in the parties' presentations whether the antidegradation regulations require a specific document entitled, "Nondischarge Alternatives Analysis" or some like title. Obviously, there was no such document in this case. DEP and Alpine took pains to argue that the regulation does not require that there be such a specific tangible document. We cannot say that the regulations specifically require that there be such a specific document. However, we think BMPA has a point when it says that the presence of such a document in these cases would not be a bad idea because it would make compliance with the antidegradation regulations far easier for DEP and the Board to determine. BMPA Post Trial Reply Brief, p. 14-15, n. 12. For the reasons we discussed before and for the reasons BMPA mentions, it might behoove applicants and DEP in future Chapter 93 cases to have such a document on hand.

93.4c(b)(1)(i)(A) (emphasis added). This requires not just that some or all of the aforementioned techniques happen to be employed but that the best available combination of them be employed so as to ensure against any degradation of the receiving water.

Obviously, the starting point to knowing and employing the best available combination of techniques is to do an analysis of what the alternatives are. When asked whether she agreed with that statement, Ms. Crowley said, "I would think so, yes." 3/28/06 Crowley, p. 120. We agree with her and we think so too. Ms. Crowley admitted that she did not know whether an analysis of such alternatives had been undertaken in this case. *Id. at 120-21.*

Both DEP and Alpine argue that implementing the selection of BMPs at the site satisfies ABACT. DEP Post Trial Brief., p. 30; Apline Post Trial Brief., p. 33-46. Alpine especially points out there are BMPs which will be used at the site which fall into the various categories mentioned in 25 Pa. Code § 93.4c(b)(1)(i)(A). But this would be like saying that by happening to have all food groups on your plate once you come back from the buffet line you have satisfied an obligation to deliberate, contemplate and conclude before going through the buffet line what would be the best combination of foods to put on your plate to promote health. Alpine did not demonstrate before it received the permit that the mere presence of techniques in the various categories represents a deliberated and considered conclusion that those intended to be employed are the best available combination of those techniques which will ensure that Aquashicola Creek is not degraded.

In addition, even granting that the BMPs to be used at the site do represent the best combination of techniques to prevent erosion and sedimentation from reaching the Creek and thus protecting the Creek from degradation in the form of increased sediment deposits, that does not mean that there is ABACT with respect to the broader range of parameters and concerns

which the antidegradation regulations implicate. The question of possible thermal impact of the discharge to the Creek is illustrative in this regard. Since this creek is a High Quality, Cold Water Fishery the antidegradation regulation requires that the applicant demonstrate before receiving its permit that the temperature limitations on the Creek will be maintained so as to persevere and maintain its status as a High Quality, Cold Water Fishery. Water quality criteria temperature parameters and allowable changes in temperature are set in very specific detail by 25 Pa. Code § 93.7(a). Mr. Blechschmidt, Alpine's consultant, admitted that Alpine "did not prepare a thermal analysis" of the potential impact of the discharge to the Creek in this case. 3/30/06 Blechschmidt, p. 56-57. We have no way of knowing whether the Section 93.7(a) parameters and allowances will be met.

The erosion and sedimentation control BMPs do not directly address the potential thermal impact from the discharge. As mentioned before, Chapter 102 BMPs address accelerated erosion and sedimentation. Indeed, a BMP wet pond approved for use at this site to control erosion and sedimentation, may have a tendency to exacerbate thermal pollution of the Creek. The wet pond special protection BMP intended to be used here holds water in the basin for a longer period of time than a wet pond in a non-high quality area. 3/30/06 Blechschmidt, p. 27; Alpine Ex. 52, sheet 71-80; 3/39/06 Mayer, p. 60. While this increased time in the basin allows for a longer period of time for sediment to fall out of the water, it also increases the time that the water will be exposed to the sun. As Mr. Blechschmidt admitted, the increased exposure time to the sun would heat the water in the basin because "it absorbs solar radiation." 3/30/06 Blechschmidt, p. 56; 3/31/06 Murin, p. 119.

This raises the potential that the water would be heated before discharging into the Aquashicola Creek and degrade the thermal quality of the Creek. There was testimony by Mr.

D'Onofrio that this potential would be reduced by the placement of shade trees around the ponds which might keep the water temperatures down. 3/30/06 D'Onofrio, p. 134-35. Mr. Blechschmidt testified likewise. 3/30/06 Blechschmidt, p. 56. However, Mr. D'Onofrio never followed through on this to draw any conclusions whether there would or would not be an adverse thermal impact to the Creek from the stormwater discharge. We do not credit Mr. D'Onofrio's bare "yes" response to the question "are the thermal controls (vegetation and plantings) adequate to protect and maintain the water quality of the Aquashicola?" 3/30/06 D'Onofrio, p. 139. Mr. D'Onofrio offered no basis or substantiation for that answer and it is clear that he had done no analysis or consideration of that question either at trial or when he reviewed the permit application. Likewise, as we have already noted, Mr. Blechschmidt testified that Apline conducted no thermal analysis. Also, Mr. D'Onofrio's testimony was contradicted by Mr. Murin who when asked if the trees planted near the ponds would help cast shade on the ponds, thus reducing the water temperature, answered—"I don't know if I can answer that. I'd say no. It will not necessarily reduce that temperature." 3/31/06 Murin, p. 116-17.

We do not and cannot make any finding on this open thermal impact question at this point. There is not enough evidence in the record to make any such finding even now after a full trial of the matter. What this discussion of the potential thermal impact does, though, is to demonstrate quite graphically the essence of the failure in this case of compliance with the antidegradation regulations. At this point, even after a full trial of the matter, nobody knows whether there will or will not be an adverse thermal impact on the Creek from the discharge. The antidegradation regulations require that the applicant demonstrate that there will not be an adverse thermal impact on the Creek before getting a permit.

Maintain and Protect the Existing Water Quality, 25 Pa. Code § 93.4c(b)(1)(i)(B)

The last requirement of Section 93.4c(b)(1) states, "[a] person proposing a new, additional or increased discharge to High Quality or Exceptional Value Waters, who has demonstrated that no environmentally sound and cost-effective nondischarge alternative exists under clause (A), shall demonstrate that the *discharge will maintain and protect the existing quality of receiving surface waters . . .*" 25 Pa. Code § 93.4c(b)(1)(i)(B) (emphasis added). Our discussion above sufficiently shows that this demonstration was not made in this case.

Conclusion

Based on the foregoing, we must overturn the Department's granting of this NPDES permit. Alpine did not undertake the required analyses or make the requisite showings under the antidegradation regulations. Likewise, the Department failed in its duty to assure that the permit be issued only upon the applicant's performance of the required analyses and its making of the requisite showings under the antidegradation regulations. Whether the permit would be the same after appropriate antidegradation analysis we cannot know and is not a question we can deal with or answer at the Board. For this case, the antidegradation analyses need to take place at the time of the application, before a permit is issued, to be considered by the Department in its review of the application before granting the permit. None of that took place here with respect to this permit. An appropriate order will follow.

CONCLUSIONS OF LAW

1. The antidegradation regulations outline a process and procedure which an applicant proposing a new, additional or increased discharge to High Quality or Exceptional Value Waters must follow in making certain affirmative demonstrations to the Department as a prerequisite to the Department's granting of a permit for such a new, additional or increased discharge to High

the Department's granting of a permit for such a new, additional or increased discharge to High Quality or Exceptional Value Waters. 25 Pa. Code § 93.4c(b)(1)(i)(A).

2. First, a person proposing a new, additional or increased discharge to High Quality or Exceptional Value Waters shall evaluate nondischarge alternatives to the proposed discharge and use an alternative that is environmentally sound and cost-effective when compared with the cost of the proposed discharge. 25 Pa. Code § 93.4c(b)(1)(i)(A).

3. In the event that a nondischarge alternative is demonstrated to be not environmentally sound and cost-effective, the proponent of the discharge is to show that the new, additional or increased discharge shall be subject to the best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies (Antidegradation Best Available Control Technologies or ABACT). 25 Pa. Code § 93.4c(b)(1)(i)(A).

4. Finally, a person proposing a new, additional or increased discharge to High Quality or Exceptional Value Waters, who has demonstrated that no environmentally sound and cost-effective nondischarge alternative exists, is to demonstrate that the discharge will maintain and protect the existing quality of receiving surface waters with an exception which is not relevant in this case. 25 Pa. Code § 93.4c(b)(1)(i)(B).

5. The Department must require that the applicant for a permit for a new or increased discharge into a High Quality Water undertake the requisite analyses and make the requisite showings as a precondition to granting the discharge permit.

6. The enhanced Best Management Practices provisions of 25 Pa. Code § 102.4(b)(6) do not completely incorporate the totality of the requirements of the antidegradation regulations.

7. Alpine did not make the requisite showings required by the provisions of the antidegradation regulations in connection with the issuance by the Department of this NPDES permit.

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	:	

ORDER

AND NOW this 7th day of September 2006, it is HEREBY ORDERED that the appeal of Blue Mountain Preservation Association is **sustained**. The Department's issuance of the NPDES Permit No. PAS10S119 to Alpine Rose Resorts, Inc. is **vacated**. The matter is remanded to the Department for further proceedings consistent with this opinion.

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 7, 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: September 7, 2006**

OPINION AND ORDER ON MOTION TO DISMISS OR LIMIT ISSUES

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board focuses on objective criteria in evaluating jurisdictional questions and the applicability of administrative finality, rather than the Department's institutional state of mind or the motivations behind its action. The Board denies a motion to dismiss an appeal from the reinstatement of a permit condition that had been unintentionally deleted in an earlier permitting action.

OPINION

This case involves two appeals that we have consolidated. The appeal docketed at Docket No. 2004-140-L is UMCO Energy, Inc.'s ("UMCO's") appeal from a Department of Environmental Protection ("Department") order requiring UMCO to implement a restoration plan for a stream known as the 4E/5E Stream at UMCO's High Quality Mine in Fallowfield Township, Washington County. UMCO dewatered the stream when it longwall mined beneath it. The

appeal docketed at Docket No. 2006-091-L involves a special permit condition that requires UMCO to maintain a minimum augmented flow of 25 gallons per minute at a designated downstream monitoring point in the 4E/5E Stream as part of its restoration efforts.

The special condition was originally added as part of an earlier revision to UMCO's permit in 2004. The Department accidentally deleted the special condition in the process of issuing a later permit revision that related to the construction of an unrelated treatment pond. Apparently, no one noticed the deletion. Both parties acted as if the condition was still there. UMCO continued to maintain the minimum stream flow mandated by the condition.

Many months went by. UMCO's mining engineer was the first to notice the omission. He telephoned the Department on February 1, 2006 to report the omission. The Department issued the "corrective revision" reinstating the special condition on February 3. UMCO's 2006 appeal is from that "corrective revision."

The Department has moved to dismiss UMCO's appeal. In the alternative, it asks us to preclude UMCO from challenging the terms of the special condition. The Department contends that it is entitled to relief for two reasons: First, the Board lacks jurisdiction over the appeal because a permit revision that does no more than correct a prior inadvertent clerical error is not an "agency action." Second, allowing UMCO to collaterally attack the special condition solely because of an inadvertent clerical error is prohibited by the doctrine of administrative finality.

UMCO opposes the motion to dismiss. UMCO does not so much contest the Department's version of the facts as add an additional key fact. UMCO points out that it has been complaining about the special condition almost from the day it was added. It says that the record would support a finding that the Department's decision was more than a simple correction of a clerical error. Rather, the reinstatement of the special condition represents the Department's

considered rejection of UMCO's ongoing requests to remove the condition from the permit. In reply, the Department points out that UMCO did not have a *formal* application to remove the condition pending at the time the Department accidentally deleted the condition.

It is very important to define exactly what action is being appealed. *Winegardner v. DEP*, 2002 EHB 790, 792-93. UMCO is *not* challenging the Department's first action, namely, the creation of the special condition in the first place. It is *not* challenging the Department's second action, namely, the accidental deletion of the special condition. UMCO is challenging the Department's third action, namely, the reinstatement of the condition. Therefore, whether the UMCO had a request to remove the condition pending at the time the special condition was deleted is beside the point. Similarly, the merits of creating the special condition in the first place are beside the point. It is the merit of putting the condition back into the permit despite allegedly changed circumstances that is at issue. It is the state of affairs *at the time of the reinstatement* that matters in resolving the Department's motion.

The Department's motion is grounded on the fact that the second action (deletion of the condition) was "unintentional and accidental." This appeal, however, is from the third action (reinstatement). The Department's decision to reinstate the special condition was obviously not "unintentional and accidental." Thus, to be precise, the Department would have us create an exception to our jurisdiction and apply the doctrine of administrative finality when there is a knowing and intentional Departmental action that is designed to correct for a previous unintentional and accidental action.

The Department's theory would put us on a slippery slope that we do not like. It would require an inquiry into the Department's institutional frame of mind and the motivations behind its actions. Instead of trying to decide whether the Department's actions are intentional, we

would much rather focus on objective criteria in evaluating jurisdictional questions, *Kutztown v. DEP*, 2001 EHB 1115, 1121, and the applicability of administrative finality, *Wheatland Tube Company v. DEP*, 2004 EHB 131, 137.

Jurisdiction

At the most basic level, what the Department did here was issue a permit revision. Considering the objective criteria we outlined in *Kutztown*, it is difficult to imagine circumstances where a revision of a mining permit would not constitute an adjudication or action of the Department giving rise to Board jurisdiction. *See* 35 P.S. § 7514(a) (Board has jurisdiction over "orders, permits, licenses, or decisions of the Department"); *Felix Dam Preservation Association v. DEP*, 2000 EHB 409, 421-22. The permit condition obviously affects UMCO's personal or property rights. UMCO was not required to maintain 25 gpm of flow before the reinstatement; now its failure to do so would be nothing less than a violation of its permit. Under the objective criteria set forth in *Kutztown*, a revision to a mining permit is clearly an appealable action in our view.

The Board's opinion in *Pittsburgh Coal and Coke, Inc. v. DER*, 1986 EHB 704, admittedly supports the Department's theory but it may be distinguished on the facts. In that case, the Department issued a mining permit with a term that was irreconcilable with a mine drainage permit that had been issued for the same operation. The two permits envisioned two different and inconsistent types of post-mining reclamation. The Department discovered the error and corrected the mine permit to make it consistent with the mine drainage permit. The corrective action was appealed. The Board dismissed for lack of jurisdiction. It found after taking testimony at a supersedeas hearing that the corrective action was "extremely trivial" and "nothing more than a purely ministerial act" on the part of the Department." 1986 EHB at 708,

709. The act "did not involve any exercise of discretion." *Id.*, 1986 EHB at 706. The Department's act did not affect the operator's rights because the mine drainage permit--a much more significant permit in the Board's view--was controlling both before, during, and after the correction.

In contrast to the facts in *Pittsburgh Coal and Coke*, UMCO would not have been required to maintain flow but for the special condition. The reinstatement clearly affected UMCO's rights. We also cannot comfortably conclude that reinstatement of such a permit condition is an "extremely trivial" or "purely ministerial" act. Furthermore, we are not sure that assessing whether the Department's action involved the exercise of discretion should be the operative criterion in assessing jurisdiction. This Board has jurisdiction to review the Department's nondiscretionary acts. *See Warren Sand & Gravel Co. v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975) ("If DER acts pursuant to a mandatory provision of a statute or regulation, then the only question before the Board is whether to uphold or vacate DER's action.") The details regarding the Department's exercise of discretion or performance of a mandatory duty go more to the merits than the assessment of the Board's jurisdiction.

Administrative Finality

The application of the doctrine of administrative finality also turns on objective observations, not the Department's intent. "The key question is not whether any properly requested changes were approved, it is whether they were considered and acted upon." *Wheatland Tube*, 2004 EHB at 137.

The Department says that administrative finality applies here because UMCO did not appeal the special condition when it was first added to the permit. At the time of reinstatement, the Department was merely correcting an inadvertent error. UMCO says that the Department

knew that UMCO wanted to eliminate the special condition at the time the Department reinstated it. The Department in UMCO's scenario may have been correcting an error, but it was also in effect rejecting UMCO's pending request to leave the condition out. UMCO may have a point. There was nothing compelling the Department to reinstate the special condition. Unlike the situation in *Pittsburgh Coal & Coke*, the Department was not forced to reconcile completely inconsistent permit requirements. Although the omission of the special condition may have been accidental, if the Department felt that the condition had no continuing utility, it seems that it could have simply left it out when the omission was brought to its attention.

The record is not clear at this point as to whether UMCO can fairly be said to have had any requests, let alone a formal request, pending to eliminate the condition at the time of reinstatement. UMCO points to ongoing discussions it had with the Department employees as embodying continuing requests to delete the condition. The Department disputes UMCO's version of the conversations in its reply memorandum, but this is the sort of "he said/she said" dispute we will not resolve in the context of a motion to dismiss. The more intriguing question is exactly what sort of request must be pending to trigger the active sort of consideration that prevents the application of administrative finality. In *Wheatland Tube*, we stated that the Department must be acting upon "properly requested changes." 2004 EHB at 137. The ongoing discussions relied upon by UMCO may or may not be enough, but we need to defer resolution of the issue until we develop a more complete record.

The Department protests that UMCO should not be permitted to collaterally attack the merits of the original decision to create the special condition. The Department is correct, but again, that is not what UMCO is challenging here. UMCO's challenge is to the reinstatement. Its case is that the condition may have been justified when originally established, but was *no*

long necessary at the time of the reinstatement. (UMCO Memorandum at 10, 11.) The Department has moved to limit issues that UMCO has not tried to present.

UMCO accurately points out that little would be gained by dismissing UMCO's appeal at this time. The appeal from the special condition has been consolidated with the appeal from the Department's original order to restore the stream. The order effectively requires flow augmentation and the special condition defines the minimum amount of flow augmentation. Both appeals are going to trial presently. There is an obvious overlap of facts and law between the two cases, both of which address UMCO's obligations vis-à-vis the 4E/5E Stream. Resolution of the 2006 appeal will not take much incremental effort. We would also observe that it is difficult to see how the pendency of 2006 appeal is having any practical effect. The condition remains in place. It has not been superseded. There is some indication in recent filings, however, that the Department is not enforcing the condition. Still further, UMCO currently has a formal application pending to delete the condition. The Department concedes that the application is an appropriate vehicle for raising the issue. (Reply Memorandum at 7.) The Department has indicated that it will act upon that application, and its action will undoubtedly constitute an appealable act.

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 7th day of September, 2006, it is hereby ordered as follows:

1. The Department's motion to dismiss for lack of jurisdiction or in the alternative to limit issues is denied.

2. UMCO's motion to hold the Department's motion in abeyance pending further discovery is denied.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: September 7, 2006

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JOHN M. GERA	:	
	:	
v.	:	
	:	**EHB Docket No. 2005-067-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JOHN W. RICH, PRESIDENT, WMPI PTY., LLC, Permittee	:	**Issued: September 8, 2006**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

By George J. Miller, Judge

Synopsis

The Board grants a motion for summary judgment where the Department successfully demonstrated that the appellant had no evidence to support his claims that the Department improperly issued an air quality plan approval or engaged in fraudulent and deceptive activity in granting that approval. We also deny the appellant's motion for summary judgment because he failed to demonstrate that the proposed facility will emit toxic substances or that the Department was required to consider emissions from other facilities. The appellant also failed to adduce evidence to support his bare claim that the Department acted fraudulently or with a purpose to deceive the public in the plan approval process.

OPINION

Before the Board are motions for summary judgment filed by both the Appellant, John M. Gera, and also the Department of Environmental Protection and the Permittee, WMPI PTY., LLC. As we explain in more detail below, we must grant the Department's motion and dismiss the Appellant's motion.

On April 15, 2005, the Appellant[1] filed an appeal from the Department's issuance of an air quality plan approval for the construction and temporary operation of a coal-based liquid fuels production facility in Mahanoy and West Mahanoy Townships, Schuylkill County. The Appellant's complaints are that the Department failed to consider adequately the cumulative impacts of emissions from the proposed plant in view of emissions from other facilities in the area; that emissions from the facility are toxic; that the air monitoring site relied upon by the Department was inappropriately located; and that the Department failed to disclose salient facts about the proposed project to the public in responding to comments made at a public meeting. The Appellant accuses the Department of "deceptive and fraudulent means in granting permits, tampering with evidence, making false misleading statements, falsified documents [sic], negligence, corruption, conspiracy and abuse of power, etc." The ultimate relief the Appellant requests in both his notice of appeal and motion is that we disband the Department.

After the close of discovery the Appellant filed a motion for summary judgment. The focus of the motion is what he believes is corruption of the Department and its failure to carry out its mission to protect the environment. Specifically he charges that the

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[1] Although the Appellant requested *pro bono* counsel, he was unable to secure representation and elected to proceed *pro se*.

Department "knowingly placed and are using an air monitoring site . . . that is deceptive because it sits upwind of the cogens."; that the Department provided deceptive answers to comments made at a public meeting and fraudulently altered the comment/response document after he filed his appeal and objected to the fact that his comments were not included in that document. The Appellant further complains that the Department tampered with evidence by removing an air monitor at the Mahanoy Sewage Treatment Plant. In support of his claims, the Appellant includes a videotape; a portion of a site map; a portion of a draft environmental impact statement for a "Gilberton Coal-to-Clean-Fuels and Power Project"; a newspaper article; and a copy of a comment/response document prepared by the Department.

The Department also seeks summary judgment in its favor. It argues that the Appellant can not prevail on the substantive issues raised concerning the plan approval because he has no expert evidence to support his technical claims, the Appellant's allegations of fraud and deception are unsubstantiated and that the Board does not have the authority to grant the relief that the Appellant requests. Therefore, according to the Department, the Appellant can not sustain his burden of proof and his appeal should be dismissed.

Standard for Summary Judgment

The purpose of summary judgment is to challenge the sufficiency of the evidence that the opposing party has to support his claim at hearing.[2] Accordingly, the Board will only grant summary judgment where the evidentiary materials which support the motion

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[2] *Scalice v. Pennsylvania Benefits Trust Fund,* 883 A.2d 429 (Pa. 2005); *Jones v. SEPTA*, 772 A.2d 435 (Pa. 2001); *Jackson v. DEP*, 2005 EHB 496.

demonstrate that the moving party is entitled to judgment as a matter of law.[3] Evidentiary material in support of a motion or response must be admissible at a hearing in accordance with the Pennsylvania Rules of Evidence which, in a jury trial, would require the issues to be submitted to a jury.[4] Such materials may include pleadings, depositions, answers to interrogatories, admissions of record and affidavits based on personal knowledge.[5] Documentary evidence outside of the record must be presented by means of a properly sworn affidavit or one of the other materials from the record.[6]

A party opposing a motion for summary judgment may not rest on mere denials of the averments in the moving party's motion:

> [T]he opposing party must do more than allege unsupported allegations. Bald allegations are insufficient to create an element necessary for a prima facie case. Neither can bald, conclusory allegations create genuine issues of material fact.[7]

With these principles in mind we turn our attention to the motions before us now.

The Motions

In this matter, the Appellant bears the burden of proof.[8] Accordingly, in order to prevail on his motion, he must demonstrate that there is no genuine issue of material fact in dispute and that we can conclude as a matter of law, based on the record, that the Department's action in granting the plan approval was unreasonable or not in accordance

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[3] *E.g. Global Ecological Services, Inc. v. Department of Environmental Protection,* 789 A.2d 789 (Pa. Cmwlth. 2001); *Barra v. DEP*, EHB Docket No. 2003-038-L (Opinion issued April 24, 2006).

[4] Pennsylvania Rule of Civil Procedure (Pa. R.C.P. No.)1035.2(1); *Jackson,* 2005 EHB at 499.

[5] *See* Pa. R.C.P. No. 1035.1; 25 Pa. Code § 1021.94a(2)(d).

[6] *Farmer v. DEP*, 1998 EHB 1306; *City of Scranton v. DEP*, 1997 EHB 985.

[7] *Golaschevsky v. Department of Environmental Resources*, 683 A.2d 1299, 1302 (Pa. Cmwlth. 1996), *affirmed,* 720 A.2d 757 (Pa. 1998)(citations omitted.).

[8] 25 Pa. Code § 1021.122(c)(2).

with the law. The Appellant also charges the Department with fraud and deception. If proven, such activity on the part of the Department may be relevant in determining whether its action in granting the plan approval was appropriate.[9] Similarly, to prevail on its motion, the Department must demonstrate that the Appellant has insufficient evidence or fails to state a claim upon which we could grant him relief.[10]

In his motion and notice of appeal, the Appellant makes sweeping statements that the Department employed fraudulent means in granting the plan approval and fraudulent means and criminal means in defending the permit. Specifically, he contends that an air monitoring site was inappropriately placed, that another was improperly removed, and that the Department deliberately failed to include his comment made at a public hearing in a comment/response document.

In the Department's motion, it contends that the plan approval was properly issued in accordance with the regulations and that the Appellant can not substantiate any of his claims of fraud, nor can he support the technical allegations in his notice of appeal because he has no relevant, admissible evidence to present, expert or otherwise. Accordingly, in the Department's view we must dismiss the Appellant's appeal.

The Shenandoah Monitor and Emission-related Challenges

The Appellant argues that the Department relied upon an air monitor it knew to be upwind from the Permittee's proposed facility. The Appellant implies that the Department's purpose for doing so was to obfuscate "toxic" emissions from the

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[9] *Cf. Defense Logistics Agency v. DEP*, 2000 EHB 987(evidence of bias or ill-will by the Department may be relevant in a *de novo* hearing before the Board).

[10] Pennsylvania Rule of Civil Procedure No. 1035.2(2).

Permittee's facility and other permitted facilities in the area that are emitting "toxic" substances.

In the Department's motion it contends that this monitor, the Shenandoah monitor, is irrelevant because it was not used in the Permittee's plan approval. Since the Permittee's proposed facility is not a "major emitting source" it was not required to consider emission data from other facilities. The Department further contends that the Appellant has no evidence from the plan approval to establish any claims that the emissions from the Permittee's facility or any other facility in the area are "toxic."

There is no dispute that there is an air monitor located in Shenandoah, Schuylkill County. The Appellant argues that the Department acted fraudulently because this monitor is located upwind of the proposed facility, therefore it can not demonstrate an exceedance of any ambient air quality standard. The Appellant supports this claim with a videotape purporting to demonstrate the wind direction in the vicinity of the monitor on a succession of days, and a quote from a draft environmental impact statement by the United States Department of Energy.[11] This point is important to the Appellant because an allegation in his notice of appeal is that the Department should not have issued this plan approval because there are eight other facilities in the area that are emitting "toxic pollutants". Therefore the Department's statement at the public hearing for this plan approval that no ambient air quality standard will be impacted by the facility proposed by the Permittee is, according to the Appellant, "deceptive and fraudulent." The Appellant

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[11] Appellant's Exs. 1 and 2. We recognize that the Appellant's exhibits are not properly part of the record or are inadmissible hearsay. We consider them solely for the purpose of disposing of these motions. 25 Pa. Code § 1021.4.

contends that the Department specifically placed this monitor upwind in order to give false data.

The Permittee and the Department[12] do not challenge the Appellant's position that the monitor is located upwind of the proposed facility. However, in their view the location of the monitor is not relevant to the propriety of the issuance of the plan approval. Karen Gee, a Department air quality program specialist, explains in her affidavit[13] that the Shenandoah monitor is a hi-vol monitor which measures ambient pollutant concentrations for CO and SO_2 as part of the Commonwealth of Pennsylvania Air Monitoring System (COPAMS). It was installed independently of and prior to the submission of the plan approval application for the Permittee's proposed facility. Data from this monitor was not considered as part of the plan approval.

The Department further contends in its motion that the proposed facility is not a "major emitting facility" or "major stationary source" as defined by the regulations.[14] Therefore the Department was not required by law to consider emissions from other facilities. The fact that there are other facilities located near to that proposed by the Permittee is insufficient by itself to deny the Permittee's application. The Appellant has no emission or other air quality data either from the plan approval, or from any of the other facilities which suggests that any emissions are "toxic" or that the cumulative effect of emissions from the Permittee's facility will cause any exceedance of a relevant air quality standard. In his response the Appellant merely repeats the broad allegations of his

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[12] The Permittee filed a response to the Appellant's motion which the Department joined. The Department filed the cross-motion for summary judgment in which the Permittee joined.

[13] Permittee Response Ex. A; Department Motion Ex. K.

[14] Department Motion Ex. H (Affidavit of Shailesh Patel).

motion and notice of appeal, but points to nothing that directly refutes the technical position of the Department. Nor does the Appellant point to any legal authority which suggests that the Department incorrectly applied the Clean Air Act, the Air Pollution Control Act or the regulations pertinent to those statutes.

We can not grant judgment in the Appellant's favor. His videotape, submitted as an exhibit to his motion, does purport to show the direction of the wind on a succession of days. However, the Appellant fails to explain what data from the monitor the Department was required by law to consider. Not only are we unable to conclude that the placement of an air monitor upwind of the proposed facility was an abuse of discretion on the part of the Department, we are also not able to conclude that any fraud or improper purpose was involved. Since the monitor was placed at its location independently of the plan approval application and was not considered or relied upon by the Department when it decided to approve the application, there is no basis, other than the Appellant's bald accusations, upon which to conclude any fraud or deceptive conduct.

We also must conclude that the Appellant has no basis upon which to prevail at a hearing because he has no admissible evidence to support his claims. The Appellant offers no scientific support for his contention that the Shenandoah air monitor was inappropriately located as a technical matter. In his view he does not need expert testimony because "one does not need scientific, technical or other specialized knowledge to review documents, papers evidence like Exhibit 8, 9 or (Exhibit 6, attached, title: Table 78 – Occupational Health Effects of Constituents of Indirect Liquefaction Process Streams) . . . If the Court still needs to hear it from an expert, Gera will give it to the DEP

Expert to read."[15] Appellant's Exhibit 8 appears to be an excerpt from a newsletter and Exhibit 9 is a table created by the Schuylkill Taxpayers Opposed to Pollution. Not only are these materials inadmissible hearsay, but they are insufficient to resist the Department's motion, even if we could consider them.[16] The Appellant has not presented any evidence to connect this information, if true, specifically to the Permittee's proposed facility. He includes no data from the plan approval which states that any of these constituents of concern will be emitted from the Permittee's facility and in what concentrations.

Similarly, the placement of the monitor by itself is insufficient to prove fraud or deception. The Shenandoah monitor was placed at its current location before the Permittee submitted its plan approval application.[17] Although the Department's responses to comments expressing concern regarding emissions in the area were brief and did not go into great detail concerning the details of the plan approval requirements, principles of the Prevention of Significant Deterioration (PSD) program or attainment areas, we do not find anything patently untruthful on the part of the Department. The substance of the Department's comments are simply that it does monitor the air quality of the area as a general matter and that there was nothing about the proposed emission control technology

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[15] Appellant's Memorandum of Law Contra to Department's Motion for Summary Judgment at p. 3, ¶ 4. (Emphasis omitted).

[16] In its reply brief, the Department states that these documents were within the ambit of discovery requests directed to the Appellant and that they were not turned over during discovery. As the Department correctly points out, our rules of procedure require that all documents which will be used in a hearing to support a party's case-in-chief must be properly identified during discovery. Failure to do so generally results in a sanction including the exclusion of such documents. 25 Pa. Code § 1021.161; *DEP v. Dotan*, 2005 EHB 416.

[17] Department Motion Ex. K (Affidavit of Karen Gee).

proposed by the Permittee that gave it any reason to believe that any areawide emission requirement might be exceeded.

Removal of the Mahanoy Monitor

The Appellant also contends that the Department acted criminally when it removed a monitor at the Mahanoy Sewage Treatment Plant during the discovery period of this matter and that the Department's counsel was deceptive by professing to have no knowledge of this monitor in a telephone conversation with Department counsel. The Department and the Permittee do not dispute that the air monitor was removed, but contend that the monitor was not functional at the time of the plan approval process and was not functional when it was removed. It was not related to the plan approval.[18] The Appellant appears to concede that the monitor was not functioning at the time the plan approval was under consideration.[19]

Precisely the nature of the misunderstanding which must have occurred between the Appellant and the Department's counsel is less than clear from the motions and responses before us. The Appellant claims that he was told that the Department had no knowledge of the monitor. Counsel says that he explained the purpose of the monitor and the circumstances related to its removal to the Appellant. However, even if Department counsel provided the Appellant with information which was not completely accurate, we do not believe that this rises to a systemic indictment of the Department's permitting process in general, or calls into question the integrity of this plan approval in particular. There is nothing presented by the Appellant which proves the very serious accusation that

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[18] Affidavit of Karen Gee, Response, Ex. A; Department Motion Ex. K.
[19] Appellant Response at p. 2.

Department counsel was deliberately deceptive other than his unsubstantiated claim that this is so. Further, the Appellant has agreed that the Department did not use this monitor for any purpose since it was not functioning. Yet, his position is that the Department must explain why it did not use this monitor and or another non-functioning monitor at the Mahanoy Prison.[20] To the contrary, it is the Appellant's burden to present evidence that the removal of the air monitor was for an improper purpose.

The Department has established two points that have not been refuted by the Appellant: 1) the Department was not required to consider ambient air monitoring data because the proposed facility was not a major source; and 2) the monitors were not functioning during the plan approval process. At a hearing on the merits, it would be the Appellant's burden of proving that the Department should have considered data from these monitors and that had the Department considered that data, it would likely have arrived at a different conclusion and denied the Permittee's plan approval application. Accordingly, in order to resist the Department's motion he must provide some admissible evidence that might establish this claim. But the Appellant has not provided any potentially admissible evidence from the record to support such a claim, nor has he provided any potentially admissible evidence from the record or discussion of air pollution law in response to the Department's motion, that provides us with any hope that he could establish a prima facie case on the merits of this issue.

The Comment/Response Document

A public hearing on the proposed plan approval was held on January 18, 2005. Thereafter the Department generated a comment/response document which recorded

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[20] *Id.*

comments made during the hearing and the Department's written response to those comments.

The Appellant contends that the plan approval should be rescinded because the Department deceptively and with a fraudulent purpose did not include his comments in the comment/response document after the public hearing on the plan approval application, but added them later for the purpose of his deposition. The Department does not dispute that there are two versions of the comment/response document, one which includes the Appellant's comments and one which does not. In the Department's view, this is not evidence of fraud on the part of the Department and is not a sufficient basis upon which to grant summary judgment.

The Department does not explain when or under what circumstances the Appellant's comments were added to the original comment/response document and presented to the Appellant without explanation at his deposition.[21] This presentation of a different version of the document strikes us as a potentially "sharp practice" on the part of the Department that may be unacceptable.

However, we are also unclear why the existence of two comment/response documents is relevant to the issue of whether or not the Department appropriately issued the plan approval or rises to the level of fraud. The Appellant does not cite any legal authority which requires the Department to rely on any specific comment made at a public hearing and recorded in a comment/response document when granting a plan approval. Therefore, even if the Appellant's comment was included in the original document, we have no basis upon which to find that the Department would have denied

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[21] Department Motion, Ex.B at pp. 23-26 (Gera Deposition transcript).

the plan approval had they properly considered it, particularly in view of other similar comments.

In short, we find that the Department has satisfied its burden of demonstrating that the Appellant can not sustain his burden of proof because he has failed to put forth evidence that would support the claims made in his notice of appeal. Therefore we must grant the Department's motion and dismiss the Appellant's appeal.[22]

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[22] In addition to the motion for summary judgment, the Appellant also filed a motion for oral argument and a motion for a site view. In view of our rulings on the motions for summary judgment, we need not reach the merits of these motions.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN M. GERA	:	
	:	
v.	:	
	:	**EHB Docket No. 2005-067-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JOHN W. RICH, PRESIDENT, WMPI PTY., LLC, Permittees	:	

ORDER

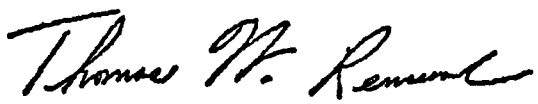
AND NOW, this 8th day of September, 2006, upon consideration of the motions for summary judgment and the responses thereto in the above-captioned appeal, it is hereby ordered that:

1. The motion for summary judgment of John M. Gera is hereby **DENIED**.
2. The motion of the Department of Environmental Protection is hereby **GRANTED**.
3. The appeal of John M. Gera is **DISMISSED**.

ENVIRONMENTAL HEARING BOARD

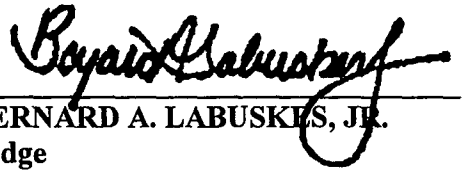
MICHAEL L. KRANCER
Chief Judge and Chairman

GEORGE J. MILLER
Judge



THOMAS W. RENWAND
Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

DATED: September 8, 2006

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

ZACHARY S. ZAZO	:
	:
v.	:
	: EHB Docket No. 2005-217-MG
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SELVAGGIO ENTERPRISES, INC., Permittee	**: Issued: September 13, 2006**

OPINION AND ORDER ON MOTIONS FOR SANCTIONS

By George J. Miller, Judge

Synopsis

The Board grants motions for sanctions filed by the Department and the permittee where the appellant failed to file a pre-hearing memorandum. Although the appellant did file an answer to a rule to show cause issued by the Board, that answer did not provide a reasonable excuse for failing to file his pre-hearing memorandum, but merely repeated the objections of his notice of appeal.

OPINION

Before the Board are motions for sanctions filed by the Department of Environmental Protection and Selvaggio Enterprises, Inc. (Permittee), which seek dismissal of an appeal by Zachary S. Zazo (Appellant) for failing to file a pre-hearing

memorandum by the date required by the Board. As we explain below, we will grant the motions and dismiss the Appellant's appeal.

On July 5, 2005, the Appellant filed an appeal objecting to the Department's issuance of an NPDES permit to the Permittee for the discharge of stormwater from construction activities at the Yeker Farms residential development in Salisbury Township, Lehigh County. Shortly thereafter, the Appellant requested *pro bono* counsel. In December 2005, the Board granted the Appellant a 90-day extension of pre-hearing deadlines in order to provide him with an opportunity to secure counsel. In February 2006, at the request of the Appellant, an additional extension was granted. The Appellant was unable to secure counsel, but elected to proceed *pro se*. After a conference call with the parties, the Board issued an order dated May 8, 2006, scheduling a hearing on the Appellant's appeal for August 1, 2006 and required the Appellant to file his pre-hearing memorandum by June 8, 2006. That order detailed the requirements of what must be included in a prehearing memorandum:

A. A statement of facts in dispute and the facts upon which the parties agree.

B. A statement of the legal issues in dispute, including citations to statutes, regulations and case law supporting the party's position.

C. A description of scientific tests upon which the party will rely and a statement indicating whether an opposing party will object to their use.

D. A list of all expert witnesses and indicate whether their qualifications will be challenged.

E. A summary of the testimony of each witness or a report of the expert as an attachment.

F. A list of fact witnesses which each party intends to call. The list shall include the full name and address of each witness.

G. The proposed order of witnesses.

H. A list of exhibits the party seeks to introduce into evidence and a statement indicating whether the opposing party will object to their introduction. Copies of these exhibits shall be attached. All documentary evidence shall be numbered and marked in order to allow for expeditious offering into evidence.

I. Signed copies of any stipulations reached by the parties.

The Appellant failed to file his pre-hearing memorandum by June 8, 2006. He was contacted by Board staff and represented that he would submit his pre-hearing memorandum by June 19, 2006. He did not file his pre-hearing memorandum by June 19. He was again contacted by Board staff and informed the Board that he would be withdrawing his appeal in the next few days. When the Board did not receive written confirmation of his withdrawal, he was again contacted by the Board and again told Board staff that he would be withdrawing his appeal.

The Board did not receive a letter from the Appellant confirming the withdrawal of his appeal, nor did the Board receive a pre-hearing memorandum. Accordingly, on July 3, 2006, the Board issued a rule to show cause which cancelled the hearing scheduled for August 1, and directed the Appellant to show cause why his appeal should not be dismissed on or before July 10, 2006. By letter dated July 10, 2006, the Appellant informed the Board that he believed that his appeal had merit, but that he was not able to secure counsel to represent him. He described his objections to the Department's issuance of the permit, but did not provide the Board with a reason why he did not file his pre-

hearing memorandum as required by the Board's May order, other than his lack of representation. Accordingly, both the Department and the Permittee filed motions for sanctions in the form of dismissal on July 13 and July 17, respectively. To date, the Appellant has not responded to the motions for sanctions.

It is well-settled that the Board has the authority to dismiss an appeal as a sanction for failing to obey 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.)[1]

Accordingly, the Board has on several occasions dismissed appeals as a sanction for failing to file a pre-hearing memorandum.[2] Most recently in *Hollobaugh v. DEP*,[3] the Board dismissed the appeal of a *pro se* appellant because he failed to file a response to a motion to dismiss by the Department which sought dismissal as a sanction for failing to respond to discovery. The Board directly ordered a response to the motion to dismiss. Rather than filing a response, the appellant submitted a short letter simply stating that he had no attorney but felt that he deserved "to have his say." The Board nevertheless

---

[1] 25 Pa. Code § 1021.161; *RJM Manufacturing Inc. v. DEP*, 1998 EHB 436. The Board has also recently dismissed an appeal for failing to comply with orders of the Board, signifying an intent not to pursue an appeal. *Swistock v. DEP,* EHB Docket No. 2005-158-MG (Opinion issued June 29, 2006); *see also Sri Venkateswara Temple v. DEP*, 2005 EHB 54.

[2] *Hollobaugh v. DEP*, 2003 EHB 720; *Potts Contracting Co. v. DEP*, 1999 EHB 958; *Yourshaw v. DEP,* 1998 EHB 1063.

[3] 2003 EHB 720.

dismissed his appeal, noting that "[a]llowing Mr. Hollobaugh to proceed with the hearing, having filed no pre-hearing memorandum outlining the factual issues in dispute, would clearly result in prejudice to the Department."[4]

We are faced with very similar circumstances here. While we are not unsympathetic to the Appellant's unsuccessful attempts to secure representation, he is not excused from following the procedures of the Board by his status as a *pro se* appellant.[5] In this matter the Board provided the Appellant with nearly a year to obtain representation. However, we can not allow the Appellant to continue to pursue his appeal if he is not going to follow the rules of procedure and file his pre-hearing memorandum when required by the Board to do so. The pre-hearing memorandum is an essential part of the preparation for a hearing. It advises both the Board and the opposing parties of the details of the evidence supporting the appellant's claim so that surprise at the hearing will be eliminated. The Appellant's answer to the rule to show cause does not provide a reason why he could not file his pre-hearing memorandum. As set forth above, the requirements for the pre-hearing memorandum are described by the Board in language that any lay person can understand. Further, his failure to answer the motions for sanctions evidences his intent to not pursue his appeal. Accordingly, we have no choice but to dismiss his appeal in accordance with important Board requirements.

We therefore enter the following:

---

[4] 2003 EHB at 722.

[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 Tassel v. DEP*, 2002 EHB 625.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ZACHARY S. ZAZO	:	
	:	
v.	:	
	:	**EHB Docket No. 2005-217-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SELVAGGIO ENTERPRISES, INC.,Permittee	:	

ORDER

AND NOW, this 13th day of September, 2006, the motions for sanctions filed by the Department of Environmental Protection and Selvaggio Enterprises, Inc. in the above-captioned matter are hereby **GRANTED**. The appeal of Zachary Zazo is hereby **DISMISSED**.

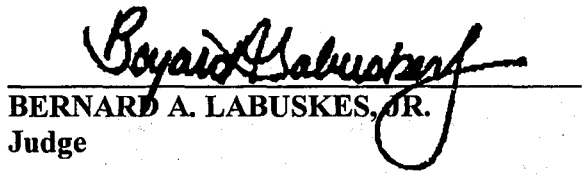
ENVIRONMENTAL HEARING BOARD

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: September 13, 2006

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

LOWER SALFORD TOWNSHIP AUTHORITY AND UPPER GWYNEDD-TOWAMENCIN MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2005-100-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 19, 2006**

OPINION AND ORDER DENYING THE DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Board denies the Department of Environmental Protection's (Department or DEP) motion for summary judgment which argues that the Board has no jurisdiction over a challenge to the Skippack Creek Total Maximum Daily Load (TMDL). DEP argues that because the TMDL is the federal Environmental Protection Agency's (EPA) action and not the Department's action the Board has no jurisdiction. The Department is not entitled to judgment as a matter of law, because there is a question whether the law provides that the TMDL be considered the state's action, regardless of which agencies did what particular work associated with the

development of the TMDL. Also, there are many disputed factual issues regarding which agency did what and the ultimate impact of findings to be made in that regard.

Introduction

The pending Department Motion for Summary Judgment and this Opinion and Order thereon is really the sequel to the Department's Motion to Dismiss (MTD) and the Opinion and Order denying same issued on October 25, 2005. *Lower Salford v. DEP*, 2005 EHB 854, *petition for reconsideration and to amend order to allow interlocutory appeal denied*, 2005 EHB 893, *petition for review denied*, 2477 CD 2005 (Pa. Cmwlth., January 9, 2006) (MTD Opinion). The factual and statutory background for this appeal of the Skippack Creek TMDL is provided in the MTD Opinion and we will not repeat it here. Then *via* Motion to Dismiss and now *via* Motion For Summary Judgment, the Department claims that we have no jurisdiction to hear this challenge to the Skippack Creek TMDL because the action is the federal EPA's, not the Department's.

Our MTD Opinion commented that there could be no decision at that stage of the open factual question whether it was DEP or EPA which, in fact, did the work making this TMDL and whose TMDL it was. DEP's Motion For Summary Judgment focuses on that aspect of the MTD Opinion. DEP has bolstered its Motion to Dismiss by adding very substantial factual development from what it had presented then. DEP's Motion For Summary Judgment is its Motion to Dismiss "supersized."

DEP still relies heavily on the Affidavit of EPA employee Mr. Henry, as it did in its Motion to Dismiss. However, from being only four paragraphs on two pages in DEP's Motion to Dismiss, the Henry Affidavit has blossomed into 53 paragraphs on ten pages with 35 attachments, being over three inches thick. DEP also relies for support on parts of the transcripts

of the depositions of Mr. McDonnell, Ms. Fields, Mr. Everett, Mr. Stoe, Ms. Fields, Mr. Brown, and Dr. Carrick. Appellants have done likewise. They do not proffer Mr. Henry but they, like DEP, proffer the testimony of Mr. McDonnell, Ms. Fields, Mr. Everett, Mr. Stoe, Ms. Fields, Mr. Brown, and Dr. Carrick.

It turns out that the question of which agency did what work on this TMDL and what it means to have done such work is quite complicated and convoluted. There is no simple compact answer. We agree with Appellants, though, that the summary judgment record shows that the Department's involvement with the development of this TMDL was considerably more pervasive and potentially overarching than was apparent at the motion to dismiss stage. The development of this TMDL was a multi-faceted process involving various people and various companies who did various things at various times under various contracts being funded from various sources.

Our MTD Opinion had another aspect. We noted that the Clean Water Act is quite specific in its dictate that the states, not the federal government, have the obligation to promulgate TMDLs. The federal EPA is to step in to promulgate TMDLs if and only if a state defaults on that obligation. Thus, the law itself might require that this TMDL be considered as the state's action regardless of whether contractors or other regulatory agencies were involved in doing some of the work. Appellants have so argued.

We will divide our discussion, then, into two parts. First, we will discuss the question of whether the law attaches this TMDL to DEP. Then we will discuss the more purely factual matters which the parties have addressed as they impact the viability of the pending Motion for Summary Judgment. Both analyses lead to the same conclusion, namely that the Department is not entitled to summary judgment.

I. The Skippack TMDL is DEP's Action By Operation of Law

We have always held that the statutory and regulatory context of a matter is a very important factor in determining whether we have an appealable action. *Corco Chemical Co. v. DEP*, 2005 EHB 733, 735; *Neville Chemical Co. v. DEP*, 2003 EHB 530, 536; *Walter Schneiderwind v. DEP*, 2003 EHB 274, 300; *Beaver v. DEP*, 2002 EHB 666, 673; *County of Berk v. DEP*, 2002 EHB 77, 82; *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121. In this case the statutory and regulatory context of the matter at hand commands our having jurisdiction.

We demonstrated in detail in our MTD Opinion that the Clean Water Act squarely and unequivocally places on the states the mandatory duty and responsibility to promulgate TMDLs. If, and only if, the state defaults in that obligation is EPA required or even allowed to promulgate a TMDL. This, we said, raised at least a factual question whether it actually was DEP that promulgated the TMDL in this case. We said in the MTD Opinion that,

> When the law, regulation and source documents all indicate that it should have been party X who was to do something and those documents do not on their face or as a matter of law conclusively show that party X did not do that something, then it becomes a question of fact whether party X did that something. The answer to that question is the essence of the jurisdictional question before us.

Lower Salford v. DEP, 2005 EHB 854, 862. We would refine that point to provide as follows: when the law, regulation and source documents all place on party X, not party Y, the mandatory duty to do something, and Y may only do that something if and only if X defaults, and not even party X alleges that it defaulted, then that something, when done, must be X's by law. In our case, X is DEP, Y is EPA and the TMDL is the "something" which was required to be done.

Thus, the after the fact parsing out and identification of which agency, which agency's employees and which agency's contractors did what on behalf of whom with respect to this TMDL and who paid for what would not even be a relevant inquiry into the bottom line question

of whose TMDL this is. The law attributes this TMDL as being DEP's action regardless of what division of labor DEP and EPA and their respective agents, employees and contractors may have agreed to in its construction. The law, in this case the Clean Water Act, assigns ownership of and responsibility for this TMDL to DEP as being its action. 33 U.S.C. § 1313(d)(1)(c), (d)(2). The Clean Water Act puts the sign "the buck stops here" on DEP's desk when it comes to this TMDL.

The TMDL, being DEP's TMDL as a matter of law, means that the Board has jurisdiction. Certainly, the Department's motion, which to be granted, would require us to conclude beyond doubt that the TMDL is not DEP's TMDL, and that DEP is entitled to judgment on that question as a matter of law, cannot be granted since we cannot so conclude.

The cases DEP cites actually support Appellants' theory of the case. The Department cites *Miller & Son Paving, Inc. v. Pennsylvania Historical and Museum Commission*, 628 A.2d 498 (Pa. Cmwlth. 1993), *appeal denied* 641 A.2d 590 (Pa. 1994), and *Sarah A. Todd Memorial Home v. Commonwealth, Department of Health*, 410 A.2d 404, 405 (Pa. Cmwlth. 1980), as analogous to this case and supporting a conclusion that the action here must be a federal action over which we have no jurisdiction. Those cases support the opposite conclusion. Indeed, both cases are the obverse of the situation at hand and lead to the conclusion that this TMDL is a Department action.

In *Miller*, federal law designated the federal National Park Service (NPS) as the agency with the responsibility for the designation of a property on the National Register of Historic Places (Register). The Pennsylvania Historic and Museum Commission (Pa. Commission) approves and certifies any particular place for nomination for inclusion on the Register. In *Miller*, Miller appealed from the Pa. Commission's certification of nomination. The Pa.

Commission argued in support of its motion to quash the appeal that the Commonwealth Court lacked jurisdiction because the matter was governed by federal statutes and implementing regulations and federal law placed on the NPS the responsibility for placement of any property on the Register. The Court agreed, saying that the Pa. Commission's action was not a final agency action because the final decision on inclusion on the Register rested with the federal government. *Miller*, 628 A.2d at 501.

The *Sarah Todd* case, which DEP points out in its brief was cited by the *Miller* Court, is the same. There, federal law placed the responsibility for determining whether a nursing home project qualified for "need approval" on the federal government acting through the Secretary of Health, Education and Welfare. The state was assigned the role of determining whether a project should be recommended for a "need approval." In *Sarah Todd*, the state determination was held not to be appealable because, among other things, the ultimate responsibility for determining "need approval" was upon the federal government. *Sarah A. Todd*, 410 A.2d at 404-05.

Our case is the obverse of *Miller* and *Sarah Todd* and shows that this action is state action and appealable as such. Here, the ultimate mandatory responsibility under both federal law and the Consent Decree for promulgation of the TMDL for Skippack Creek is placed on the state government, *i.e.*, the Department. As we already have noted, not even the Department argues that this mandatory responsibility has been superseded or displaced. Thus, under the logic and analysis of *Miller* and *Sarah Todd*, the TMDL is state action and, as such, we have jurisdiction.

II. Disputed Issues of Fact Regarding Whether DEP, In Fact, Promulgated This TMDL

Even if the who did what for whom and who paid for it questions are relevant to our jurisdictional question, the record which the parties have developed during summary judgment

motion practice shows us that there are many issues of disputed fact on those questions. On the Appellants' side of the ledger, there is sufficient evidence in the record to support conclusions that: (1) Dr. Hunter Carrick developed the phosphorous endpoint input to the TMDL; (2) he did so (a) under contract with the Department, (b) working for the Department, (c) answerable to the Department and, (d) under the Department's sole supervision with no oversight or involvement by EPA; (3) the contract was funded by the Department; (4) the Department, without EPA, or with EPA as "nothing more than a bystander", (Appellants' Response Brief, p. 29), deliberated over and established the phosphorous endpoint without consultation with or input from the EPA; (5) the phosphorous endpoint was selected solely by DEP; and (6) the TMDL is the dependent product of the phosphorous endpoint such that establishment of the phosphorus endpoint is tantamount to establishing the TMDL. These conclusions, or potential conclusions, come from the deposition testimony of Mr. McDonnell, Ms. Fields, Mr. Everett, Mr. Stoe, Ms. Fields, Mr. Brown, and Dr. Carrick. Appellants claim that these conclusions, or potential conclusions, show that the TMDL is DEP's, not EPA's.

DEP disputes most or all of these points with contrary evidence. DEP suggests contrary interpretations of the evidence and contrary conclusions based on its view of the evidence. DEP characterizes its input and participation as "subordinate" and "advisory" as merely "limited to data collection from existing files" and "just data transfer." DEP Brief., p. 4, 18. DEP, using the Henry Affidavit and parts of deposition transcripts, says it was EPA's contractor, Parsons, who controlled and directed the TMDL development process. It disputes how, by what process, and under whose control, the phosphorus endpoint came to be selected. DEP says that it "most emphatically does NOT agree that the record shows that Dr. Carrick 'selected the phosphorus endpoint that he deemed suitable' or that 'the phosphorus endpoint was derived by Dr. Carrick.'"

DEP Reply Brief, p. 5 (all caps in original). DEP insists that the phosphorus endpoint was selected by EPA, not DEP, and that the phosphorus endpoint was not entirely based on Dr. Carrick's work anyway. It disputes even the nature and the significance of the phosphorus endpoint itself in the TMDL derivation process. DEP says that "[s]election of the endpoint is not the final TMDL, but only an interim step in the TMDL process." DEP Brief, p. 25. DEP says that "the ultimate phosphorus target in the Skippack TMDL, *from* which subsequent EPA modeling exercises produced effluent limits to be placed upon the Appellants, was derived from Dr. Carrick's work and NOT selected by or derived *by* Dr. Carrick." DEP Reply Brief, p. 6 (emphasis and all capitals in the original). DEP says that the real driver of the TMDL is the so-called "QUAL2K model" which was generated by EPA's contractor, Parsons. DEP Brief., p. 17. These conclusions, or potential conclusions, claims the Department, lead to the conclusion that the TMDL is EPA's, not DEP's.

We note that DEP's conclusions, or potential conclusions, come from the very same deposition testimony as do Appellants' conclusions or potential conclusions, namely Mr. McDonnell, Ms. Fields, Mr. Everett, Mr. Stoe, Ms. Fields, Mr. Brown, and Dr. Carrick. That, in and of itself, has to give any trial tribunal pause before proceeding to grant any party summary judgment. Even DEP sees that "it is striking to note the number of passages from . . . the testimony of Department employees and of Dr. Carrick that are cited by both parties to this dispute." DEP Reply Brief, p. 10. The conclusion DEP derives from this is that it "show[s] that the Department's efforts with respect to the Skippack TMDL were undertaken at the request of EPA and in support of EPA's overall effort: that is the overall theme of the Department's Motion." *Id.*

Obviously, that "conclusion" puts the rabbit in the hat. We have dueling parties telling us, with firm conviction, from and with support from the same record, out of the mouths of the same witnesses, that it is clear that the record supports their respective conclusions. We think that, from our perspective, as a tribunal evaluating a summary judgment motion, and subjecting that motion to the appropriate standard of review, a proper conclusion to reach is that we have another confirming indicator that there are genuine issues of material fact in dispute and that this is not a case in which summary judgment can or ought to lie. Both parties see the nature, quality, substance, significance and the consequence of DEP's involvement in diametrically different ways. Both parties have what appears on the face of the paper filings to be substantial evidence in the form of documents and deposition testimony to support their respective viewpoints. There are a host of material factual questions and interpretational questions which escape being captured by summary judgment practice. In fact, it is impossible to determine at this stage of the proceedings the precise nature of the TMDL derivation process since there is a genuine factual dispute even about that. It is impossible to tell on the basis of the conflicting paper record what steps of the process and what pieces of the process mean what in the overall development of the TMDL.

DEP's reply brief continues the theme of restating DEP's version of the facts and DEP repeats over and over again that the record, its view of it anyway, clearly shows that it was EPA which took this action. Repetition of a viewpoint does not make it so. The record is disputed and it simply does not clearly show, as a matter of undisputed fact, that DEP is entitled to summary judgment as a matter of law.

Both parties refer to our decision in *Stern v. DEP*, 2001 EHB 628, in which we stated that a decision consists of three components: (1) the input; (2) the deliberation and contemplation of

the input; and (3) the conclusion. *Id.* at 648. The Department concedes that it was "certainly...involved with input...and with deliberation." DEP Brief, p. 23-24. The Department takes its version of the disputed facts and argues that those facts show that there is no DEP decision under the *Stern* analysis because DEP did not reach the conclusion on the TMDL, EPA did. Appellants take their version of the disputed facts and argue that those facts show that there is a DEP decision under *Stern* because DEP did reach the conclusion on the TMDL. Again, those respective exercises illustrate why summary judgment is not appropriate now. Nobody can determinatively say at this stage in whose favor the *Stern* analysis will go. There are genuine issues of disputed fact which are material to the application of the *Stern* analysis.

We note also that although there are many important witnesses in this case, Mr. Henry of the EPA is the one DEP relied upon most heavily in support of its Motion to Dismiss and now relies upon in support of its Motion for Summary Judgment. As we said earlier, the Henry Affidavit has grown substantially in length and detail since the original version DEP proffered in its Motion to Dismiss. DEP tells us that Mr. Henry "coordinated EPA's work on the Skippack TMDL." DEP Motion, ¶ 3; Henry Affidavit, ¶ 50. Mr. Henry is the central character to DEP's theory of its Motion to Dismiss, and now its Motion for Summary Judgment, but we still have not seen Mr. Henry in person.

As we mentioned, there are also other witnesses DEP relies upon as well to show its version and interpretation of the facts is the truthful and correct one; the same ones that Appellants rely upon to demonstrate their version and interpretation of the facts is the truthful and correct one. We are reluctant to grant summary judgment to a party on the sole basis of deposition transcripts under these circumstances. *See Solomon v. DEP*, 2000 EHB 227, 256-58 (Krancer, J. concurring in part and dissenting in part)(expressing reservations against entering

summary judgment where sole support for the contention that there is an absence of a genuine issue of material fact is oral testimony, either through affidavits or deposition, especially where the credibility of the witness is important to determine). Under the circumstances here, the credibility of the many witnesses is something that is important to determine in this case. At the very least we need to see and hear them in order to sort out the conflicting chaos which the paper record presents. Also, again, summary judgment would be most inappropriate where, as here, both parties are proffering the very same witnesses to support mutually exclusive versions and interpretations of what they consider to be the truth.

In addition, we cannot accept what seems to be an overarching premise of DEP's theory of the case which seems to be that the action is not its and, thus, we have no jurisdiction, by virtue of the fact that work was done by contractors and others. DEP tries to demonstrate that the action is not its through exercises in forensic accounting and contracting analysis. We agree with Appellants who have this to say on the subject:

> The Department cannot avoid the jurisdiction of the Board by retaining a third party and have another agency publish the work of that party. Adoption of the Department's argument would allow the Department to forever elude the jurisdiction of this Board by merely hiring a consultant, allowing that consultant [to] do all the necessary work, supplying that work to another agency, and, finally, having that agency promulgate the action on its own letterhead.

Appellants' Response Brief, p. 45.

As alluded to earlier, the law squarely places on the state the obligation to promulgate TMDLs. That the state brings in contractors and/or the federal EPA to work in connection with fulfilling its obligation in that regard does not mean that the action then becomes the contractors' or the EPA's. Under DEP's approach, the TMDL would not be EPA's either, it would be Parson's TMDL. Again, in the absence of default by the state, and none is alleged here, the law puts a "the buck stops here" sign on DEP's desk when it comes to TMDLs.

As was the case with our MTD Opinion, we are not here criticizing, inhibiting or discouraging DEP's engaging in any division of labor it so desires in fulfilling its obligation to promulgate TMDLs. Nor are we discussing what should have happened as to this TMDL which DEP says Appellants are arguing. We agree with DEP that a fact pattern of what should have happened would be beyond the jurisdiction of the Board or any judicial tribunal for that matter. Appellants and DEP well know that such a "case" would be unreal and purely hypothetical and academic and that is not what Appellants are arguing. The case before us now and the motion we are asked to decide deals very directly, not with what should have happened, but with what did happen and the significance and consequences of what did happen. As we have been saying, there are disputed issues of material fact on these questions.

Likewise, we are not discussing whether EPA's actions in connection with this TMDL were "proper" as DEP says in its brief. That is another question which is quite beside the point of our decision today and is not the point of any of Appellants' arguments. Ironically, though, to be endeavoring, as DEP does, to assign who has taken a TMDL action through complex and extended analysis of contracting questions, agency issues and forensic accounting investigation, which, as we have noted, inherently and inevitably opens up significant disputed factual questions for decision, also, no doubt, makes it much harder for state environmental agencies to engage in division of labor since other agencies would be wary to lend a hand for fear of being considered the promulgator of the TMDL. In any event, agency counsel will have to spend endless hours contemplating and trying to advise their clients on what would be the muddled uncertainty of what level of "labor sharing" and/or funding would be wise short of their agency being tagged with ownership of the TMDL or, as in this case, litigating over the question. This question alone in this case has already taken two motions, at least seven depositions and other

discovery, and 18 months of litigation time. It would seem that all parties should be getting on with promulgating TMDLs and defending them substantively on the technical merits, if called upon to do so, instead of having technical and legal time and talent being diverted to side exercises which only further delay the already tardy and still incomplete TMDL process. We explained in our MTD Opinion the West Virginia Supreme Court's litany of good reasons that Congress placed the obligation on the states, not the federal government, to develop TMDLs. We would add what we just discussed to the list.

An appropriate order follows.

COMMONWEALTH OF PENNSYVANIA
ENVIRONMENTAL HEARING BOARD

LOWER SALFORD TOWNSHIP AUTHORITY: AND UPPER GWYNEDD-TOWAMENCIN MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2005-100-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 19th day of September 2006, IT IS ORDERD that the Department's Motion For Summary Judgment is **denied**.

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 19, 2006

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BANFE SOIL AND MULCH, INC.	:	
	:	
v.	:	**EHB Docket No. 2005-359-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** September 20, 2006

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Judge

Synopsis

The Board denies a motion for summary judgment. The Department failed to carry its burden of showing that there were no genuine issues of material fact and that it was entitled to judgment as a matter of law. It is not clear from the record that the Department's order was reasonable because there are issues of fact that must be developed concerning the appellant's level of involvement at the Site and whether orders of the court of common pleas make compliance with the Department's order legally impossible.

OPINION

Before the Board is a motion for summary judgment by the Department of Environmental Protection which seeks to dismiss the appeal of Banfe Soil and Mulch, Inc. (Appellant). The Appellant has filed an appeal from a November 23, 2005 administrative order which required the Appellant, among other things, to remove waste material from a site where the Appellant had

been performing mulching activities under an agreement with a lessee of the land who also had engaged in wood processing activities there.

The basic facts of this matter are largely undisputed. In February 2005 the Appellant and Brent Nugent, a lessee of the property which is the subject of this appeal (the Site), entered into an agreement which allowed the Appellant to engage in mulching activities with materials generated by Mr. Nugent's tree service which also operated at the Site. At the time the Appellant entered into the agreement with Nugent, there was already wood on the Site from the tree operation. From February 2005 until sometime in early October 2005, the Appellant processed materials on the Site consisting of grinding the wood waste into mulch products for sale to the Appellant's customers.

On November 23, 2005, the Department issued an administrative order to the Appellant which required the Appellant to remove all land clearing, grubbing and excavation waste, including, but not limited to trees, brush, stumps and vegetative material by December 23, 2005.

At the same time the Appellant and Nugent were in the midst of litigation concerning access to the site and ownership of the materials on the site. Also on November 23, 2005, the Court of Common Pleas of Delaware County issued an order formalizing a ruling made from the bench which required the Appellant to remove certain items of equipment from the property, but also required that "all wood products on the subject property claimed by [the Appellant] or designated by [Nugent] as [the Appellant's] property shall be properly maintained and segregated." Nugent was not permitted to "sell, remove or dispose of any such wood products" or "commingle" those wood products with others owned by Nugent or brought on to the property

by Nugent.[1] Later, by order dated December 30, 2005, the court required Nugent to grant access to the Appellant to retrieve certain specifically enumerated wood products from the site.

On December 27, 2005,[2] the Appellant filed an appeal challenging the Department's November 23 Order. The notice of appeal included a recitation of the circumstances summarized above and sought dismissal of the Department's order because the Appellant was not the proper party against whom the Department's order should have been directed. According to the Appellant, most, if not all, of the violations noted by the Department in its order pre-existed the Appellant's contractual relationship with Nugent; and as a result of the court orders it is legally impossible for the Appellant to comply with the Department's order.

The Department has moved for summary judgment on the basis that the "Appellant's sole objection to the Administrative Order is that it is not the appropriate party to receive such an order." The Appellant's memorandum in response to the Department's motion does not challenge the basic factual framework represented by the Department's motion, but reiterates that it does not have the legal capacity to comply with the Department's order. As we explain more fully below, we do not believe that the Department's motion demonstrates that it is clearly entitled to judgment in its favor as a matter of law.

Standard for Summary Judgment

The Board will only grant summary judgment where the evidentiary materials which support the motion demonstrate that there are no genuine issue of material facts and the moving party is entitled to judgment as a matter of law.[3] Evidentiary material in support of a motion or

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[1] DEP Exhibit 11.

[2] The Appellant received notice of the Department's order on November 28, 2005.

[3] *E.g., Scalice v. Pennsylvania Benefits Trust Fund,* 883 A.2d 429 (Pa. 2005); *Jones v. SEPTA*, 772 A.2d 435 (Pa. 2001); *Global Ecological Services, Inc. v. Department of*

response must be admissible at a hearing in accordance with the Pennsylvania Rules of Evidence which, in a jury trial, would require the issues to be submitted to a jury.[4] Such materials may include pleadings, depositions, answers to interrogatories, and admissions of record and affidavits based on personal knowledge.[5] Documentary evidence outside of the record must be presented by means of a properly sworn affidavit or one of the other materials from the record.[6] The record must be viewed in the light most favorable to the non-moving party, and any doubts as to genuine issues of material fact must be resolved in favor of the non-moving party.[7]

In this matter, it is the Department which bears the burden of proof.[8] When the Department issues a compliance order it must demonstrate 1) the facts underlying the order; 2) that the order was authorized by law; and 3) that the order was reasonable and an appropriate exercise of the Department's discretion.[9] Accordingly, in order to prevail on the motion for summary judgment, each of these factors must be established.

The Department's motion attempts to limit the objections raised in the Appellant's notice of appeal by characterizing the issue as a limited question of whether the Appellant was the appropriate party to receive the Department's order. We believe that, read as a whole, the appeal is broader than that. Although not enumerated, it is clear that the Appellant believes that the order is an abuse of discretion inasmuch as the Department ignored the parallel legal proceedings in the court of common pleas, and required the Appellant to remediate a condition that existed before it entered into a limited contractual relationship with the lessee of the property. Although

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Environmental Protection, 789 A.2d 789 (Pa. Cmwlth. 2001); *Barra v. DEP*, EHB Docket No. 2003-038-L (Opinion issued April 24, 2006).

[4] Pennsylvania Rule of Civil Procedure (Pa. R.C.P. No.)1035.2(1).

[5] *See* Pa. R.C.P. No. 1035.1; 25 Pa. Code § 1021.94a(2)(d).

[6] *Farmer v. DEP*, 1998 EHB 1306; *City of Scranton v. DEP*, 1997 EHB 985.

[7] *Scalice; Jones.*

[8] 25 Pa. Code § 1021.122(b)(4).

[9] *Starr v. DEP,* 2003 EHB 360, 368. *See also Carignan v. DEP*, 2004 EHB 730.

not labeled as the factors described above, the notice of appeal clearly does challenge the reasonableness of the order and the Department's legal authority to issue it against the Appellant.[10]

The Department contends that it was appropriate to direct the order to the Appellant because the Appellant was an "operator" within the meaning of the Solid Waste Management Act.[11] The Appellant claims ownership of wood products stored at the Site and finally, the Department notes that the court of common pleas has also required the Appellant to process the wood products which remain on the Site. An identical order was also issued to Nugent, and in the Department's view it makes no difference whether Nugent or the Appellant remediates the site. Therefore, in the Department's view, the order as issued was an appropriate exercise of the Department's discretion.

While it may be true that under a strict reading of the Solid Waste Management Act and the regulations, the Department was authorized to issue the order to the Appellant, the question remains whether it was *reasonable* to issue the order to the Appellant.[12] There is a significant question whether the dispute between the Appellant and Nugent and the proceedings in the court of common pleas made it legally impossible for the Appellant to comply with the order within the specific timeframes required by the order. In its reply brief, the Department asserts that the Appellant's ability to access the Site is irrelevant. We disagree. Since the Department's enforcement action must be reasonable, it may well be that to ignore other realities which

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[10] *Croner, Inc. v. Department of Environmental Resources,* 589 A.2d 1183 (Pa. Cmwlth. 1991). *See also Solebury Township v. DEP,* 2005 EHB 898.

[11] The regulations provide an unhelpful definition of "operator" as "a person or municipality that operates a municipal waste processing or disposal facility." 25 Pa. Code § 271.1.

[12] *Barra v. DEP*, EHB Docket No. 2003-038-L (Opinion issued April 24, 2006)(orders of the Department must be lawful *and* reasonable).

affected the Appellant's ability to comply with all of the requirements of the order, was inappropriate. But we do not believe that we can make a determination concerning the extent of the Appellant's alleged lack of access to the Site on the record as presented. Among other things, the Department's order directs the removal of all the wood from the Site, while the court's order grants access only to remove wood products owned by the Appellant.

Further, it seems that the "operation" at the Site may have encompassed a good deal more than the activity which the Appellant was undertaking. The Department has not established as a matter of law that it was reasonable to issue an identical order to Nugent and the Appellant given the scope and timeframe in which the Appellant was processing wood products at the Site and the history of Nugent's activity at the Site before the Appellant and Nugent entered into their agreement. It is more appropriate for these questions to be answered with a more fully developed factual record and with a fuller discussion of the legal precedent and principles that may be involved. Accordingly, we will deny the Department's motion for summary judgment.[13]

We therefore enter the following:

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[13] In its memorandum the Appellant asks that "this case be stayed or dismissed pending the outcome of the Delaware County Proceeding." If the Appellant wishes for a dismissal of the case, it may simply withdraw its appeal. We can not grant summary judgment in the Appellant's favor without a motion requesting that we do so. *Bensalem Township School District v. Commonwealth,* 544 A.2d 1318 (Pa. 1988); *Exeter Township v. DEP,* 2000 EHB 630. Further, should the Appellant wish to seek a stay of Board proceedings, it may do so with a properly filed motion making that request.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BANFE SOIL AND MULCH, INC.	:	
	:	
	:	
v.	:	**EHB Docket No. 2005-359-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 20th day of September, 2006, the motion for summary judgment by the Department of Environmental Protection in the above-captioned matter is hereby **DENIED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Judge

DATED: September 20, 2006

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

JAMES GILMORE	:	
	:	
v.	:	
	:	**EHB Docket No. 2005-328-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and PIKE TOWNSHIP and PINE CREEK VALLEY WATERSHED ASSOCIATION, Intervenors	:	**Issued: September 20, 2006**

OPINION AND ORDER ON
MOTIONS FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board finds that the Department improperly deferred to a municipality rather than conducting an independent review of a Sewage Facilities Act private request. The Department has a responsibility to review a private request to determine whether a municipality's official plan is adequate to meet a resident's sewage disposal needs. The Board will hold a hearing to address the merits of the petitioner's private request.

OPINION

Background

James Gilmore submitted a subdivision plan to the Intervenor, Pike Township, Berks County (the "Township") seeking approval of a two-lot subdivision for a 4.35-acre parcel that Gilmore owns in the Township. One lot would be 2.21 acres and the other lot would be 2.14 acres. If the existing dwelling on the parent tract is included, there would be a total of three

dwellings. Each lot would be served by an individual onlot sewage disposal system. Gilmore's property is located along a tributary to Pine Creek. Pine Creek and the tributary in question are designated as Exceptional Value waters.

The Township's Board of Supervisors rejected Gilmore's subdivision plan. The Township found that Gilmore's plan would violate a setback requirement in the Township's zoning ordinance because at least one of the proposed houses and its sewage disposal system would be too close to Pine Creek. The Township also found that the proposed onlot sewage disposal systems would create excessive pollutant loadings and volume inimical to the uses of Pine Creek, which it found to be inconsistent with the Township's Sewage Facilities Ordinance.

Gilmore appealed the plan denial to the Court of Common Pleas of Berks County and won. *Gilmore v. Board of Supervisors of Pike Township*, No. 04-1691 (June 28, 2004). The Township appealed to the Commonwealth Court and lost. *Gilmore v. Pike Township Board of Supervisors*, No. 1596 C.D. 2004 (February 6, 2005) (unreported). The Commonwealth Court held that the Township had incorrectly interpreted its setback requirement to apply to the Pine Creek tributary adjacent to Gilmore's property. The Court held that the setback only applied to Pine Creek itself. The Court also addressed the Township's reliance on its Sewage Facilities Ordinance and its Act 537 (i.e. Official) Plan, and we will discuss that portion of the Court's holding below.

On remand, the Township approved Gilmore's subdivision plan, "subject to approval of sewage planning modules by all required agencies, including but not limited to the Pennsylvania Department of Environmental Protection." The Township in a separate letter informed Gilmore that the Township would insist pursuant to Section 604.2 of its Official Plan that Gilmore perform certain described topographic, soil, geological, hydrological, and hydrogeological

analyses before the Township would be in a position to approve his sewage facilities planning module.[1] Gilmore refused to perform all of the required study. He instead submitted a sewage facilities planning module with less information. Specifically, Gilmore submitted the basic

---

[1] Section 604.2 of the Township's Act 537 Plan reads in part as follows:

> Any subdivision of three (3) or more lots, or any land development plan designed for sewage flows equal to three (3) or more equivalent dwelling units, that is located within the drainage area of any "exceptional value waters," pursuant to Chapter 93 and 95 of Title 25 of the Pennsylvania Code, shall provide the following analysis and a Planning Module for revision to the Township's Sewage Facilities Plan.
>
> a. Topographic Analysis
>
> Slopes of 25% or more shall be required to be delineated through actual field survey.
>
> b. Soil Analysis
>
> All soil types, as indicated on the Berks County Soil Survey, shall be identified. . . . The Township may require that the soil information contained in the Soil Survey for Berks County be verified through actual field analysis, however, it shall be mandatory to delineate all potential wetlands. . . . ;
>
> c. Geological Analysis
>
> All sinkholes, karst and/or limestone formations, outcropping and shallow bedrock areas shall be identified;
>
> d. Hydrological Analysis
>
> All streams and water bodies shall be identified and all 100-year flood plain boundaries shall be shown. . . . Hydrological and hydraulic analysis shall be undertaken only by a professional engineer or other with demonstrated qualifications. . . . ; and
>
> e. Hydrogeological Anaylsis
>
> A preliminary hydrogeological analysis, consistent with the standards and procedures specified under Section 71.62 of the Pennsylvania Code, Title 25, shall be conducted which determines the limits and impact of pollutant loading (including but not limited to heavy metals, bacteriological contaminants and nitrate-nitrogen) for each individual system, upon groundwater and upon surface waters (including streams, seeps, springs, wetlands, or waters contributing thereto) within the area of each individual dispersal plume and mixing zone of said individual system. The results of the hydrogeological analysis shall be submitted to the Township for review prior to municipal approval of the subdivision and/or land development plan.

information called for in "Component 1" of the Department's standard planning module form. The Township insisted on the more detailed study that is required to complete "Component 2." The Township rejected Gilmore's module because he failed to perform the required analysis.

On June 7, 2005, Gilmore submitted a private request to the Department of Environmental Protection (the "Department") claiming that the Township's Official Plan was inadequate to serve his sewage disposal needs and asking the Department to order the Township to revise its Official Plan accordingly. The Township opposed the private request. The Department denied Gilmore's private request. The Department cited the following reasons for denying the request:

> 1. The Department defers to Pike Township in the determination and application of its Act 537 Official Plan as it pertains to developments in the Township. The Township has determined this project to be a three lot subdivision and therefore subject to Section 604.2 of its Official Plan, relating to subdivisions in the drainage area of any exceptional value water.
>
> 2. The applicant for the private request has failed to demonstrate that Pike Township's Official 537 Plan is inadequate to meet the property owner's sewage disposal needs.

(Township Ex. M.) Gilmore filed this appeal. The Township and the Pine Creek Valley Watershed Association, Inc. intervened on the side of the Department. We have now before us motions for summary judgment filed by the Township, the Department, and Gilmore.

The Township has actually filed two motions for summary judgment. The first motion argues that this Board must defer to the Department's decisions as a matter of law, that state sewage regulations do not preempt local authority to impose regulations that are more strict, and that the court decisions regarding Gilmore's subdivision plan do not mandate approval of Gilmore's planning module or his private request. The Township's second motion for summary judgment incorporates an expert witness report and adds an argument that the Township's

Official Plan submission requirements are reasonable and scientifically valid. The Watershed Association filed a letter joining in the Township's motion for summary judgment.

The Department's motion to dismiss/summary judgment motion argues that this Board lacks jurisdiction to review the Department's denial of Gilmore's private request because Gilmore is really challenging ordinances and he must, therefore, pursue another court action. The Department argues that Gilmore's failure to pursue another court action shows that he "failed to exhaust his administrative remedies." This Board also may not proceed to the merits in the Department's view because Gilmore did not file an appeal from the Township's preexisting Act 537 Plan immediately after he bought his property a few years ago. The Department lastly contends that Gilmore has failed to allege any facts supporting a claim that the Township's Plan is not being implemented or that it is inadequate.

Gilmore filed his own motion for summary judgment. He argues that the Township has gone beyond the requirements of its own ordinances and Official Plan, that the Township's submission requirements are "ultra vires" and void because they are more stringent than and not authorized by the Sewage Facilities Act and the regulations promulgated thereunder, and that he has supplied enough information to show that his planning module should be approved. He complains that the Department made no findings of fact or conclusions of law and did not deal even to the slightest degree with his legal position: "Appellant deserves DEP's fair review and response to issues raised in the Private Request, not blind "*deference.*" The Department in Gilmore's view should have made a ruling as to whether the Township may require a hydrogeological evaluation for a three lot subdivision, but it did not. In his response to the Department's motion, he argues that requiring a hydrogeological study for a project such as his

involves unnecessary and overwhelming expense. Gilmore disputes that the Official Plan is being implemented or that it is adequate to meet his sewage disposal needs.

Unfortunately, neither the Township nor the Department filed substantive responses to Gilmore's motion. They instead advised the Board that they opposed Gilmore's motion for the reasons set forth in their respective motions and the briefs in support of those motions. This approach does not fully comply with our rules, 25 Pa. Code § 1021.94a, and more importantly, has deprived us of the benefit of specific responses to Gilmore's specific arguments, which were not in all cases coextensive with the arguments set forth in the Department and the Township's papers.

Of all of the parties' arguments, the one that is correct and applicable and capable of positive resolution on the current record is Gilmore's argument that he did not receive a fair review by the Department of his private request. To that extent, we grant partial summary judgment in Gilmore's favor and take this opportunity to outline the course of future proceedings in this appeal.

Discussion

Section 5(b) of the Sewage Facilities Act, 35 P.S. § 750.5(b), reads in the pertinent part as follows:

> Any person who is a resident or legal or equitable property owner 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 or property owner can show that the official plan is not being implemented or is inadequate to meet the resident's or property owner's sewage disposal needs.

25 Pa. Code § 71.14 is to the same effect. Thus, there are two ways to get the Department to approve a private request: (1) show that the municipality's plan is not being implemented, or (2) show that the existing plan is inadequate to meet a resident's sewage disposal needs. *Yoskowitz*

v. DEP, EHB Docket No. 2003-172-C, slip op. at 9 (Adjudication, June 5, 2006). The Department's decision whether to issue an order in response to a private request is discretionary. *Pequea Township v. Herr*, 716 A.2d 678, 686 (Pa. Cmwlth. 1998). Accordingly, this Board reviews the Department's decision to ensure that it is reasonable, supported by the facts, and in accordance with the law. *See Colbert v. DEP*, EHB Docket No. 2005-029-MG, slip op. at 17 (Adjudication, March 10, 2006). Gilmore has the burden of proving that it was not. *Yoskowitz, supra*, slip op. at 12; *Force v. DEP*, 1998 EHB 179, 186, *aff'd*, 977 C.D. 1998 (Pa. Cmwlth. December 30, 1998). If Gilmore is successful in proving that the Department erred, we may substitute our discretion for that of the Department and order appropriate relief, which may include an order modifying the Department's action and directing the Department in what is the proper action to be taken. *Pequea Township*, 716 A.2d at 687.

Pike Township is undoubtedly implementing its Official Plan. The Official Plan provides for onlot disposal but requires the submission of detailed hydrogeological information before onlot disposal in exceptional value watersheds will be approved under the circumstances presented here. The Township has followed the requirements of its Official Plan in its dealings with Gilmore. In fact, as the Department accurately points out, Gilmore's complaint arises from the fact that the Township *is* implementing its plan.[2]

That leaves the issue of whether the Township's existing plan is inadequate to meet Gilmore's sewage disposal needs. The Department says that a plan is inadequate if it fails to afford an individual a feasible means to address his sewage disposal needs. (Reply Brief at 3.) We think that the Department's paraphrasing is correct. An official plan must provide for

[2] There is some question whether the Township has properly interpreted its own plan. Section 604.2 of the Township's Official Plan requires a hydrogeological analysis for any subdivision of "three or more lots." Gilmore plans two new lots, but there is a parent tract. Gilmore suggests that the Township has not properly interpreted its Official Plan, but he does not push the issue in his brief. We will assume--for purposes of the current discussion only--that the Township has properly interpreted Section 604.2 to apply in Gilmore's situation.

feasible means of sewage disposal for a municipality's residents or the Department in its discretion may find the plan to be inadequate.

The Department goes on to argue that a private request cannot be used to challenge "nonsubstantive" provisions of an Act 537 Plan "such as submission requirements or fees." (Reply Brief at 6.) This is how the Department justifies its failure to consider Gilmore's challenge to the procedural aspects of the Township's plan. Instead, the Department believed that it should "defer" to the Township on such issues.

The Department's responsibility in reviewing private requests is straightforward. It is required to evaluate whether an official plan is adequate with respect to a particular resident's needs. In evaluating the plan's adequacy, we see no basis in the applicable regulations for lopping off an entire area of inquiry based upon the often illusory distinction between substantive and procedural requirements. A municipality can just as easily fail to adequately provide for its residents' sewage disposal needs by creating illegal or unreasonable procedural hurdles as it can by creating illegal or unreasonable substantive limitations. In fact, that is exactly what Gilmore has alleged here. The Township in his view has quite effectively prevented all development in certain areas of the Township by creating illegal, unreasonable procedural burdens for any person who would attempt to develop in those areas.

Under the Department's approach, a municipality could ostensibly provide for onlot sewage disposal but with impunity impose a five-year waiting period for all applications. Under the Department's approach, a municipality can pretend to allow for onlot disposal in a particular area but impose an application fee of one million dollars before any module will be processed. These examples illustrate that a plan can fail to provide for feasible sewage disposal in more

ways than one. Rather than creating distinctions with no basis in law, fact, or reason, the Department has a responsibility to review plans for adequacy.

The Department argues that Gilmore's request is nothing short of an attack on the Township's Official Plan itself and that it is, therefore, barred by the doctrine of administrative finality. The problem with the Department's argument is that *every* private request alleging inadequacy is essentially an attack on an official plan. If a plan is not defective, i.e. inadequate, no private request can be granted. The very purpose of a private request is to get the plan changed. If we precluded every private request that involved some aspect of a previously approved official plan, there would be no private requests.

It is true that issues associated with developing and approving the Township Official Plan or bygone revisions of that plan are not before us. Gilmore cannot launch broad-based attacks against the official plan itself in this appeal. *Yoskowitz v. DEP*, 2005 EHB 401, 403-05; *Winegardner v. DEP*, 2002 EHB 790, 792-93; *Scott Township Environmental Preservation Alliance v. DEP*, 2001 EHB 90, 96; *Scott Township Environmental Preservation Alliance v. DEP*, 1999 EHB 425, 433-34. What Gilmore can do, however, is challenge the application of that plan to his individual circumstances. That is a perfectly appropriate role for a private request. *See Yoskowitz*, 2005 EHB at 406 (appellant entitled to pursue claims that related to sewage disposal methods at his service station. *Scott Township*, 1999 EHB at 431-34 (the only remedy of a property owner who contends a plan is inadequate is to submit a private request).

In some cases, it is not terribly difficult to distinguish between claims improperly going to the plan itself and claims that properly relate to a private situation. For example, a claim that goes well beyond the petitioner's individual circumstances is a strong indication that a private request is being used as an improper attempt to argue issues that do not apply to the action under

a previously adopted plan. Thus, in *Scott Township*, the appellants challenged the Township's decision to construct a centralized sewage collection and treatment system. We rejected the use of a private request to effect such a wholesale revision of the plan. 2001 EHB at 94-96. In *Yoskowitz*, the appellant specifically cited several deficiencies in the official plan itself that went well beyond his claim that the borough had failed to provide for his needs. Again, we rejected such an improper use of a private request. 2005 EHB at 405.

Gilmore's situation is not quite as clear. Gilmore's challenge has elements of both a wholesale attack on the plan and an individualized complaint. To the extent Gilmore asks us to declare Section 604.2 "void," he arguably goes too far. On the other hand, to the extent he contends that Section 604.2 is preventing *him* from having any feasible means of sewage disposal at *his* property, we think that he presents a legitimate challenge. Put another way, neither the Department nor this Board needs to decide whether Section 604.2 is void as against all the world under any circumstances; we only need to decide whether it is invalid as it is being applied to Gilmore's site.

There is no need to make this inquiry more complicated or far-reaching than it needs to be. In the immediate context, the Department was only required to decide whether the Township's plan is inadequate to meet *Gilmore's* needs. Like all property, Gilmore's property is unique. Gilmore's subdivision plan calls for the construction of two new single family dwelling units. The Gilmore site is removed from Pine Creek itself. The site has certain known soil and groundwater characteristics. Any decision that the Department made regarding Gilmore's situation would not necessarily have applied to any other proposed project. It is not necessary to decide, for example, whether Section 604.2 could be applied to a nine-lot subdivision of small lots immediately adjacent to Pine Creek. Gilmore's private request is not an appropriate vehicle

for deciding whether Section 604.2 may be applied to the development of a commercial or industrial facility. We are not even asked to decide whether Section 604.2 would be appropriately applied if there were sewage disposal alternatives to onlot disposal. The only thing that is called for is a review of Section 604.2 as applied to Gilmore's site. Administrative finality does not bar such a review.

In response to the Department's assertion that he failed to exhaust administrative remedies, Gilmore argues that the *only* course available to a person caught in his predicament was the filing of a private request, and we think he may be right. There is no relief at the local level. Residents can only pursue a private request if they ask the municipality to revise its plan and the municipality refuses. The Department suggests that Gilmore should have gone to court instead of coming to it with a private request. We are not sure what the Department would have Gilmore do. Even assuming a court challenge is the proper vehicle for challenging an ordinance, Gilmore is not challenging an ordinance. The Commonwealth Court has already ruled that Gilmore's subdivision plan must be approved under the Township's ordinances. Consistent with the court ruling, the Township did not rely on its ordinances in denying Gilmore's module; it relied on Section 604.2 of its Official Plan. The Official Plan in and of itself is not an ordinance. *See* 25 Pa. Code §§ 71.31(f) (official plans to be adopted by resolution) and 71.53(h) (official plan revisions adopted by resolution). We are fairly certain that a court would rebuff any attempt by Gilmore to challenge that plan or its implementation without first exhausting the administrative remedy provided by the Sewage Facilities Act, namely, a private request. In other words, the Department has it exactly wrong. Gilmore is exhausting the only remedy that he has by pursuing his private request.

We are not suggesting that the Department should intrude into exclusive local government functions. *Compare, e.g., Force v. DEP*, 1998 EHB 179 (allocation of sewer hookup costs is a purely local function). A very broad range of options, choices, and procedures fall within the range of adequacy. It is not the Department's or our function to pick among reasonable choices, and the Department obviously must not second-guess the propriety of decisions properly made by local agencies in the areas of sewage system design, permitting of specific sewage facilities, land use, or zoning. *Force*, 1998 EHB at 189; *Young v. DER*, 1993 EHB 380, 407, *aff'd*, 1032 C.D. 1993 (Pa. Cmwlth. 1994). The plan needs to be no more than "adequate" with respect to a particular resident's sewage disposal needs. 35 P.S. § 750.5(b); 25 Pa. Code § 71.14. The resident need only have feasible disposal alternatives. *Cf. Council of Middletown Township v. Benham*, 523 A.2d 311, 317 (Pa. 1987) (municipality may not deprive residents of any sewage disposal alternatives). The burden remains on the resident at all times to produce evidence that the alternatives available under an official plan are infeasible. *Yoskowitz, supra*, slip op. at 14-15. In the context of this case, Gilmore will need to convince us that he has been deprived of any feasible means for addressing his sewage disposal needs.

Thus, we conclude that the Department erred by failing to duly consider Gilmore's private request. The Department should have determined whether the plan is inadequate to address Gilmore's needs. The question, then, is what we should do to rectify the error. We believe that the most appropriate and efficient way to proceed at this point is for us to perform the analysis that the Department should have performed.

Turning to the merits of Gilmore's private request, Gilmore argues that Section 604.2 of the Township's Official Plan is not authorized by the Sewage Facilities Act or the regulations

promulgated thereunder. Therefore, he contends that the Township has no legal authority to use Section 604.2 to bar his development.

Gilmore argues that he has a *right* to submit only that information required by Component 1 of the Department's standard form sewage facilities planning module. The Department's form implements 25 Pa. Code § 71.55, but that regulation states that a municipality *does not have to* revise its official plan for subdivisions of 10 lots or less utilizing onlot systems. The provision is obviously discretionary. It does not say that a municipality *must* forgo planning for the described subdivisions. Furthermore, Section 71.55 only applies when a subdivision has been shown to have "generally suitable" soils. 25 Pa. Code § 71.55(a)(2). According to Gilmore's module (Township Ex. J), his site is only "marginally" suitable for onlot disposal.

Gilmore claims that the Township is specifically prohibited from requiring a hydrogeologic study because the Department's regulations do not mandate such a study in his situation. Again, however, we see nothing in the regulation cited by Gilmore, 25 Pa. Code § 71.62(c), that *prohibits* such studies from being required for small subdivisions. To the contrary, the regulation states that a preliminary hydrogeologic evaluation may be required where it is determined that known geological conditions on the site are potentially problematic. 25 Pa. Code § 71.62(c)(2)(iv). We are not suggesting that such conditions exist on Gilmore's site; we are merely pointing out that the regulation itself envisions some flexibility in its application.

Gilmore draws our attention to various provisions requiring that a municipality's permitting procedures and standards be consistent with Department regulations. 35 P.S. § 750.8(b)(9); 25 Pa. Code § 72.42(a)(8)-(9). Gilmore confuses the *permitting* process with the *planning* process. The planning process is governed by different provisions. 35 P.S. § 750.5; 25 Pa. Code Chapter 71. Gilmore has not referred us to any provision in the planning regulations

that states that local agencies lack the legal authority to require hydrogeologic studies for small subdivisions, and as we said, we do not see an irreconcilable conflict between the Township's planning procedures and the Department's.

Gilmore asserts that he is not making a preemption argument, but there is very little difference between his contention that procedural requirements in municipal plans may not be more stringent than state regulations and a contention that a municipality may not regulate a certain activity at all. (Preemption cases do not tend to come up unless a municipality attempts to pass rules more stringent than state rules.) To the extent Gilmore's claim borders on a preemption argument, we are guided by *Council of Middletown Township v. Benham*, 523 A.2d 311 (Pa. 1987), wherein the Supreme Court expressly held that the Sewage Facilities Act does not preempt the field. 523 A.2d at 313. The Court also had this to say:

> Instead of forbidding all municipal legislation on sewage facilities, the legislature has provided for it as an essential component of the statewide regulatory scheme. Reading the Sewage Act as a whole, we conclude that the legislature plainly intended to combine state and local power into a comprehensive regulatory scheme for sewage disposal.

Id. at 314.

Although it is also not precisely on point, Section 7 of the Sewage Facilities Act is also worth mentioning. Under that Section, plan revisions may be excused under certain circumstances, including a showing that the area proposed for development is outside high quality or exceptional value watersheds. 35 P.S. § 750.7(b)(5)(iii). While this section certainly does not *mandate* anything, and it does not say anything regarding sites that *are* in special protection watersheds, it does reflect the motion that a municipality may account for special protection waters in some aspects of its planning process.

In sum, we conclude that Gilmore has not demonstrated that the Township exceeded its legal authority by requiring a hydrogeologic study for Gilmore's subdivision. Gilmore has not shown us that the Township exceeded its legal authority in this case. That, however, is not the end of our inquiry.

Gilmore's case on the facts is simply stated: The only disposal method for his property provided for in the plan is onlot disposal and the only way to obtain permission for onlot disposal is to conduct an unnecessary and overwhelmingly burdensome hydrogeologic study. As a result, the Township in the guise of sewage planning has prevented him from developing his site. He cannot develop his site because he has been denied any feasible alternative for sewage disposal.

There is enough here to give us pause but not enough to decide the question of the plan's adequacy vis-à-vis Gilmore. First, there is some question in our mind whether the Township and the Department have acted in good faith compliance with the previously mentioned Commonwealth Court opinion and order. The Court had this to say regarding Gilmore and the Township's implementation of its Official Plan:

> The third issue revolves around whether the Board [of Supervisors] had the ability to reject the plan based upon the idea that the plan might impact the special protection waters. The Board argues that the Board has the ability because the Act 537 Plan has the effect of a regulation, as it sets forth a course of actions and procedures that are to be followed in order to comply with the mandates of the DEP. Gilmore argues that Act 537 is not a regulation but merely a general policy to be followed and that the Board cannot deny the plan based solely on a general policy. Again, this Court need not decide this because even if the Act 537 Plan is enforceable, there is no evidence anywhere in the record that the subdivision plan will have the impact on the special protection waters asserted by the Board. In fact, the evidence is to the contrary because the percolation tests from 1996 and 1997 prove otherwise. The Board's attempt to reject the subdivision plan based on its idea that "it is well known that test results, with time, can become, unreliable, necessitating new submissions, which are subject to current standards" is completely without merit. The Township's

> own Sewage Enforcement Officer has approved the module based upon these percolation tests. This Court concludes that there is no evidence that the proposed on-lot sewage disposal system "would discharge into Pine Creek, and would create excessive pollutant loadings and volume inimical to the use of the waters." If evidence arises to this effect, then DEP can impose and enforce the appropriate regulations at the appropriate time.

Slip op. at 5-6.

The Township states in its motion for summary judgment that the Court's decision does not mandate approval of Gilmore's private request. This might be technically accurate, but at the very least the Township's actions do not appear to have been entirely consistent with the spirit and tenor of the Commonwealth Court's ruling. The Court expressly "concludes that there is no evidence that the proposed onlot sewage disposal system 'would discharge into Pine Creek and would create excessive pollutant loadings and volume inimical to the use of the waters.'" The Court found that the site has been studied enough but on remand the Township is requiring more study. Perhaps more to the point, this Board's immediate responsibility is to review the action of the Department, and it is not clear from the existing record what consideration, if any, the *Department* gave to the Commonwealth Court's findings. We will give due regard to the Court's ruling as we move forward with our deliberations.

Beyond that, Gilmore's uncontradicted affidavits state that he has already supplied information sufficient to satisfy the Township's submission requirements regarding topographic analysis, soils analysis, geological analysis, and hydrological analysis. The only missing component is the hydrogeological analysis. We do not have a sense of how burdensome this analysis is or how technically appropriate it is to require such an analysis for a two new homes on two-acre lots in the area in question. We do not have a sense of how important or relevant the results of such an analysis would be in assessing the environmental impact of the site

development. We do not know what standards the Township intends to apply in reviewing the results of the study, or how the Township intends to go about reviewing the results. We need to understand why it is necessary and scientifically valid to insist on study in light of the work that has already been done as referenced in the Commonwealth Court's opinion. If the Township's submission requirements are reasonable and legitimate as applied to Gilmore based on these and other factors, and, therefore, do not deprive Gilmore of a feasible means of sewage disposal, the plan may very well be adequate. On the other hand, if our review shows that the requirement effectively makes onlot sewage disposal--which is the only approved alternative in the plan--infeasible, the plan while facially valid may very well be inadequate as applied to Gilmore. In other words, we need to examine the same sort of facts that we would examine with any other private request. *See, e.g., Yoskowitz, supra*, slip op. at 10-13. The record as it currently exists is insufficient to answer these questions. We will schedule a hearing in the near future in order to develop a proper record.[3]

Accordingly, we issue the order that follows.

[3] Gilmore argues that he has a "vested right" to proceed with his development due to the court-mandated subdivision approval. He concedes in his papers, however, that Municipal Planning Code approval alone does not automatically require sewage facilities planning approval. His argument appears to be that the sewage planning decision was nothing more than a front for a land use decision. Evidence specific to that theory may be presented at the hearing. We express no opinion on the merits of the theory at this time. We will reserve ruling on the vested right theory pending the hearing on the propriety of the private request.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAMES GILMORE	:	
	:	
v.	:	
	:	**EHB Docket No. 2005-328-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and PIKE TOWNSHIP and PINE CREEK VALLEY WATERSHED	:	

ORDER

AND NOW, this 20th day of September, 2006, the Board hereby finds and orders as follows:

1. Gilmore's summary judgment motion is granted in part.

2. The Department failed to perform a sufficient evaluation of whether the Township's Official Plan was inadequate to meet Gilmore's sewage disposal needs as required by 35 P.S. § 750.5(b) and 25 Pa. Code § 71.14.

3. The Board will schedule a hearing to assess whether the Township's Official Plan is inadequate to meet Gilmore's sewage disposal needs.

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 20, 2006

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

ARMY FOR A CLEAN ENVIRONMENT, INC.	:	
	:	
v.	:	
	:	**EHB Docket No. 2005-036-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LEHIGH COAL & NAVIGATION, Permittee	:	**Issued: September 22, 2006**

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis:

It is debatable whether the doctrine of administrative finality should *ever* be applied where a party fails to appeal a general permit. Assuming the doctrine applies, it only bars a challenge in a subsequent appeal if it is clear that a party was aggrieved by an earlier action. The Board holds that it is not clear that a third party was aggrieved by a general permit that does not apply to any particular site.

OPINION

The Department of Environmental Protection (the "Department") issued General Permit No. WMGR085 (the "General Permit") to Lehigh Coal and Navigation Company ("Lehigh") on March 2, 2004. Notice of the General Permit's issuance was published in the Pennsylvania Bulletin on March 13, 2004. The General Permit approves the beneficial use of residual waste. Specifically, the General Permit allows freshwater, brackish, and marine dredge material, cement

kiln dust, lime kiln dust, coal ash, and cogeneration ash processed by screening, mechanical blending, and compaction to be used as fill in mine reclamation. The General Permit provides that, "[p]rior to acceptance of any waste by the permittee, the permittee shall have coverage for the processing and beneficial use operations under a surface mining permit or a signed contractual agreement with the Department for reclamation of an abandoned mine." (Special Condition 2.) The General Permit sets maximum levels for a long list of metals and other constituents, establishes sampling, testing, reporting, and record-keeping protocols, and sets forth numerous other terms and conditions regarding the processing and use of the waste material.

The General Permit by its own terms is not an individual permit. (Special Condition 46.) It does not apply to any particular site. It does not authorize processing or use of waste material at any specific location. Instead, it applies "statewide."

Persons that propose to operate under the General Permit are required to apply for a "determination of applicability." (Special Condition 21.) The application among many other things must describe the location of the reclamation site to be used. A permittee must obtain advance approval from the Department before using a new area. (Special Condition 22.)

On January 19, 2005, the Department issued Coal Surface Mining Permit No. 54733020C34 (the "Mining Permit") to Lehigh. The Mining Permit was "issued to incorporate the provisions of General Permit WMGR085 for the processing/beneficial use of residual waste into this Surface Mining Permit, pursuant to Special Condition #2 of the General Permit, which was issued to Lehigh Coal and Navigation Company (LCN) on March 2, 2004." (Part B, § 1.) The Mining Permit goes on in considerable detail in 18 single-spaced pages to set forth terms and conditions for the use of the waste material at Lehigh's mine.

The Army for a Clean Environment ("ACE") is a nonprofit corporation based in Tamaqua, Pennsylvania. ACE filed this appeal from the General Permit and the Mining Permit. There is no question that ACE's appeal from the issuance of the Mining Permit was timely. Lehigh, however, has filed a motion for partial summary judgment claiming that ACE's appeal from the General Permit was untimely. Lehigh also contends that ACE is precluded by the doctrine of administrative finality from challenging any aspect of the General Permit in the context of its appeal from the Mining Permit. Lehigh's motion is based on the fact that ACE obviously did not file this appeal within 30 days of the issuance of the General Permit in 2004. The Department has not joined in Lehigh's motion. We conclude that ACE's appeal is in fact timely and that ACE is not barred by the doctrine of administrative finality from challenging the General Permit.

We will turn first to Lehigh's argument regarding administrative finality. Lehigh contends that ACE cannot raise any objections in its appeal from the Mining Permit that could and should have been raised in an appeal from the General Permit when that General Permit was issued. We are not sure that the doctrine of administrative finality should *ever* have any application to general permits. General permits are hybrid creatures that are part regulation and part permit. They are a regulatory device designed to streamline the permitting of classes of facilities or activities sufficiently similar in design or operation to warrant general requirements and conditions. 35 P.S. § 6018.104; 25 Pa. Code § 287.611. General permits actually look more like regulations than traditional permits. They set forth "standardized conditions." *Belitskus v. DEP*, 1997 EHB 939, 944. "A general permit is the opposite of an individual permit for an individual site." *Stevens v. DEP*, 2002 EHB 249, 256. General permits are not unlike the standard permit conditions at issue in *DER v. Rushton Mining Company*, 591 A.2d 1168 (Pa.

Cmwlth.), *allocatur denied*, 600 A.2d 541 (Pa. 1991), that were held to be the equivalent of regulations. They implement a uniform state-wide policy for certain aspects of, in this case, the beneficial use of waste, which would suggest that they are bordering on being regulations. *Id.*, 591 A.2d at 1174. On the other hand, they allow for considerable variation based upon circumstances specific to individual sites, and agency personnel have discretion to vary their terms and conditions accordingly, which would suggest that they are not quite regulations. *Id.*

Pre-enforcement review of regulations is discouraged under Pennsylvania law. *Neshaminy Water Resources Authority v. DER*, 513 A.2d 979 (Pa. 1986); *Concerned Citizens v. DER*, 632 A.2d 1 (Pa. Cmwlth. 1993). Regulations usually do not cause any immediate harm because they are rarely self-executing, and it generally makes much more sense and is more respectful to the legislative function for a court to review them in the context of specific fact patterns. *Concerned Citizens*, 632 A.2d at 3-4. Those exact same considerations could easily be said to apply to general permits. We believe that it will almost always be preferable to review challenges to general permits in the context of their application in particular cases. Not only is it more practical, it keeps us from drifting into the regulatory arena. In short, general permits have many of the characteristics of regulations, and the doctrine of administrative finality does not apply to regulations. Parties have an unquestioned right to challenge regulations as applied even if they did not challenge them at the time they were promulgated. *See, e.g., Concerned Citizens*, 632 A.2d at 3.

Another reason that the doctrine of administrative finality does not seem to apply when it comes to general permits is that the rationale for the doctrine does not apply. The seminal case in this area is *DER v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd*,

375 A.2d 320 (Pa.), *cert. denied*, 434 U.S. 969 (1977). The Court's oft-quoted formulation of the doctrine is as follows:

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

348 A.2d at 767. This language shows that the doctrine of administrative finality only applies to a party who has been aggrieved by the earlier action. It is difficult to conclude that any party is aggrieved by a general permit because such permits are by definition divorced from particular sites. They create standards that are not self-executing. Furthermore, we note that the Court was concerned with the idea of putting off appeals "to some indefinite future time in some indefinite future proceeding." *Id.* We are not as concerned with that potential with general permits. General permit programs are set up in such a way that no one can actually benefit from them until they obtain some sort of individual coverage approval, here in the form of a mining permit.[1] Although one cannot say exactly when those coverage approvals will be issued, this is not a case where issues will only come up "in some indefinite future proceeding." We do not see that deferring appeals until general permits are applied to specific situations compromises the vitality of administrative actions or frustrates the orderly operations of administrative law. To the contrary, we see an approach that encourages appeals from coverage approvals as preferable to creating a regimen where essentially meaningless, protective appeals must be filed from generic general permits.

General permits are a valuable regulatory device, but they should not be used as a tool for whittling down constitutional rights. The doctrine of administrative finality is nothing more or

[1] In some cases, such as *Stevens*, *supra*, the general permit is two steps removed from specific locations.

less than a tool to insulate agency action from review. When due process rights are implicated, we ought to be sparing in its application. We see absolutely nothing to be gained here by precluding ACE's challenge of the General Permit.

There may be cases where a general permit *may* be appealed, but we do not think that it should automatically follow that the right to appeal equates to a duty to appeal. For example, we suspect that Lehigh could have appealed the General Permit, but we also suspect that it was not required to file an appeal or lose its right forever to challenge any aspect of that permit. Similarly, whether or not ACE *could* have appealed, we do not think that it was forced to appeal from the General Permit or be barred forever from doing so once the General Permit was applied to actual sites.

We do not need to conclude in this case that it is *never* appropriate to bar an appeal from a determination of applicability (or its equivalent) because of a failure to appeal from an earlier general permit. We do not need to take that step here because, even where the doctrine of administrative finality applies in concept, it should only be applied to preclude a collateral attack where it is clear that a party was aggrieved by an earlier action but chose not to file an appeal. *Wheeling-Pittsburgh Steel Corp.*, 348 A.2d at 767; *DEP v. Peters Township Sanitary Authority*, 767 A.2d 601, 603 (Pa. Cmwlth. 2001); *Moosic Lakes Club v. DEP*, 2002 EHB 396, 406. The doctrine should not be applied to toss a party out of court because the party *arguably* could have appealed the earlier action.

Here, it is far from clear that ACE could have appealed from the General Permit when it was originally issued. Whether we examine the question in terms of standing or ripeness, the fact that the General Permit by its express terms does not apply to any particular site raises serious doubt in our mind that ACE could have appealed. As to standing, because the General

Permit did not apply to the Springdale Pit--the locus of ACE's concern--it is not clear that ACE was an aggrieved party. Only aggrieved parties may pursue an EHB appeal. 35 P.S. § 7514(c); 25 Pa. Code § 1021.52(a)(2); *Borough of Roaring Spring v. DEP*, 2004 EHB 889. As to ripeness, because the General Permit was not applicable to any particular site, to the extent that considerations of ripeness apply to Board proceedings, it is not apparent that issues concerning the General Permit were ripe in the sense that they had been developed adequately for judicial review. *See Potratz v. DEP*, 2005 EHB 186, 193. Among other dangers, there would have been a threat that we would have delved into issues that relate to the General Permit but had no relevance to the Springdale Pit. In the current context, our doubt regarding these issues must be resolved in favor of ACE. We conclude based upon the existing record that it is far from clear that ACE could have successfully brought an appeal from the General Permit within 30 days of its issuance. Since it does not appear that ACE could have appealed then, ACE's current appeal is timely and administrative finality does not preclude challenges to that permit now either directly or in the context of the Mining Permit appeal.

Lehigh argues that ACE was aware that the General Permit would probably be incorporated into the Mining Permit for the Springdale Pit. We do not see this as relevant. The fact that a permit *might* eventually apply to a particular site is not enough to trigger a duty to appeal. The permit on its face did not apply to any particular site. Some additional action was required before it would apply. There was no way of knowing whether that additional action would occur. Potential appellants cannot be expected to use a crystal ball. Furthermore, ACE's "awareness" is irrelevant. This is not a notice case. The fact that a party has notice is a question that is entirely different than the pertinent question here, which is whether a party has been aggrieved. A party cannot "know" that something will occur in the future, but even if we assume

that ACE had telepathic powers, the knowledge itself would not have created a duty to appeal. The duty/right to appeal would only arise when ACE's prognostication that it would be aggrieved came true.

Lehigh's arguments have essentially been put to rest in the Board's decisions in *Stevens v. DEP*, 2000 EHB 438 and 2002 EHB 249. Lehigh's attempt to distinguish those decisions in its reply memorandum (Lehigh did not mention the decisions in its original memorandum) is to no avail.

Stevens involved the Department's regulatory approval process for the beneficial use of sludge. There, as here, the Department issued a general permit (General Permit PAG-8). The general permit was 60 pages long and contained requirements for persons who prepare sewage sludge and wish to apply the sludge to land. The general permit did not apply to any particular party or site. Any person wishing to obtain approval for coverage under the general permit was required to obtain a "coverage approval."

The municipal authority involved in the *Stevens* case obtained a coverage approval. Like the General Permit in this case, the coverage approval did not relate to any particular site. Before the municipal authority could apply sludge at any particular site, it was required to notify the Department, the county conservation district, and landowners adjacent to the proposed site. The Stevenses were adjacent landowners who filed an appeal to this Board after receiving that notice.

The Department moved to dismiss the appeal. We observed that insisting upon an appeal from the coverage approval would have required persons to be clairvoyant in regards to whether a person will some day decide to spread sewage sludge on property adjacent to theirs or appeal

every general permit the Department issues for land application of sewage sludge. 2000 EHB at 440.

In language that we believe to be directly applicable here, we had this to say in response to the Department's motion:

> Section 4(c) of the Environmental Hearing Board Act provides 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 this Board. 35 P.S. § 7514(c). *See also* 35 P.S. § 691.7(a) (any person having an interest which is or may be adversely affected by an action of the Department may appeal). *See generally Martin v. DER*, 548 A.2d 675, 679 (Pa. Cmwlth. 1988) (persons must have opportunity to be heard); *Commonwealth v. Derry Township*, 314 A.2d 868, 872 (Pa. Cmwlth. 1973), *modified*, 351 A.2d 606 (Pa. 1976) (same). In this appeal, the Stevenses were not adversely affected by the general permit or the coverage approval when they were issued. Neither the general permit nor the coverage approval applied to any particular land-application site. The permit and coverage approval confer the right to produce the sludge, conclude that the sludge is suitable for land application generically speaking, and create operational and managerial requirements for sludge application, but they do not relate to any particular site. *See* General Permit PAG-08-3538. In fact, 25 Pa. Code § 271.902(e) provides that the site-specific review and approval requirements that would ordinarily apply to NPDES general permits do not apply to General Permit PAG-8.
>
> Therefore, we are quite certain that any attempt by the Stevenses to have appealed those actions at the time of publication would have failed for lack of standing. Again, the Department concedes this point. The Stevenses could not possibly have shown that they were aggrieved in any way merely by the issuance of the general permit or the coverage determination. The Stevenses had no opportunity to be heard at the time those actions were taken. Preventing the Stevenses from challenging those actions at some later point would mean that they could never be heard. Under the terms of the Environmental Hearing Board Act, the coverage determination may have been final as to the Authority soon after it was made, but it was not final as to the Stevenses because they had no ability to appeal that action at that time. The Environmental Hearing Board Act makes it clear that an action may be final as to one person but not as to another.

The factual situation that gave rise to *Belitskus v. DEP*, 1997 EHB 939, is similar in some respects to the situation that is presented here. In *Belitskus* the Department had issued general permits for storm water discharges from industrial activities and from construction activities in 1992. In 1994, the Department issued a coverage approval under the general permit for construction activities to Willamette Industries for a plant in McKean County. In 1996, the Department issued Willamette a coverage approval under the general permit for industrial activities for the same plant. Belitskus and others appealed from the coverage determinations. Willamette moved to dismiss on jurisdictional grounds. It argued that the coverage determinations were not appealable actions. We rejected that argument, stating as follows:

> Willamette's suggestion that Appellants' only opportunities to challenge DEP's actions were the filing of timely appeals from the adoptions of the general NPDES permits in October and November 1992 is without merit. At that point, neither Appellants nor anyone else could foresee the instances where DEP would approve coverage in the future. The general NPDES permits at the time of adoption were executory in nature, creating frameworks within which specific applications for coverage would be considered. It was only when those applications were filed by Willamette, seeking coverage for specific discharges to specific streams from specific sites and when those applications were approved by DEP with specific conditions that final, appealable actions occurred. It was only at that point that Appellants or other persons or entities could have been adversely affected.

1997 EHB at 957-958. *Belitskus* supports our conclusion that the Stevenses can appeal the coverage approval (which the Department has not questioned). Although the Board in *Belitskus* was not perfectly clear on this point, the spirit if not the language of the opinion indicates that challenges to the general permit as well as the coverage determination were within the Board's jurisdiction.

The Board in *Belitskus* went on to hold that the appellants were required to appeal within 30 days after the approvals of coverage were published in the *Pennsylvania Bulletin*. 1997 EHB at 958. That meant that the appeal from the 1994 coverage determination was untimely, but the appeal from the 1996 determination, which was filed within 30 days of publication, was

> timely. This holding at first blush would seem to suggest that the Stevenses' appeal is untimely. There is, however, a critical distinction between this case and the *Belitskus* holding. In *Belitskus*, the coverage determinations were site-specific. They related to a particular site—Willamette's McKean County plant. Indeed, using the language of the opinion, the coverage determination authorized specific discharges to specific streams from specific sites. *Id.* Here, the Authority's coverage determination is not site-specific. It does not authorize land application at any particular site. Paraphrasing *Belitskus*, it is only at the point that a given site is selected that Mr. and Mrs. Stevens (or any other nearby landowners for that matter) could face the possibility of being adversely affected.

2000 EHB at 440-43. We went on to deny the Department's motion to dismiss.

In our final Adjudication in *Stevens*, we repeated that no party is likely to be in a position to file an immediate appeal from a non-site-specific coverage approval because the coverage approval does not identify any particular site:

> As we discussed in our earlier opinion, *Stevens*, 2000 EHB 438, when a party is notified that it could be adversely affected by the coverage approval, it has the right to appeal that coverage approval, even if it is notified well beyond the 30-day deadline that would normally apply for an appeal from the coverage approval to this Board.

2002 EHB 249, 256 n.1. We added that the Department's program could have had constitutional problems if persons were not able to appeal from the notice that the coverage approval would apply to a particular site. 2002 EHB at 258-59.

Stevens and *Belitskus* remove all doubt that Lehigh's motion is without merit. ACE's appeal is timely and its previous failure to appeal the General Permit has no legal consequence. Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ARMY FOR A CLEAN ENVIRONMENT, INC.	:	
	:	
v.	:	
	:	**EHB Docket No. 2005-036-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LEHIGH COAL & NAVIGATION, Permittee	:	

ORDER

AND NOW, this 22nd day of September, 2006, the Permittee's motion for partial summary judgment is denied.

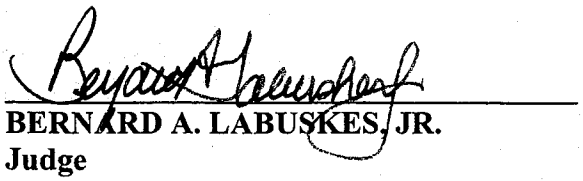
ENVIRONMENTAL HEARING BOARD

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 22, 2006

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

HANSON AGGREGATES PMA, INC.	:	
GLACIAL SAND AND GRAVEL COMPANY	:	
and TRI-STATE RIVER PRODUCTS, INC.	:	
	:	
v.	:	**EHB Docket No. 2006-175-R**
	:	**(Consolidated with 2006-176-R**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 2006-177-R)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and COMMONWEALTH OF	:	
PENNSYLVANIA, FISH AND BOAT	:	
COMMISSION, Intervenor	:	**Issued: September 25, 2006**

OPINION AND ORDER ON
PENNSYLVANIA FISH AND BOAT COMMISSION'S
PETITION TO INTERVENE

By: Thomas W. Renwand, Judge

Synopsis:

An independent state government agency is permitted to intervene in a consolidated appeal in which three companies engaged in commercial sand and gravel dredging of the Allegheny and Ohio Rivers have filed broad challenges to conditions in their dredging permits issued by the Pennsylvania Department of Environmental Protection. The petitioner, the Pennsylvania Fish and Boat Commission, is an independent commission of the Commonwealth of Pennsylvania that has, among other duties and responsibilities, jurisdiction over the protection, propagation and distribution of fish in Commonwealth waters. As the agency entrusted with protecting and managing Pennsylvania's fish population and establishing and maintaining the threatened and endangered species lists for fish in the state, the Pennsylvania Fish and Boat Commission has an interest in this consolidated appeal

that is greater than that of the general public.

Introduction

Presently before the Pennsylvania Environmental Hearing Board is the Petition to Intervene filed by the Pennsylvania Fish and Boat Commission (Fish Commission). Appellants Hanson Aggregates PMA, Inc. (Hanson), Tri-State River Products, Inc. (Tri-State) and Glacial Sand and Gravel Company (Glacial Sand) have mounted a comprehensive and broad based appeal to various conditions set forth in their commercial sand and gravel dredging permits issued by the Pennsylvania Department of Environmental Protection. Appellants have, *inter alia*, objected to Special Condition F and Appendix B, relating to a requirement that they conduct fish surveys before being authorized to dredge in certain areas of the Ohio and Allegheny Rivers.

Petition to Intervene

Appellants argue that the Fish Commission's Petition to Intervene should be denied because it does not set forth sufficient facts setting forth that Petitioner's interests in this matter are greater than those of the general public. We respectfully disagree. Although the Petitioner is not entitled to intervene simply because it is an agency of the Commonwealth of Pennsylvania and participated in the review process of the permits in question, it is entitled to intervene because of its important statutory duties and responsibilities regarding Pennsylvania's fish population.

Any interested party may petition the Board to intervene in any pending matter prior to the initial presentation of evidence. See 35 P.S. § 7514(e); 25 Pa. Code § 1021.62(a). A party may intervene in a Board proceeding if the party's interests are "substantial, direct, and immediate." *Borough of Glendon v. Department of Environmental Resources*, 603 A.2d 226, 233 (Pa. Cmwlth. 1992). For an interest to be considered "substantial," the interest must "surpass the common interest

of all citizens seeking obedience to the law." *Tortorice v. DEP*, 1998 EHB 1169, 1170 (citing *Darlington Township Board of Supervisors v. DEP*, 1997 EHB 934, 945). A "direct" interest articulates a harm caused by the action of a named party. *Id.* An "immediate" interest must demonstrate a "causal connection, not remote in nature," between the named party action and the alleged harm. *Id.*

Applying these concepts here compels us to grant the Fish Commission's Petition to Intervene. The Fish Commission has been an active party and independent voice in the regulatory process regarding the development of fair dredging standards in the area of commercial sand and gravel dredging. In fact, the Opinion cited in Appellants' First Amended Notice of Appeal involved an independent action the Pennsylvania Fish Commission filed challenging the dredging permits issued by the Pennsylvania Department of Environmental Protection to three companies (including Glacial Sand). The Fish Commission objected to the Department of Environmental Protection's issuance of amendments to dredging permits that authorized dredging in certain sections of the Allegheny River. Although in that case, after a hearing, we denied the Fish Commission's Petition for a Supersedeas, the case clearly refutes the Appellants' current argument that the views and interests of the Fish Commission and the Department of Environmental Protection are identical. In fact, as that case clearly shows, these two state agencies are sometimes in respectful disagreement regarding what should be required as conditions in dredging permits.

Although the Fish Commission could have provided more factual detail in their Petition to Intervene it is still sufficiently clear that it has the requisite substantial, direct, and immediate interest in the subject matter of this consolidated appeal to warrant its participation as a party. The Fish Commission's interest in these issues is clearly more than a general interest in the proceedings.

We will therefore grant the Pennsylvania Fish and Boat Commission's Petition to Intervene.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HANSON AGGREGATES PMA, INC.	:	
	:	
v.	:	**EHB Docket No. 2006-175-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and COMMONWEALTH OF PENNSYLVANIA, FISH AND BOAT COMMISSION, Intervenor	:	

ORDER

AND NOW, this 25th day of September, 2006, following review of the Pennsylvania Fish and Boat Commission's Petition to Intervene and Appellants' Replies to the Petition, it is ordered as follows:

1) The Petition to Intervene is ***granted.***

2) The Pennsylvania Fish and Boat Commission is added as a party in the consolidated appeal and the caption is amended accordingly.

3) The Pennsylvania Fish and Boat Commission may offer evidence and legal argument both generally and on the following issues:

    a) The effects of dredging on fish and fish habitat;

    b) The Pennsylvania Lists of Endangered, Threatened and Candidate Species;

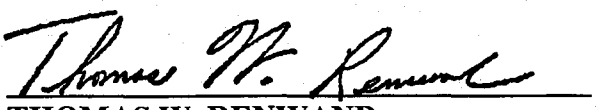
    c) The utility of fish surveys as a condition of Appellants' permits;

    d) The propriety of the methodologies and sampling techniques of the required

surveys; and

e) The propriety of the permit conditions imposed and additional information allegedly justifying more stringent protection of fish and fish habitat from dredging activities.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Judge

DATED: **September 25, 2006**

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CITIZEN ADVOCATES UNITED TO SAFEGUARD THE ENVIRONMENT, INC., SUFFER, DREW MAGILL AND ANDREW F. MAGILL	:	
v.	:	**EHB Docket No. 2006-005-L (Consolidated with 2005-327-L 2005-329-L, and 2005-363-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and HAZLETON REDEVELOPMENT AUTHORITY and HAZLETON CREEK PROPERTIES, Permittees	:	**Issued: September 28, 2006**

OPINION AND ORDER ON PERMITTEE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis:

A citizens' group consisting of multiple individuals associated in a common enterprise qualifies as an entity that may pursue an appeal before this Board.

OPINION

SUFFER, Drew Magill, and Andrew Magill filed the appeal docketed at EHB Docket No. 2005-327-L challenging General Permit No. WMGR085 (the "General Permit") issued to Lehigh Coal and Navigation Company and a Determination of Applicability ("DOA") issued to the Permittee, Hazleton Creek Properties, LLC ("Hazleton Creek"). Hazleton Creek has moved for partial summary judgment on two grounds. First, it argues that the appeals of SUFFER, Andrew Magill, and Drew Magill from the issuance of the General Permit must be dismissed as untimely

and that the appellants are precluded by the doctrine of administrative finality from challenging the General Permit in the context of their appeal from the DOA. Second, it argues that SUFFER must be dismissed from the case because it did not exist as a properly organized unincorporated association prior to expiration of the time period for filing an appeal from the DOA.

We reject Hazleton Creek's theories regarding timeliness and administrative finality for the reasons set forth in our Opinion in *Army for a Clean Environment, Inc. v. DEP*, EHB Docket No. 2005-036-L (Opinion and Order, September 22, 2006). We should add that Hazleton Creek seems particularly concerned that it will be required to defend against objections to the General Permit that "have no tie whatsoever to the Hazleton Site." We do not share Hazleton Creek's concern. We have no interest in issuing advisory opinions or adjudicating irrelevant issues. Our conclusion that we have jurisdiction in the appeal from the General Permit and that administrative finality does not bar challenges to that permit in the appeal from the DOA should not be interpreted as a willingness to adjudicate factual or legal issues that "have no tie whatsoever" to the site at issue in this case.

Turning to Hazleton Creek's second issue, Hazleton Creek argues that only a "person" may file an appeal to this Board, and "person" is defined in our rules as "an individual, partnership, association, corporation, political subdivision, municipal authority or other entity." 25 Pa. Code § 1021.2. Hazleton Creek contends that SUFFER was not an unincorporated association at the time it filed its appeal and, therefore, it did not fit our definition of "person."

Hazleton Creek's argument is without merit. Hazleton Creek's initial memorandum in support of its motion did not so much as mention Judge Miller's well-reasoned opinion in *Weiss v. DEP*, 1996 EHB 246, which is directly on point. In *Weiss*, a permittee advanced the very same argument that Hazleton Creek is advancing here; namely, that an appellant citizens' group

did not constitute a party that could file an appeal because it was not properly organized as an "unincorporated association." Judge Miller ruled that a group of individuals associated in a common enterprise or undertaking, such as the appeal of a permit, may pursue an appeal before this Board. 1996 EHB at 250-51. Our review of the record in this case does not reveal any dispute that SUFFER, at a minimum, constituted a group of individuals associated in the common enterprise or undertaking of challenging the proposed beneficial use of waste at the Hazleton site at the time it filed its appeal.

In its reply brief, Hazleton Creek attempts to distinguish *Weiss* by pointing out that the citizens' group in *Weiss* "never became a corporation. Here, SUFFER became a nonprofit corporation." Hazleton Creek misses the whole point of *Weiss*. It does matter that SUFFER was not a properly organized unincorporated association prior to becoming a corporation. It did not need to be. It merely needed to be a group of individuals associated in a common enterprise, and there is no question that it was precisely that. The fact that the group later incorporated is entirely beside the point.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITIZEN ADVOCATES UNITED TO SAFEGUARD THE ENVIRONMENT, INC., SUFFER, DREW MAGILL AND ANDREW F. MAGILL	:	
v.	:	**EHB Docket No. 2006-005-L**
	:	**(Consolidated with 2005-327-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and HAZLETON REDEVELOPMENT AUTHORITY and HAZLETON CREEK PROPERTIES, Permittees	:	**2005-329-L, and 2005-363-L)**

ORDER

AND NOW, this 28th day of September, 2006, it is hereby ordered that Hazleton Creek's motion for partial summary judgment is denied. SUFFER's request for sanctions is denied.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: September 28, 2006

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

CITIZENS FOR PENNSYLVANIA'S FUTURE and GROUP AGAINST SMOG AND POLLUTION and CAMBRIA COKE COMPANY	:	
v.	:	**EHB Docket No. 2005-106-R (Consolidated with 2005-090-R and 2005-102-R)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and CAMBRIA COKE COMPANY, Permittee	:	**Issued: September 28, 2006**

OPINION AND ORDER ON APPELLANTS' MOTION FOR LEAVE TO FILE SECOND AMENDED NOTICE OF APPEAL

By Thomas W. Renwand, Judge

Synopsis:

The Pennsylvania Environmental Hearing Board grants Appellants' Motion for Leave to Amend Appeal even though it was not filed until after the conclusion of discovery. By extending the discovery deadline no party will suffer undue prejudice because of the amendments to the Appeal. Moreover, the Board also extends the deadline for filing dispositive motions.

Background

Presently before the Pennsylvania Environmental Hearing Board is the

Appellants,' Citizens for Pennsylvania's Future (Penn Future) and Group Against Smog and Pollution (GASP), Motion for Leave to File Second Amended Notice of Appeal. The Pennsylvania Department of Environmental Protection issued the Plan Approval for the proposed Cambria Coke Company (Cambria Coke) plant on April 4, 2005. The proposed plant is a non-recovery coke plant utilizing heat recovery steam generating technology.

On May 4, 2005, Appellants filed a Notice of Appeal of the Plan Approval listing twenty-four specific objections. On the same day, the Department issued an Administrative Order modifying aspects of the Plan Approval. Twenty days later, on May 24, 2005, Appellants filed an Amended Notice of Appeal, adding an additional five objections. Also on May 24, 2005, Cambria Coke filed an appeal of the May 4, 2005 Administrative Order. By Order dated June 21, 2005, Chief Judge Michael L. Krancer of the Pennsylvania Environmental Hearing Board consolidated all of the appeals at EHB Docket No. 2005-106-K.

Following extensive discovery which concluded on May 4, 2006, the parties served their expert reports. On August 23, 2006, Appellants filed their Motion for Partial Summary Judgment. One day later, on August 24, 2006, Appellants filed the pending Motion for Leave to File their Second Amended Notice of Appeal. By Order of the Board dated August 29, 2006 primary responsibility for this case was transferred from the Honorable Michael L. Krancer to the Honorable Thomas W. Renwand.

Motion For Leave to File Second Amended Notice of Appeal

Penn Future requests leave to add five paragraphs to their Second Amended

Notice of Appeal.

1) Appellants object that the Pennsylvania Department of Environmental Protection (Department) failed to require Cambria Coke Company to obtain federally enforceable NO_x offsets prior to issuance of the Plan Approval, as required by Pennsylvania and Federal law.

2) Appellants object that the emission limits for volatile organic companies (VOCs) found in the Plan Approval are not supported by available technical data.

3) Appellants object that the Plan Approval does not include emission limitations for start-up emissions which will likely lead to violations of the National Ambient Air Quality Standards.

4) Appellants object that the Plan Approval fails to prevent violations of the National Ambient Air Quality Standards for sulfur dioxide.

5) Appellants object that the Plan Approval fails to require a multiple pathway risk assessment.

Appellants' Proposed Second Amended Notice of Appeal, paragraphs 45-49.

Standard of Review for Amending a Notice of Appeal

The Pennsylvania Environmental Hearing Board earlier this year adopted a more liberal standard for amending a Notice of Appeal.

> After the 20-day period for amendment as of right, the Board, upon motion by the appellant or complainant, may grant leave for further amendment of the appeal or complaint. This leave may be granted if no undue prejudice will result to the opposing parties. The burden of proving that no undue prejudice will result to the opposing party is on the party requesting the amendment.

25 Pa. Code § 1021.53(b), 36 Pa. B. 709 (February 11, 2006).

Under the prior version of the rule, a party seeking to amend its Notice of Appeal had to meet one of three narrow criteria. The new rule was adopted by the Board upon the recommendation of its nine-member Environmental Hearing Board Rules Committee (chaired by Attorney Howard Wein) and is intended to create a more liberal standard for allowing the amendment of appeals. *See Preamble to Proposed Rulemaking* 106-8, 35 Pa. B. 2107.

Discussion

Turning to the specific issue before the Board, Appellants seek to add five objections to their Notice of Appeal and contend that neither the Department nor the Permittee will be prejudiced by the amendment. The Department objects to three of the amendments contending that they would be prejudiced because discovery is over and at least one of the objections may be the subject of a dispositive motion which deadline has also passed. They also claim that these objections are not related to the earlier objections and some could have been raised long ago. Cambria Coke objects to the Appellants'

Motion mainly because they would be prejudiced in responding to the objections at trial because both the discovery and the dispositive motions deadlines have passed.

Unlike the situation in *Groce v. DEP and Wellington Development*, EHB Docket No. 2005-246-R (Opinion and Order issued May 26, 2006), the proposed amendments do not arise from recently produced information in discovery. More importantly, it seems Appellants certainly should have been aware of these potential objections quite some time ago. The first of these consolidated appeals was filed in early May 2005. Not only has the already extended discovery deadline passed but the dispositive motion deadline has also expired. It would certainly be within our sound discretion to deny the Motion to Amend on the grounds that Appellants have simply waited too long.

Nevertheless, in looking at the proposed amendments to the Second Amended Notice of Appeal we do not believe that extensive discovery is required to protect the due process rights of the parties. No trial has been set in this case. We are also not aware of any need to expedite the trial that has been brought to our attention by any party. Therefore, we think the wiser option in this specific case is to reluctantly grant the Motion to Amend the Second Amended Notice of Appeal while at the same time reopening discovery and extending the dispositive motions deadline accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CITIZENS FOR PENNSYLVANIA'S FUTURE and GROUP AGAINST SMOG AND POLLUTION and CAMBRIA COKE COMPANY	:	
v.	:	**EHB Docket No. 2005-106-R (Consolidated with 2005-090-R and 2005-102-R)**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and CAMBRIA COKE COMPANY, Permittee	:	

ORDER

AND NOW, this 28th day of September, 2006, after review of the Appellants' Motion for Leave to File Second Amended Notice of Appeal, it is ordered as follows:

1) The Motion for Leave to Filed Second Amended Notice of Appeal is ***granted***.

2) Appellants may file their Second Amended Notice of Appeal on or before **October 10, 2006**.

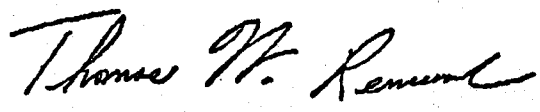
3) Discovery concerning the five new objections shall be completed on or before **November 28, 2006**.

4) Dispositive motions, if any shall be filed, on or before **December 14, 2006**.

5) Trial is set to commence on **April 17, 2007**. Additional dates

and deadlines are set forth in Pre-Hearing Order No. 2.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Judge

DATE: September 28, 2006

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BENJAMIN A. AND JUDITH E. STEVENS	:	
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASHINGTON TOWNSHIP MUNICIPAL AUTHORITY, Permittee	:	**EHB Docket No. 2005-198-L**
	:	
	:	**Issued: October 3, 2006**
	:	
	:	

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis:

A Department employee's testimony during a prior Board hearing does not prevent the Department from approving a subsequently amended notice to apply sewage sludge. The employee's testimony has been quoted out of context, but even assuming the appellants' interpretation of the testimony was accurate, the employee had no authority to permanently foreclose future Departmental actions and the appellants have failed to allege the elements of an estoppel or contract claim or cite any other basis for granting them relief based on the employee's prior testimony.

OPINION

This matter involves a *pro se* appeal by two individuals, Benjamin A. Stevens and Judith E. Stevens (the "Stevenses"), from an amended Notice of First Land Application submitted by the

Washington Township Municipal Authority ("WTMA") and approved by the Department of Environmental Protection (the "Department") for the land application of sewage sludge at WTMA's property in Washington Township, Franklin County, pursuant to 25 Pa. Code § 271.915 and General Permit No. PAG-08-3538. The Stevenses' interest in the matter arises from the fact that they live on property immediately adjacent to the fields where the sludge is to be applied. The fields are owned by WTMA.

The back-story for this case dates back to the year 2000 when the Department approved WTMA's use of its fields for the land application of sewage sludge pursuant to a Notification of First Land Application of Biosolids (the "May 2000 Notice"). The Stevenses filed an appeal with the Board challenging the Department's review of WTMA's May 2000 Notice. The appeal was ultimately unsuccessful. *See Stevens v. DEP*, 2002 EHB 249.

During a supersedeas hearing in that initial appeal, Thomas J. Sweeney, a Soil Scientist and Biosolids Coordinator for the Department, testified that under WTMA's submitted and approved May 2000 Notice, WTMA would not apply sewage sludge within 300 feet of the Stevenses' *property line*, despite the fact that the regulations only require a 300-foot isolation distance to a *house* or *well*. 25 Pa. Code § 271.915(c). (*See Stevens*, EHB Docket No. 2000-030, Supersedeas Transcript ("S.T.") 77, 80, 84.) WTMA proposed to use the Stevenses' property line because the Stevenses refused to identify the location of their well. The proposal originated with WTMA, not the Department. Based on WTMA's proposal, Sweeney testified that there would "always" be a 300-foot buffer separating the property line from the nearest application of sludge. (S.T. 77.) The Department repeated that statement in its later response to the Stevenses' interrogatories. (Stevens Ex. A-3 ¶ 12.)

In 2004, WTMA discovered the location of the Stevenses' well and informed the Department that it intended to submit a revised map using the Stevenses' home as the starting point for the 300-foot buffer zone. On July 9, 2004, WTMA submitted a revised map showing the location of the Stevenses' home and well, along with an Amended Notice of First Land Application ("July 2004 Amended Notice"), and indicated its intent to continue to apply sewage sludge, this time using the Stevenses' home as the starting point for the 300-foot buffer zone. On June 9, 2005, the Stevenses observed WTMA applying sludge within 300 feet of their property line and they filed this appeal.

The Department now moves for partial summary judgment. WTMA joins in the motion. The Department asserts that the Stevenses have not put forth any evidence to support some of their objections to the Department's approval of WTMA's July 2004 Amended Notice. Specifically, the Department moves for judgment as a matter of law on a portion of Objection 1 and Objections 2-5 and 7 in the Stevenses' notice of appeal. The Stevenses oppose the motion.

Summary judgment will be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.2; *Gera v. DEP*, EHB Docket No. 2005-067-MG, slip op. at 3 (September 8, 2006); *Barra v. DEP*, EHB Docket No. 2003-038-L (April 24, 2006.) Partial summary judgment may be granted if an adverse party who will bear the burden of proof at the hearing has failed to produce evidence of facts essential to the cause of action. Pa.R.C.P. 1035.2(2); *Jones v. SEPTA*, 772 A.2d 435, 438 (Pa. 2001); *Screck v. Department of Transportation*, 749 A.2d 1041, 1042 (Pa. Cmwlth. 2000); *Jackson v. DEP*, 2005 EHB 496; *Goetz v. DEP*, 2003 EHB 16, 19.

The Stevenses rely almost entirely on the representation repeated twice by the Department in the earlier litigation between the Department and the Stevenses that there would "always" be a

300-foot buffer separating the Stevenses' property line from the nearest land application of sludge. The problem with the Stevenses' case is that they never articulate a cohesive legal theory that would support their position that the Department's statements entitle them to some relief in this appeal. The Stevenses touch on various and sometimes contradictory elements of diverse legal theories that have changed over time, but they have failed to put any one actionable claim together. The Stevenses are not entitled to relief under any conceivable reading of their filings.

To begin with, we believe that the Stevenses have distorted the import of the Department's statements by reading them out of context. During the August 15, 2000 supersedeas hearing, in describing WTMA's May 2000 Notice, Sweeney testified that the:

> submitted and approved proposal is to land apply within a 300 foot buffer from the property line between the Appellant's [Stevenses'] property and the WTMA property. Therefore, there will always be a 300 foot buffer from any point on Appellant's property to the nearest land application area on WTMA's farm.

(S.T. 77.) It is important to note that Sweeney's testimony refers to WTMA's *submitted and approved* May 2000 Notice. This is echoed in the Department's August 2, 2000 interrogatory response. In response to a question regarding the 300-foot buffer and the Stevens' property line, the Department limited its answer to the "submitted and approved proposal." (Stevens Ex. A-3 ¶ 12.)

The Department's statements were clearly limited to WTMA's original notice of land application. The Department was not saying that WTMA would be precluded forever from submitting new or revised notices of land application. The Department's remarks did not go to the content or scope of future applications. The Department's statements, not only in and of themselves, but understood in the broader context of the earlier litigation as well, simply meant

that the 300-foot buffer would be maintained so long as WTMA operated pursuant to its *original* notice.

The Stevenses have not pointed to any provision in the applicable regulations or general permit that would have imparted upon the Department the authority to permanently foreclose WTMA from ever submitting new or revised notices. We suspect that any attempt to impose the sort of perpetual bar envisioned by the Stevenses would have been *ultra vires* and unenforceable.

There would be no grounds for imposing a perpetual bar even if such a bar could exist in theory. The Department did not require WTMA to create a 300-foot buffer from the Stevenses' property line. The Department simply approved a notice that incorporated WTMA's voluntary, unilateral decision to create such a buffer. WTMA did not commit that it would *never* use the lands that it is entitled to use under the operative regulations. Thus, the Department did not approve a perpetual buffer because no such buffer had been proposed. Again, the Stevenses are reading too much into the Department's litigation statements.

Furthermore, the Stevenses are relying on the statements of Sweeney. Sweeney was one of the Department's biosolids coordinators. It is true that the Department identified Sweeney as its designated representative in response to a sequestration request at the earlier hearing (Stevens Ex. A-2), but it does not follow that Sweeney had the authority to bind the Department in any way.

The Stevenses assert that Sweeney's statements constituted a "determination." (See, e.g., Brief ¶ ¶ 43, 45.) They seem to suggest that this "determination" was an appealable action of the Department. We do not see how this helps them. Assuming *arguendo* that the Stevenses' characterization is correct, it does not follow that WTMA was precluded from submitting new notices or that the Department could not take new appealable actions in response to changed circumstances. The Department can take multiple appealable actions with respect to a particular

project or site. To the extent that the Department's so-called determination was an appealable action, it was not irrevocable.

At certain points the Stevenses seem to be asserting a contractual claim. For example, the Stevenses asserted that Sweeney had the "power and authority" to "form a contract that is binding to the Department." (Stevens Brief in Support of Answer to Motion to Dismiss at 2.) Elsewhere, the Stevenses asserted that "the Department breached [its] agreement." (Stevens Brief in Support of Answer to Motion to Dismiss at 5.) At other points they deny that they are seeking relief on that basis. For example, the Stevenses stress that nowhere in their notice of appeal do they mention a "contract." (Stevens Brief at 2.) Additionally, the Stevenses repeatedly note in their response that the Department did not make an "offer." (Stevens Brief at 2, 8.) This is just one example of how the Stevenses tend to contradict themselves over time.

To the extent the Stevenses' claim sounds in contract, it has no merit. To form a contract, there must be an offer, acceptance, and consideration. *Reed v. Pittsburgh Bd. of Public Education*, 862 A.2d 131, 134 (Pa. Cmwlth. 2004); *Schreiber v. Olan Mills*, 627 A.2d 806, 808 (Pa. Super. 1993) (elements of an enforceable contract are offer, acceptance, consideration, or mutual meeting of the minds); RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981). It is obvious that the basic elements of a contract never existed here. No offer and acceptance occurred and there was no consideration. WTMA's use of the 300-foot buffer from the Stevenses' property line was not a bargained for restriction. WTMA unilaterally elected to employ the 300-foot buffer from the Stevenses' property line. Sweeney's testimony at the August 2000 hearing was nothing more than an explanation of WTMA's choice. Furthermore, we have little doubt that Sweeney had no authority to contract on behalf of the Department. The Commonwealth's entry into contracts is governed by statute. *See* 62 Pa. C.S. §§ 101 – 4509. Additionally, the Commonwealth Attorneys

Act, 71 P.S. §§ 732-101 to 732-506, provides that the Office of General Counsel and the Office of the Attorney General must approve contracts before they can take effect.

It might be that the Stevenses are arguing an estoppel theory, but if they are, it has no merit. To apply the doctrine of equitable estoppel against a governmental agency, it must have intentionally or negligently represented some material fact and induced a party to act to its detriment, knowing or having reason to know that the other party will justifiably rely on the misrepresentation. *Bolduc v. Board of Supervisors of Lower Paxton Township*, 618 A.2d 1188 (Pa. Cmwlth. 1992); *Kane Gas Light & Heating Company v. DEP*, 1997 EHB 451, 454; *Ambler Borough Water Department v. DER*, 1995 EHB 11, 26. Here, there is no evidence of any misrepresentation of a material fact by the Department or any inducement by the Department to the Stevenses upon which they relied to their detriment. As previously noted, the Department did not misrepresent anything. Even if the Stevenses were left with the impression that the 300-foot buffer from the property line would exist in perpetuity, there was no detrimental reliance. Estoppel will not lie where, as here, there is no evidence to indicate that the party invoking the doctrine acted any differently from how it otherwise would have acted. *See Westinghouse Electric Corp. v. Workers' Comp. Appeal Board*, 883 A.2d 579, 586-87 (Pa. 2005); *Blofsen v. Cutaiar*, 333 A.2d 841, 844 (Pa. 1975).

In sum, the most generous reading of the Stevenses' claims based upon the Department's statements in the earlier litigation does not get them anywhere. WTMA was not precluded from filing new notices and the Department was not precluded from acting upon such notices.

When we turn to the Department's approval of WTMA's latest notice--the action actually under appeal--we see nothing in the Stevenses' appeal that would support a finding that the Department erred. Putting aside the failed theories regarding the Department's prior statements,

the Stevenses do not claim that the Department violated applicable laws or permit terms by approving the new areas covered by the notice. WTMA has committed to stay at least 300 feet away from the Stevenses' well or house in accordance with 25 Pa. Code § 271.915. Although the Department has the authority on a case-by-case basis to impose requirements that are more stringent than the setback requirements in the regulations when necessary to protect the public health and the environment against any adverse effects of a pollutant in the sewage sludge, 25 Pa. Code § 271.904, the Stevenses have repeatedly admitted that they have no evidence of environmental harm or adverse public health consequences. (*See, e.g.* DEP Ex. B, G.)

Finally, the Stevenses claim that the regulatory setback requirements are facially unconstitutional because they do not apply to features that come into existence *after* notice is given of sludge application.[1] There is no need to delve into the merits of this contention. First, there is no mention of constitutional concerns in the Stevenses' notice of appeal. The Stevenses first raised this issue in their December 7, 2005 deposition. While we have been giving the Stevenses the benefit of the doubt in interpreting their claims, at some point it simply becomes unacceptable to keep adding and changing theories in support of an appeal. The Stevenses' latest constitutional theory crosses that point. We do not believe that the theory has been properly raised.

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[1] 25 Pa. Code § 271.915 reads:

> (c) Sewage sludge may not be applied to agricultural land, forest or a reclamation site that is:
>
> ***
>
> (3) Within 300 feet (or 91 meters) from an occupied dwelling unless the current owner there has provided a written waiver consenting to activities closer than 300 feet (or 91 meters). . . . *This paragraph does not apply to features that may come into existence after the date upon which adjacent landowner notification is given* under Chapter 275 or § 271.913(g) (relating to land application of sewage sludge; and general requirements) (emphasis added).

Secondly, the theory seems to be completely divorced from any real-world facts. There is no allegation here that there are any past or future post-notification features. The Stevenses are essentially arguing claims that are not their own, and as far as we know, do not apply to anyone at this time. The matter is not justiciable.

Finally, the Stevenses have not offered up anything specific to support their claim of unconstitutionality. There is no record support or even claim that there are similarly situated parties being treated differently for irrational reasons. *See DEP v. Parker White Metal Co.*, 515 A.2d 1358 (Pa. 1986). In other words, there is no evidence here or promise of any evidence of the kind that would support an equal-protection claim, even if the claim had been properly raised and could be reviewed at this time.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BENJAMIN A. AND JUDITH E. STEVENS	:	
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASHINGTON TOWNSHIP MUNICIPAL AUTHORITY, Permittee	:	**EHB Docket No. 2005-198-L**

ORDER

AND NOW, this 3rd day of October, 2006, it is hereby ordered that the Department's motion for partial summary judgment is granted. The portion of Objection 1 that relates to applicable site restrictions and Objections 2-5 and 7 are 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: October 3, 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	:	**EHB Docket No. 2004-120-CP-C**
v.	:	
	:	**Issued: October 4, 2006**
GERALD STRUBINGER	:	

ADJUDICATION

By Michelle A. Coleman, Judge

Synopsis:

The Board assesses a civil penalty against a contractor in the amount of $9,110 as recommended by the Department for violations of the Clean Streams Law and the Dam Safety and Encroachments Act. The Board assesses $6,100 for the contractor's unauthorized encroachment to a watercourse and a pond. The Board assesses $3,010 for the contactor's failure to implement erosion and sediment control Best Management Practices and for operating without an approved erosion and sediment control plan. The violations were intentional and resulted in damage to a High Quality Cold Water Fishery watercourse.

INTRODUCTION

The Department of Environmental Protection (Department) initiated this matter on June 4, 2004, by filing a Complaint for Assessment of Civil Penalties against Gerald Strubinger (Defendant) pursuant to the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.1 *et seq.* (Clean Streams Law), and the 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). The Complaint alleges that the Defendant unlawfully encroached upon a watercourse and a pond on property (Site) owned by his son, Gregory Strubinger, without developing an erosion and sediment control plan or incorporating erosion and sediment control Best Management Practices (BMPs), thereby causing accelerated erosion to occur and resulting in the discharge of sediment pollution to the waters of the Commonwealth. The Department requests that the Environmental Hearing Board (Board) assess a civil penalty in the amount of $9,110 against the Defendant for the violations set forth in the Complaint.

On August 30, 2004, the Defendant filed an Answer to the Complaint denying that he committed any unlawful conduct on the Site.

The Board has previously addressed the violations underlying this Complaint in an action involving the Defendant's son, Gregory Strubinger. *See Gregory Strubinger v. DEP*, 2003 EHB 247. In that case, the Board dismissed Gregory Strubinger's appeal of a compliance order requiring him to remedy the aforementioned violations on all grounds except the requirement that he return the watercourse to its original location and construct a new pond. The Board found that Gregory Strubinger, acting through his contractor (the Defendant in this matter), changed the course, current, and cross-section of the watercourse by filling in the original channel and diverting flow into a newly excavated channel, and filled in a pond on the Site. In the case before us now, the Department asks the Board to assess a civil penalty against the Defendant for the violations that occurred at the Site. Thus, the existence of the violations is not at issue in this case; rather, we must determine whether the Defendant, in fact, committed these violations, and if so, whether the penalty amount is reasonable and appropriate under the circumstances.

Judge Michelle A. Coleman presided over the trial of this matter, which was conducted

on November 7, 2005 and November 9, 2005. Filing of post-hearing briefs was completed on March 2, 2006, and the matter is now ripe for adjudication. The record consists of: a 477-page transcript from the appeal of *Gregory Strubinger v. DEP*, EHB Docket No. 2001-220-L, admitted as a Board exhibit, a 482-page transcript from the trial of the current action, and 53 exhibits. After a careful review of the record, the Board makes the following findings of fact.

FINDINGS OF FACT

1. Plaintiff is the Department of Environmental Protection, the executive agency of the Commonwealth 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 *et seq.* (Clean Streams Law); 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); Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended* 71 P.S. § 510-17 (Administrative Code), and the rules and regulations promulgated at Title 25 of the Pennsylvania Code. (C. at ¶ 2.)

2. Defendant is Gerald Strubinger, an adult individual residing at 555 West Tenth Street, Jim Thorpe, Pennsylvania 18229. (C. at ¶ 3; C. Ex. 1.)[1]

3. The Defendant was the general contractor for the construction of a house on property located along the north side of West Eighth Street between Spring and Pine Streets in Jim Thorpe Borough, Carbon County, which is owned by his son, Gregory Strubinger. The Site is identified as Carbon County Tax Map No. 82A3-16-A41.01. (C. at ¶ 5; B. Ex. 1 at 339-340,

[1]The following abbreviations will be used: "C. __" for Complaint; "C. Ex. __" for Commonwealth Exhibits; "D. Ex. __" for Defendant's Exhibits; "N.T. __" for the Transcript; "B. Ex. __" for the Transcript from the proceedings in *Gregory Strubinger v. DEP*, EHB Docket No. 2001-220-L, admitted into evidence as Board Exhibit 1.

346; N.T. at 274-275.)

4. A conveyance of surface water having a defined bed and banks and at least intermittent flow (watercourse) which serves as a tributary to Robertson Run traversed the Site prior to August 2000. (C. Ex. 2, 4, 40, 41, 48, 54, 55; B. Ex. 1 at 19, 41-43, 60, 65, 75, 102, 110, 112, 181, 183, 200, 204, 241, 247, 249, 375-377, 386-387, 392, 403, 438; N.T. at 132, 319.)

5. The watercourse is designated by Section 93.9d of the Water Quality Regulations, 25 Pa. Code § 93.9d, as a special protected watercourse because it is a High Quality Cold Water Fishery. (C. at ¶ 6; B. Ex. 1 at 73, 204; N.T. at 378.)

6. The Defendant conducted earthmoving activities on the Site in August 2000. (B. Ex. 1 at 339-340, 346; N.T. at 274-275.)

7. The Carbon County Conservation District is by delegation agreement with the Department authorized to investigate complaints and earthmoving activities to determine compliance with the Clean Streams Law and Erosion and Sediment Control Regulations promulgated thereunder at Chapter 102 of Title 25 of the Pennsylvania Code. (C. Ex. 46.)

8. On August 4, 2000, James Clauser, District Manager for the Carbon County Conservation District, inspected the Site in response to complaints of potential violations occurring on the Site. (B. Ex. 1 at 17; N.T. at 125, 128.)

9. Mr. Clauser observed the Defendant operating a hydraulic excavator in and around the watercourse and Eric Craigie operating a bulldozer on the Site. During the course of his inspection, Mr. Clauser noted the following conditions:

a. an existing stream channel was being filled in with excavated soil;

b. earthmoving activities were being conducted without an erosion and sediment

control plan; and,

c. erosion and sediment control BMPs were not incorporated.

(C. Ex. 2, 3, 14, 15, 23, 24, 58; B. Ex. at 19-20, 39-40; N.T. at 131-132, 138, 153-154, 159-162, 167-168, 205-206, 207-210, 213, 270-271, 436.)

10. Mr. Clauser advised the Defendant to cease from conducting earthmoving activities on the Site until he obtained the proper authorization. (C. Ex. 2; N.T. at 138-139.)

11. The Defendant refused to stop performing earthmoving activities on the Site. (C. Ex. 2; N.T. at 138-139.)

12. On August 5, 2000, Mr. Clauser returned to the Site and observed the Defendant and Mr. Craigie operating earthmoving equipment on the Site again. While inspecting the Site Mr. Clauser noted the following conditions:

a. the original channel of the watercourse had been filled in;

b. earthmoving activities were being conducted without an erosion and sediment control plan; and,

c. erosion and sediment control BMPs were not installed.

(C. Ex. 2; N.T. at 159-160.)

13. Mr. Clauser again advised the Defendant to cease from conducting earthmoving activities on the Site. (C. Ex. 2; N.T. at 159.)

14. The Defendant refused Mr. Clauser's request to stop conducting earthmoving activities on the Site. (C. Ex. 2; N.T. at 159.)

15. Mr. Clauser inspected the Site on August 7, 2000, accompanied by representatives from the Department and the Pennsylvania Fish and Boat Commission and observed the following conditions:

a. the original channel of the watercourse was filled in;

b. earthmoving activities had been conducted without an erosion and sediment control plan; and,

c. erosion and sediment control BMPs were not implemented.

(C. Ex. 2; N.T. at 161-162.)

16. Mr. Clauser advised the Defendant to cease from performing any earthmoving work on the Site except for the installation of erosion and sediment control BMPs. (C. Ex. 2; N.T. at 164-165.)

17. Mr. Clauser inspected the Site on August 9, 2000, accompanied by representatives from the Department and United States Army Corps of Engineers and observed the following conditions:

a. the flow from the original channel of the watercourse had been diverted to a newly excavated channel on the Site;

b. earthmoving activities had occurred on the Site without an erosion and sediment control plan; and,

c. erosion and sediment control BMPs were not incorporated.

(C. Ex. 2; N.T. at 167.)

18. The Defendant altered the flow of the watercourse by filling in the old channel of the watercourse and diverting the flow into a new channel that he dug at a different location on the Site. (C. Ex. 2, 4, 6, 14, 15, 19, 20, 21, 22, 26, 28, 29, 30, 31, 32, 45, 51, 58; B. Ex. 1 at 19, 40, 43-45, 52, 59, 73, 104-105, 158, 170, 183, 242, 250, 257, 315, 318, 323, 383-385, 391, 438, 455-456, 458; N.T. at 131, 153, 154-155, 158, 159-160, 167, 175-177, 327, 355-361, 362, 366, 367.)

19. The Defendant did not have a permit or authorization to fill in the original channel and relocate the watercourse. (C. at ¶ 8,11; C. Ex. 6; N.T. at 361-362.)

20. A small, intermittent man-made pond existed on the Site prior to August 2000. (C. Ex. 6; B. Ex. 1 at 119-122, 124-126, 128-135; N.T. at 14, 158.)

21. The Defendant filled in and graded over the pond. (B. Ex. 1 at 132, 184; N.T. at 319, 362.)

22. The Defendant did not have a permit or authorization to eliminate the pond. (C. Ex. 2, 7.)

23. The Defendant conducted earthmoving activities on the Site without developing an erosion and sediment control plan or implementing erosion and sediment control BMPs to effectively minimize the potential for accelerated erosion and sedimentation. (C. ¶ 13; C. Ex. 45; N.T. at 456.)

24. The Defendant's conduct created a danger of sediment pollution to the watercourse. (C. Ex. 45; N.T. at 456.)

25. The Defendant's conduct caused or allowed accelerated erosion and sedimentation to occur at the Site. (C. ¶ 32; C. Ex. 2, 15, 45; B. Ex. 1 at 230-231, 247, 398-399; N.T. at 128, 132, 133, 153-154, 391, 456-457.)

26. The record demonstrates that the Defendant's conduct was intentional. (C. Ex. 2, 45; B. Ex. 1 at 22, 44; N.T. 138-139, 159-160, 161-162,164-165, 188-189, 390, 463.)

27. The violations of the Clean Streams Law and the Dam Safety and Encroachments Act as described in the paragraphs above subject the Defendant to civil penalties under 35 P.S. § 691.605 and 32 P.S. § 693.21. *See* Complaint.

28. The Department uses a penalty matrix to determine the recommended amounts for

penalties. (C. Ex. 45; N.T. at 459.)

29. The Department's penalty assessment is for the violations that occurred on August 4, 7, and 9, 2000. (C. Ex. 45.)

30. The Department filed a complaint for civil penalties in the amount of $9,110 for violations of the Clean Streams Law and the Dam Safety and Encroachments Act. (C. at page 8.)

31. Count I of the Complaint seeks an assessment of $6,100 for an unauthorized encroachment to a watercourse and a pond, in violation of Section 6 of the Dam Safety and Encroachments Act, 32 P.S. § 693.6(a), and Section 105.11 of the Dam Safety and Waterway Management Regulations, 25 Pa. Code § 105.11(a). (C. at page 5.)

32. Count II of the Complaint seeks an assessment of $3,010 for the Defendant's failure to develop an erosion and sediment control plan and implement erosion and sediment control BMPs, and the resulting pollution to the waters of the Commonwealth, in violation of Sections 401 and 611 of the Clean Streams Law, 35 P.S. §§ 691.401 and 691.611, and Section 102.4 of the Erosion and Sediment Control Regulations, 25 Pa. Code § 102.4. (C. at page 8.)

DISCUSSION

The Board's duty in a civil penalty complaint case differs from our role in an appeal of a civil penalty assessment. In *DEP v. Leeward Construction*, 2001 EHB 870, 885-86, Judge Labuskes clarified this distinction as follows:

> Our role where the Department has filed a complaint for civil penalties ... 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.

Leeward Construction, 2001 EHB at 885-86. The Department bears the burden of proof. 25 Pa. Code § 1021.122 (a), (b)(1). However, the Defendant bears the burden of proving any affirmative defenses, such as establishing other factors which may have caused the violations at issue. *Frisch v. DER*, 1994 EHB 1226, *affirmed*, 2543 C.D. 1994 (Pa. Cmwlth. filed May 23, 1995).

We first turn to the issue of whether the Department sustained its burden of proving the violations of the relevant laws arising from the channel change of a watercourse and filling in of a pond on the Site. Both the Clean Streams Law and the Dam Safety and Encroachments Act provide that failure to comply with any part of the statute or any of the regulations promulgated thereunder is unlawful and subjects the violator to sanctions including the assessment of civil penalties. Section 611 of the Clean Streams Law, 35 P.S. § 691.611, and Section 18 of the Dam Safety and Encroachments Act, 32 P.S. § 693.18. Thus, in this case, the Department has the burden of proving by a preponderance of the evidence that the Defendant committed violations of the Cleans Streams Law and Dam Safety and Encroachments Act and that civil penalties should be assessed. The Department has satisfied that burden here.

In Count I of its Complaint, the Department seeks a penalty for violations of 32 P.S. § 693.6(a) and 25 Pa. Code § 105.11(a) because the Defendant encroached upon a watercourse and a pond on the Site without a permit.

Section 6(a) of the Dam Safety and Encroachments Act provides that "no person shall construct, operate, maintain, modify, enlarge or abandon any dam, water obstruction or encroachment without the prior written permit of the Department." 32 P.S. § 693.6(a). Section 105.11 of the Department's Dam Safety and Waterway Management Regulations mirrors this requirement. *See* 25 Pa. Code §105.11(a). An "encroachment" is "any 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.

The Defendant denies rerouting a watercourse and placing fill in a pond on the Site; however, the record in this matter reveals otherwise. At trial, the Department presented the testimony of James Clauser, District Manager for the Carbon County Conservation District, who visited the Site on several occasions in response to complaints of potential violations occurring on the Site. Mr. Clauser testified that during his first visit to the Site on August 4, 2000, he witnessed the Defendant operating a hydraulic excavator in and around the watercourse and noticed that the existing channel of the watercourse was being filled in with excavated soil. (N.T. at 125, 128.) On the following day, August 5, 2000, Mr. Clauser returned to the Site and viewed the Defendant operating the excavator again and observed that the original channel of the watercourse had been filled in. (N.T. at 159-160.) When inspecting the Site with representatives from the Department and Pennsylvania Fish and Boat Commission a couple of days later, on August 7, 2000, Mr. Clauser observed that the channel was completely filled in and opined that wetlands had been impacted. (N.T. at 161-162.) During each of these inspections, Mr. Clauser

advised the Defendant to cease from conducting earthmoving activities on the Site because he had not obtained a written permit from the Department, had not developed an erosion and sediment control plan, and had not incorporated erosion and sediment control BMPs to effectively minimize the potential for accelerated erosion and sedimentation at the Site; however, the Defendant refused to comply with his requests. (N.T. at 138-139, 159-160, 164-165.) Thus, upon inspecting the Site on August 9, 2000, with representatives from the Department and Army Corps of Engineers, Mr. Clauser observed that additional earthmoving activities had occurred and the flow from the original channel of the watercourse had been diverted to a newly excavated channel at a different location on the Site. (N.T. at 167.) Mr. Clauser's testimony was supported by his field notes and inspection reports from his inspections of the Site.

Contrary to Mr. Clauser's testimony, the Defendant testified that he did not engage in any earthmoving activities on the Site. (N.T. at 273.) In fact, the Defendant insisted that he lacks the skill required to operate an excavator. (N.T. at 97.) Similarly, the Defendant's son, Gregory Strubinger, testified that his father only served in an advisory capacity to assist him with building a house on the Site. (N.T. at 103.) Gregory Strubinger asserted that he oversaw any earthmoving activity that occurred on the Site and subcontracted out all of the earthmoving work conducted on the Site. (N.T. at 103-104.) According to Gregory Strubinger, he hired Randy Clemmer, Eric Craigie, Richard Beers and his son, and Coon Excavating and Trucking, to perform earthmoving work on the Site. (N.T at 98, 100, 104.)

We credit the testimony of Mr. Clauser and deem him to be a credible witness; however the same cannot be said for the testimony offered by the Defendant and his son in this matter. In the previous trial involving the Defendant's son held before Judge Labuskes, the Defendant testified that he performed earthmoving work on the Site and conceded that he was engaged in

earthmoving activities on August 4, 2000, when Mr. Clauser first inspected the Site. (B. Ex. 1 at 339-340, 346.) But in the instant case, the Defendant has denied any involvement in the earthmoving activities that occurred on the Site. (N.T. at 273.) Similarly, in the previous trial, Gregory Strubinger acknowledged that his father was responsible for the earthmoving activities conducted on the Site. (N.T. at 465-467.) However, in the case at bar, Gregory Strubinger testified that he was responsible for the earthmoving activities conducted on the Site and named several individuals he allegedly hired to conduct excavation work on the Site. (N.T. at 103.) Furthermore, as the Department argues in its post-hearing brief, the Defendant's testimony was not even consistent during the trial in this matter. Initially, the Defendant alleged that he lacked the skill necessary to operate a hydraulic excavator and asserted that any work he performed on the Site was limited to digging with hand tools. (N.T. at 278.) However, the Defendant later conceded that he used the excavator to move soil to the low-lying area of the Site and remove tree stumps and logs from the premises. (N.T. at 312, 319.)

In light of the glaring inconsistencies evidenced above, we must reject the testimony offered by the Defendant and his son, as it is clearly not credible and thus cannot be properly relied upon. As a result, we conclude that the Defendant was the contractor responsible for the earthmoving activity conducted at the Site.

The Defendant contends that stormwater runoff originating upslope from the Site has caused excessive erosion in the Borough. He suggests that this erosion is a result of commercial and residential development north of the Site and the Borough's failure to effectively manage the stormwater runoff. Thus, he argues that the watercourse that traverses the Site is nothing more than a "huge eroded ditch" that serves as a collection point for stormwater during rain events. (Defendant's post-hearing brief at page 2.) In support of this contention, the Defendant offered

the testimony of Borough residents who attested to the adverse impact that stormwater runoff has had on the Borough. William Maurer, the Borough Council President, acknowledged that stormwater runoff and the resulting erosion is a "borough-wide problem." (N.T. at 108.) Likewise, a retired resident, Joseph Lesisko, testified that the "drainage ditch" behind his property is "about 15 feet deep in spots and straight down." (N.T. at 69.) The Defendant insists that he and other residents have sought the assistance of federal and state agencies to remedy this problem, but to no avail.

We do not discount the fact that stormwater runoff has been and continues to be a problem in Jim Thorpe Borough and a source of major frustration for its residents. The Defendant has presented credible evidence establishing this. However, the presence of stormwater runoff on the Site does not provide a sufficient basis for the unlawful conduct that occurred there. Regardless of whether the Defendant considered the channel to be a watercourse or a "drainage ditch," as he and other residents suggest, the laws of this Commonwealth prohibit him from taking matters into his own hands and resorting to self-help to remedy the problem. *See Kresge v. DEP*, 2000 EHB 30, 52 (parties may not engage in the self-help remedy of ignoring Department orders). Such behavior completely undermines the purpose of the Clean Stream Law, Dam Safety and Encroachments Act, and the appurtenant regulations. Furthermore, the fact that portions of the watercourse were suffering erosion problems does not negate the fact that the Defendant's unlawful conduct contributed to this problem. *See Strubinger supra*, at 250. In sum, we are not convinced that any factor, other than the Defendant's conduct, caused the violations at issue in this case. We therefore find that the Department has sustained its burden of proving violations of the Dam Safety and Encroachments Act and its regulations because the Defendant diverted a watercourse and filled in a pond on the Site without having first obtained a

permit authorizing him to do so.

In Count II of its Complaint, the Department seeks a penalty for violations of 35 P.S. §§ 691.401 and 691.611, and 25 Pa. Code § 102.4 because the Defendant conducted earthmoving activities without developing an erosion and sediment control plan or implementing erosion and sediment control BMPs, and sediment pollution of the waters of the Commonwealth occurred as a result. These violations are based on Mr. Clauser's inspection of the Site on August 7 and 9, 2000. Mr. Clauser observed that a watercourse had been rerouted and a pond had been filled in and no erosion and sediment control BMPs were installed at the Site. (N.T. at 161-162, 164-165, 167.)

Chapter 102 of the Department's regulations outlines the erosion and sediment control requirements for earthmoving activities conducted within this Commonwealth:

> (1) The implementation and maintenance of erosion and sediment control BMPs are required to minimize the potential for accelerated erosion and sedimentation ...
>
> (2) A person proposing earth disturbance activities shall develop a written Erosion and Sediment Control Plan under this chapter if one or more of the following apply:
>
> > (i) The earth disturbance activity will result in a total earth disturbance of 5,000 square feet (464.5 square meters) or more.
> > ...
> >
> > (ii) The earth disturbance activity, because of its proximity to existing drainage features or patterns, has the potential to discharge to a water classified as a High Quality or Exceptional Value water pursuant to Chapter 93 (relating to water quality standards).

25 Pa. Code § 102.4 (a) (1), (b) (2) (i), (iii).

The Defendant does not dispute that an erosion and sediment control plan was not developed before earthmoving activities commenced on the Site or that erosion and sediment

control BMPs were not installed; rather, he contends that these requirements were not his responsibility and suggests that Mr. Clauser could have "draw[n] something up that [was] ... satisfactory to him and issue Gregory Strubinger the E&S plan as he had done for others in the past." (Defendant's post-hearing brief at 9.) We find both of these arguments to be unpersuasive and without merit. As someone engaged in earthmoving activities on the Site, the Defendant was bound by the erosion and sediment control requirements contained in Chapter 102, regardless of whether he was the record owner of the Site or not. *See* 25 Pa. Code § 102.2. Furthermore, Chapter 102 places the burden of adhering to these requirements on contractors and other persons engaged in earthmoving activities, not the Department or the District. *See Leeward Construction Co.* v. *DEP*, 821 A.2d 145 (Pa. Cmwlth. 2003.) While we will not speculate about Mr. Clauser's actions in past site inspections, it is clear that he was under no obligation to develop an erosion and sediment control plan for the Defendant's use as he seems to suggest. Accordingly, we hold that the Department sustained its burden of proving that the Defendant violated the Clean Steams Law and the Erosion and Sediment Control Regulations because he conducted earthmoving activities without developing an erosion and sediment control plan or implementing erosion and sediment control BMPs which resulted in the discharge of sediment pollution into the waters of the Commonwealth.

Having determined that the Defendant committed these violations, we now turn to the amount of penalty proposed by the Department for the violations.

The Board may assess a penalty 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 also a relevant factor. *Westinghouse v. DEP*, 745 A.2d 1277, 1280-1281 (Pa. Cmwlth. 2000) ("Westinghouse II"); *Whitemarsh*, 2000 EHB at 346. However, under the Dam Safety and Encroachments Act, we may assess the maximum civil penalty of $10,000 per day for each violation plus $500 for each day of a continued violation, and a penalty may be assessed whether the violation was willful or not. 32 P.S. § 693.21. Nonetheless, we do consider, for advisory purposes, the civil penalty recommended by the Department. *DEP v. Breslin*, EHB Docket No. 2005-069-CP-L (Adjudication issued April 6, 2006) *slip op.* at 9; *DEP v. Tessa*, 2000 EHB 770, 787.

Our assessment is based on the Department's recommended civil penalty and the evidence presented at trial. The Department's Complaint recommended a civil penalty in the amount of $9,110. (C. at page 8.) In determining the appropriate penalty amount for the violations of the Clean Streams Law and the Dam Safety and Encroachments Act, the Department utilized its civil penalty matrix worksheet.

The record demonstrates that the Defendant committed four violations of the law on three separate days. There were two violations of the Clean Streams Law and Erosion and Sediment Control Regulations on August 4 and 7, 2000, and two violations of the Dam Safety and Encroachments Act and the Dam Safety and Waterway Management Regulations on August 7 and 9, 2000.

Turning first to the classification of the violations, the Department determined that the violations were "severe" because the violations were conducted without a permit or the implementation of BMPs and caused accelerated erosion to occur and resulted in sediment pollution to a High Quality Cold Water Fishery watercourse. Having provided us with sufficient evidence of the Defendant's unlawful conduct and the resultant damage to the waters of the

Commonwealth, we find that the Department has established the appropriate severity classification for the violations.

Turning next to the willfulness of the Defendant's actions, we have defined the levels of culpability in the context of a civil penalty assessment 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 existence of reasonable care.

Whitemarsh, 2000 EHB 300, 349. The Department has determined that these violations were intentional. We agree and adopt the Department's conclusion. The exhibits introduced at trial indicate that the Defendant was personally made aware of the need to acquire a permit and implement erosion and sediment control BMPs before encroaching upon the watercourse on the Site on at least September 12, 1997 and September 23, 1997, as shown by a letter from the District directed to his attention and his signature on an inspection report, yet the violations still occurred after these dates. (C. Ex. 46, 48.) Also, the Defendant was advised on three separate occasions to cease from conducting earthmoving activities on the Site until he obtained the proper authorization. However, he openly disregarded Mr. Clauser's requests and proceeded with the earthmoving work underway. In addition, although the Defendant was advised that erosion and sediment control BMPs were required to be installed at the Site, he proceeded to conduct earthmoving work without making the slightest attempt to do so.

The Defendant's unlawful conduct resulted in considerable harm to the environment. The Department provided ample evidence establishing this fact at trial. The Defendant

eliminated approximately 150 feet of the original channel of a watercourse by filling it in with excavated material. (C. Ex. 4; N.T. at 357.) He then rerouted the flow from the original channel to a newly excavated channel at a different location on the Site. The channel change to the watercourse caused accelerated erosion downstream from the Site and resulted in the discharge of sediment into a protected watercourse. No evidence of the costs of restoration or the costs of the Department's enforcement efforts was presented at trial.[2]

We think the Department's assessment is reasonable and appropriate under the circumstances. Thus, the Board assesses a civil penalty in the amount of $9,110 against the Defendant. While it is within our discretion to assess a higher or lower penalty than recommended by the Department, we do not believe it is necessary to do so in this case. The Department's assessment is sufficient to deter the Defendant from thinking he is above the law in the future.

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; 32 P.S. § 693.21; 35 P.S. § 7514.

2. The Department bears the burden of proof when it files a complaint for a civil penalty. 25 Pa. Code § 1021.122 (b)(1).

3. The Defendant encroached upon a watercourse and a pond on the Site without a permit in violation of Section 6 of the Dam Safety and Encroachments Act, 32 P.S. § 693.6(a) and Section 105.11(a) of the Dam Safety and Waterway Management Regulations, 25 Pa. Code § 105.11(a).

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[2] In *Breslin* we recently stated: "we ... strongly encourage the Department and other parties to produce evidence along these lines in future cases where this Board is asked to assess a civil penalty." Having not received such evidence in this case, we continue to do so. *See* also *DEP v. Hostetler*, EHB Docket No. 2005-011-CP-K (Adjudication issued June 8, 2006) and *Leeward Construction*, 2001 EHB at 918 (Krancer concurring).

4. The Defendant's unauthorized encroachments constitute unlawful conduct under 32 P.S. § 693.18 of the Dam Safety and Encroachments Act and 35 P.S. § 691.611 of the Clean Streams Law.

5. The Defendant failed to develop an erosion and sediment control plan prior to conducting earthmoving activities in violation of Section 102.4 of the Erosion and Sediment Control Regulations, 25 Pa. Code § 102.4.

6. The Defendant failed to implement erosion and sediment control Best Management Practices to effectively minimize accelerated erosion and sedimentation in violation of Section 102.4 of the Erosion and Sediment Control Regulations, 25 Pa. Code § 102.4.

7. The Defendant's failure to develop an erosion and sediment control plan and implement erosion and sediment control Best Management Practices for earthmoving activities constitutes unlawful conduct under Section 18 of the Dam Safety and Encroachments Act, 32 P.S. § 693.18, and Section 611 of the Clean Streams Law, 35 P.S. § 691.611.

8. The Defendant's unlawful conduct resulted in the discharge of sediment pollution into waters of the Commonwealth in violation of Section 401 of the Clean Streams Law, 35 P.S. § 691.401.

9. The Board assesses a civil penalty in the amount of $9,110 against the Defendant for his violations of the Dam Safety and Encroachments Act and the Clean Streams Law and the regulations promulgated thereunder.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2004-120-CP-C**
GERALD STRUBINGER	:	

ORDER

AND NOW, this 4th day of October 2006, it is hereby ORDERED that civil penalties are assessed against Gerald Strubinger in the total amount of $9,110.

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: October 4, 2006

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BOROUGH OF AMBLER	:	
	:	
v.	:	**EHB Docket No. 2005-336-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: October 16, 2006**

OPINION AND ORDER ON MOTION TO COMPEL

By George J. Miller, Judge

Synopsis

The Board grants in part and denies in part a motion to compel which seeks more specific answers to interrogatories and document requests. The Board holds that in some instances where discovery requests were very broad or tangential to the issues on appeal, the Department adequately responded by making its files available to the requesting municipality. However, where discovery sought information concerning issues that were directly related to the NPDES permit renewal or sought the basis for the Department's determination that a strict phosphorus effluent limitation was appropriate, the Board has directed the Department to provide more specific answers.

OPINION

Before the Board is a motion to compel filed by the Borough of Ambler. The motion generally seeks more specific answers to a variety of interrogatories and requests

for admissions which were directed to the Department of Environmental Protection in this appeal from the renewal of Ambler's NPDES permit.

On December 6, 2005, Ambler filed an appeal from an NPDES permit issued by the Department for a discharge from the Ambler Borough Sewage Treatment Plant located in Upper Dublin Township, Montgomery County. The discharge point was to the Wissahickon Creek. Ambler objected, among other things, to the phosphorus limit imposed by the permit. Specifically, Ambler questions the Department's determination that the Wissahickon is in fact impaired by Ambler's discharge.

On March 6, 2006, Ambler served a request for admissions, answers to interrogatories and production of documents on the Department. The Department answered this discovery on May 1, 2006. Some of its answers directed Ambler to its files which would be made available for review by Ambler. A file review was arranged for June 9, 2006. In Ambler's view, the files were inadequately identified and not organized. Accordingly, it has filed a motion to compel asking the Board to direct the Department to provide more specific answers to certain discovery requests because merely directing Ambler to voluminous files is generally an inadequate response to discovery.

The Department opposes the motion, arguing that the Rules of Civil Procedure permit it to direct Ambler to its files, where the burden of sifting through the information is the same for the Department as it would be for Ambler. The Department also states that the files that were provided were identified by subject-matter and were adequately organized for Ambler's review.

Ambler generally objects to the Department's presentation of records in lieu of written answers to many of the interrogatories. The Pennsylvania Rules of Civil Procedure permit this procedure:

> Where the answer to an interrogatory may be derived or ascertained from the records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of that party's records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer would be substantially the same for the party serving the interrogatory as for the party served, a sufficient answer to such an interrogatory shall be to specify the records from which the answer may be derived or ascertained and to afford the party serving the interrogatory reasonable opportunity to examine, audit or inspect those records and to obtain copies, compilations, abstracts or summaries.[1]

However, as the Explanatory Comment emphasizes, the rule is not "intended to give an answering party carte blanche to foist upon the inquiring party a jumble of personal records." Accordingly, the records-production option is only appropriate "where the burden would be substantially the same for both parties and never where it will be an undue burden on the inquiring party."[2]

The Board has certainly permitted a review of records in lieu of specific answers to interrogatories.[3] However, the fact that the answering party must search large files to derive responsive material is not enough, by itself, to justify a general direction to files as an answer to an interrogatory. This is especially true where a requestor seeks materials that are directly related to the basis or reason for the Department's decision. In those

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[1] Pa. R.C.P. No. 4006(b).

[2] Pa. R.C.P. No. 4006(b), Explanatory Comment – 1978.

[3] E.g., *Defense Logistics Agency v. DEP*, 2000 EHB 987; *Brush Wellman v. DEP*, 1999 EHB 388.

instances, the Board has required a responder to at least direct the requestor to a portion of a document or file that is responsive to the discovery request.[4] By contrast, where an interrogatory is broadly worded, seeks decades worth of Department records on a broad category of actions, or is unlikely to lead to admissible evidence for use at hearing, the Board has found that making files available is appropriate.[5]

With these principles in mind, we will grant in part and deny in part Ambler's motion to compel. We agree with the Department that providing for a file review is an appropriate manner in which to answer some of Ambler's discovery requests. However, there are clearly discovery questions which seek specific information relating to the basis for the Department's decision to renew Ambler's permit with the restrictive phosphorus limit provided for by 25 Pa. Code § 96.5(c).[6] In those instances, which we deal with in

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[4] *E.g., Weiss v. DEP*, 1996 EHB 697 (reference to non-coal surface mining permit application as an answer to and interrogatory is permissible, but the answering party must at least direct the requestor to the section of the application where the information can be found).

[5] *E.g., C&K Coal Co. v. DEP*, 1987 EHB 796; *Chippewa Township v. DEP*, 1981 EHB 509.

[6] That regulation provides:

> When it is determined that the discharge of phosphorus, alone or in combination with the discharge of other pollutants, contributes or threatens to impair existing or designated uses in a free flowing surface water, phosphorus discharges from point source discharges shall be limited to an average monthly concentration of 2 mg/l [milligrams per liter]. More stringent controls on point source discharges may be imposed, or may be otherwise adjusted as a result of a TMDL which has been developed.

25 Pa. Code § 96.5(c).

more detail below, we find that the Department must provide more specific answers by identifying specific documents upon which its specific determination was based.

We are also aware that there is a fundamental disagreement between the parties as to the significance of a potential amendment to the TMDL for the Wissahickon as it pertains to phosphorus. The Department takes the position that any future amendment of the Wissahickon TMDL for phosphorus is irrelevant to an appeal of the Ambler NPDES permit. Yet where Ambler sought discovery on this topic, the Department nevertheless made files available during the June 9 file review. We might agree with the Department, except that it appears that work that was being done on a future amendment to the TMDL on some level informed the Department's determination that the phosphorus limit in the current TMDL was not appropriate for the Ambler permit, and that a more stringent phosphorus limit mandated by Section 96.5(c) of the Department's regulations was appropriate. In the Department's draft permit which was sent to Ambler, there is a great deal of discussion of the future amendment of the phosphorus TMDL, apparently as a justification for imposing the requirements of Section 96.5(c) on Ambler's permit.[7] Therefore, some exploration of the ongoing TMDL process may lead to admissible evidence concerning the Department's conclusion that the 2 mg/l phosphorus limit was appropriate by indicating the Department's view as to what designated use of the stream may be impacted by Ambler's discharge.

Accordingly, we will grant Ambler's motion to compel answers to Interrogatory Nos. 27, 28, 30, 33(a), 34, 36, and 40(d), and direct the Department to identify specific documents or other information which may be responsive to those questions.

---

[7] Ambler Motion, Ex. D.

Specifically, the Department should identify specific documents in response to Interrogatory Nos. 28, 30, 33(a), and 34. Interrogatory No. 28 requests documents which provide the basis for a statement made in the draft permit by Jenifer Fields, which while related to a future amendment to the Wissahickon TMDL, also informs the conclusion that phosphorus pollution as indicated by algae growth is an "impairment" justifying the imposition of the 2 mg/l limit for phosphorus. Interrogatory No. 30 asks that the Department identify "criteria" used to determine that phosphorus creates nuisance algae growth. The Department interpreted "criteria" to refer to only the regulatory meaning of the word as it relates to "water quality criteria." Rather, the interrogatory appears to ask why the Department believes that phosphorus creates nuisance algae growth and the basis for that belief. Interrogatories 33(a) and 34 are related to the Department's position that the Wissahickon is "impaired." This is clearly a central issue in this case and the Department must either provide more specific written answers to the interrogatories or identify specific documents which are responsive to those questions.

As for Interrogatory Nos. 27, 36 and 40(d), these interrogatories pose broader queries, and we believe that direction to the Department's files is appropriate. However, the Department must provide some direction to which subject-matter files are responsive.

The remainder of Ambler's motion to compel is denied because the Department has provided adequate answers. Interrogatory Nos. 9, 26, 37, 43, 44, and 47 are very broad and have limited, if any, relevance to Ambler's appeal. Therefore an opportunity to review the Department's files related to these matters is appropriate.

There was some question whether Ambler intended to compel a more specific answer to Interrogatory No. 10 or No. 11 in its motion. Interrogatory No. 10 asks whether

EPA or DEP would develop the TMDL for the Wissahickon. This is irrelevant to the appeal and unlikely to lead to admissible evidence. If Ambler intended to compel a more complete answer to Interrogatory No. 11 which asks if the Department has ever refused to apply a TMDL because it was insufficient to protect water uses, that interrogatory has been sufficiently answered by the Department when it made its files available.

We will also deny the motion to compel answers to Interrogatory Nos. 12 and 32. Interrogatory No. 12 seeks both EPA and Department documents related to the development of an amended TMDL to address nutrient contamination in the Wissahickon. The interrogatory is very broad and only relevant to the extent it may lead to admissible evidence related to the Department's determination that imposition of the 2 mg/l phosphorus limit is appropriate. Therefore we find that by making the Department's files available, the interrogatory is adequately answered. However, in its response to the motion to compel the Department points out that if Ambler wants internal EPA documents, it must request them directly from EPA. While we generally agree, if the Department has copies of internal EPA documents responsive to this interrogatory in its own files, those documents should be provided, unless they have been provided already. The motion to compel an answer to Interrogatory No. 32 is denied because the potential liability of a permit holder for a violation of a permit condition is not relevant to whether or not the permit was properly issued.

Finally, we deny Ambler's motion to compel answers to Interrogatory Nos.16(c), 19, 33(c), and 50 and Admission Request Nos. 15, 25 and 39. These questions have all been thoroughly answered by the Department. That Ambler does not agree that a particular document supports the Department's answer or otherwise disagrees with the

Department's interpretation of various studies and correspondence is not a basis to conclude that any more is required. It is not our role in resolving discovery disputes to evaluate the weight or value of information that is provided.[8]

We therefore enter the following:

---

[8] *Weiss v. DEP*, 1996 EHB 697, 701.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF AMBLER	:	
	:	
v.	:	**EHB Docket No. 2005-336-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 16th day of October, 2006, it is hereby ordered that:

1. The Borough of Ambler's motion to compel answers to Interrogatory Nos. 27, 28, 30, 33(a), 34, 36, and 40(d), is **GRANTED**. The Department shall provide more specific answers to those interrogatories as directed in the above opinion within 15 days of entry of this order.

2. The Borough of Ambler's motion to compel answers to Interrogatory Nos. 9, 10, 12, 16(c), 19, 26, 32, 33(c), 37, 43, 44, 47, and 50, and Admission Request Nos. 15, 25 and 39, is **DENIED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Judge

DATED: October 16, 2006

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

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SECRETARY TO THE BOARD

FOUNDATION COAL RESOURCES CORPORATION and PENNSYLVANIA LAND HOLDINGS CORPORATION	:	
v.	:	**EHB Docket No. 2006-067-R (Consolidated w/2006-068-R; 2006-069-R: 2006-070-R; 2006-071-R and 2006-190-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNECO OIL COMPANY, INC., Permittee	:	**Issued: October 17, 2006**

OPINION AND ORDER ON DISCOVERY MOTIONS AND PERMITTEE'S MOTION TO CLARIFY ISSUES

By Thomas W. Renwand, 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. The Board has a duty and responsibility to assure all parties an opportunity to conduct broad based discovery adequate to allow a party to fully prepare its case. However, the Board has a corresponding duty to limit discovery where required. Therefore, the Board grants in part and denies in part the discovery motions filed by the Appellants and the Permittee.

Although normally parties are not required to set forth the legal issues in a

proceeding until they file their prehearing memoranda, where the Board has entered an order based on a motion to narrow the issues and which was not objected to by any party, the Board further grants the Permittee's motion to clarify the issues in the case. The three discrete areas raised in the motion to clarify stem from the issues set forth by the Appellants.

Opinion

Introduction

Presently before the Pennsylvania Environmental Hearing Board are several discovery motions and responses together with the Permittee Penneco Oil Company, Inc's (Penneco) Motion to Clarify Issues. The parties, including the Pennsylvania Department of Environmental Protection, have filed responses. These responses which are numerous and also include correspondence, in some instances, have resulted in compromises. Nevertheless, there are still areas of dispute which we will resolve in this Opinion and Order.

These discovery disputes are between Penneco and the Appellants (Foundation Coal). This consolidated appeal involves objections Foundation Coal filed to the Department's issuance of several oil and gas well drilling permits in Greene County, Pennsylvania. On August 15, 2006 the Appellants filed a Motion to Limit Issues which, after hearing no objection from either the Department or Penneco, we granted on September 8, 2006. Thereafter, on October 10, 2006 Penneco filed its Motion to Clarify

which seeks to include what it terms three "core issues" to the issues set forth in Appellants' Motion to Limit Issues.

We will not review the numerous permeations of the original discovery motions in this opinion but note that although the parties have tried very hard to amicably resolve these issues they have been unable to do so. Therefore, we held oral argument on the matters still in dispute in Pittsburgh on Thursday afternoon, October 12, 2006. We also heard argument concerning the Permittee's Motion to Clarify. At the request of Foundation Coal's attorney, we allowed him until Monday, October 16, 2006 to file an additional brief in opposition to the Motion to Clarify.[1]

Discovery

Discovery before the Pennsylvania Environmental Hearing Board is governed by the Board's 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 and Orix-Woodmont*, 2003 EHB 652, 657. The main purposes of discovery before the Board are so all sides can accumulate information and evidence, plan trial strategy, and explore the strengths and weaknesses of their respective positions. *Groce et. al. v. DEP and Wellington*, (*Slip op.* issued April 28, 2006) at pages 2 & 3; *DEP v. Neville Chemical Company*, 2004 EHB 744, 746.

1 Foundation Coal filed a long letter on October 16, 2006 responding not only to the Permittee's Motion to Clarify but further addressing the discovery issues.

Not only does Rule 4003.1 of the Pennsylvania Rules of Civil Procedure allow discovery regarding any non-privileged matter that is relevant to the subject matter but it also allows discovery of even inadmissible information if that information "appears reasonably calculated to lead to the discovery of admissible evidence." Indeed, Penneco is arguing that it is entitled to voluminous documents and information regarding the operations of Foundation Coal and other coal mines, which may or may not be related to the coal holdings of Appellants involved in these specific appeals. Penneco argues that these documents are relevant and/or reasonably calculated to lead to the discovery of admissible evidence. On the other hand, Foundation Coal argues that its case regards rather narrow objections to oil and gas permits issued by the Department to Penneco. It further contends that not only is most of the discovery at issue here not relevant to this consolidated appeal but the discovery will not lead to admissible evidence.

The Board has a responsibility to not only assure that adequate discovery takes place but also a concurrent duty to limit discovery where required. *See* Pennsylvania Rule of Civil Procedure 4012; *Wellington*, at 3. Discovery can be expensive. It also can be very time consuming. We are especially cognizant of these less desirable aspects of the discovery process when the parties seek information from those who are not parties to the litigation. 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.

Legal Issues

The issues in this case as set forth in the Board's adoption of the consented to order promulgated by Foundation Coal are as follows:

> a. Whether the coal reserves (underlying the wells which are the subject of these appeals) and the owners, lessors or sublessors thereof are included within the definition or meaning of the following terminology or phraseology as used in the Oil and Gas Act, 58 P.S. § 601.101 *et seq.*, and 25 Pa. Code Chapter 78 for purposes of filing objections under Sections 201 and 202 of the Oil and Gas Act, 58 P.S. §§ 201 and 202:
>
> (a) "workable coal seam;"
>
> (b) a coal mine "projected and platted" but not yet operating;
>
> (c) "coal owner"; and
>
> (d) "coal operator."
>
> b. Whether the Department had a nondiscretionary duty to hold an informal conference under sections 202 and 501 of the Oil and Gs Act before issuing the Porter Well No. 2 and Gaines Well No. 1 permits for which a timely objection and request for conference had been submitted by Appellants, and if so, the appropriate topics for discussion and resolution.
>
> c. Whether PPL as a party "with an economic interest in a workable coal seam" as set forth in Section 502, 58 P.S. § 502, has the right to file objections to the Braddock Nos. 1-4 and Porter No. 2 well applications.
>
> d. As to all the well permits, whether the Department failed to comply with Sections 201 and 501 in not addressing or resolving objections by the coal owner or coal operator through applicable permit conditions in order to address the purposes of

the Oil and Gas Act under Section 102 and 25 Pa. Code 78.28 regarding mine safety, maximizing recovery of all resources, and protection of property rights.

e. Whether it was unreasonable and/or contrary to law for the Department to have issued the permits in the absence of conditions requested by Appellants, or equivalent conditions, which Appellants assert are the minimal conditions necessary to prevent undue interference with the mine, and to insure the safety of the mine workers, protect property rights, and protect natural resources.

f. Whether when imposing permit conditions, the Department unreasonably or unlawfully shifted the cost of compliance with such conditions from the permittee to the objectors, and whether the permit conditions, as included in each of the permits, are otherwise unreasonable and/or contrary to law.

Penneco's Motion to Clarify really seeks to add to these issues. Penneco identifies these as "core issues" in the consolidated appeal.

(a) The extent to which a coal operator may be and/or is obligated to conduct mining operations in the vicinity of existing or proposed oil and gas wells by alternate methods to longwall mining, such as by room and pillar mining methods and/or the extent to which the "longwall panels" that have been or will be "projected" by the coal operators can be either "moved" or "modified."

(b) The impact and application of the Oil and Gas Act (Act 223), the Coal and Gas Resource Coordination Act (Act 214), the DEP regulations found in Chapter 78 of the Pennsylvania Code, MSHA Regulations and the decision of the Commonwealth Court in *Einsig v. Pennsylvania Mines Corporation*, 452 A.2d 558 (Pa. Cmwlth. 351, 1982), as well as other applicable appellate decisions and decisions of the Board, including without limitation, the comprehensive scheme established by the legislation with regard to the "spacing" of oil and gas wells and "coal pillars" to be left in place surrounding

oil and gas wells.

(c) Whether the coal within the proposed coal mine of the Appellant will "likely" and/or "ever" be mined.

Foundation Coal strongly objects that the issues raised by Penneco are outside the scope of this consolidated appeal. The Department disagrees and further adds that parties can set forth what they believe are the legal issues at the time they file their prehearing memorandum. We agree with the Department.

In any event, we believe the three issues raised in Penneco's Motion to Clarify certainly are encompassed in this consolidated appeal. Therefore, the framework of discovery is based on these issues together with the issues raised by Foundation Coal as set forth above.

Discussion

We have carefully reviewed all the motions, discovery requests and responses, and the lengthy letters exhaustively setting forth the parties' positions. We also have the benefit of a lengthy oral argument where counsel not only articulately set forth their respective positions but responded to our many questions. We certainly agree with Penneco's co-counsel, Attorney Lambert, that matters before the Board are heard *de novo*. However, we fail to see how lengthy discovery concerning other mines and non parties, in some instances with little or minimal connection with Foundation Coal and no connection with the oil and gas permitting decisions at issue, will lead to discoverable evidence. We therefore conclude that even under the most expansive interpretation of the discovery rules much of what Penneco

seeks is not discoverable. For example, Penneco seeks all maps (including prior drafts) for two mines, the Emerald Mine and the Cumberland Mine, which are existing mines and do not have any connection with the permitted oil and gas wells. Penneco seeks voluminous records from nonparties including fifty years of correspondence from the Pennsylvania Coal Association.

Foundation Coal has offered by its letter to counsel of October 10, 2006 to produce much of the requested information including some specific business reports from those who are not parties to this litigation. In addition, as was pointed out by the Department at the oral argument, the Department has voluminous public records for the Emerald and Cumberland mines that are available for review at the Department's California, Pennsylvania mining office.

We will therefore issue an Order quashing the subpoenas to the third parties and denying in part and granting in part the Motion to Compel filed by Penneco.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FOUNDATION COAL RESOURCES CORPORATION and PENNSYLVANIA LAND HOLDINGS CORPORATION	:	
v.	:	**EHB Docket No. 2006-067-R (Consolidated w/2006-068-R; 2006-069-R; 2006-068-R; 2006-071-R and 2006-190-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNECO OIL COMPANY, INC., Permittee	:	

ORDER

AND NOW, this 17th day of October, 2006, following review of the various discovery motions, responses, letters, and further following oral argument, it is ordered as follows:

1) The Permittee's Motion to Compel is ***granted in part and denied in part.***

2) It is ***granted in part*** and Foundation Coal shall either produce or answer the discovery requested on or before **Tuesday, November 7, 2006** as follows:

   a. Foundation Coal shall produce and/or answer the discovery requested as set forth in detail in its letter of October 10, 2006.

   b. In addition to what it agreed to in its letter of October 10, 2006,

Foundation Coal shall produce and/or answer the following discovery:

1. All maps (including all prior drafts) involving the proposed "Foundation Mine."
2. All coal mine permit data relating to the proposed Foundation Mine, including but not limited to, the data compiled pursuant to 25 Pa. Code Section 89.154.
3. All surface maps that show the location of surface property boundaries, existing oil and gas wells, streams and other bodies of water, residential dwellings and other structures that overlie the area comprising the Foundation Mine.
4. All current coal reserve studies and reports relating to the coal reserves of the Foundation Mine.
5. All engineering and other studies and reports relating to alternative mining methods to that of longwall mining in the vicinity of oil and gas wells.
6. All communications over the past five years sent to or received from oil and gas operators other than Penneco involving coal mining operations and/or proposed coal mining operations in the vicinity of oil and gas wells.

7. All engineering and other studies or proposals involving coal pillars surrounding existing or proposed oil and gas wells in the areas of the Foundation Mine.

8. Copies of all communications since January 1, 2001 discussing coal mining operations in the vicinity of oil and gas wells between Mr. James Roberts and (a) the Secretary of the Department of Environmental Protection, and (b) any other appointed or elected officials of the Commonwealth of Pennsylvania.

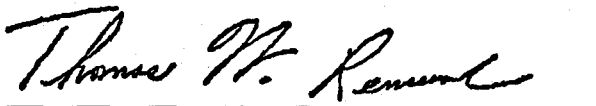
3) Penneco's Motion to Compel is **denied** in all other respects.

4) Foundation Coal's objections to the issuance of the subpoenas are **granted** and the subpoenas are ***quashed.***

5) Foundation Coal will produce some of the materials requested in the subpoenas as set forth in its October 10, 2006 letter. (*See* 2a. of this Order). After review of the materials produced, Penneco can submit a request for new, less onerous subpoenas if it still believes that it is being denied discoverable information in the possession of those not parties to this consolidated appeal.

6) Penneco's Motion to Clarify is ***granted*** and the three issues it raises will be considered as part of this consolidated appeal

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Judge

DATED: October 17, 2006

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SHENANGO INCORPORATED	:	
	:	
v.	:	**EHB Docket No. 2002-259-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 1, 2006**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Department did not exceed its legal authority or act unreasonably by including concentration and pH limits in a coke manufacturer's NPDES permit, even where such limits are not required under applicable regulations.

FINDINGS OF FACT

1. Shenango, Inc. owns and operates a coke manufacturing facility in the Newville Island section of Pittsburgh. (Verbatim Record of Hearing page ("T.") 10; Shenango Exhibit ("S.Ex.") 2.)

2. Shenango discharges industrial wastewater to the Ohio River pursuant to National Pollutant Discharge Elimination System ("NPDES") Permit No. PA0002437. (T. 11; S.Ex. 2.)

3. The current permit (the permit that is the subject of this appeal) was issued on

September 18, 2002 and effective on October 1, 2002.[1] The permit expires September 18, 2007. (T. 11-12; S.Ex. 2.)

4. The NPDES permit contains discharge limits on various outfalls at the facility. The outfalls are Outfall 001, which is the external outfall which discharges to the Ohio River, and internal Outfalls 101, 201, and 301. (S.Ex. 2.)

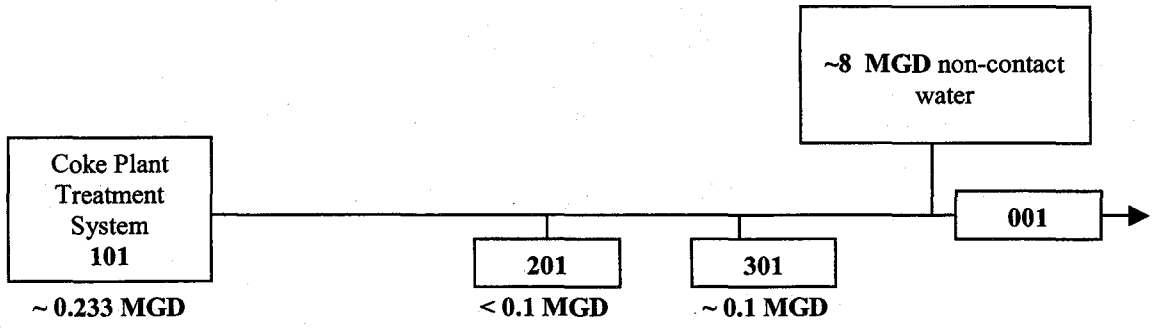
5. Internal Outfall 101 receives wastewater from the wastewater treatment facility. (S.Ex. 2.)

6. Internal Outfall 201 receives wastewater from the hot lime soda ash softener blowdown. (S.Ex. 2.)

7. Internal Outfall 301 receives wastewater from the zeolite softener backwash and boiler blowdown. (S.Ex. 2.)

8. The discharge from Outfall 001 is a combination of the wastewater from the three internal outfalls plus non-contact cooling water, boiler blowdown, filter backwash, and storm water. (T. 11-12; S.Ex. 2.)

9. A schematic of the discharge points is as follows:



(S. Ex. 28.)

[1] Prehearing deadlines were postponed numerous times in this appeal at the request of the parties. The parties had hoped that events would render the case moot, but those events apparently have not come to pass.

10. The identified volume of discharge from each outfall is as follows: Outfall 101 – 0.233 million gallons per day ("mgd"); Outfall 201 – 0.007 mgd; and Outfall 301 – 0.123 mgd. The combined volume from these three internal outfalls is about 0.363 mgd. There is a non-contact cooling water flow of 7.9 mgd that goes directly to Outfall 001 and does not pass through Outfall 101, 201, or 301. The total discharge volume of Outfall 001 is about 8.25 mgd. (S.Ex. 8.)

11. Although Shenango's production is very steady, its wastewater flow is variable. (T. 236, 283-86; C.Ex. 24A-C.)

12. Although Shenango has had NPDES permits for many years, the Department for the first time in issuing Shenango's 2002 permit imposed average monthly and daily maximum concentration limits for, among other parameters, ammonia, phenols, and cyanide at internal Outfall 101. The Department also for the first time included pH limits for internal Outfalls 101, 201, and 301 in Shenango's permit. (T. 26-27; S.Ex. 2.)

13. Shenango has a physical/chemical wastewater treatment plant that includes, among other equipment, an ammonia still for the treatment of free and fixed ammonia compounds, a dephenolizer for the treatment of phenol compounds, clarifiers and filters for solids removal, and activated carbon columns for the treatment of various compounds. (T. 12, 243; S.Ex. 8, 17, 27.)

14. Shenango's discharge at internal Outfall 101 is subject to the Iron and Steel Manufacturing Point Source Category Effluent Limitation Guidelines codified at 40 CFR 420 Subpart A – Cokemaking Subcategory ("ELGs"). (T. 13-14, 244-45.)

15. ELGs are categorical national standards promulgated by EPA for major industrial categories. The ELGs set forth effluent limitations representing the degree of effluent reduction

attainable by Best Practicable Control Technology Currently Available ("BPT"), Best Available Technology Economically Achievable ("BAT"), or Best Conventional Technology ("BCT"). (T. 81, 83, 84, 166-67.)

16. Shenango's discharge at Outfall 101 would normally be subject to the BAT limitations at 40 CFR 420.13(a)(3) for ammonia-N (i.e. ammonia nitrogen; hereinafter "ammonia") and phenols, BCT limitations at 40 CFR 420.17(a) for pH, and BPT limitations at 40 CFR 420.12(a) for cyanide. (T. 87; S.Ex. 6.)

17. Shenango has been granted what is known as a 301(g) variance pursuant to Section 301(g) of the federal Clean Water Act, 33 U.S.C. § 1311g, for its discharge of ammonia and phenols. (T. 18, 87, 88; S.Ex. 14, 15, 17.) The effect of this variance is that the effluent limits for these two pollutants are calculated using the ELGs for the less stringent technology of BPT instead of BAT. (T. 16-18; S.Ex. 17.)

18. The ELGs allow a discharger a credit for a by-product coke plant such as Shenango's plant which has a wet desulfurization system (a system which removes sulfur compounds from coke oven gases and produces a contaminated wastewater) to the extent the system generates an increased effluent volume. The BPT regulations at 40 CFR 420.12(a)(1) allow a credit not to exceed 11 percent for ammonia, phenols, and cyanide. Shenango's permit contains a credit at Outfall 101 for ammonia, phenols, and cyanide for a wet sulfurization system. (S.Ex. 2.)

19. The ELGs allow a discharger a credit allowance for a by-product coke plant which includes an indirect ammonia recovery system (a system which recovers ammonium hydroxide as a by-product from coke oven gases and waste ammonia liquors) to the extent that such systems generate an increased effluent volume. The BPT regulations at 40 CFR

420.12(a)(2) allow a credit not to exceed 27 percent for ammonia, phenols, and cyanide. Shenango's permit contains a credit for ammonia, phenols, and cyanide for an indirect ammonia recovery system. (S.Ex. 2.)

20. The BCT ELG at 40 CFR 420.17(a) imposes a pH effluent limitation of 6 to 9.

21. To develop effluent limitations for the iron and steel industry including cokemaking, EPA conducted an extensive study and analysis of the industry that is described in its 1000-plus page "Development Document for Effluent Limitations Guidelines, New Source Performance Standards and Pretreatment Standards for the Iron and Steel Manufacturing Point Source Category" (the "Development Document"). (T. 148, 156-59, 252-53; S.Ex. 10, 10A.)

22. The ELGs do not require a discharger to install any particular type of treatment technology in order to achieve the applicable effluent limitations. (T. 181, 183, 262, 292, 421, 435-36, 439; S.Ex. 10A.)

23. In formulating the ELGs, EPA developed an average discharge concentration for regulated pollutants and identified a typical or representative wastewater flow to produce a ton of product. (T. 253-55; S.Ex. 10, 10A.)

24. EPA's long-term average discharge concentration represents the median concentration of a pollutant in the discharge at the many coke facilities that were surveyed before promulgating the ELGs. The long-term average discharge concentration represents the effluent concentration of a pollutant that in EPA's judgment can be met by a well operated and maintained treatment plant. The BPT long term average concentration for ammonia for example is 97.2 mg/l. (T. 255, 270-71; S.Ex. 10A.)[2]

25. The representative amount of water required to produce a unit of product

[2] Like the parties, we will focus on ammonia throughout this Adjudication. The same principles and conclusions apply to the other pollutants at issue.

expressed in gallons/ton at a well operated and maintained treatment facility is the "production normalized flow" or "model flow." The model flow for BPT is 225 gallons of water per ton of product produced. This consists of 175 gallons/ton from a physical/chemical treatment plus 50 gallons/ton dilution water used in a biological treatment plant. (T. 188, 254-56; S.Ex. 10A.) Shenango does not have a biological treatment plant. (T. 28, 178; S.Ex. 8.)

26. Shenango's actual flow is closer to 170 gallons/ton of product than the 225-gallon figure used by EPA. (T. 236-39, 281.)

27. EPA used the long-term average concentration value and the production normalized flow to develop the "loading factor," the key number contained in the ELGs which the permit writer uses to develop effluent limitations based on mass. (S.Ex. 10.)

28. Thus, to derive the BPT loading factor for ammonia in the ELG at 40 CFR 420.12(a), EPA multiplied the BPT long-term average concentration for ammonia (97.2 mg/l) by the BPT production normalized flow (225 gallons/ton). The equation is:

> Ammonia-N concentration x production normalized flow = loading factor
> 97.2 mg/l x 8.34 pounds [conversion factor] x 225 gallons (.000225 million gallons/ton) = 0.182 lbs/ton
> 0.182/2 = 0.0912 lbs/1000 lbs. production/day

(Commonwealth Exhibit ("C.Ex.) 22; T. 258.)

29. Mass effluent limitations in an NPDES permit are calculated by multiplying the applicable ELG loading factor by the facility's production. (T. 167.)

30. To develop the mass effluent limit in Shenango's 2002 NPDES for ammonia the Department multiplied Shenango's reported representative production of 1061 tons/day (2122 thousand pound units/day) times the loading factor of 0.0912 for a result of 194 pound units/day as the monthly average mass effluent limitation. The equation is:

> Production in thousand pound units x loading factor = mass limit (lbs./day)

2122 thousand pound units x 0.0912 = 194 lbs./day

(T. 259, 412-13, 415, 420.)

31. The ammonia credits granted in Shenango's permit for wet desulfurization (21 pounds) and indirect ammonia recovery (52 pounds) increase the mass based permit limitation for ammonia from 194 pounds/day to 267 pounds/day. (T. 259-61, 416; C.Ex. 26; S.Ex. 6.)

32. The ELGs do not *require* the imposition of concentration limits. The actual regulatory limits are only expressed in terms relating to mass limits. 40 CFR 420.

33. The Department included concentration limits in Shenango's permit and a pH limit at the internal outfalls to create a greater incentive for Shenango to properly operate and maintain its treatment facilities on a consistent basis. (T. 119-121, 125-27, 270, 298-99; S.Ex. 2 (Fact Sheet/Statement of Basis).)

34. The Department did not conduct a site-specific analysis of Shenango's specific processes, control technology, economic burden, or other factors unique to Shenango in deriving the level of the concentration limits in the permit. The Department considered Shenango's situation and history in making the decision to impose concentration limits as stand alone permit requirements, but it did not consider Shenango's situation or history in coming up with specific concentration values. (T. 137-139, 344.)

35. For example, the Department did not consider the actual flow from internal Outfall 101 in determining the concentration limits. (T. 117-19, 263; S.Ex. 2 (Fact Sheet/Statement of Basis).)

36. Instead, the Department used the concentration limits set forth in the Development Document, which are the factors that EPA used in the equations to derive the ELG mass limits (mass = concentration x flow). The credits given to Shenango for wet

desulfurization and indirect ammonia recovery systems affect mass but not concentrations limits. (T. 79-81, 259-61.)

37. The Department and Shenango entered into a consent order and agreement on November 4, 1999 that addressed numerous effluent violations, including violations of the phenolics, ammonia, and cyanide limits at Outfall 101 and pH violations at Outfall 001. (C.Ex. 18.)

38. Shenango's history of repeated operation and maintenance problems at its treatment facility are documented in letters Shenango attached to its discharge monitoring reports ("DMRs") and submitted to the Department. (S.Ex. 7A-7E; C.Ex. 4.)

39. In 1998, Shenango exceeded the mass effluent limitations for ammonia and phenols at internal Outfall 101 approximately 9 times. Shenango attributed the exceedances to, *inter alia*, operational problems with its dephenolizer, maintenance issues with its ammonia still, and computer problems. (S.Ex. 7; C.Ex. 4, 17-18.)

40. In 1999, Shenango exceeded the mass effluent limitations for ammonia, cyanide, and phenols at internal Outfall 101 a total of 16 times. Shenango attributed these exceedances to several operational problems at an ammonia still, and operation problems at the dephenolizer. (S.Ex. 7; C.Ex. 4, 17-18.)

41. In 2000, Shenango exceeded the mass effluent limitations for ammonia and cyanide (August, September, December) at internal Outfall 101 6 times. Shenango attributed the exceedances to operational problems at the Sulferox facility, and operational problems with steam feed line to the ammonia still. (S.Ex. 7A; C.Ex. 4, 17.)

42. In 2001, Shenango exceeded the mass effluent limitations for ammonia, cyanide, and phenols at internal Outfall 101 35 times. (S.Ex. 7A, C.Ex. 17.) Shenango attributed the

exceedances to maintenance activities performed at the Sulferox process, pluggage of Sulferox equipment, pluggage in liquor lines and in pumps to the ammonia still, operating problems at the dephenolizer, pluggage at an ammonia still at the level controller valve and outlet, and operation problems at an old ammonia still. Shenango retained the services of U.S. Filter to evaluate corrective activities to reduce cyanide and ammonia concentrations in its discharge. (C.Ex. 7.)

43. In 2002, prior to the issuance of its 2002 NPDES permit (effective on October 1, 2002), Shenango exceeded the mass effluent limitations for ammonia, cyanide, and phenols at internal Outfall 101 5 times. (S.Ex. 7; C.Ex. 17.)

44. The 2002 NPDES permit containing concentration based effluent limitations in addition to mass based effluent limitations became effective October 1, 2002. Shenango exceeded the concentration based effluent limitations for ammonia (October, November, December), cyanide (October, November) and phenols (December) at internal Outfall 101 approximately 6 times in 3 months. Shenango attributed the exceedances to operation and maintenance problems. (C.Ex. 17, S.Ex. 7B.)

45. In 2004 and 2005, due to self-reported operation and maintenance problems, Shenango has continued to exceed its mass limitations. (S.Ex. 7D, 7E, C.Ex. 17.)

46. Shenango has made a series of upgrades and improvements to its wastewater treatment plant and processes over the past fifteen years, but it has not resulted in consistent compliance. (T. 30-31, 48-50; S.Ex. 7, 19; C.Ex. 17.)

47. A well operated physical/chemical treatment facility can achieve the concentration and pH limits in Shenango's permit. (T. 282-86, 300-01; S.Ex. 10, 10A.)

48. The Department acted reasonably in relying upon the concentration factors used to develop the mass-based ELG values in writing Shenango's permit limits.

49. Although the Department can also pursue enforcement actions for permit violations, imposing concentration and pH limits at internal Outfall 101 in Shenango's permit provides an additional incentive for Shenango to adequately operate and maintain its treatment facility consistently and in a manner that is in accordance with the terms and goals of ELGs. (T. 296-98.)

50. Including concentration and pH limits in Shenango's permit constituted a reasoned exercise of the Department's discretion.

DISCUSSION

Shenango filed this appeal from the terms in its 2002 NPDES permit that impose concentration and pH limits at its internal outfalls. Shenango asks us to order the Department to delete those portions of its permit in their entirety.

Shenango argues that the concentration limits must be vacated for several reasons. First, the Department lacks the legal authority to impose concentration limits. Second, the limits must be vacated because the Department failed to conduct a site-specific Best Professional Judgment ("BPJ") analysis. Third, even assuming the Department had the requisite legal authority and that it used the proper analysis, it acted unreasonably by including concentration limits because they are unnecessary, the Department has no good reason for imposing them, they take away much of the regulatory flexibility Shenango acquired in 301(g) variances issued in the past, they discourage innovative techniques, and Department and EPA guidance documents suggest that concentration limits are not appropriate. Finally, Shenango argues that the concentration limits are too stringent as grounds for striking the limits in their entirety.

As to the internal pH limits, Shenango argues that the Department acted unreasonably by depriving it of the beneficial effect of dilution of its wastestream from non-contact cooling water

prior to final discharge to the Ohio River.

The Department vigorously disputes all of these arguments. We find that the Department had the requisite legal authority and it acted within the range of reasonableness. We, therefore, decline Shenango's request that we vacate the concentration and pH limits.

I. Concentration Limits

Legal Authority

The Department had the legal authority to include concentration limits in Shenango's permit. In fact, both the state and federal regulations (incorporated by reference into the state regulations) give the Department the express authority to set concentration limits in addition to mass limits. 25 Pa. Code § 92.57 states:

> NPDES permits shall specify average and maximum daily quantitative limitations for the level of pollutants in the authorized discharge in terms of weight except pH, temperature, radiation and any other pollutants not appropriately expressed by weight. Permits may in addition impose limitations on frequency of discharge, concentrations or percentage removal, and may include instantaneous maximum limits, BMP's or any other limitations, as necessary.

And 40 CFR 122.45(f)(2), incorporated by reference at 25 Pa. Code § 92.2(b)(15), states:

> Pollutants limited in terms of mass additionally may be limited in terms of other units of measurement, and the permit shall require the permittee to comply with both limitations.

In the face of such clear regulatory authority, it is difficult to appreciate Shenango's argument that concentration limits are unauthorized. Both 25 Pa. Code § 92.57 and 40 CFR 122.45(f)(2) clearly and expressly impart authority to impose concentration limits "in addition" and "additionally" to mass limits. There is nothing in the ELGs for cokemaking, or in any other regulation for that matter, that specifically prohibits concentration limits in Shenango's permit. There is no need to apply or even interpret contradictory regulatory provisions because there are

no regulations that contradict § 92.57 and Part 122.45(f)(2).

Shenango relies on 25 Pa. Code § 92.2d and 40 CFR 125.3, but we see no support in those regulations for Shenango's theory that the Department is prohibited from imposing concentration limits and mass limits for the same pollutant. Section 92.2d is titled "Technology Limits" and reads:

> Discharges that are regulated by this chapter shall meet the following minimum requirements when applicable:
> (1) EPA-promulgated effluent limitation guidelines established under section 304 of the Federal Act (33 U.S.C.A. § 1314).
> (2) For those industrial categories for which no effluent limitations have been established under paragraph (1), Department-developed technology-based limitations established in accordance with 40 CFR 125.3 (relating to technology-based treatment requirement in permits).

Similarly, 40 CFR 125.3 states that technology-based limits may be established on a case-by-case basis "to the extent that EPA-promulgated effluent limitations are inapplicable." Shenango's argument is that ELGs must be followed where they exist. Shenango may be right, but to repeat, the cokemaking ELGs do not prohibit concentration limits. The Department followed the ELGs here. The ELGs provide that discharges must at a minimum meet requirements set forth in the applicable ELGs, and there is no dispute that the Department did at least that much here.

Section 92.57 and Part 122(f)(2) are directly on point; Section 92.2d and Part 125.3 are not. Section 92.2d and Part 125.3 do not so much as mention concentration versus mass limits. We do not see them as limiting the Department's legal authority to include concentration limits in Shenango's permit expressly or by some sort of implication.

Shenango relies throughout its brief on its expert witness, Gary Amendola, to support its legal position regarding the applicable regulations. For example, Shenango cites the testimony

of Mr. Amendola to support its key legal claim that the general authority to impose concentration limits set forth in 25 Pa. Code § 92.57 and 40 CFR 122.45(f)(2) is limited by the perceived absence of express language regarding the issue in the ELGs themselves. (*See e.g.,* Shenango Brief at 19-20, Reply Brief at 2.) Another example is Amendola's opinion that the regulations prohibit the imposition of BPJ limits if there are categorical limits.[3]

Legal conclusions are within the purview of the Board, not witnesses. *Browne v. Commonwealth*, 843 A.2d 429, 434 (Pa. Cmwlth. 2004). Opinions on questions of law are generally prohibited. See OHLBAUM ON PENNSYLVANIA RULES OF EVIDENCE §§ 704.05 and 704.08 (2005-06 ed.) (and cases cited therein). While the Board in some cases may allow testimony regarding how the Department interprets a particular regulation or how a regulation was developed or applied, such testimony is actually factual, not expert, testimony. In other words, the Board may need to know how the Department as an institution interprets or applies a regulation, but a given witness's *opinion* regarding the legal meaning or effect of a regulation is irrelevant and improper. *Commonwealth v. Neal*, 618 A.2d 438, 439 (Pa. Super. 1992). Mr. Amendola's opinion that applicable regulations limit the Department's legal authority fits squarely within the domain of legal opinion testimony upon which we may not rely. The regulations themselves are the best source for drawing those conclusions. *Browne*, 843 A.2d at 434. The regulation themselves leave us with no doubt that the Department acted within the scope of its legal authority.

The Type of Analysis Used

Shenango contends that, conceding the Department's authority, if the Department was

[3] The Department is guilty of the same practice. For example, it relies on the testimony of its expert, Ronald Schwartz, in support of its legal theory that applicable regulations require pH limits at Outfall 101. (Brief at 36.)

going to impose stand-alone concentration values, it needed to perform a BPJ analysis. BPJ is a term of art. It involves a deliberative development of technology-based limits for a particular facility or group of facilities based upon such considerations as the age of the plants and equipment, the processes employed, engineering factors, cost, and non-water-quality environmental impacts. 40 CFR 125.3(d). BPJ is generally only used "for those industrial categories for which no [ELGs] have been established." 25 Pa. Code § 92.2d(2). ELGs have been established for coke manufacturers. 40 CFR Part 420. Therefore, the Department needed to follow those ELGs, not BPJ.

As previously noted, concentration values are authorized under 25 Pa. Code § 92.57 and 40 CFR 122.45(f)(2). They are, however, not required. Therefore, while the term-of-art BPJ analysis may not be applicable, the Department's decision to include concentration values must nevertheless be based upon the reasonable exercise of its discretion. In exercising its discretion, the Department must obviously bring its professional and technical expertise to bear, but that is to be distinguished from the term-of-art regulatory BPJ process, which only applies where ELGs do not exist. There is no list of mandatory criteria or checklist of procedures that the Department must follow in exercising its discretion to impose concentration limits in the ELG universe. We will examine the Department's exercise of discretion on a case-by-case basis to decide whether the Department made unreasonable decisions, i.e., abused that discretion.

Whether the Department Acted Reasonably

Shenango challenges the reasonableness of Department's decision. Shenango's case might have been more compelling had it proposed alternative limits and provided a justifiable basis for those alternatives. For example, Shenango complains that the Department simply "plucked the numbers out of EPA's Development Document," but it does not suggest some other

numbers that might have been more appropriate. It is quite apparent that Shenango's primary concern is not so much with the actual concentration values selected as it is that the Department acted unreasonably by including *any* stand-alone concentration limits in the permit.

Before turning to Shenango's more specific objections, we need to point out our disagreement with Shenango's generalized criticism regarding the Department's use of concentration values that EPA used to come up with its mass-based limits. We find no fault in what the Department did. A little background is required.

As previously noted, the Department was operating in the ELG world in this case because there are ELGs for cokemakers such as Shenango. ELGs are not intended to reflect particularized conditions at any one plant. They are not site-specific. They represent a technical as well as a policy decision that a certain level of treatment should be required for a particular industry in order to balance the need to operate a successful business with the need to protect the nation's waterways. The EPA makes this technical/policy decision, and the Development Document for each ELG describes how EPA went about making that decision. The Development Document for Shenango's category is 1,050 pages long, which is emblematic of the amount of work that goes into developing these standards. The effluent limitations are in essence goals that everyone covered by the ELG must meet.

ELGs come in different shapes and sizes, but in this case the actual regulatory limit for ammonia discharges for the cokemaking industry is expressed as 0.0912 pounds per 1000 pounds of coke production. A mass limit is the product of concentration and flow. In order to develop a regulatory standard production-based mass limit, there must be a standard concentration and a standard flow. For example, in order to come up with the ELG limit for ammonia of 0.0912 lb/1000 lb production, EPA had to first come up with a concentration figure and a flow figure.

Just as the actual mass limit represents a technical/policy decision about what should be required of the industry, the concentration and flow components of the mass-based limit themselves represent technical/policy decisions about what can be accomplished by the regulated community. In fact, since the mass limit itself is nothing other than the mathematical product of the concentration and flow numbers, it might be said that the true technical/policy decisionmaking goes into formulating the concentration and flow numbers.

Just as the production-based mass limit is non-site-specific, the concentration and flow components upon which the limits are based are themselves non-site-specific. They do not reflect the performance of any one plant. Instead, they reflect EPA's decision that demonstrated technologies can produce a discharge with a certain concentration and a certain flow. This is a critical point. In the case of cokemaking, the appropriate concentration does not vary with flow:

> The Agency [EPA] believes that the model BPT flow rates *and* effluent quality can be achieved at all coke plants provided properly designed treatment facilities are installed and those systems are well operated.

Development Document (S.Ex. 10A p. 151) (emphasis added).

For ammonia discharges in cokemaking, EPA used a concentration figure of 97.2 mg/l. This figure does not vary. It is not altered due to amount of flow, treatment techniques used, the age of equipment, or anything else because it was those very factors that EPA normalized to derive industry-wide standards. Again, it represents the demonstrated performance of the treatment technologies upon which the effluent guidelines were based. Similarly, the normalized standard for flow is 225 gallons/ton of coke produced. Although EPA did not include either its concentration number or its flow number into a separate effluent-limit regulation as stand-alone requirements, the mass-based regulation is simply the mathematical result of the concentration and flow numbers: 0.0912 lb/1000 lb = 0.182 lb/ton = 97.2 mg/l x 8.34 lb/mg/mg/l [a conversion

faction] x 0.000225 MG/ton.

Shenango's generalized concern seems to be that it was unreasonable for the Department to rely on EPA's technical and value judgments as embodied in the Development Document and incorporated into the ELGs. To the extent the Department had a choice, we see nothing unreasonable in relying on EPA's conclusion as supported and explained in its Development Document that all cokemaking plants can meet the published concentration values if they properly operate and maintain their plants.

Shenango contends that it is not enough that it is capable of meeting the limits.[4] Shenango argues that the Department must at least have some legitimate reason for imposing concentration limits where, as here, the ELGs do not require them. Here, Shenango argues that the Department has no such reason, or alternatively, that its purported reasons keep on changing.

Shenango is correct in stating that it is not enough for the Department to put limits in a permit simply because a source is capable of meeting them. *Municipal Authority of Union Township*, 2002 EHB 50, 60. That is not, however, what the Department did here. The Department included concentration limits in Shenango's permit to help ensure that Shenango properly operates and maintains its treatment plant. Other additional reasons may have come and gone, but this reason has remained constant throughout the permit drafting and litigation processes. This is the reason we will focus upon, and we conclude that it is a legitimate basis for imposing concentration limits.[5]

Technology-based effluent limits are obviously indirectly related to reducing pollution, but their immediate objective is to force sources to install, operate, and maintain technology that

[4] There is no dispute that Shenango is capable of meeting the limits.
[5] Shenango argues that we should not defer to the Department because of its ever-changing rationales. We have not deferred to the Department in any event.

is capable of satisfying a minimum level of treatment. As previously mentioned, the level required represents EPA's technical and policy judgment on what is reasonably attainable on an industry-wide basis. For the most part, this performance-based approach as applied to cokemakers does not care how a source gets where it needs to be in meeting its mandated effluent quality so long as it gets there.

Shenango has the right under the cokemaking ELG to choose how it will meet the industry performance standards. The Department may not, for example, force Shenango to install particular equipment. To the extent that the Department has claimed otherwise, it is wrong. Thus, the Department cannot insist that Shenango install a pH adjustment system prior to its carbon absorption units.

The Department can insist, however, that Shenango perform to industry standards, and Shenango has not done so. Shenango has a long history of difficulty meeting its mass-based limits. Shenango is correct in pointing out that the Department can bring enforcement actions for failing to meet permit limits and/or failing to comply with separate permit conditions requiring proper operation and maintenance of treatment facilities (*e.g.* S.Ex. 2, Part B, Condition 10, 25, Part B., Condition 11; C.Ex. 3, Conditions 18 and 21). *See* 25 Pa. Code § 92.51(4) (maintain facilities in good working order and operate efficiently); 40 CFR 122.41(e) (same). The Department has, in fact, taken enforcement actions against Shenango, but Shenango has continued to have recurring operational and maintenance problems that have resulted in exceedances of its permit limits. The record does not support Shenango's characterization that it has suffered "isolated incidents." Rather, enough of a pattern and practice has emerged that some additional incentive appeared to be appropriate.

The Department has shown that including stand-alone concentration limits provides

another useful vehicle for forcing Shenango to operate its equipment correctly so that exceedances are avoided. Imposing stand-alone concentration limits complements the Department's other efforts to achieve compliance and ensure optimal performance in accordance with the performance-based goals of the ELGs. This is most clearly demonstrated by the fact that Shenango must explain what happened each time it exceeds its limits. (S.Ex. 7A-E; C.Ex. 17.) Shenango has been required to reveal and deal with several admitted operational problems that might have gone without proper attention in the absence of concentration limits. For example, despite several admitted operational problems with its ammonia still, Shenango was able to meet its mass but not its concentration limits at the times it was experiencing problems. (S.Ex. 7.) The concentration limits provide an additional and effective incentive for Shenango to perform up to par by correcting operational or maintenance problems in a timely manner, or perhaps more importantly, putting programs in place to ensure that they do not happen in the first place. Given the Department's rationale, we cannot agree that the Department acted unreasonably in deciding to impose stand-alone concentration limits.

The Department's expert witness, Ronald Schwartz, testified credibly that imposing concentration (and pH--discussed below) limits at the internal outfall will provide an additional, effective incentive for Shenango to meet ELG performance standards by operating its equipment properly. (T. 296-98; C.Ex. 27.) We consider it quite significant that Shenango's expert, Gary Amendola, while opining that the Department has other means of achieving compliance, did not directly contradict Schwartz's conclusion that the concentration limits will encourage improved performance. (*See* T. 348-49; S.Ex. 29.) And to repeat, performance is what the technology-based program is all about.

Shenango argues that it is not enough that the Department act reasonably; concentration

limits must be "necessary." It is true that 25 Pa. Code § 92.57 (quoted above) states that non-mass-based limits may be added "as necessary." 40 CFR 122.45(f)(2), however, does not contain such a qualifier. To the extent Shenango is correct, the "necessary" language does not set up a but-for test. The Department is not required to show that concentration limits are the one and only way to effect compliance. Shenango is required to prove to us that it was not reasonably necessary to include the limits, and Shenango's proven record of failing to meet its performance standards prevents it from doing so.

Shenango claims that the concentration limits discourage the use of water conservation techniques. It is true that measures to reduce flow theoretically could have a tendency to increase concentrations, all other things being equal. Stated another way, the solution to pollution defined in terms of concentration is dilution. Although water conservation is an admirable goal, we cannot conclude that the Department erred in deciding that compliance with effluent limits is of overriding importance. In any event, the record belies Shenango's intimation that its compliance problems have resulted from water conservation measures. Shenango has not shown us that any future plans to implement such practices have been foreclosed. The bottom line when it comes to performance-based limits is that it is up to Shenango to design and operate all of its facilities in such a way that it does not violate its permit. If water conservation is important enough, or the economics justify it, Shenango can engineer the other aspects of its facilities to ensure permit compliance.

Shenango argues that it was unreasonable to include stand-alone concentration limits because doing so had the effect of nullifying its Section 301(g) variance. On this point Shenango is simply wrong. Shenango has been granted a 301(g) variance pursuant to Section 301(g) of the Clean Water Act, 33 USC § 1311g, for the discharge of ammonia and phenols. The effect of this

variance is that the effluent limits for these two pollutants are calculated using the ELG for the less stringent technology of BPT instead of BAT. Shenango own manager of environmental control concedes that the variance is incorporated into Shenango's current permit. (T. 18, 28.) The Department calculated Shenango's permit limits, including the concentration limits, using the BPT ELGs. For example, the Department used the BPT concentration limit for ammonia of 97.2 mg/l. Had the Department used BAT (and, therefore, "nullified the 301(g) variance"), the applicable concentration value for ammonia would have been 25 mg/l.

Shenango argues that the concentration limits are unduly stringent. This argument is rather unique because most parties who argue that a limit is too stringent suggest alternative limits. Shenango, however, argues that the unduly stringent limits must be stricken in their entirety and not replaced with anything. This is a bit of *non sequitor* that hints at the weakness of the argument. Surely there are concentration limits that are not more stringent than the mass limit, but Shenango has not explained what they are. In any event, we agree with the Department that the concentration limits are not more stringent than the mass limits.

The Department relied entirely upon the ELGs for both the concentration limits and the mass limits. The Department has been analytically consistent in keeping actual site conditions out of the calculations. In contrast, in an attempt to convince us that its concentration values are more stringent than its mass values, Shenango puts the rabbit in the hat by comparing its permit mass limits, which are based on the ELG concentration numbers multiplied by the *ELG* flow rates, with a value that represents the product of the ELG concentration numbers and Shenango's *actual* flows. Since Shenango's *actual* flows happen to be lower than the industry standard, multiplying the *actual* flow with the ELG concentration numbers results in a lower value than the value calculated using the ELG flows. For example, the ammonia concentration limit is 97.2

mg/l. When that number is multiplied by Shenango's *actual* flow, 0.218 mg/day (and the conversion factor of 8.34 lb/MG/mg/l), the result is 176.5 lb/day. When this result is compared to Shenango's permit mass limit of 267 lb/day, Shenango concludes that its "effective" mass limit is 33.9 percent more stringent.

There is no good reason, however, to factor *actual* flows into any part of the analysis. As we have already explained, neither actual flows nor any other unique aspect of any one plant (beyond production amounts) has any place in applying ELGs. The ELGs constitute industry-wide goals and standards. The Department acted reasonably and consistently when it used only ELG factors instead of adopting Shenango's approach, which mixes apples with oranges.

In order to be analytically consistent, if concentration permit values should be based on actual flows, then the mass limits should as well. This might be a case of being careful what you wish for. The concentration values are simply lifted out of EPA's calculations, *but so are the flow numbers*. Shenango's current permit mass limits are based on ELG flow values. If the flow numbers were adjusted to reflect actual conditions, they would be much lower. If we assume *arguendo* that actual conditions matter, it could be that Shenango's mass limits are too generous, not that its concentration limits are too stringent.

Shenango's flows happen to be lower than the ELG industry standard. That is in large part why it is objecting to concentration values. Another plant might have flows greater than the industry standard, which would mean that it might have trouble meeting mass limits. It would be just as inappropriate to adjust the industry flow standard (e.g. 225 g/ton for ammonia) for that plant in order to soften the mass limits as it would be to adjust Shenango's concentration values to account for its low flows. The whole point of the ELGs is to avoid these sorts of site-specific adjustments and create industry-wide goals and standards.

In short, it is not appropriate to factor actual flows into the analysis. When that gimmick is eliminated, Shenango has no basis for claiming that its concentration values are unduly stringent. To the contrary, in formulating the ELGs, EPA concluded that both the mass and concentration values are reasonably attainable and therefore constitute appropriate goals. The ELG concentration does not vary with flow and the ELG flow rate does not vary with concentration. We cannot agree that the Department acted unreasonably by sticking to these ELG factors and values.

Shenango argues in its brief that pertinent Department and EPA guidance documents suggest that concentration limits are not appropriate. The Department in response protests that Shenango cannot cite to those documents because Shenango forgot to move them into evidence. Shenango in its reply brief asks us to take official (i.e. judicial) notice of the documents.

Although the Department is technically correct and Shenango has not complied with our rules regarding official notice and reopening of the record, *see* 25 Pa. Code §§ 1021.125(c) and 1021.133, we will exercise our authority under our rules to "disregard any error or defect of procedure which does not affect the substantial rights of the parties," 25 Pa. Code § 1021.4, and consider the documents in our deliberations. The guidance documents are the Department and EPA's permit writer's manuals. They were not developed in connection with this case, and they were referred to extensively by multiple witnesses during the proceedings and in other exhibits. There is no question regarding their authenticity or relevance, and but for an obvious oversight, they would have been admitted.

More fundamentally, we will grant Shenango's request to consider the documents in our deliberations because doing so does not affect the substantial rights of the Department in any adverse way. To the contrary, we are surprised at the Department's opposition because the EPA

permit writer's guide in particular strongly supports what the Department did in this case:

> While the regulations require that limitations be expressed in terms of mass, a provision is included at 40 CFR § 122.45(f)(2) that allows the permit writer, at his or her discretion, to express limits in additional units (e.g., concentration units). Where limits are expressed in more than one unit, the permittee must comply with both.
>
> As provided by the regulations, the permit writer may determine that expressing limits in more than one unit is appropriate under certain circumstances. *For example, expressing limitations in terms of concentration as well as mass encourages the proper operation of a treatment facility at all times.* [Emphasis added.] In the absence of concentration limits, a permittee would be able to increase its effluent concentration (i.e., reduce its level of treatment) during low flow periods and still meet its mass-based effluent limits. Concentration limits discourage the reduction in treatment efficiency during low flow periods, and require proper operation of treatment units at all times.
>
> The derivation of concentration limits should be based on evaluating historical monitoring data and using engineering judgment to be sure they are reasonable. In certain situations, the use of concentration limits may not be appropriate since they may discourage the use of innovative techniques, such as water conservation by the permittee. For example, *if a facility had a history of providing efficient treatment* of its wastewater [emphasis added] and also wished to practice water conservation, inclusion of concentration limits would not be appropriate (i.e., concentration limits would prohibit decreases in flow that would concurrently result in an increase in pollutant concentration). To summarize, the applicability of concentration limits should be a case-by-case determination based upon the professional judgment of the permit writer.
>
> * * *
>
> Example 1:
>
> An industrial facility (leather tanner) is subject to effluent limitations guidelines based on its rate of production. The permit writer calculates the applicable mass-based limits based on the long-term production rate at the facility and incorporates the mass limits in accordance with 40 CFR § 122.45(f)(1).
>
> In reviewing the past inspection records for the facility, the permit writer notes that while the facility is generally in compliance with

> its mass limits, the effluent flow and concentration vary widely. To ensure that the treatment unit is operated properly at all times, the permit writer determines that concentration-based limits are also appropriate. *The permit writer consults the EPA Development Document* [emphasis added] for the leather tanning effluent limitations guidelines and bases the concentration-based limits on the demonstrated performance of the treatment technology upon which the effluent guidelines were based. The concentration-based limits are then incorporated in the permit in accordance with 40 CFR § 122.45(f)(2).

S.Ex. 13 pp. 66-67.)

Although Shenango's production of coke is steady, its flow rates are not. (C.Ex. 24, 27.) Shenango does *not* have a history of providing efficient treatment. Most fundamentally, the manual expressly envisions the use of concentration limits to conduce the proper use of technology. Including concentration limits in Shenango's permit is clearly consistent with "the background, purpose, letter, and spirit of the remainder of the technology regulatory process." *Municipal Authority of Union Township v. DEP*, 2002 EHB 50, 61.

One final point regarding the reasonableness of the Department's action: Including both concentration and mass limits in a permit is hardly unusual. It is actually a very common practice. Concentration limits regulate the strength of the discharge and mass limits regulate the total amount of pollutants being added to waterways. There is nothing inherently unreasonable in including both types of controls in an NPDES permit. In fact, the Department has imposed mass and concentration based effluent limitations in the NPDES permits of the two other cokemaking plants in the Southwest Region, Koppers Monessen Coke Plant and USS Clairton Works. (T. 272.) Shenango has fallen well short of meeting its burden of proving that the Department made an unreasonable decision to apply both limits to the Shenango plant as well. Indeed, Shenango has failed to provide any record support for its claim that including

concentration has interfered with the level playing field that the ELGs are intended to create.[6]

II. pH Limit at Internal Outfalls

Shenango's other objection to its permit is that the Department acted unreasonably by imposing a pH limit at its internal outfalls instead of at the point of discharge to the Ohio River. It argues that the Department has no practical reason for imposing internal limits. It says that it is difficult for it to comply with the internal limits due to the configuration of its treatment process. The Department once again responds that it has imposed a pH limit at an internal outfall as an additional tool for attaining better compliance by getting Shenango to pay more attention to its treatment system.

There is no dispute that the Department had the *authority* to impose an internal pH limit. We do not believe that Shenango has shown that the Department was unjustified or unreasonable in imposing pH limits at internal outfalls. Shenango violated its pH limit at its final discharge point 18 times in the 21 months before the permit was issued. Shenango has continued to have pH exceedances since the permit was issued. Placing additional pH limits at internal points helps to better define the cause of the exeedances at the final outfall. It brings the testing point closer to the source of the problem, which will provide an additional incentive for Shenango to operate its treatment system effectively.

Shenango contends that pH should be limited only at the external outfall because the effluent from its internal outfall is diluted substantially by non-contact cooling water before it reaches the external outfall. As previously noted, Shenango's compliance record for pH at the external outfall belies the motion that dilution will consistently help it achieve better compliance. In any event, the idea that Shenango should be allowed to ineffectively operate its treatment

[6] Shenango's complaint about being deprived of a level playing field is made harder to swallow by the fact that Shenango is operating pursuant to 301(g) variances that have dramatically reduced its performance requirements.

system because the discharge is diluted anyway is completely at odds with the purpose and design of the performance-based permitting program.

Just as the Department cannot force Shenango to configure its treatment system in a particular way, Shenango cannot be heard to complain that the particular configuration it has chosen entitles it to special treatment. It is up to Shenango to design, operate, and maintain a system that meets performance criteria.

Finally, all of the key pollutants are controlled at the internal outfall. The burden is on Shenango to show that the Department made an unreasonable choice by grouping the compliance point for pH together with the compliance point for the other constituents, and it has failed to satisfy that burden.

CONCLUSIONS OF LAW

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

2. Shenango has the burden of proving that the Department's NPDES permit terms are unlawful or unreasonable. 25 Pa. Code § 1021.122(c)(3).

3. DEP has the legal authority to include concentration limits in Shenango's permit in addition to mass limits. 25 Pa. Code § 92.57; 40 CFR 122.45(f)(2) (incorporated at 25 Pa. Code § 92.2(b)(15)).

4. Expert opinions on questions of law are generally prohibited.

5. BPJ is generally only used for industrial categories for which no ELGs have been established. 25 Pa. Code § 92.2; 40 CFR 125.3.

6. The decision to impose concentration limits where authorized but not required is a matter within the Department's discretion.

7. DEP acted with reasoned discretion here because concentration limits will provide an additional incentive for Shenango to properly operate and maintain its treatment facilities.

8. Department acted reasonably by including pH limits at Shenango's internal outfalls as an additional incentive to ensure proper operation and maintenance of Shenango's treatment facilities.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SHENANGO INCORPORATED	:	
	:	
v.	:	**EHB Docket No. 2002-259-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 1st day of November, 2006, this appeal 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: November 1, 2006

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

REDBANK VALLEY MUNICIPAL AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2005-262-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 9, 2006**

ADJUDICATION

By George J. Miller, Judge

Synopsis

The Board holds that a letter from the Department which includes a demand for civil penalties based upon the terms of a consent agreement due to the failure of the municipal authority to comply with the terms of the agreement is an appealable action. However, the municipality's appeal is dismissed because its claimed unilateral mistake of fact is an insufficient basis upon which to avoid the negotiated terms of the consent agreement.

Background

On August 24, 2005, the Redbank Valley Municipal Authority filed a notice of appeal with the Board appealing a letter from the Department which demanded payment of civil penalties based upon the Authority's failure to comply with a timetable for the installation of flow meters in accordance with a negotiated consent agreement dated May 9, 2005. The purpose

of this agreement was to resolve certain violations which were occurring at the Authority's publicly owned treatment works and to avoid litigation.

On March 28, 2006, the Department and the Authority filed a joint motion to waive hearing pursuant to 25 Pa. Code § 1021.112, and proceed with a joint stipulation of fact and cross dispositive motions. After consultation with the parties, the Board entered an Order on April 3, 2006, granting the parties' request to waive hearing in accordance with 25 Pa. Code § 1021.112, and ordering the parties to file a joint stipulation of fact on or before May 31, 2006, and file their post-hearing briefs thereafter. The parties timely filed a joint stipulation of facts and exhibits. Briefing was completed on August 21, 2006. After full consideration of these materials we make the following:

FINDINGS OF FACT

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"); the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. § 750/1-750.20a ("Sewage Facilities Act"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder ("Regulations"). (Stipulation of Fact ("Stip.") 1.)

2. The Redbank Valley Municipal Authority is a municipal authority organized and existing under the Municipality Authorities Act of 1945, Act of May 2, 1945, P.L. 382, *as amended*, 53 Pa.C.S. §§ 5601-5623 ("Municipality Authorities Act"), and maintains a mailing address of 243 Broad Street, New Bethlehem, Pennsylvania 16242. (Stip. 2.)

3. The Authority operates and maintains a publicly-owned treatment works, which consists of a sewage treatment plant ("Plant") located in Mahoning Township, Armstrong County, and a sewage conveyance system that transports sewage, including sewage generated from New Bethlehem and South Bethlehem, to the Authority's Plant. Treated sewage effluent is discharged from the Plant into Redbank Creek, a "water of the Commonwealth," as defined in Section 1 of the Clean Streams Law, 35 P.S. § 691.1. (Stip. 3.)

4. On May 9, 2005, the Department and the Authority entered into a consent order and agreement to resolve certain violations occurring at the publicly owned treatment works. (Stip. 4.)

5. The consent order and agreement was reviewed and signed by counsel for the Authority. (Stip. 5.)

6. As required by the consent agreement, the Authority reached agreements with New Bethlehem Borough and South Bethlehem Borough (the "Boroughs") whereby the Authority has taken ownership and operation of all sewage collection and conveyance systems that are tributary to its Plant. (Stip. 13.)

7. Among other things, the consent order and agreement required the Authority to install flow metering devices at points in the collection and conveyance systems, as well as in the Plant. (Stip. 14.)

8. Pursuant to the consent order and agreement, the flow metering devices were to be installed within 45 days of the execution of the consent order and agreement. (Stip. 15.)

9. June 23, 2005 was 45 days from the execution date of the consent order and agreement. (Stip. 16.)

10. The Authority did not complete its obligation to install all necessary flow metering devices under the consent order and agreement until July 14, 2005. (Stip. 20.)

11. July 14, 2005 is 21 days from June 23, 2005. (Stip. 21.)

12. Because of the Authority's failure to meet this obligation within 45 days of the execution date of the consent order and agreement, the Authority was subject to the stipulated civil penalties provision contained in Paragraph 9 of the Agreement. (Stip. 23.)

13. Paragraph 9.a of the consent order and agreement provides: "If the Authority fails to comply in a timely manner with any applicable term or provision of this Consent Order and Agreement, the Party failing to meet its obligation shall be in violation of this Consent Order and Agreement and, in addition to other applicable remedies, shall pay a civil penalty in the amount of $200 per day for each violation." (Stip. 24.)

14. Paragraph 9.e of the Agreement provides in pertinent part: "Stipulated penalties shall be due without notice and payable monthly on or before the 15 day [sic] of each succeeding month." (Stip. 25.)

15. The Department did not receive a stipulated civil penalty payment on or before July 15, 2005. (Stip. 26.)

16. On July 25, 2005, the Department sent a letter to the Authority outlining the violations of the Agreement and advising the Authority that the Department, as of July 25, 2005, had calculated a total stipulated penalty in the amount of $6,600. (Stip. 27.)

17. Specifically, the letter that is the subject of this appeal reads as follows:

> The Department has completed a file review and has determined that Redbank Valley Municipal Authority ("Authority") is not in compliance with the Consent Order and Agreement (CO&A), executed with the Department on May 9, 2005. We base this determination on the following information:

- *Inflow/Infiltration and Data Collection Obligations* (Paragraph 3.c.a. of the CO&A). On or before June 23, 2005, the Authority was to install flow metering devices at points in their respective collection and conveyance systems, as well as the plant. At a minimum, the Authority was to install meters to quantify all overflow discharges adjacent to the Broad Street and Short Street Pump Stations, and at the plant. As confirmed by conversations with your consultant, Tom Thompson, on July 12, 2005 and July 25, 2005, this obligation was not completed until July 14, 2005, and consequently is 21 days overdue.

- *Stipulated Civil Penalties* (Paragraphs 9.a. and 9.e. of the CO&A). As of the date of this correspondence (July 25, 2005), a penalty of $4200 (21 days at $200/day) is owed for failing to comply in a timely manner with the terms and provisions of the CO&A. An additional $2000 has been added to the base total ($4200) for each day that payments are overdue beyond July 15, 2005 (10 days at $200/day).

Thus, as of July 25, 2005, the Department has calculated a total stipulated penalty of $6600 ($4200 + $2000 = $6600).[1] The payment shall be made by corporate check or the like made payable to "Commonwealth of Pennsylvania Clean Water Fund" and sent to my attention. As a reminder, all future stipulated civil penalties are due automatically and without notice. In addition, $200 per day continues to accrue until the Department receives payment.

(Stip. Exhibit 2.)

18. On July 28, 2005, the Department received a stipulated civil penalty payment from the Authority in the amount of $ 7,000. (Stip. 29.)

[1] The Authority has not challenged the arithmetic error in the calculation of the civil penalty.

DISCUSSION

Jurisdiction

The Department argues that the Authority's appeal should be dismissed because the Board lacks the jurisdiction to consider the July 25 Letter. Specifically, the Department contends that the letter merely describes the pre-existing obligations imposed by the consent agreement and is not final because the Authority could choose to ignore the letter thereby forcing the Department to file a petition to enforce in the Commonwealth Court.

Our first inquiry is to determine whether we have the power to hear the Authority's appeal. In evaluating our power to adjudicate the Authority's claims, we are not concerned with the ultimate merit of those claims. Rather, our focus in on the nature of the letter which is the basis of the appeal and whether that letter constitutes an action of the Department over which we have jurisdiction. We find that it does: The Department (1) made a specific determination that the Authority had violated the terms of the consent agreement based on specific facts; (2) determined the duration of the violation; and (3) calculated a specific amount of civil penalties that were owed in accordance with the terms of the consent agreement. As we explain more fully below, we find this procedure indistinguishable from a situation where the Department writes a letter which (1) made a specific determination that the Authority had violated the terms of the Sewage Facilities Act based on specific facts; (2) determinates the duration of the violation; and (3) calculates a civil penalty based upon the factors provided for and the rate established by the statute. Since the latter unquestionably constitutes an appealable action, the former does as well.

The scope of the Board's jurisdiction is described by Section 4 of the Environmental Hearing Board Act. That Act authorizes the Board to adjudicate claims based "on orders,

permits, licenses or decisions of the department."[2] The Act further provides 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 . . ."[3] Our regulations refine the Act's definition of an "action" as "[a]n order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification."[4] Not all communications from the Department fall neatly into one of these categories. Therefore, we will consider several factors in order to assess whether communication in a letter constitutes a final action adversely affecting a person.[5] Some of those factors include the specific wording of the communication; the purpose, intent and practical impact of the communication; the apparent finality of the letter; the regulatory context; and the relief that the Board may be able to provide.[6]

Reviewing the language and context of the July 25 Letter, we find that it is an action of the Department. The wording of the letter is very specific and includes a specific conclusion that a civil penalty is due from the Authority based upon its failure to comply with the terms of the consent agreement. The letter provides the Department's analysis of the facts which it believes constituted a breach of the agreement, a penalty calculation, an amount due and instructions for mailing payment. The letter is not simply a description of the terms of the consent agreement: the letter calculated a civil penalty and provided instructions for the payment of that penalty

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[2] Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. § 7514(a). *See also* Sewage Facilities Act, 35 P.S. § 750.16(b)("any order, permit or decision of the department under this act . . . shall be taken subject to the right of notice and appeal to the Environmental Hearing Board . . .")

[3] 35 P.S. § 7514(c).

[4] 25 Pa. Code § 1021.2.

[5] *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121.

[6] *Beaver v. DEP*, 2002 EHB 666, 673.

based on the Department's decision that the consent agreement had been violated. Further, the Board could certainly find that the Department made erroneous findings of fact or miscalculated the penalty, or that the penalty assessment was based upon an illegal contract provision,[7] and provide relief to the recipient of such a letter.

The Department places great emphasis on the fact that the Authority had a "pre-existing obligation" to pay an agreed upon civil penalty for violation of the terms of the consent agreement, and is therefore not adversely affected by the letter. That begs the question presented by this appeal as to whether the Authority has any obligation to pay a penalty under the consent agreement by reason of a mistake. Any obligation or duty to comply with the law, either as a permit condition or a negotiated contract provision, is "pre-existing" to the violation. This fact is not relevant to whether or not the Authority is adversely affected by the Department's action. Moreover, the EHB Act does not limit the terms "adversely affected" to mean only the creation of "new" legal obligations.

Indeed, the controversy here is whether the Authority must pay the amounts demanded. The consent agreement might not be enforceable at all if its execution was based on a mutual mistake of fact or if performance was impossible due to force majeure.[8] The Department's determination that it is owed $ 6,600 plus future accrued penalties and its demand for payment has an obvious adverse impact upon the Authority. In other contexts, the Board has found that

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[7] *Global Eco-Logical Services, Inc. v. Department of Environmental Protection*, 789 A.2d 789 (Pa. Cmwlth. 2001).

[8] *See Global Eco-Logical Services, Inc.*

less concrete claims of harm, such as limitations on the opportunities for hiking, fishing and hunting, can adversely affect a party and provide standing to pursue an appeal.[9]

We also disagree with the Department that the letter is not a "final" action because the Authority could ignore the letter, and the Department would then be required to file a petition to enforce in the Commonwealth Court in order to collect the penalty. It is true that the Board has no authority to render a declaratory interpretation of a consent agreement.[10] It is also true that the Department can file a petition to enforce in the Commonwealth Court to directly seek an order requiring the Authority to comply with the terms of the consent agreement.[11] However, the fact that the Department could seek different relief in another forum is not relevant to whether or not an action is final for the purposes of the Board's review. There is nothing in the wording of the letter to suggest that the Department intends to consider any additional information or that its conclusion that civil penalties are due might change. The letter clearly states that $6,600 is due in civil penalties and provides instructions for mailing the check. There is nothing in the language of the letter to suggest that it is not the Department's final determination on the matter.

This analysis does not conflict with the Board's holding in *Delta Excavating and Trucking Co. v. DER.*[12] In that case the Department wrote a letter to a permittee which restated the conditions of a consent agreement relative to the requirements of a landfill cap that the

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[9] For example, the Board has recognized that certain activities of a recreational nature or aesthetic impact can confer standing. *See, e.g., Orix-Woodmont Deer Creek I Venture L.P. v. DEP*, 2001 EHB 82; *O'Reilly v. DEP,* 2000 EHB 723; *Ziviello v. DEP*, 2000 EHB 999; *Valley Creek Coalition v. DEP*, 1999 EHB 935; *Blose v. DEP,* 1998 EHB 635, *rev'd on other grounds*, No. 287 C.D. 1999 (Pa. Cmwlth. filed July 1, 1999); *Belitskus v. DEP*, 1997 EHB 939; *Barshinger v. DEP*, 1996 EHB 949.

[10] *Protect Environment and Children Everywhere v. DEP*, 2000 EHB 1.

[11] *Department of Environmental Resources v. Landmark International, Ltd.,* 570 A.2d 140 (Pa. Cmwlth. 1990).

[12] 1987 EHB 319.

permittee was required to design pursuant to that agreement. The Board held that the letter was not a final action of the Department because it was simply part of an ongoing process of developing an "approvable" cap design and not the Department's ultimate decision. In contrast, it is clear from the language of the Department's July 25 Letter that it is the Department's "last word" on the subject.

The courts have never held that where the Department writes a letter to a party to a consent agreement demanding a penalty payment based on the consent agreement that the Board can not hear an appeal from that letter. In *Department of Environmental Resources v. Landmark International, Ltd.*[13] and *Department of Environmental Resources v. Bethlehem Steel Corp.*,[14] relied upon by the Department, the court analyzed its *own* jurisdiction to determine whether it was appropriate to entertain a *direct* action for enforcement of a consent agreement rather than seeking some other relief before the Board. Neither the *Landmark International* decision nor the *Bethlehem Steel* decision discussed the Board's power to hear an appeal from a letter by the Department which demanded payment of a penalty that was based upon the provisions of a consent agreement.

The Commonwealth Court recently approved a decision of the Board which was in a nearly identical procedural posture to the case here. In *Global Eco-Logical Services, Inc. v. DEP*,[15] the Board considered the appeal from a letter which revoked a permit for failure to pay civil penalties due under a consent agreement, as provided by that agreement and another letter which forfeited a bond pursuant to the terms of the consent agreement. The Board granted

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[13] 570 A.2d 140 (Pa. Cmwlth. 1990).

[14] 367 A.2d 222 (Pa. 1976). This decision predates the promulgation of the Environmental Hearing Board Act.

[15] 2001 EHB 99.

summary judgment in favor of the Department and the matter was appealed to the Commonwealth Court, which affirmed and specifically approved of the Board's disposition of the appeal.[16] Although the Board's jurisdiction did not appear to have been raised, both the *Bethlehem Steel* and *Landmark International* decisions were cited by the court in its opinion. If the court thought that the Board had no authority to hear the appeal in the first place, it certainly would have provided that important instruction.

Accordingly, we hold that the Department's July 25 Letter is an appealable action of the Department and therefore we have jurisdiction to adjudicate the Authority's appeal.

Authority's Contract Claim

The Authority argues that it should not have to pay the agreed upon civil penalties because when it entered into the consent agreement and agreed upon the compliance schedule, it thought that New Bethlehem Borough already owned appropriate flow meters and that it would not have to acquire them elsewhere. Shortly after entering into the agreement, the Authority determined that the Borough did not in fact own flow meters and that the equipment would have to be purchased. According to the Authority, this mistake was beyond the Authority's control and therefore it should not have to pay the civil penalties. The Authority also contends that the penalties should not apply because it acted in good faith in trying to comply with the agreement and therefore it would neither further the objectives of the Sewage Facilities Act, nor would it be fair to impose penalties under the circumstances. We find that the terms of the consent agreement are clear and that the Authority has failed to present any facts which would justify voiding the terms of the agreement.

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[16] *Global Eco-Logical Services, Inc. v. Department of Environmental Protection*, 789 A.2d 789 (Pa. Cmwlth. 2001).

The Commonwealth Court's recent decision in *Global-Ecological Services, Inc. v. Department of Environmental Protection,* is directly on point. In that case the Board dismissed an appeal from Department letters which exercised an automatic permit revocation provision and bond forfeiture based on the appellant's failure to pay agreed upon civil penalties in accordance with the schedule agreed upon in a consent agreement. The Board rejected arguments that the Department abused its discretion in revoking the permit based on the agreement because the appellant's failure to pay the penalty on time was simply an oversight at corporation headquarters. On appeal, the court approved of the Board's analysis and affirmed:

> As recognized by the EHB, its decision in *Harriman,*[17] and other cases dealing with the enforceability of automatic penalty provisions, invalidated unilateral DEP actions which dictated automatic consequences for subsequent violations, but the EHB had never considered application of this principle to a consent order and agreement. When the EHB did so, it rejected Atlantic's argument, employing reasoning that we believe to be compelling. As the EHB stated:
>
> > A negotiated agreement with [DEP] is somewhat different than a direct action under a statute, such as the issuance of a permit or the assessment of a civil penalty. The contours of [DEP's] authority in the latter instances are explicitly defined by statute. In contrast, a consent order and agreement, is "merely an agreement between the parties. It is in essence a contract binding the parties thereto." *Commonwealth of Pennsylvania v. United States Steel Corp.*, 15 Pa. Commw. 184, 325 A.2d 324, 328 (Pa. Cmwlth. 1974). As such, its enforceability is governed by principles of contract law, *Mazzella v. Koken,* 559 Pa. 216, 739 A.2d 531, 536 (Pa. 1999), subject to any applicable statutory or constitutional limits on the enforcement of the contract. Accordingly, we should only modify its terms, which were negotiated by the parties, with great reluctance. See *U.S. Steel Corp.*(court has no authority to modify or vary the terms of a consent decree absent fraud, accident or mistake).

[17] *Harriman Coal Corp. v. DEP*, 2000 EHB 1008.

> Although the [EHB] disfavors automatic action by [DEP], after reviewing the [CO&A] we can divine nothing inherently illegal about the term in a consent agreement which provides for the automatic revocation of [Atlantic's Permit and Surety Bond.] Permitting decisions or the assessment of civil penalties are essentially unilateral actions on the part of [DEP], which is required to consider the unique circumstances of each case in order to reasonably exercise it [sic] discretion. In contrast, the terms of the [CO&A] are mutually assented to by both parties who together decided that the penalty was appropriate in the event [Atlantic] failed to comply with the civil penalty payment schedule. In reaching these terms, [DEP] was only constrained by the provisions of Section 602 of [the SWMA], which provides that orders of [DEP] must be "necessary to aid in the enforcement of the act." 35 P.S. § 6018.602. Once [DEP] exercises its discretion to determine that a consent agreement is the proper enforcement tool to utilize in a certain situation, there is nothing which would preclude it from agreeing with an appellant that certain specific acts will result in the revocation of a permit.
>
> EHB op. of February 1, 2001 at 4-5; S.R. at 42b-43b.) Finding no fraud, accident or mistake in the making of the CO&A, and noting that the CO&A protected Atlantic against an arbitrary decision in the event of a force majeure, the EHB concluded that DEP acted properly in rejecting Atlantic's request to extend the time for payment based on Atlantic's own failure to understand the CO&A and act in a timely fashion. (EHB op. of February 1, 2001 at 5-6; S.R. at 43b-44b.) We agree with this analysis and adopt it.[18]

The analysis of *Global-Ecological* is equally applicable here. There is no evidence in the record which suggests that the Authority's assent to the terms of the consent agreement was secured by coercion or other improper means. The Authority freely agreed to both the timetable for compliance as well as the rate for civil penalties in the event of a breach of the terms of the

[18] *Global-Ecological Services, Inc. v. Department of Environmental Protection*, 789 A.2d 789, 795-796 (Pa. Cmwlth. 2001).

agreement. That the Authority was mistaken about the ownership of the flow meters is an insufficient basis for voiding the agreed upon terms of the agreement. It is black-letter law that a unilateral mistake of fact is not a basis for avoiding the terms of a properly negotiated contract.[19] Nor has the Authority presented any facts which support a conclusion that it was legally impossible for it to comply with the negotiated timetable.

The Authority argues that we should void the penalty because the assessment of the penalty does not further the penalty objectives of the Sewage Facilities Act.[20] However, the statutory provisions of the Sewage Facilities Act are not the authority by which the civil penalty was assessed by the Department. Rather that authority is derived from the mutually agreed upon terms of the consent agreement, including the stipulated civil penalty rate. The Authority has presented no evidence that the Department inappropriately exercised its discretion in negotiating the agreement to resolve the violations at the Authority's Plant or that the agreement does not aid in the enforcement of the Sewage Facilities Act.[21] Accordingly, we see no reason to set aside the Department's action in this matter and will dismiss the Authority's appeal.

We therefore make the following:

CONCLUSIONS OF LAW

1. The Board has jurisdiction to review an appeal of a letter by the Department demanding payment of a civil penalty under the authority of a consent agreement for violations of that agreement. 35 P.S. § 7514; *Berwick Township v. DEP*, 1998 EHB 487.

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[19] *See e.g., Vonada v. Long*, 852 A.2d 331 (Pa. Super. 2004); *Holt v. Department of Public Welfare,* 678 A.2d 421 (Pa. Cmwlth. 1996).

[20] 35 P.S. § 750.13a. Not only does this section list the factors that the Department should consider in assessing penalties under the act, but the minimum penalty assessment is $ 300 per day – more than the stipulated $ 200 per day penalty negotiated in the consent agreement.

[21] 35 P.S. § 750.10(7).

2. A consent agreement is a negotiated contract between the parties and will not be modified absent evidence that the terms of the agreement are unlawful, were the result of a mutual mistake of fact or was unenforceable by reason of force majeure. *Global-Ecological Services, Inc. v. Department of Environmental Protection*, 789 A.2d 789, 795-796 (Pa. Cmwlth. Ct. 2001).

3. The Authority failed to demonstrate that any of the terms of the consent agreement were unlawful or that it had a sufficient legal excuse for breaching the consent agreement.

We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

REDBANK VALLEY MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2005-262-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 9th day of November, 2006, the appeal of the Redbank Valley Municipal Authority in the above-captioned matter 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

DATED: November 9, 2006

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

For the Commonwealth, DEP:
Michael A. Braymer, Esquire
Northwest Regional Counsel

For Authority:
H. John Drayer, Esquire
POPE AND DRAYER
10 Grant Street
Clarion, PA 16214

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

REDBANK VALLEY MUNICIPAL AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 2005-262-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

OPINION OF BERNARD A. LABUSKES, JR.
CONCURRING IN THE RESULT

By Bernard A. Labuskes, Jr., Judge

I concur in the result, but I disagree with how my colleagues got there. In my view, we should not have accepted jurisdiction in this case.

Delineating the boundaries of the Board's authority to review Departmental letters has proven to be an elusive task. *See, e.g., Beaver v. DEP*, 2002 EHB 666 (By the Board Opinion holding Board had jurisdiction to review DEP letter), 2002 EHB 681 (Labuskes, J. concurring in result due to lack of a justiciable controversy), and 2002 EHB 684 (Krancer, C.J. dissent, disagreeing that DEP had shown letter was not appealable). Unfortunately, these difficulties will probably continue as long as the Department chooses to conduct business by writing letters because there is no easy answer when it comes to deciding whether a particular letter constitutes an appealable action. Trying to distinguish between appealable and nonappealable letters by labeling them as "descriptive" or "prescriptive" tends to beg the real question and merely serves to cloud the issue. Instead, as we stated in *Borough of Kutztown v. DEP*, 2001 EHB 1115,

> the cases illustrate that it is impossible to paint a bright line between those Departmental actions that affect a party's personal or property rights to such a degree that immediate Board review is warranted, and those Departmental actions that do not. Therefore, the determination must be made on a case-by-case basis. *Ford City v. DER*, 1991 EHB 169, 172. Although the results may vary, the same factors should be considered in every case. In deciding whether a Departmental letter constitutes a final "action" or "adjudication," we consider such factors as the wording of the letter, the substance, meaning, purpose, and intent of the letter, the practical impact of the letter (with an eye to what actions a reasonably prudent recipient of the letter would take in response to the letter), the regulatory and statutory context of the letter, the apparent finality of the letter, what relief the Board can offer (i.e., the practical value of immediate Board review), and any other indicia of a letter's impact upon its recipient's personal or property rights.

Kutztown, 2001 EHB at 1121. When I examine the *Kutztown* factors in this case, I am convinced that we should not have accepted jurisdiction.

One point needs to be made right at the outset: Redbank has essentially conceded that we have no jurisdiction. This appeal is being adjudicated on a stipulated record. After filing a joint stipulation, we directed each party to file simultaneous post-hearing briefs, followed by simultaneous reply briefs. The Department argued quite prominently in its post-hearing brief that the Board lacked jurisdiction to review its letter. Although one would have expected Redbank to dispute the point, Redbank opted not to respond. This may not technically constitute a waiver, *compare* 25 Pa. Code § 1021.131(c) (issues not briefed are waived), but it seems somewhat strange to me that we are undertaking such a detailed analysis of the issue and issuing splintered decisions in a case where the party who had the most to lose couldn't be bothered.

I also take issue with the majority's heavy reliance on *Global Eco-Logical Services, Inc. v. DEP*, 789 A.2d 789 (Pa. Cmwlth. 2001), to support its finding of jurisdiction. The majority states that "the Board's jurisdiction did not appear to have been raised" in that case. In fact, the

Department *did* challenge our jurisdiction in that appeal. The issue, in fact, was hotly contested. On July 31, 2000, we issued the following Order:

> AND NOW, this 31st day of July, 2000, due to the fact the Judge Krancer is recused and a majority of the four remaining Board members do not support dismissal, the Department's Motion to Dismiss is Denied.

Not coincidentally, *Global*, like this appeal, was reassigned for primary handling from the undersigned to Judge Miller. Because we were unable to achieve consensus on the jurisdictional issue in *Global*, we were left to resolve the appeal on its merits. *Global v. DEP*, 2001 EHB at 99. We ruled against Global on the merits, and Global appealed. Obviously, Global did not complain to the Commonwealth Court that the Board lacked jurisdiction over its own appeal. Not surprisingly, one will search the Commonwealth Court's opinion in vain for the slightest mention of a jurisdictional issue. I believe that it is misleading, at best, to make anything of that. I do not agree with the majority's unrealistic supposition that the Court would or could have taken it upon itself to not only spot an issue not raised by the parties, but gratuitously "provide an instruction" that this Board had no authority to hear the appeal in the first place.

I turn now to my take on how the *Kutztown* factors play in this case.

Form

We did not mention the form of the Departmental communication in *Kutztown* because we were focused solely on letters. But the form that the communication takes is certainly a relevant factor. Consider two examples. In one, the Regional Director of the Department runs into a principal of Redbank at the grocery store on Saturday morning and says, "You know, your guys owe the Department $7,000 and the clock is ticking." In another example, the Department issues a failure-to-comply (FTC) order to Redbank listing payment of past due penalties as a

necessary corrective action. Both communications embody the identical "decision", but most of us would agree that the grocery store conversation is not appealable and the FTC order is appealable.

A letter is somewhere in between. In my view, letters lean toward the grocery store conversation. We should not let the Department escape Board review and deprive regulated entities of their due process rights by disguising orders and assessments as letters. If a letter has all the makings of an order, it is appealable. On the other hand, this Board ought not be too anxious to insert itself into the day-to-day functioning of the agency. The Department writes thousands of letters, and that is a good thing in the sense that open, nonadversarial communication with the regulated community should be encouraged, not stifled by an ever present threat of Board litigation.

Given these counterveiling considerations, letters require a closer look than grocery store conversations and orders. We should be neither anxious to exercise our review authority nor a willing partner in efforts to skirt that authority. On balance, the fact that the Department communicated by letter to Redbank weighs against exercising jurisdiction, but I certainly agree that it is not dispositive.

Substance

The form of the communication is important, but obviously not more important than its substance. We need to look at exactly what the Department is saying. The underlying, dispositive criterion is the extent to which the communication affects the recipient's rights or liabilities. Most Departmental communications have *some* impact. The Department would not be writing a letter if it did not want something or need to notify the recipient of something. But not every minor impact is enough to trigger Board review.

I do not see the Department's demand letter as materially or significantly affecting Redbank's rights or liabilities. It does not change Redbank's legal position in any way. The letter itself actually has no legal significance. Redbank does not have an independent obligation to pay penalties or do anything else as a result of the demand letter. The Department cannot bring an action to enforce the demand letter. Whether Redbank must pay the penalties is entirely a function of the consent order and agreement itself. Redbank cannot be penalized for violating the demand letter, and the demand letter in and of itself cannot serve as the basis for any other Department action or as grounds for a Commonwealth Court action. Redbank was obviously not free to ignore the consent order, but it was free to ignore the demand letter. The parties' rights and obligations flow from the consent order alone. The demand letter does not change or affect those rights and obligations in any way. The letter is nothing more than a statement of the Department's position. It was purely informational. *See Hapchuk, Inc. v. DER*, 1992 EHB 1134, 1136; *Delta Excavating & Trucking Co. v. DER*, 1987 EHB 319, 322-23 (holding that a Department letter which contains a mere recital of the obligations contained in a COA and which does not impose any new obligations upon the recipient is not itself an appealable action).

Without saying as much, the Board today overrules *Delta Excavating*, *Hapchuck*, and perhaps several other decisions closely on point. In *Delta*, for example, we specifically held that a follow-up letter to a COA that does not impose any *new* obligations is not appealable. 1987 EHB at 322. We held that the letter in question "only stated what was required by the C.O.A., and is not an appealable action." 1987 EHB at 323. I believe *Delta, Hapchuck*, and cases like them were correctly decided.[22] Redbank's appeal is not distinguishable from those cases.

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[22] The majority curiously does not cite *Berwick Township v. DEP*, 1998 EHB at 487, even though that case is *precisely* on point.

Practical Impact

In *Kutztown* we spoke of the practical impact of a letter (with an eye to what actions a reasonably prudent recipient of the letter would take in response to the letter) as a relevant factor. This is a slightly different factor than the extent to which a letter affects a party's *legal* rights and liabilities. It is an acknowledgement that, while certain letters may technically not affect legal rights (e.g. the Redbank letter), we should leave open the possibility that they still can have quite an impact.

We should not overemphasize the importance of this factor. If a Departmental communication does not affect legal rights, we ought to be reluctant to accept jurisdiction. The majority says the Department's letter has an "obvious impact" upon Redbank. It is not obvious to me. To the contrary, we have no record to support a finding of *any* adverse impact. We should not accept jurisdiction based upon speculation, and Redbank has not lifted a finger to dispute the Department's claim that we lack jurisdiction. Redbank's unsupported allegation in its brief that paying $7,000 in stipulated penalties could jeopardize a major upgrade to its system is pure speculation and not credible. Putting aside speculation and assumptions, as we should, I see no obvious impact here. I would have been open to being shown there is such an impact, but Redbank itself has effectively conceded that there is no jurisdiction, so we obviously have no record to support such a finding.

The majority says that the "obvious impact" to Redbank (whatever that is) is more "concrete" than a claim of harm to parties' recreational opportunities. First, I would never join in an opinion belittling or demeaning the importance of parties' ability to enjoy natural resources. Who is to say a demand for payment of $100 a day is "more concrete" than permanent harm to a resource? I take great exception to the majority's comparison. More fundamentally, such

comparisons regarding the amount or scope of purported harm are simply not relevant. We should not be basing jurisdiction on what we subjectively believe the gravity of the alleged harm to be. Is the majority suggesting that the Board would lack jurisdiction if the penalty were only $10.00? Defining our jurisdiction based upon how "concrete" the harm puts us on a slippery slope and asks the wrong question.

Context

The Board needs to examine the context of a communication to assess whether it amounts to an appealable action. Let us look at what is really going on in this case. Put simply, Redbank regrets one aspect of its deal and it wants out of it. It wants us to rewrite its contract. This is clearly demonstrated by the fact that the Board has been required to write an opinion on contract law to resolve this appeal. I ask whether that is the role the Legislature envisioned for this Board when it was created. Typically the Board of Claims or Commonwealth Court deals with contract disputes, and the Commonwealth Court deals with enforcement actions, not this Board.

I am not suggesting that it would never be appropriate for this Board to review communications that follow up on a COA. To the contrary, had the Department issued a FTC order, which has independent consequences and enforceability, there is no question of our jurisdiction. The scope of our review in an appeal from an order might be limited by the COA's administrative finality, but that is a different question than the issue of our jurisdiction.

The majority says that there is no difference between this case and a case where a party fails to comply with a permit condition because, in both instances, a party has a "pre-existing" duty to comply. This is surprising given the majority's heavy reliance on *Global Eco-Logical Services*, which found that permits and COAs are in fact completely different animals. 789 A.2d at 794-95. Quoting this Board, the Court said

> A negotiated agreement with [DEP] is somewhat different than a direct action under a statute, such as the issuance of a permit or the assessment of a civil penalty. The contours of [DEP's] authority in the latter instances are explicitly defined by statute. In contrast, a consent order and agreement, is "merely an agreement between the parties. It is in essence a contract binding the parties thereto" As such, its enforceability is governed by principles of contract law, subject to any applicable statutory or constitutional limits on the enforcement of the contract.

Id. (citations omitted).

Now, we appear to be discounting the fact that the Department's letter involves a negotiated agreement. Although no one factor is dispositive, this factor brings out what is, perhaps, my greatest philosophical difference with the majority. I believe that we should only get involved in what are essentially contract disputes with "great reluctance." *Id.*, 789 A.2d at 796.

The Redbank letter does not implicate some environmental statute or regulation, and that matters to me. Statutes create pre-existing duties but they are not self-executing in the sense that a COA is. This case invokes a provision in a COA regarding *automatic*, *stipulated* penalties. The purpose of provisions like this is to foreclose exactly what we are doing. In short, the context of this dispute suggests that Board review is neither necessary nor appropriate.

Remedy

In deciding whether to accept jurisdiction in marginal cases, I like to know what relief we can conceivably offer. An inability to effect much in the way of meaningful relief is a good indication that we should not accept jurisdiction in the first place. If the Department issues a FTC order for example, we can vacate the order or we can revise the corrective action required if we find the Department acted unlawfully or unreasonably.

It is not clear to me what we can do with the Department's letter. The majority says we can find that the Department made erroneous findings of fact, miscalculated the penalty, or most

remarkably, hold that the letter was based on an "illegal contract provision," and then "provide relief" to the recipient of the letter. The majority goes on to say that we can find that the COA is "not enforceable at all." These statements are not only incorrect, they explain what the Board's opinion might say, not what its order might do.

The majority concedes that we have no authority to render a declaratory interpretation of a consent agreement, and then proceeds to do exactly that. What else are we doing here if not interpreting and enforcing (or deciding not to enforce) the contract? Acting as if this appeal involves the Department's letter as opposed to the COA itself borders on pure fiction.

The only way that we can determine whether the letter "made erroneous findings" is to interpret the COA. The most blatant example of my point is the majority's statement that we can find that the letter was based on an "illegal contract provision." This goes beyond what even the Commonwealth Court is willing to do. *DER v. Landmark International, Ltd.*, 570 A.2d 140, 142 (Pa. Cmwlth. 1990). It also completely disregards principles of administrative finality.

I cannot agree with the majority's attempt to distinguish *Landmark*. I will let the Court's words speak for themselves:

> An order issued under [35 P.S. § 691.610] may be appealed to the EHB. Where a party voluntarily enters into a consent order, it is as if DER issued an order from which no appeal was filed. *Department of Environmental Resources v. Bethlehem Steel Corp.*, 469 Pa. 578, 367 A.2d 222 (1976), *cert. denied*, 430 U.S. 955, 97 S.Ct. 1600, 51 L.Ed.2d 804 (1977). The only legal action left to be taken with respect to that order is enforcement. Landmark has not cited any authority nor even alleged that the EHB has enforcement powers (i.e., power to adjudicate contempt). What Landmark is seeking, in effect, is an appeal of the consent order, a right which it waived by voluntarily entering into the equivalent of an order from which no appeal was taken, any collateral attack on the content or validity of the order in an enforcement proceeding is barred. *Commonwealth v. Derry Township, Westmoreland County*, 466 Pa. 31, 351 A.2d 606 (1976).

> In *Bethlehem Steel*, the Pennsylvania Supreme Court held that this Court has jurisdiction over enforcement of a consent order under § 10(a) of the Air Pollution Control Act, which specifically authorizes such proceedings. In the absence of such authorization, we nevertheless conclude that we have jurisdiction over enforcement of a consent order. The EHB has no power to enforce such an order. Its general power comes from 35 P.S. § 7514(a) which authorizes the board to hold hearings and issue adjudications on orders, permits, licenses or decisions of DER. The Solid Waste Management Act and the Clean Streams Law each contain language granting the EHB the specific power to grant a supersedeas if an appeal of an order has been filed, but neither statute contains language granting the EHB enforcement powers.

570 A.2d at 142 (footnotes omitted). What we are doing in this case sure looks a lot like what the Court said we could not do in *Landmark.*

In order to analyze the remedy question correctly, I like to envision what our Order would say if we interpreted the COA in such a way that we conclude that Redbank does not owe the stipulated penalties. We obviously cannot revise the COA. Do we revise the Department's letter? Do we order the Department to revise a letter? No matter what we do, we are converting a Department letter into an EHB Order. Once we issue an EHB Order, does the Department enforce that Order or the COA? Is the Department precluded by our Order from pursuing an appropriate court action? The Board is certainly treading on new ground, and I suppose only time will address all of the ramifications of our decision to get involved in these cases.

In a case such as this, where as the majority concedes other forums and other remedies are readily available, there is something to be said for restraint. By the same token, where a party risks being thrown out of court because it failed to exhaust its administrative remedy of Board review, we should not hesitate to get involved. My guess is that there is no way Redbank would have been thrown out of any court for failing to pursue an administrative appeal from the

Department's letter. Other forums and remedies were clearly available here, and in my mind, much better suited to resolving this particular controversy.

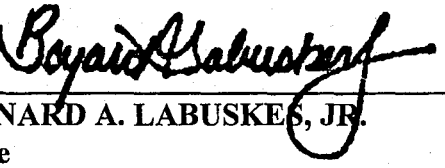
Purpose

Ironically, the purpose of the Department's letter to Redbank is to *avoid* litigation. That is why demand letters are sent. If correspondence does not work, then people pursue their legal remedies. When negotiations fail, you do not sue on a demand letter; you sue on the contract. We should not essentially eliminate this nonlitigious alternative.

Conclusion

In summary, I am obviously very uncomfortable with the Board's acceptance of jurisdiction in this case. Although no single factor is dispositive, when I add them all together, I cannot agree that we should be reviewing a letter seeking payment of automatic stipulated penalties due under a COA.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JOHN GLANTZ	:	
	:	
v.	:	**EHB Docket No. 2006-159-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 13, 2006**

OPINION AND ORDER ON MOTION TO QUASH APPEAL

By Michelle A. Coleman, Judge

Synopsis:

The Department's motion to quash, which is treated as a motion to dismiss, is granted where an appeal was filed more than thirty days after the appellant's receipt of a Departmental action.

OPINION

This matter involves an appeal filed by John Glantz from a compliance order issued by the Department of Environmental Protection (Department) dated April 17, 2006, which required Mr. Glantz to take actions to abate existing violations of 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). The compliance order issued to Mr. Glantz included standard notice language concerning the recipient's right to appeal to the Board and stated in capital letters that any appeal "must reach the Board within 30 days" of receipt. *See* Dept. Ex. A. On

June 23, 2006, the Environmental Hearing Board (Board) issued an Order directing Mr. Glantz to perfect his appeal pursuant to 25 Pa. Code § 1021.51 by filing with the Board on or before July 14, 2006 the following information: Mr. Glantz's objections to the Department's action and proof of service that the proper officials at the Department were served with the Notice of Appeal. Mr. Glantz did not comply with this Order. On July 20, 2006, the Board issued Mr. Glantz a Rule to Show Cause why his appeal should not be dismissed for failure to comply with the Board's June 23, 2006 Order. The Rule was returnable by July 27, 2006. Mr. Glantz responded to the Rule on July 26, 2006 providing the information necessary to perfect his appeal. Thereupon, the Rule to Show Cause was discharged.

Presently before the Board is the Department's motion to quash the appeal, which we treat as a motion to dismiss. The Department seeks to dismiss the appeal on the grounds that it was filed more than thirty days after Mr. Glantz received the compliance order, and there is no legitimate basis for a *nunc pro tunc* appeal. In response to the Department's motion, Mr. Glantz denies committing the violations alleged in the compliance order and contends that "this is a first time event with unknown rules." *See* Appellant's Response to the Department's Motion to Quash Appeal, at Page 1.

The compliance order issued to Mr. Glantz is dated April 17, 2006; however, it does not indicate the date on which he was served with said order. As a result, when looking at the compliance order on its face, it is unclear when Mr. Glantz was actually in receipt of it. Mr. Glantz admits however, that he received the compliance order on April 20, 2006 in his Notice of Appeal. He did not file his Notice of Appeal until June 22, 2006. Thus, approximately sixty-three days elapsed between Mr. Glantz's receipt of the compliance order and his filing of the instant appeal with the Board. Pursuant to the Board's Rules of Practice and Procedure, Mr.

Glantz was required to file his appeal within thirty days after receiving notice of the Department's compliance order. 25 Pa. Code § 1021.52 (a)(1); *Charles W. Tanner v. DEP*, EHB Docket No. 2005-223-R (Opinion and Order on Motion to Dismiss issued July 25, 2006). In light of Mr. Glantz's admission, it is obvious that he failed to file a timely appeal.

Petitions for allowance of an appeal *nunc pro tunc* (filed after the required thirty-day period) may be granted in very limited circumstances, such as where there is fraud, a breakdown in the Board's operation, or a non-negligent failure to file a timely appeal. *Martz v. DEP*, 2005 EHB 349, 350 *citing Grimaud v. DER*, 638 A.2d 299 (Pa. Cmwlth. 1994) and *Falcon Oil Co. v. DER*, 609 A.2d 876, 878 (Pa. Cmwlth. 1992). In Mr. Glantz's initial filing entitled "Request For Appeal and Reasons For Being Late" dated June 19, 2006, he states that he was under the impression that discussions between his attorney and the Department regarding the alleged violations obviated his need to file an appeal of the compliance order. Conversely, Mr. Glantz also asserts that he thought these discussions had commenced the appeal process. The Department contends that Mr. Glantz has failed to offer any grounds upon which we can grant his request for relief. We agree with the Department. Any lack of understanding on Mr. Glantz's part regarding the appeal process does not provide a sufficient basis for the tardy filing of his appeal. *See Maddock v. DEP and Consol Coal Company*, 2001 EHB 1000, 1002. Thus, an appeal *nunc pro tunc* is not appropriate in this case.

Accordingly, we enter the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN GLANTZ	:	
	:	
v.	:	**EHB Docket No. 2006-159-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

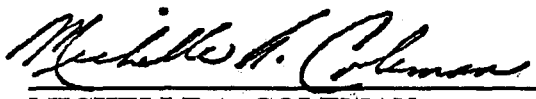
AND NOW, this 13th day of November, 2006, the Department of Environmental Protection's motion to quash is **granted** and the appeal docketed at **EHB Docket No. 2006-159-C** is hereby **dismissed.**

ENVIRONMENTAL HEARING BOARD

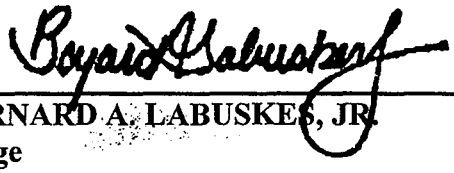
MICHAEL L. KRANCER
Chief Judge and Chairman

GEORGE J. MILLER
Judge

THOMAS W. RENWAND
Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

DATED: November 13, 2006

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

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

UNITED REFINING COMPANY	:	
	:	
v.	:	**EHB Docket No. 2006-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: November 16, 2006**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Air Pollution Control Act does not authorize the Department to impose civil penalties for a violation of a requirement that is only set forth in a guidance document notwithstanding the fact that parts of the guidance document are incorporated by reference in a regulation.

OPINION

United Refining Company ("United") operates continuous emission monitor systems ("CEMS") that monitor opacity emissions from a fluid catalytic cracking unit at its petroleum refinery in Warren, Pennsylvania. United reports CEMS data to the Department of Environmental Protection (the "Department") on a quarterly basis. The Department assessed the civil penalty of $3,600 that is the subject of this appeal against United because it found that United failed to submit adequate quarterly reports on three occasions within 30 days of the end of quarterly reporting periods.

The reporting requirement at issue is only found on page 38 of the Continuous Source Monitoring Manual (the "Manual"). Section III.B.1 of the "Record Keeping and Reporting" chapter in the 81-page Manual requires sources to prepare quarterly reports, and Section III.B.2 states that the reports "shall be submitted in two copies to the central office by the 30th day following the close of the reporting period." The parties agree that "[t]he requirement to submit CEMS quarterly reports within 30 days of the end of the calendar quarter is not found in any regulation." (United Brief at 4; Department Brief at 3.)

The Manual is a guidance document. The following disclaimer is set forth at the beginning of the Manual:

> The policies and procedures outlined in this guidance document are intended to supplement existing requirements. Nothing in the policies or procedures shall affect different statutory or regulatory requirements.
>
> The policies and procedures herein are not an adjudication or a regulation. There is no intent on the part of the Department to give these rules that weight or deference. This document establishes the framework for the exercise of DEP's administrative discretion in the future. DEP reserves the discretion to deviate from this policy statement if circumstances warrant.

(Manual at i.)

United has moved for summary judgment. United presents two related but somewhat contradictory arguments. First, it argues that the Manual, as a "binding norm," is effectively a regulation. Because it was not promulgated in accordance with applicable procedures, it is invalid and may not serve as the foundation for any Department action, including an assessment of civil penalties. Second, United argues that the Manual is *not* a regulation, and the Department cannot base a civil penalty on a violation of a statement of policy: "[T]he Department cannot make a policy pronouncement and then enforce that pronouncement as if it were a regulation." (Brief at

13.) "The Department does not have authority to base a civil penalty on a policy statement." (Brief at 18.)

The Department responds that, although the Manual is not itself a regulation, parts of the Manual are incorporated into the regulations by virtue of 25 Pa. Code § 139.101(5), which states that operators such as United "shall maintain records containing monitoring information and report data to the Department as specified in the manual referenced in 139.102(3)." The "manual referenced in 139.102(3)" is the aforementioned Continuous Source Monitoring Manual.[1] The Department points out that United was actually cited for violating § 139.101(5). (*See* Assessment ¶¶ Q, V, and BB.) In the Department's view, the assessment is lawfully based upon a violation of a regulation--§ 139.101(5)--not a policy statement.

This case does not fit in well with traditional jurisprudence regarding the distinction between statements of policy and regulations because what we have here is a little of both. The parties have not cited any case law directly on point. The Department correctly distinguishes cases such as *Dauphin Meadows v. DEP*, 2000 EHB 521, where the Department's decision was based on a test found nowhere else but in a guidance document, and *DER v. Rushton Mining Co.*, 591 A.2d 1168 (Pa. Cmwlth. 1991), where the Department imposed requirements in standard permit conditions not found in or incorporated by any regulation. *See also Mountaintop Area*

---

[1] Section 139.102 reads as follows:

25 Pa. Code § 139.102. References

The following are references of this subchapter:

(1) "Standards of Performance for New Stationary Sources," 40 CFR Chapter I, Subchapter C, Part 60, Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402-9328.
(2) "Minimum Emission Monitoring Requirements," 40 CFR Subchapter C, Part 51, Appendix P, Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402-9328.
(3) "Continuous Source Monitoring Manual," Commonwealth of Pennsylvania, Department of Environmental Resources, Bureau of Air Quality Control, Post Office Box 8468, Harrisburg, Pennsylvania 17105-8468.

Joint Sanitary Authority v. DEP, EHB Docket No. 2004-088-MG, slip op. at 7 (Opinion issued April 12, 2006) (rejecting the argument that policy set forth in 25 Pa. Code Chapter 16 was as a matter of undisputed fact applied as a binding norm). This case is one of first impression involving the imposition of civil penalties for a violation of a requirement specified only in a policy document where portions of that document are in turn referenced in a regulation.

Section 9.1 of the Air Pollution Control Act, 35 P.S. § 4009.1, defines the Department's authority to assess civil penalties as follows:

> In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of this act or any rule or regulation promulgated under this act or any order, plan approval or permit issued pursuant to this act, the department may assess a civil penalty for the violation.

Thus, a penalty may be imposed for a violation of the statute, "any rule or regulation promulgated under" the statute, or an order, plan approval, or permit. United is charged with violating the 30-day deadline. The question in this case, then, boils down to whether the 30-day deadline constitutes a "rule or regulation promulgated under the Air Act" as that phrase is used in Section 9.1. We conclude that it does not.

A regulation is a standard of conduct that has the force of law. *Moyer v. Berks County*, 803 A.2d 833 (Pa. Cmwlth. 2002). A standard is not a law unless it is equally binding on both the regulated and the regulator. *Home Builders Ass'n v. DEP*, 828 A.2d 446, 451 (Pa. Cmwlth. 2003), *aff'd*, 844 A.2d 1227 (Pa. 2004). A law that purports to bind regulated entities but not the government is no law at all. Either the EQB creates a rule that is binding on everybody, including the Department, or it is binding on nobody. To proceed otherwise is anathema to a government of laws.

The 30-day requirement is not binding on the Department. It is only contained in the Manual. The Manual is merely a statement of policy. It expressly states that it is not to be considered a regulation. In addition, the Department may rewrite the Manual at any time without undergoing regulatory review. Indeed, the Manual has been revised at least seven times. The Manual has not been published in the Pennsylvania Code or in any other collection of published laws. *See* 45 Pa.C.S.A. § 702(2) (all regulations must be codified in the Pennsylvania Code).

Section 139.101(5) does not circumscribe in any way the unbridled authority that the Department has reserved for itself in the Manual. There is nothing in Section 139.101(5) that prevents the Department from doing anything that it wants to do with respect to the 30-day requirement. The regulation reads as if the Department must follow the Manual, but that only creates the illusion of a binding requirement because the Manual itself gives the Department unlimited flexibility. Thus, neither the Manual nor the regulation would limit the Department from deciding, for example, that reports are due in 15 instead of 30 days if the last day of the reporting period falls on a Tuesday. It is also quite telling that the regulation does not reference a particular section or a particular edition of the Manual, but even if it did, it does not follow that the Department's ability to "deviate" from the Manual would be limited.

In short, the 30-day requirement does not have the force of law because it is not binding on the Department. If it is not binding on the Department, it should not be binding on United. Because the requirement does not have the force of law, it cannot be considered to be a regulation promulgated under the Air Act. Because it is not a regulation, it cannot form the basis for an assessment of civil penalties.

It is clear that the Department need not follow the Manual. The truth of the matter is that it is also not clear that United needs to follow the Manual or face civil penalties. Intolerable mixed

signals are sent when a mere policy is incorporated into a regulation. If we are to be a government of laws, there should not be any doubt about what constitutes the law. The regulated community should be able to clearly understand that certain conduct is prohibited and can result in sanctions. *Eagle Environmental II, L.P. v. DEP*, 884 A.2d 867, 881 (Pa. 2005). If the Department considers the 30-day requirement to be so important that violating it can result in civil penalties, it should ask the Environmental Quality Board ("EQB") to clearly spell the requirement out in a regulation. If it wants to retain unlimited flexibility, it should keep it in a guidance document. Trying to create the best of both worlds for itself and the worst of both worlds for regulated parties is simply not acceptable.

Still further, if a requirement is important enough to have the force of law such that a violation of the requirement can result in punitive measures, it should be clear that not only is the requirement binding, but there should be no doubt that it has been subject to proper regulatory review as well. *R.M. v. PHFA*, 740 A.2d 302, 306 (Pa. Cmwlth. 1999), *app. denied*, 759 A.2d 390 (Pa. 2000). We do not know whether the 30-day deadline was in place when the EQB first promulgated Section 139.101(5). We doubt that the regulation was repromulgated each time the Manual was revised. As far as we know, the 30-day requirement has never been reviewed by the EQB. The construct that has been devised makes it difficult or impossible to know. If what has occurred here is not an end run around the regulatory review procedures in the Commonwealth Documents Law, 45 P.S. § 1102 *et seq.*, it certainly comes dangerously close.[2]

It is, perhaps, not realistic to believe that a requirement interred on page 38 of an 81-page policy document incorporated only by general reference into a regulation undergoes the same degree of scrutiny during the regulatory review process as a requirement laid out in a regulation.

[2] The prospective incorporation of future changes into a regulation is not necessarily a problem so long as it is clear that what may be incorporated in the future must be adopted in accordance with rulemaking procedures. Revisions to policy statements, however, are not subject to such procedures.

Even if we assume the EQB reviewed the Manual, it is not necessarily fair to assume that by referring to a guidance manual, the EQB intended civil penalty liability to follow from any violation of the Manual. It is not difficult to imagine that the EQB intended to allow for operational and regulatory flexibility and did not envision or anticipate that penalties could result for failing to comply with the sort of things that are normally set forth only in technical guidance documents. It cannot be assumed that the EQB intended by promulgating Section 139.101(5) to expand the Department's enforcement authority under Section 9.1 of the Air Act.

The fact that the Department imposed a relatively modest penalty against United is beside the point. Under the Department's approach, United was exposed to liability of $25,000 per violation per day under the Air Act. 35 P.S. § 4009.1. An ongoing violation of the law can result in a permit block and have other serious ramifications. 35 P.S. § 4007.1. In fact, the Air Act includes criminal penalties. 35 P.S. § 4009.

It is important to distinguish this case from cases where one regulation incorporates or references another regulation. Our objection to the Department's assessment of a civil penalty in this case stems from the fact that a requirement set forth in a policy statement that is not binding on the Department lacks the force of law, it is intolerably confusing to simultaneously hold out a given requirement as both binding and nonbinding, and the Department can and in fact does prepare and revise policy statements without subjecting the statements to regulatory review. These concerns do not apply when one regulation incorporates another regulation. We can safely presume that a published regulation was promulgated in accordance with appropriate procedures, including an opportunity for public notice and comment, and there is no doubt or confusion that an incorporated regulation itself has the force of law.

We must also emphasize that this is an enforcement case. We are not suggesting that the Department and the EQB may never incorporate policy statements into regulations. We are simply holding that the use of that expedient could very well restrict the Department's ability to collect penalties or impose other punitive measures.

As a fall-back position, the Department argues that the assessment against United is lawful because the 30-day reporting requirement is incorporated into United's permit and United can be penalized under Section 9.1 for violating its permit. We do not believe that the record supports the Department's theory on the facts, but even if United's permit did incorporate the 30-day requirement, the assessment was not issued on that basis. The assessment does not aver a violation of United's permit. It only avers a violation of 25 Pa. Code § 139.101(5) and the Manual. The Department's rather novel contention to the contrary notwithstanding, the fact that we exercise *de novo* review of the Department's actions does not somehow enable the Department to add entirely new violations to an assessment under appeal. Our review in this appeal is limited to the action the Department has taken, not the action the Department wished it had taken.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UNITED REFINING COMPANY	:	
	:	
v.	:	**EHB Docket No. 2006-007-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 16th day of November, 2006, it is hereby ordered that United's motion for summary judgment is granted. United's appeal is sustained. The Secretary of the Board shall direct a release of United's prepayment of the civil penalty.

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: November 16, 2006

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

For the Commonwealth, DEP:
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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 – WVDT, LLC, Permittee	:	**Issued: November 22, 2006**

ADJUDICATION

By: Thomas W. Renwand, Judge

Synopsis:

The Board upholds the Department of Environmental Protection's approval of a plan to construct a waste coal fired power plant in Greene County. In upholding the plan approval, the Board makes the following findings: 1) the appellants have standing to challenge the plan approval; 2) the NOx emissions limit established by the Department for the facility meets the LAER requirement, as set forth in the federal and Pennsylvania's air quality regulations; 3) the Department properly determined that the facility will not cause or contribute to an increment violation at Shenandoah National Park, and the Department's reliance on the use of significant impact levels in reaching

this determination was appropriate; 4) the Department properly determined that the mitigation measures required by the plan approval will adequately protect the air quality related values in Shenandoah National Park; 5) the Department erred in failing to provide notice of Class I increment consumption in its initial public notice regarding the proposed facility; however, its supplemental notice, even though published after the plan approval, adequately provided notice and opportunity for public comment; and 6) we agree with the Department's interpretation of 25 Pa. Code § 127.45(4), with regard to publishing notice of degree of increment consumption.

As for the permittee's contention that we should extend the 18 month commencement of construction deadline set forth in the plan approval, we find that the permittee may not challenge the plan approval condition or regulation setting forth the 18 month deadline at this time since this issue was not raised in a timely appeal. We further note that there is no provision in the regulation for extending the deadline, even in the case of litigation. As for the permittee's contention that the deadline has been extended by a revision to the plan approval, issued to correct an error in the original plan approval pointed out by the appellants, we find that this matter is not ripe for adjudication since there has been no determination by the Department as to the expiration of the original plan approval.

Background

This is an appeal by two individuals, Dennis Groce and Phil Coleman, and two organizations, the National Parks Conservation Association and Group Against Smog and Pollution (GASP) (collectively the Appellants). The Appellants are challenging a plan

approval issued by the Pennsylvania Department of Environmental Protection (Department) to Wellington Development WVDT, LLC (Wellington) on June 21, 2005 for the construction and operation of an electric generating plant in Cumberland Township, Greene County, known as the Greene Energy facility (or Wellington facility). The Greene Energy facility will burn a mixture of coal fines, run of mine coal and bituminous waste coal in two circulating fluidized bed boilers, known as CFB combustors. The Greene Energy facility will be the largest coal refuse recovery facility of this type in the United States. (N.T. 211, Vol. 13)[1] Its major fuel component is bituminous waste coal. Most of this waste coal is in vast refuse piles known as gob (garbage of bituminous) piles. The gob piles are the result of past mining operations that have scarred Pennsylvania's pristine forests and hills for decades.

The application for the Greene Energy facility was prepared by an environmental engineering company, ENSR International (ENSR), and filed with the Department on July 13, 2004. Based upon its projected emissions of air contaminants, the Greene Energy facility was deemed to be a "major source" and was, therefore, subject to New Source Review as well as Prevention of Significant Deterioration requirements, federally mandated air quality programs administered by the Department. These requirements are in addition to the other criteria that make up Pennsylvania's air quality program. The plan approval was issued by the Department on June 21, 2005. The plan approval was subsequently amended on September 1, 2005 to incorporate a mitigation plan with regard to Shenandoah National Park and on June 12, 2006 to correct an error in the number of

[1] N.T. and Vol. refer to a page and volume of the transcript.

emission reduction credits Wellington is required to purchase.[2] (Ex. B-1, C-73)

The Appellants filed their original notice of appeal on July 29, 2005 and filed three subsequent amendments, the last of which was approved on May 26, 2006 over vigorous objections. The objections relate to the following issues: whether the Department provided proper public notice of Class I increment consumption; whether Wellington failed to demonstrate that it will not cause or contribute to a violation of the sulfur dioxide Class I increment in Shenandoah National Park; whether Wellington's facility will cause an adverse impact on the air quality related value of visibility in Shenandoah National Park; and whether the emissions limits approved by the Department are appropriate.[3]

On October 21, 2005, Wellington sought leave to expedite the trial in this matter, as well as all pre-trial proceedings. The motion was strongly opposed by the Appellants. In an Opinion and Order issued on November 15, 2005, the Environmental Hearing Board (Board) granted the motion in part.[4] While rejecting the schedule proposed by Wellington,[5] the Board did adopt a schedule that set forth an aggressive pre-trial schedule and trial date beginning in June 2006. *Groce v. DEP*, 2005 EHB 880.

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[2] This error was brought to the Environmental Hearing Board's attention by one of Appellants' attorneys, Michael Fiorentino, during his cross-examination of William Charlton, Chief of the Department's New Source Review Section. (N.T. 128, Vol. 1) Based directly on this information, the Department issued its revised plan approval correcting the error on June 12, 2006.

[3] The Appellants are no longer pursuing two objections raised in their amended notice of appeal pertaining to whether proper notice was given to the Federal Land Managers and whether Wellington failed to get approval for or provide notice of use of a modified computer model.

[4] *Groce v. DEP*, 2005 EHB 880.

[5] Wellington's proposed schedule, among other things, only provided for a two-day trial. The actual trial took the entire month of June 2006.

On March 10, 2006, the Appellants and Wellington filed cross-motions for summary judgment on the objections in the notice of appeal relating to adequacy of notice, specifically the published public notice and the notice to Federal Land Managers for Shenandoah National Park and three wilderness areas in Virginia and West Virginia. The Board held oral argument *en banc* in Pittsburgh on the cross-motions and in an Opinion and Order dated May 17, 2006, denied the motions.[6]

Extensive expert reports and responsive expert reports were filed on February 16, March 13, May 10 and May 19, 2006. Various motions in limine were submitted and ruled on.[7]

A trial was held before the Honorable Thomas W. Renwand beginning June 6, 2006, and concluding June 30, 2006. A site view was held during the course of the proceeding. Post-trial briefs and reply briefs were filed on August 23, 2006, and September 14, 2006, respectively.[8]

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

FINDINGS OF FACT

Parties

1. The Pennsylvania Department of Environmental Protection is the agency with the duty and authority to administer and enforce the Air Pollution Control Act, Act of

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[6] *Groce v. DEP*, EHB Docket No. 2005-246-R (Opinion and Order issued May 17, 2006)

[7] See Opinions and Orders issued in this matter on May 31, 2006 and June 2, 2006 at EHB Docket No. 2005-246-R.

[8] The schedules for the trial and post-hearing briefs were not extended. We commend counsel for their dedication to their clients. It was a pleasure and privilege to work with them on this matter.

January 8, 1960, P.L. 2119 (1959), *as amended*, 35 P.S. §§ 4001 – 4015; and the rules and regulations promulgated thereunder. (Stipulations of the Parties, No. 1)

2. Wellington Development – WVDT, LLC (Wellington) is a limited liability company formed for the sole purpose of developing the Greene Energy facility in Nemacolin, Pennsylvania. (N.T. 112, Vol. 9)

3. Appellant Phil Coleman is a private individual who resides in West Brownsville, Pennsylvania. (Stipulations of the Parties, No. 3) Appellant Dennis Groce is a private individual who resides in Port Marion, Pennsylvania. (Stipulations of the Parties, No. 2)

4. Appellant Group Against Smog and Pollution (GASP) is a non-profit corporation organized under the laws of Pennsylvania that focuses primarily on air quality issues in southwestern Pennsylvania. GASP's mailing address is 5604 Solway Street, #204, Pittsburgh, Pennsylvania 15217. (Stipulations of the Parties No. 4)

5. Appellant National Parks Conservation Association is a non-profit corporation headquartered and incorporated in Washington, D.C. that focuses primarily on issues related to the protection and improvement of the National Parks. The National Parks Conservation Association's mailing address is 1300 19th Street, N.W. Suite 300, Washington, D.C. 20036. (Stipulations of the Parties, No. 5)

Standing

6. Appellant Phil Coleman resides in West Brownsville, Pennsylvania, and has lived there since 1970. Mr. Coleman is a retired Professor of English and Dean of Liberal

Arts. (Stipulations of the Parties, No. 56)

7. Mr. Coleman's residence is approximately 10 miles from the proposed location for the Greene Energy Facility in Nemacolin, Pennsylvania. (Stipulations of the Parties, No. 57)

8. Mr. Coleman is greatly concerned about the level of pollution in the areas in and around West Brownsville and has been a committed environmentalist for decades. He has been an active member of the Pennsylvania Chapter of Sierra Club for over 30 years and has held several offices including Chapter Chair. (Stipulations of the Parties, No. 58)

9. Mr. Coleman perceives that he will be harmed by the Greene Energy Facility because it will emit air pollution. (Stipulations of the Parties, No. 59)

10. Mr. Coleman is concerned that pollution from the Greene Energy Facility would have a negative impact on his health. Specifically, Mr. Coleman spends four hours a day outside on his land or in the community during non-winter months. While outside Mr. Coleman engages in physical activities associated with the upkeep of his land or with recreation, and fears that he will be more susceptible to respiratory impacts during these times due to the pollution caused by the Greene Energy Facility. (Stipulations of the Parties, No. 60)

11. Mr. Coleman contends that he will be harmed by the Greene Energy Facility because it will create the following nuisances in his rural neighborhood: the 550-foot smoke stack will be a permanent eyesore; light pollution from the facility will diminish

his ability to see stars in the nighttime sky; and truck, barge, and rail traffic will increase. (Stipulations of the Parties, No. 61)

12. Mr. Coleman's residence is located approximately 80 miles northwest of Dolly Sods Wilderness Area, 75 miles northwest of Otter Creek, and 100 miles northwest of Shenandoah National Park. These are all designated as Class I areas. Mr. Coleman has visited these areas for recreation and intends to do so in the future. Mr. Coleman's last visit to these areas for recreation was at least 10 years ago. Mr. Coleman believes there will be visibility impacts in these areas and is concerned that his enjoyment and the enjoyment of his children and grandchildren, some of whom also use these areas and have done so more recently, will be diminished due to emissions from the Greene Energy facility. (Stipulations of the Parties, No. 62, as modified by the Board)

13. Mr. Coleman is concerned that his enjoyment of Quebec Run State Forest in Pennsylvania, 20 miles from the Greene Energy Facility, will be diminished by the facility's pollution. Mr. Coleman hikes and backpacks in this state forest regularly. (Stipulations of the Parties, No. 63)

14. Robert N. Leggett, Jr. resides in Great Falls, Virginia, and has lived there since 1979. His primary occupation is private investor. (Stipulations of the Parties, No. 64)

15. Mr. Leggett is a member of the National Parks Conservation Association and has been a member for 17 years. Mr. Leggett is a member because of his deep and abiding belief that national parks and other preserved natural areas hold great value to him as

places where he and his family have the opportunity to appreciate a connection to the natural world. (Stipulations of the Parties, No. 65)

16. Mr. Leggett agrees with National Parks Conservation Association's mission of "protecting parks for future generations." Mr. Leggett has served on the Board of National Parks Conservation Association for six years and on the National Council for over five years. (Stipulations of the Parties, No. 66)

17. Mr. Leggett is concerned about the impact on air quality that he believes would result from the operation of the Greene Energy facility at two federal land areas that he uses regularly for recreation and teaching environmental awareness as a Boy Scout leader. (Stipulations of the Parties, No. 67)

18. Mr. Leggett frequently recreates in Shenandoah National Park. On average, Mr. Leggett has made a trip to Shenandoah National Park two to three times per year for many years. His most recent trip was in November 2005, when he went hiking with his Scout troop. Mr. Leggett anticipates returning to Shenandoah National Park in the future. In addition, Mr. Leggett enjoys taking scenic drives and engaging in photography in Shenandoah National Park. (Stipulations of the Parties, No. 68)

19. Mr. Leggett also uses the Dolly Sods National Wilderness Area in West Virginia. Mr. Leggett is a Scout leader and has, for the last 27 years, taken Scout troops on annual backpacking trips in Dolly Sods. He anticipates continuing to take those trips in the future. (Stipulations of the Parties, No. 69)

20. Mr. Leggett believes that he is harmed by the Greene Energy Facility because he believes it will degrade visibility and air quality in Shenandoah National Park and Dolly Sods Wilderness Area and expose him, his wife, and his Scouts to harmful additional air pollution. (Stipulations of the Parties, No. 70)

21. The National Parks Conservation Association is an existing, functioning non-profit corporation, with principal offices in Washington, D.C., with members located across the nation. For the purposes of its opposition to the Wellington facility, the National Parks Conservation Association's interests in this matter include impacts to Shenandoah National Park and to activities that may lead to impacts to national parks. (Stipulations of the Parties, No. 71)

22. GASP is a non-profit organization operating in accordance with Pennsylvania law, with principal offices in Pittsburgh, Pennsylvania, and with members primarily in Southwestern Pennsylvania. GASP is interested in protecting and improving air quality locally, regionally, and nationally, including but not limited to Class I areas frequented by its members. GASP claims standing in this matter through the standing of one of its members, Dennis Groce. (Stipulations of the Parties, No. 72)

23. Dennis Groce resides in Point Marion, Pennsylvania, and has lived there since 1977. Mr. Groce works for a company called EG&G, where he gathers information about respirator use and works on developing ways to improve respirators in the United States. Mr. Groce has a degree in civil engineering and a master's degree in public

health. Mr. Groce's residence is approximately 10 miles southeast of the proposed location of the Greene Energy facility in Nemacolin, Pennsylvania. (Stipulations of the Parties, No. 73)

24. Mr. Groce is a member of GASP. He is greatly concerned about the level of pollution in the area in and around Point Marion. (Stipulations of the Parties, No. 74)

25. Mr. Groce believes the issuance of the permit to Wellington harms him because it will lead to the construction of the Greene Energy facility, which will emit air pollutants. Mr. Groce believes that he will be harmed by the facility because the proximity of the facility to his house might cause the real estate value of his property to decrease. Therefore, the price of his house might be lower in the event he decides to sell it. (Stipulations of the Parties, No. 75, 77)

26. Mr. Groce's residence is located approximately sixty (60) miles northwest of Dolly Sods Wilderness Area, sixty-five (65) miles northwest of Otter Creek Wilderness Area, and one-hundred (100) miles northwest of Shenandoah National Park. Mr. Groce has visited these areas and plans to do so in the future. Mr. Groce has bicycled in Shenandoah National Park and has hiked and cross-country skied in Dolly Sods and Otter Creek Wilderness areas. Mr. Groce is concerned about preserving these areas because he has used them for recreation and plans to do so in the future. (Stipulations of the Parties, No. 76)

Background: Air Quality Regulations

27. The primary means of generating electricity in Pennsylvania and across the United States is by burning or combusting a fuel to create steam. (Stipulations of the Parties, No. 6)

28. The steam produced is used to turn a turbine and generator where electrical energy is created from the energy in the steam. (Stipulations of the Parties, No. 7)

29. Numerous types of combustion units exist and are used. The appropriate type of unit will be dictated by various factors, including the type of fuel, and the desired size of the unit. (Stipulations of the Parties, No. 8)

30. Combustion units are "air contamination sources," as that term is defined in Section 3 of the Air Pollution Control Act, 35 P.S. § 4003, and require the Pennsylvania Department of Environmental Protection's approval prior to commencing construction. Section 6 of the Air Pollution Control Act, 35 P.S. § 4006.1; 25 Pa. Code § 127.11. (Stipulations of the Parties, No. 9)

31. Bituminous coal ("coal") is a fuel that is commonly burned to generate electricity. (Stipulations of the Parties, No. 10)

32. The combustion of coal or waste coal results in the emission of sulfur dioxide (SO_2), oxides of nitrogen (NO_x), particulate matter (PM), and other pollutants. This case involves the emissions and control of SO_2 and NO_x. (Stipulations of the Parties, No. 11)

33. Section 109 of the federal Clean Air Act, 42 U.S.C. § 7409, requires the federal Environmental Protection Agency (EPA) to develop National Ambient Air Quality Standards ("Ambient Standards" or "NAAQS"). (Stipulations of the Parties, No. 13)

34. Ozone (O_3), is not emitted directly into the atmosphere, but is created by a photochemical reaction in the atmosphere. Although ozone cannot be regulated directly, ozone precursors, the substances that combine to form ozone - oxides of nitrogen (NO_x) and volatile organic compounds (VOC's) – are regulated. (Stipulations of the Parties, No. 14)

35. An area may be in compliance, or in "attainment" with the Ambient Standards for some pollutants, and not in compliance or in "non-attainment" for others. (Stipulations of the Parties, No. 15)

36. The location of the proposed Greene Energy facility is in non-attainment for ozone and its precursors, but is in attainment for other pollutants, including SO_2 and NO_2. (Stipulations of the Parties, No. 16, 33)

37. Whether an area is in attainment or in non-attainment is a factor in determining which permitting requirements apply to new or modified major sources of air contamination, as defined at 25 Pa. Code §§ 127.1, 127.203. Projects in attainment areas are subject to Prevention of Significant Deterioration requirements, and projects in non-attainment areas are subject to New Source Review requirements. (Stipulations of the Parties, No. 17)

38. The Greene Energy facility is subject to New Source Review for NO_x (an ozone

precursor), and subject to Prevention of Significant Deterioration review for SO_2 and NO_2. (Stipulations of the Parties, No. 33)

39. Under the Clean Air Act, states are expected to prepare plans to achieve and/or maintain compliance with the Ambient Standards. The plans are known as State Implementation Plans. (N.T. 54, Vol. 1)

40. The Environmental Protection Agency has approved Pennsylvania's New Source Review program as part of Pennsylvania's State Implementation Plan. Pennsylvania's New Source Review regulations are set forth at 25 Pa. Code Chapter 127, Subchapter E. (N.T. 54, Vol. 1; Stipulations of the Parties, No. 18)

41. New Source Review only applies to new major sources of air contamination or new major modifications to existing major facilities. These terms are defined at 25 Pa. Code §§ 121.1, 127.203. (Stipulations of the Parties, No. 19)

42. The primary aspects of New Source Review are: (1) Lowest Achievable Emission Rate (LAER), and (2) emission offsets. (N.T. 55-56, Vol. 1)

43. Lowest Achievable Emission Rate is defined as follows:

(I) The *rate of emissions* based on the following, whichever is more stringent:

> (A) The most stringent *emission limitation* which is contained in the implementation plan of a state for the class or category of source unless the owner or operator of the proposed source demonstrates that the limitations are not achievable.
>
> (B) The most stringent *emission limitation* which is achieved in practice by the class or category of source.

25 Pa. Code § 121.1 (*emphasis added*). (Stipulations of the Parties, No. 20)

44. Lowest Achievable Emission Rate is determined for the "class or category of source," which encompasses the source being evaluated. (N.T. 55, Vol. 1; 25 Pa. Code § 121.1)

45. Lowest Achievable Emission Rate is an emissions limitation. LAER is not defined by a particular control technology or by a percentage reduction of a pollutant or control efficiency. (N.T. 55, 156, Vol. 1; N.T. 234-35, Vol. 8)

46. "Achieved in practice" means that the source is capable of meeting the emission limitations at all times. (N.T. 233-234, Vol. 8)

47. The fuel used and type of combustion technology employed are important facts in determining "class or category" for determining LAER. (N.T. 99-100, Vol. 1; 61-62, Vol. 14)

48. The determination of "class or category" is within the reviewing agency's discretion. (N.T. 99, Vol. 1; 72-73, Vol. 6)

49. LAER does not typically take costs into account. (N.T. 64, Vol. 5)

50. Cost of control may be considered under LAER only to show that further controls or emission reduction controls would prevent any similar source from being built. (N.T. 72, Vol. 14)

51. Pennsylvania administers the Prevention of Significant Deterioration program in

Pennsylvania pursuant to its adoption of the federal Prevention of Significant Deterioration Regulations (40 CFR § 52.21). 25 Pa. Code Chapter 127, Subchapter D. However, under the terms of the incorporation, EPA retains responsibility under several provisions of 40 CFR § 52.21. *See* 25 Pa. Code § 127.83. (Stipulations of the Parties, No. 21)

52. Prevention of Significant Deterioration applies to new major stationary sources of air contamination and major modifications at existing major stationary sources. These terms are defined at 25 Pa. Code § 121.1. (Stipulations of the Parties, No. 22)

53. Prevention of Significant Deterioration permitting requirements are set forth in 40 CFR § 52.21. (Stipulations of the Parties, No. 23)

54. Of primary importance to Prevention of Significant Deterioration permit review is an evaluation of: 1) Best Available Control Technology (BACT) and 2) whether the increment will be exceeded. (N.T. 59-60, Vol. 1)

55. Best Available Control Technology applies to the proposed sources of emissions of pollutants for which the area is in attainment with the Ambient Standards. Unlike LAER, BACT is a "case-by-case" analysis that takes "into account energy, environmental and economic impacts and other costs." (N.T. 58-59, Vol. 1; 25 Pa. Code §121.1)

56. Lowest Achievable Emission Rate is at least as stringent as Best Available

Control Technology. (N.T. 59, Vol. 1; 64, Vol. 5)

57. For purposes of Prevention of Significant Deterioration review the United States is divided into three different classes of areas: Class I, Class II and Class III. Certain national parks and wilderness areas are designated as Class I areas. Most other areas are classified as Class II areas. (Stipulations of the Parties, No. 24)

58. Pennsylvania has no Class I or Class III areas; all of Pennsylvania is considered to be Class II for Prevention of Significant Deterioration purposes. (Stipulations of the Parties, No. 25)

59. For Prevention of Significant Deterioration review, the impact of a new major source or major modification on air quality increment is typically determined by computer modeling, which takes into account factors including meteorology, topography, and other air contamination sources within the area modeled. (Stipulations of the Parties, No. 26)

60. A computer model, CALPUFF, was approved for use by the Environmental Protection Agency in 2003. *See* 40 C.F. R. part 51, App. W. (Stipulations of the Parties, No. 27)

61. CALPUFF predicts concentrations of pollutants for various time periods at locations known as receptors. (N.T. 27-29, Vol. 2)

62. Allowable "increments" are established for Class I, Class II, and Class III air

quality areas in the Clean Air Act and federal Prevention of Significant Deterioration regulations. Section 163(b) of the federal Clean Air Act, 42 U.S.C. § 7473(b); 40 C.F.R. § 52.21(c). (N.T. 60-61, Vol. 1)

63. New major sources or new major modifications subject to Prevention of Significant Deterioration may "consume" up to the entire increment, but may not contaminate the atmosphere in excess of the increment. (N.T. 64, Vol. 1; 152-153, Vol. 8; C-72)

64. A Federal Land Manager is the federal agency responsible for a Class I area, such as a national park or wilderness area, and is responsible for protecting air quality related values (AQRVs), such as visibility and sulfur deposition, in the areas they administer. (N.T. 173, Vol. 8; Ex. A-55 (p. 153))

65. Federal Land Managers do not have the authority to approve or deny air quality permits or plan approvals; they serve an advisory function, albeit a very important one, to the permitting authority. (N.T. 160-61, Vol. 14; Ex. A-55 (p. 5))

The Application

66. On July 23, 2003, a year before the Plan Approval Application ("Application") was submitted, Wellington and the Department participated in a meeting with the Federal Land Managers responsible for oversight of the Class I areas evaluated for potential impacts from the Project in order to discuss the forthcoming application.

Participating in the meeting were representatives of Wellington and its consultant, ENSR; Andrea Stacy and Cinder Huber from the United States Forest Service, the Federal Land Manager for Otter Creek, Dolly Sods and James River Face Wilderness Areas; and by phone, Don Shepherd and John Notar of the National Park Service, the Federal Land Manager for Shenandoah National Park, and representatives from the Department. (N.T. 156-158, Vol. 9)

67. Where the Federal Land Managers expressed concerns about the Project, Wellington made efforts to work with them and to accommodate those concerns wherever possible. (N.T. 167-168, Vol 14)

68. On August 15, 2003, well before the Application was submitted to the Department, Wellington submitted its proposed protocol for modeling the impacts of Project emissions on Class I areas to the Federal Land Managers directly. (Ex. B-45, N.T. 191, Vol. 3; 80, Vol. 14)

69. The Pennsylvania Department of Environmental Protection and the applicant must provide notice of any proposed new major source or major modification subject to Prevention of Significant Deterioration or New Source Review in the *Pennsylvania Bulletin* and a newspaper of general circulation in the area of the proposed facility.[9] 25

[9] (b) The notice required by subsection (a)(1) – (4) will be completed and sent to the applicant, the Environmental Protection Agency, any state within 50 miles of the facility and any state whose air quality may be affected and that is contiguous to this Commonwealth. The applicant shall, within 10 days of receipt of notice, publish the notice on at least 3 separate days in a prominent place and size in a newspaper of general circulation in the county in which the source is to be located; proof of the publication shall be filed with the Department within 1 week thereafter. A plan approval will not be issued by the Department in the event of failure by the

Pa. Code §§ 127.44 and 127.45. (Stipulations of the Parties, No. 29)

70. The Department may, in its discretion, convene a public hearing or public conference on any application for plan approval:

> **§ 127.48. Conference and hearings**
>
> (a) Prior to any plan approval issuance, the Department may, in its discretion, hold a fact finding conference or hearing at which the petitioner, and any person who has properly filed a protest under § 127.46 (relating to filing protests) may appear and give testimony; provided, however, that in no event will the Department be required to hold such a conference or hearing.
>
> (b) The applicant, the protestant, and other participants, will be notified of the time, place and purpose of a conference or hearing, in writing or by publication in a newspaper or the *Pennsylvania Bulletin*, except where the Department determines that notification by telephone will be sufficient.

(25 Pa. Code § 127.48)

71. Wellington filed its Application with the Department on June 13, 2004. (Stipulations of the Parties, No. 34)

72. Wellington's consultant provided a copy of the Application to the National Park Service and the Forest Service at the time that it sent the Application to the Department; it was received by the Federal Land Managers on July 13, 2004. (N.T. 32, 33, Vol. 7)

73. The Department published notice of its receipt of the Application in the July 31, 2004 Pennsylvania Bulletin. 34 Pa. Bull. 4046. (Stipulations of the Parties, No. 35)

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applicant to submit the proof of publication. 25 Pa. Code § 127.44(b).

74. On September 24, 2004 the Department determined the Application to be administratively complete. (Stipulations of the Parties, No. 36)

75. Shortly after receiving the Application, the Department sent a technical deficiency letter to Wellington to which Wellington responded. (N.T. 34, Vol. 7)

76. The Application was primarily reviewed by engineers in the Department's Southwest Regional Office. Modeling was reviewed by a meteorologist in the Department's central office in Harrisburg. (N.T. 10, Vol. 7)

77. The Department published notice of intent to issue a Plan Approval to construct the Wellington Facility on February 26, 2005. 35 Pa. Bull. 1454-58. The notice was also published in newspapers of general circulation in the area, the Herald Standard and Observer Reporter. (Stipulations of the Parties, No. 37)

78. On February 26, 2005 the Department published notice of a public conference concerning the Application to be held on March 30, 2005. 35 Pa. Bull. 1459, 35 Pa. Bull. 2330. (Stipulation of the Parties, No. 38)

79. The February 26, 2005 public notice contained notice of the degree of increment consumption expected to result from the operation of the Project in Class II areas. (N.T. 104-105, Vol. 1)

80. In March 2005, the Department conducted a public conference on the proposed Plan Approval. (Ex. B-21; N.T. 40-41, Vol. 7)

81. During the Application review the Department received comments from members of the public. Some comments supported the project, others opposed it. (N.T. 40, 41, Vol. 7; Ex. B-2)

82. Federal Land Managers participated in the review process by submitting extensive written comments, discussing aspects of the Application with the Department and Wellington in telephone conversations and e-mail correspondence, and by having the opportunity to meet with the Department face to face. (N.T. 77, 107, 142-45, 151, Vol. 3; N.T. 217-18, Vol. 8)

83. Following the public conference and receipt of comments, the Department evaluated all comments. The Department subsequently required significant changes to the draft Plan Approval. The changes included:

- The PM10 emission limitation was reduced from 0.05 lb/MM BTU (pounds per million British Thermal Units) to 0.012 lb/MM BTU;
- The annual allowable PM10 emissions were reduced from 1,207 tons to 289.7 tons;
- The SO_x emission limitation was reduced from 0.234 lb/MM BTU (24 hr. avg.) to 0.156 lb/MM BTU (30 day avg.);
- Annual allowable SO_x emissions were reduced from 5,649 to 3,767 tons;
- The NO_x emission limitation was reduced from 0.10 lb/MM BTU (24 hr. avg.) to 0.08 lb/MM BTU (30 day avg.) and 0.10 lb/MM BTU (24 hr. avg.);
- Annual allowable NO_x emissions were reduced from

2,414 tons to 1,931.4 tons;

- Condition 9 in the Wellington Plan Approval required Wellington to implement a Mitigation Plan, which included retiring 2,088 tons of SO_2 Emission Reduction Credits (ERCs);

- Condition 9 in the Wellington Plan Approval was amended on September 1, 2005 to require Wellington to retire an additional 411 tons of SO_2 ERCs for a total of 2, 499 tons.

(N.T. 43-46, Vol. 7; Ex. B-1, Ex. C-32)

84. On June 15, 2005, the Forest Service accepted Wellington's mitigation proposal, and indicated that it would not take action in opposition of the Department's issuance of the proposed Plan Approval. (Ex. B-16)

85. On June 21, 2005 the Department issued Plan Approval No. PA-30-00150A to Wellington authorizing it to construct the Greene Energy Facility. (Stipulations of the Parties, No. 39)

86. On July 2, 2005, notice of the issuance of the Wellington Plan Approval was published in the Pennsylvania Bulletin. 35 Pa. Bull. 3697. (N.T. 45,Vol. 7)

87. On July 23, 2005, a correction to the notice of the issuance of the Wellington Plan Approval was published in the *Pennsylvania Bulletin*. This notice did not affect the issued Plan Approval's terms. It only corrected inaccuracies in the July 2, 2005 Notice. 35 Pa. Bull. 4137.

88. Whereas the emissions limit for NO_x in the February 15, 2005 draft Plan

Approval (Ex. B-31) had been 0.10 lb/MM BTU on a 24-hour average basis, the Plan Approval, issued on June 21, 2005 (Ex. C-8), contained an additional emission limitation for NO_x of 0.08 lb/MM BTU on a 30-day average. (Ex. C-32; N.T. 44-45, Vol. 7).

89. On September 1, 2005, the Department modified the Plan Approval to provide for the acquisition and retirement of ERCs for an additional 411 tons of SO_2 in addition to the 2,088 tons of SO_2 ERCs that were included in the original mitigation plan incorporated into the Plan Approval. (Ex. B-1; N.T. 206-207, Vol. 8)

90. The September 1, 2005, revisions were a result of changes requested by the National Park Service. (N.T. 206, Vol. 8; Ex. B-1)

91. On December 17, 2005, the Department published notice of, and solicited public comment on, the degree of increment consumption expected to result from the operation of the Project in Class I areas. (Ex. B-29)

92. On January 14, 2006, the Department published an amended notice and solicitation of public comment concerning the degree of increment consumption in Class I areas resulting from operation of the Project. (Ex. B-30)

93. The December 17, 2005 public notice and the January 14, 2006 public notice differed in that the January public notice correctly identified the computer model used to assess the Project's emission impacts on Class I areas as the "CALPUFF" model, while the December public notice erroneously indicated that the model used was the

"AERMOD" model. (N.T. 148, Vol. 8)

94. On June 12, 2006, the Department issued an amended Plan Approval correcting an error in the number of emission reduction credits Wellington will be required to purchase. (Ex. C-73)

The Project

95. Wellington proposes to construct a 525 megawatt (net) capacity power plant in Cumberland Township, Greene County, Pennsylvania. (Stipulations of the Parties, No. 30)

96. The Wellington facility will be located on the west bank of the Monongahela River, on the abandoned LTV Nemacolin Mine site. (Stipulations of the Parties, No. 31)

97. The proposed Wellington facility consists of two circulating fluidized bed combustors (CFB Combustors), which will exhaust to the atmosphere through a single stack with two flues. (Stipulations of the Parties, No. 32)

98. The principal fuel for the CFB Combustors will be bituminous waste coal that will be reclaimed from disposal areas in the vicinity of the Wellington facility. Approximately 85% of the fuel (based upon heating value) is expected to be bituminous waste coal, which includes coarse refuse and fines. The remainder will be run-of-mine coal. The plant will consume approximately 7,300 tons of bituminous waste coal per day. (N.T. 100, Vol. 1; 128, Vol. 9; Ex. A-148)

99. The Wellington facility is designed to burn a fuel blend with a heating value of 7,700 BTU/lb. Under maximum operating conditions the CFB Combustors will burn 357.9 ton/hour and 3,135,240 tons/year of the fuel blend. (N.T. 181, 198, Vol. 10; Ex. B-31)

100. The Wellington facility will be located adjacent to the Nemacolin waste coal pile, which is expected to be the initial fuel source for the Plant. The Nemacolin waste coal pile was created by coal mining operations over approximately 65 years. Areas where bituminous waste coal is currently located will be reclaimed. (N.T. 118-22, 134-135, 141-42, 175-76, Vol. 9; Ex. W-134)

101. Wellington has identified numerous other sources of bituminous waste coal in the area and is negotiating contracts for those piles. (N.T. 124-29, Vol. 9; Ex. W-135)

102. Wellington estimates that its fuel blend will consist of approximately 85% bituminous waste coal (coarse and fines) and 15% run-of-mine coal, by weight. (N.T. 176-77, Vol. 9; Ex. A-148)

103. Coal is processed prior to being used as fuel. During coal processing, among other things, rock and other material are removed to the extent practicable. The waste material that results when bituminous coal is processed is sometimes called waste coal, coal refuse, or gob (garbage of bituminous). (N.T., 47, 68, Vol. 1; 222-23, Vol. 8)

104. The gob piles that make up part of the fuel for the Project were created by long-

abandoned mining operations conducted by unrelated parties, who discarded the gob as mining waste. (N.T. 119-120, Vol. 9)

105. The operational plan for the Project calls for all of the gob pile areas used as fuel for the Project to be reclaimed by Wellington as they are consumed. (N.T. 141-142, 152, Vol. 9)

106. Some combustible material remains in the waste coal. (N.T. 68, Vol. 1)

107. Waste coal is not uniform; its properties are variable. (N.T. 121-22, 124, 126, Vol. 9; N.T. 51, Vol. 14)

108. Waste coal contains less energy, that is, it has a lower heating value, than coal. Heating value is typically measured in British Thermal Units (BTU) per pound (BTU/lb). Bituminous coal's heating value typically ranges between 12,000 and 13,000 BTU/lb; bituminous waste coal's heating value is typically half of that or less. (N.T. 67-68, Vol. 1)

109. Waste coal contains a greater amount of noncombustible material than coal. The amount of noncombustible material is often referred to as ash. The operator must dispose of any material that does not burn. (N.T. 68-69, Vol. 1)

110. Waste coal consists of coarse waste and fines. The coarse waste coal is usually rock and other undesirable material that is removed from the coal. (N.T. 222-23, Vol. 8)

111. It is typical for waste coal CFBs to burn both coarse waste coal and fines, as Wellington proposes to do. (N.T. 223, Vol. 8)

112. The composition of bituminous waste coal is variable because the process of cleaning coal provides no uniform quality control for the waste coal. Rock and other undesirable material is simply removed. In addition, coal itself has some inherent variability. (N.T. 223-25, Vol. 8)

113. Different coal cleaning and processing methods that were used at the site created bituminous waste coal with different characteristics. (N.T. 121, Vol. 9)

114. The inherent variability in bituminous waste coal, particularly variability in nitrogen content and sulfur content, will result in variability in air emissions. This variability in emissions makes the control of emissions more difficult. (N.T. 225-27, Vol. 8)

115. The Nemacolin pile, which will provide Wellington's initial fuel source, and other piles that will be used by Wellington, are typical of waste coal piles that were created before laws mandating proper disposal of waste coal were enacted. At piles like Nemacolin, waste coal was simply dumped by the generator onto large piles covering many acres which remain today. These piles, like Nemacolin, typically do not support vegetation or wildlife, and often cause collateral environmental problems such as polluted runoff and uncontrolled burning refuse. In addition, such piles may

pose safety hazards because of steep slopes that tend to be unstable and have slides and sharp drop offs. (Ex. B-20, Ex. B-31)

116. Coal that is burned for electricity generation is typically combusted in pulverized coal combustion units (Pulverized Coal Units). (N.T. 72-73, Vol. 1)

117. Pulverized Coal Units burn coal which has been finely pulverized to the consistency of talcum power. (N.T. 73, Vol. 1)

118. A Pulverized Coal Unit's design does not allow it to burn waste coal because it contains a significant amount of rock, the waste coal's heat content is too low, and waste coal cannot be pulverized to the consistency required by a Pulverized Coal Unit. In addition, because of its higher ash content, waste coal would typically create more ash. (N.T. 68, Vol. 1; N.T. 206, Vol. 13)

119. A CFB Combustor's design is very different than a Pulverized Coal Unit's design. (N.T. 59, 61-63, Vol. 14)

120. CFB Combustors were first constructed to generate electricity from waste coal in the 1980s. There are several CFB facilities in Pennsylvania that are burning either bituminous waste coal or anthracite waste coal to generate electricity. (N.T. 45-47, 69, Vol. 1)

121. No other type of combustion unit is capable of utilizing waste coal as a fuel source on a commercial basis. Until CFB combustion technology was developed and

proven to feasibly utilize waste coal, waste coal was not a viable commercial fuel source. (N.T. 69, 100, Vol. 1)

122. A CFB boiler is the only boiler technology available for gob-fired projects because only CFB boilers can accommodate a heterogeneous fuel such as gob. A CFB boiler is the only commercially viable technology to burn bituminous waste coal. (N.T. 69, 87, Vol. 1; N.T. at 128, Vol. 9)

123. CFB Units are more expensive than comparable Pulverized Coal Units. (N.T. 145-46, Vol. 9)

124. CFB Combustors do not require the fuel to be pulverized as Pulverized Coal Units do. (N.T. 83-84, Vol. 1; N.T. 59, Vol. 14)

125. Waste coal requires a longer burning time than coal in a Pulverized Coal Unit. The CFB Combustor's design allows for this greater burning time. (N.T. 206-207, Vol. 14)

126. Pulverizing coal allows for a quick release of heat and efficient transfer of energy. (N.T. 75, Vol. 1)

127. CFBs operate best on a consistent fuel. To provide some consistency in the fuel, a small amount of run-of-mine coal is mixed with the bituminous waste coal to stabilize its combustion properties. (N.T. 87, Vol. 1)

128. Pollution control, specifically control of NO_x, is inherent in the design of a CFB.

(N.T. 220, Vol. 13)

129. In a CFB Combustor the fuel is injected into the boiler and circulates in a bed of sand and pulverized limestone that is suspended by high velocity air. Limestone injected into the bed is added to chemically absorb and prevent the emission of sulfur dioxide (SO_2) to the atmosphere. (N.T. 81-86, Vol. 1; Ex. C-26)

130. In a Pulverized Coal Unit, SO_2 is typically controlled by adding a "scrubber," an air pollution control device that treats exhaust gases from the combustion process. Various scrubber designs for Pulverized Coal Units exist, but all are "end of pipe," that is, add-on air pollution control devices. (N.T. 79, Vol. 1; 131-132, Vol. 14)

131. In a CFB Combustor, most SO_2 control occurs in the CFB Combustor itself, rather than in an add-on pollution control unit. SO_2 is controlled by injecting limestone directly into the combustion bed, where it reacts with sulfur and converts it to a solid substance, calcium sulfate. The calcium sulfate can be removed from the exhaust gases in the baghouse. (Stipulations of the Parties, No. 12)

132. The most recently installed bituminous waste coal CFBs, including the proposed Wellington facility, have added a small "polishing" dry scrubber to further increase the SO_2 control efficiency. (Stipulations of the Parties, No. 12)

133. The Wellington facility will control SO_2 by injecting limestone directly into the unit's firebox and exhausting exhaust gases through a small polishing scrubber.

(Stipulations of the Parties, No. 45)

134. CFB Combustors are designed to handle the larger quantity of ash that results from the high ash content of the waste coal and the injection of limestone directly into the combustion bed. (N.T., 223, Vol. 13)

135. Because limestone is added to the furnace, ash particles from a CFB Unit are irregular and sharp; particles from a Pulverized Coal Unit tend to be spherical and rounded. (N.T. 59, Vol. 14)

136. In a boiler, NO_x is primarily created in two ways. NO_x is created when nitrogen in the fuel combines with oxygen in the air (fuel NO_x). A proportionately greater amount of NO_x is created when the heat of combustion causes nitrogen and oxygen in the atmosphere to react (Thermal NO_x). (N.T. 243-44, Vol. 13)

137. Because CFB Combustors operate at a lower temperature than Pulverized Coal Units, CFB Combustors intrinsically produce lower NO_x emissions than Pulverized Coal Units. (N.T. 77, 85-86, Vol. 1; N.T. 216, Vol. 13)

138. NO_x formation rises with increasing temperatures in the combustion process. CFB Combustors have an inherently lower uncontrolled NO_x emission rate than Pulverized Coal Units because CFB Combustors operate at lower temperature than Pulverized Coal Units. (N.T. 77, 85-86, Vol. 1; N.T. 216, Vol. 13)

139. NO_x may be controlled by two technologies, Selective Non Catalytic Reduction

(SNCR) and Selective Catalytic Reduction (SCR), that use the same chemical "reduction" reaction to convert NO_x to elemental nitrogen. (N.T. 89-91, Vol. 1)

140. "Reduction" is a chemical reaction that removes oxygen. It is the opposite of "oxidation." (N.T. 91-92, Vol. 1)

141. Ammonia and urea are the chemicals that are typically used as the "reducing agent." (N.T. 89, Vol. 1)

142. Wellington proposes to control NO_x from the CFB Combustors using Selective Non-Catalytic Reduction controls. (Stipulations of the Parties, No. 40)

143. Selective Non-Catalytic Reduction is well suited to bituminous waste coal fired CFB Combustors because it affords an ideal location and favorable exhaust gas conditions for application of this NO_x reducing technology. Specifically, the temperature of the CFB Combustors is optimal for the reduction reaction to proceed, and the turbulence of the gas stream is favorable to mixing the reagent resulting in less NO_x. (Stipulation of the Parties, No. 41)

144. Using Selective Non-Catalytic Reduction, the reagent is injected directly into the exhaust gas. (N.T. 89-90, Vol. 1)

145. The sole function of the catalyst in a selective catalytic reduction technology is allowing the NO_x reduction reaction to occur at a lower temperature that it would otherwise, typically between 550 and 750 degrees Fahrenheit. (N.T. 91, 138, Vol. 1)

146. The catalyst does not allow more NO_x reduction than could be obtained at optimal conditions. (N.T. 138, Vol. 1)

147. Particulate matter and dust in the gas may adversely affect a Selective Catalytic Reduction (SCR) catalyst and reduce its effectiveness by 1) physically plugging the catalyst, and 2) poisoning the catalyst so that it is not available to function. (N.T. 92-93, Vol. 1)

148. The Department investigated NO_x LAER for bituminous waste coal fired CFB Combustors in EPA's RACT/BACT/LAER Clearinghouse (EPA Clearinghouse), a source of information to which regulators and air quality professionals commonly refer. EPA is required to maintain the EPA Clearinghouse by the Clean Air Act. 42 U.S.C. § 7408(h). EPA compiles information about air pollution sources, including emissions limitations, in the Clearinghouse. (Stipulations of the Parties, No. 42)

149. The Wellington facility is in an area that is in attainment for NO_2. (Stipulations of the Parties, No. 43)

150. NO_2 is a constituent of NO_x and is controlled by the same means as NO_x. (Stipulations of the Parties, No. 44)

151. The primary revenue for the Project will be generated by the sale of electricity to the electric transmission grid, which is managed by a transmission provider, PJM, Inc. the regional transmission organization for Pennsylvania and certain other Eastern states.

(N.T. 91, Vol. 10) PJM manages the transmission grid that distributes electricity throughout the region that includes Pennsylvania. (N.T. 129, Vol. 9; N.T. 93, Vol.10)

152. The Project is located in the market known as "PJM West." Allegheny Power Company is the company that owns the transmission equipment in the portion of the PJM West Market into which the Project will deliver electricity. (N.T. 129, Vol. 9)

153. Wellington chose Nemacolin as the site for the Project because, of the alternatives, Nemacolin offers a location for interconnection points into the regional electric transmission grid (the PJM system), accessibility to the river for transportation and fuel availability and diversity at the site. (N.T. 139, Vol. 9) The Department, after visiting and evaluating alternative sites, also concluded that Nemacolin was the best site for the Project. (N.T. 90, Vol. 8)

154. The Project is expected to cost approximately $1.3 billion. (N.T. 104, Vol. 10)

Air Quality Related Values

155. The air quality impacts of the Wellington Facility on four Class I areas were modeled and evaluated. (Stipulations of the Parties, No. 46)

156. The four areas are Shenandoah National Park in Virginia, Otter Creek Wilderness Area in West Virginia, Dolly Sods Wilderness Area in West Virginia, and James River Face Wilderness Area in Virginia. (Stipulations of the parties, No. 47)

157. The United States Department of the Interior's National Park Service manages

Shenandoah. The United States Department of Agriculture's National Forest Service (Forest Service) manages Otter Creek, Dolly Sods, and James River Face Wilderness Areas. (Stipulations of the Parties, No. 48)

158. The approximate distances from each of the four Class I areas to the proposed location of the Wellington Facility are:

Otter Creek	95 km
Dolly Sods	105 km
Shenandoah	185 km
James River Face	255 km

(Stipulations of the Parties, No.49)

159. CALPUFF is the computer modeling system that Wellington used. It is commonly used for Class I modeling, and has been approved by EPA. See 40 CFR Part 51, App. W, A.3. (Stipulations of the Parties, No. 50)

160. Wellington modeled the impact of the proposed Wellington facility on the Class I areas by developing what it termed a "refined" CALPUFF cumulative model. (Stipulations of the Parties, No. 51)

161. Wellington's refined CALPUFF cumulative model used actual meteorologic data for three years (1990, 1992 and 1996) and emissions for major sources in the modeled area, which is also called the "domain." (Stipulations of the Parties, No. 52)

162. The modeling that the Department relied upon for its decision to issue the Plan Approval was the refined cumulative model submitted with the Plan Approval Application and the results of subsequent modeling set forth in Wellington's April 12, 2005 memorandum report. (Stipulations of the Parties, No. 53)

Public Notice

163. The Department's public notice of the "degree of increment consumption expected to result from the operation of the plant or facility," published prior to the issuance of the Wellington Plan Approval, did not include *Class I areas*. (Stipulations of the Parties, No. 54)

164. Consistent with its typical practice and experience in Prevention of Significant Deterioration reviews, the Department only provided notice of the "degree of increment consumption expected to result from the operation of the plant or facility" for *Class II areas* in the notice published prior to the issuance of the Wellington Plan Approval. (Stipulations of the Parties, No. 55)

165. After the Plan Approval the Department published a supplemental public notice that included degree of increment consumption for one of the Class I areas, James River Face. (Ex. B-29)

166. The supplemental notice was published on December 17, 2005, nearly six months after issuance of the Plan Approval. (Ex. B-29)

167. An additional notice was published on January 14, 2006 to correct an error in the December 17, 2005 notice regarding the type of modeling system used. (Ex. B-30)

167. The Department did not publish notice of degree of increment consumption for the other three Class I areas (Shenandoah, Dolly Sods and Otter Creek) based on its interpretation of what is meant by "contribute to increment consumption." (N.T. 158-59, 165-65, Vol. 8)

Increment Consumption

168. A new or modified source does not contribute to increment consumption unless its modeled impact exceeds the significant impact level at the time and location in the Class I area that has the highest modeled cumulative impact. (N.T. 158-159, Vol. 8)

169. Some minimum threshold level is necessary for measuring increment consumption in order to meaningfully evaluate a proposed source's impact on air quality. (N.T. 156-165, Vol. 8)

DISCUSSION

Burden of Proof and Standard of Review

The Pennsylvania Environmental Hearing Board, as set forth by the Commonwealth Court in *Warren Sand & Gravel Company v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1978), reviews all Department of Environmental Protection final actions *de novo*. Chief Judge Krancer, in the oft-cited case of *Smedley v.*

DEP, 2001 EHB 131, clearly set forth our duty in every case:

> We must fully consider the case anew and we are not bound by prior determinations made by the DEP. Indeed, we are charged to "redecide" the case based on our *de novo* scope of review. The Commonwealth Court has stated that "[d]e novo review involves full consideration of the case anew. The [EHB], as a reviewing body, is substituted for the prior decision maker, [the Department], and redecides the case." *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *O'Reilly v. DEP*, Docket No. 99-166-L, *slip op.* at 14 (Adjudication issued January 3, 2001)

2001 EHB at 156. Therefore, we make our own findings of fact based solely on the record developed before us. *Smedley*, at 156; *Benacci v. DEP*, 2005 EHB 560, 568.

In this third party appeal, Appellants bear the burden of proving by a preponderance of the evidence that the Department acted unreasonably and in violation of the laws of the Commonwealth in issuing the Plan Approval to Wellington. 25 Pa. Code § 1021.122(c)(2); *Shuey v. DEP,* 2005 EHB 657, 691; *Zlomsowitch v. DEP*, 2004 EHB 756, 780. In other words, the Appellants must prove that the Department's issuance of the Plan Approval to Wellington was an abuse of discretion in the sense that it was unreasonable, inappropriate or not in conformance with law. *Pennsylvania Trout v. DEP*, 2004 EHB 310, 362; *People United to Save Homes v. DEP*, 2000 EHB 1309, 1318.

Standing

There is clearly no question that the Appellants have standing to pursue this appeal. Appellant Phil Coleman lives approximately 10 miles from the proposed location of the Greene Energy facility and is concerned that air pollution from the facility will

have a negative impact on his health. (Ex. B-9, S-57 and 60)[10] He is also concerned that his enjoyment of Quebec Run State Forest, which is located 20 miles from the proposed facility and is a place where Mr. Coleman backpacks and hikes regularly, will be diminished by pollution from the facility. (Ex. B-9, S-63) Appellant Dennis Groce also lives approximately 10 miles from the proposed location of the Greene Energy facility. (Ex. B-9, S-73) He is concerned about pollution from the facility as well as its effect on the value of his property. (Ex. B-9, S-75) He has visited the Class I areas at issue in this appeal and plans to do so in the future. (Ex. B-9, S-76) Mr. Groce is a member of Group Against Smog (GASP), another appellant in this matter, which thereby gives it standing. As noted by Judge Coleman in *Borough of Roaring Spring v. DEP*, 2004 EHB 889:

> Pennsylvania courts have held that an organization may have standing either in its own right or on behalf of its members... Where an organization seeks standing as a representative of its members, as long as the organization has at least one member who will be adversely affected by the challenged DEP action, the organization has standing to sue.

Id. at 900 (citing a number of cases, including *In re Family Style Restaurant, Inc.*, 509 Pa. 109, 115 (1983) and *Pennsylvania Trout v. DEP*, 2003 EHB 622, 624).

The National Parks Conservation Association is a non-profit organization that focuses on the protection and improvement of national parks. (Ex. B-9, S-5) Its interest in this matter concerns potential impacts to Shenandoah National Park, which is one of the Class I areas at issue in this appeal. (Ex. B-9, S-71) Additionally, at least one of its

[10] Exhibit B-9 is the Stipulation of the Parties.

members, Robert N. Leggett, Jr., frequently enjoys activities in Shenandoah National Park and Dolly Sods National Wilderness Area, both of which are at issue in this appeal. (Ex. B-9, S-64, 65, 68, 69) It too, therefore, has standing.

Testimony of Mr. Derby and Mr. Jarboe

The Appellants object to portions of the testimony of two witnesses called by Wellington, Mr. Wilfred Derby and Mr. Thomas Jarboe. Mr. Derby, clearly an enthusiastic and passionate individual, is a principal of Wellington. He gave general background information about the project and detailed technical testimony concerning cost projections, electricity rates, and requirements of equity investors and lending institutions. Mr. Jarboe, a project manager with Bechtel Power Company, is a professional engineer. Some of the testimony he offered included substantive opinions about recognized standards in the engineering field.

We have excluded the testimony from these two witnesses that is expert in nature. These witnesses were not identified as expert witnesses in contravention of Pa.R.C.P. 4003.5 and Board pre-trial orders. They were not listed as expert witnesses in Wellington's pre-hearing memorandum. See detailed discussion in *Borough of Edinboro v. DEP*, 2003 EHB 725, 764-72, and *DEP v. Angino*, EHB Docket No. 2003-004-CP-L (Opinion and Order issued May 22, 2006). We have not relied on any expert testimony of Mr. Derby or Mr. Jarboe to support any of our findings or conclusions because they were not properly identified as expert witnesses by Wellington.

Air Quality Regulations: Background

The federal Clean Air Act requires the Environmental Protection Agency (EPA) to

develop National Ambient Air Quality Standards (Ambient Standards or NAAQS) with which states must achieve and/or maintain compliance. 42 U.S.C. § 7409. Ambient Standards exist for various pollutants pertinent to this appeal, including ozone, sulfur dioxide (SO_2) and nitrogen dioxide (NO_2). (N.T. 52, Vol. 1) Because ozone is not emitted into the atmosphere but created by a photochemical reaction, it cannot be regulated directly. Therefore, ozone precursors, or substances that combine to form ozone, must be regulated. These include oxides of nitrogen (NO_x) and volatile organic compounds. (Ex. B-9, S-14)

An area may be in compliance or in "attainment" with the Ambient Standards for some pollutants while in "non-attainment" with others. Projects in "attainment areas" are subject to Prevention of Significant Deterioration requirements, while projects in "non-attainment areas" are subject to New Source Review requirements. EPA has approved Pennsylvania's New Source Review program as part of Pennsylvania's State Implementation Plan. Pennsylvania's New Source Review requirements are set forth at 25 Pa. Code Chapter 127, Subchapter E. Pennsylvania's Prevention of Significant Deterioration program is administered pursuant to the state's adoption of the Federal regulations at 40 CFR § 52.21. The Prevention of Significant Deterioration requirements are set forth at 25 Pa. Code Chapter 127, Subchapter D.

The location of the proposed Greene Energy facility is in non-attainment for ozone but is in attainment for other pollutants for which Ambient Standards have been developed, including SO_2 and NO_2. (Ex. B-9, S-16) Therefore, the proposed facility is subject to New Source Review standards for all ozone precursors, such as NO_x, and

subject to Prevention of Significant Deterioration review for SO_2 and NO_2. (Ex. B-9, S-33)

New Source Review

New major sources of air contamination or modifications to existing major facilities (as defined at 25 Pa. Code §§ 121.1, 127.203) that are located in non-attainment areas are subject to the New Source Review section of the regulations: 25 Pa. Code Chapter 127, Subchapter E. (Ex. B-9, para. 19) There are two primary aspects of a New Source Review permit review: 1) emission offsets and 2) the lowest achievable emission rate (LAER). LAER is discussed in more detail below.

Prevention of Significant Deterioration

New major sources of air contamination or modifications to existing major facilities (as defined at 25 Pa. Code §§ 121.1) are subject to the Prevention of Significant Deterioration section of the air quality regulations: 25 Pa. Code Chapter 127, Subchapter D. (Ex. B-9, para. 22) Of primary importance to this type of permit review are the following: 1) best available control technology and 2) whether the increment will be exceeded. (Ex. B-9, para. 23) Best available control technology is defined by the regulations as follows:

> An emissions limitation based on the maximum degree of reduction for each pollutant subject to regulation under the Clean Air Act emitted from or which results from a major emitting facility which the permitting authority, on a case-by-case basis, taking into account energy, environmental and economic impacts and other costs, determines is achievable for the facility through application of production processes and available methods, systems and techniques. . . .

25 Pa. Code § 121.1.

For purposes of review under the Prevention of Significant Deterioration program, the United States is divided into three classes designated as Class I, II and III. Allowable "increments" are established for each class area. An "increment" is the amount of new contamination that may be added to the ambient air above the baseline pollutant concentration by all new or modified sources. (N.T. 59-60, 64, Vol. 1) Different increments are established for different pollutants. New major sources or major modifications to existing facilities may consume the entire increment but may not contaminate the atmosphere in excess of the increment. (N.T. 64, Vol. 1; N.T. 152-53, Vol. 8)

All of Pennsylvania falls into the Class II category. However, the air quality impacts of the proposed Greene Energy facility on four out-of-state Class I areas were modeled and evaluated. These four areas are as follows: Shenandoah National Park and James River Face Wilderness Area in Virginia and Otter Creek Wilderness Area and Dolly Sods Wilderness Area in West Virginia. The United States Department of the Interior's National Park Service (National Park Service) manages Shenandoah National Park. The United States Department of Agriculture's National Forest Service (Forest Service) manages the other areas. The federal agency responsible for protecting the air quality related values of a Class I area is known as a Federal Land Manager. Federal Land Managers do not have the authority to approve or deny air quality permits or plan approvals, but they serve in an advisory capacity to the permitting agency, in this case,

the Pennsylvania Department of Environmental Protection. Based on the testimony presented at trial, the Federal Land Managers were actively involved in the review and final requirements of the plan approval issued by the Department to Wellington.

LAER & BACT

The Plan Approval limits NO_x emissions at the Greene Energy facility to a rate of 0.10 lb/MMBtu on a 24 hour average, and 0.08 on a 30 day average. (Ex. B-1) Appellants contend that these limitations do not meet the applicable standards based on the Lowest Achievable Emission Rate (LAER) and Best Available Control Technology (BACT).

BACT and LAER are parallel standards that apply to ambient air quality attainment areas and non-attainment areas respectively.[11] The LAER standard is at least as stringent as the BACT standard. (N.T. 59, Vol. 1) Therefore, a NO_x emission limitation that satisfies the LAER standard for the Project will also satisfy the BACT standard. (N.T. 89, Vol. 8)

LAER is a multi-step process defined at 25 Pa. Code § 121.1 as follows:

> The rate of emissions based on the following, whichever is more stringent:
>
> a) The most *stringent emission* limitation which is

[11] Since the proposed Wellington Facility in Greene County does not achieve the NAAQS for ground level ozone, the Plan Approval was required to contain an emission limitation for NO_x, a contributor to ground-level ozone, that meets the LAER standard. See 25 Pa. Code § 127.205. When a proposed facility is located in an area that achieves the NAAQS for a given pollutant, the emission limitation for that pollutant must reflect the BACT standard. See 25 Pa. Code § 127.83 and 40 C.F.R. § 52.21(j). The Project is located in an area that achieves the NAAQS for NO_2. See 40 C.F.R. § 81.339. Therefore, the Plan Approval was required to contain an emission limitation for NO_2 that meets the BACT standard.

contained in the implementation plan of a state for the *class or category of source* unless the owner or operator of the proposed source demonstrates that the limitations are *not achievable*.

b) The most stringent *emission limitation* which is *achieved in practice* by the *class or category of source*.

25 Pa. Code § 121.1 (emphasis added) (N.T. Vol. 1; Exhibit C-61) Therefore, this definition sets forth two sources that may be used to establish LAER: (1) a state implementation plan; (2) or actual operating experience at an actual operating facility. In order to be a source of a LAER standard, an emissions rate must meet three criteria: (1) the rate must be an "emission limitation;" (2) the rate must apply to the same "class or category of source" as the facility under review; and (3) the rate must be "achievable" or "achieved in practice."

Pennsylvania, unlike some states, does not allow emission reduction credits obtained from other facilities to offset emissions from a permitted facility as a means "to achieve compliance with ... BACT, LAER or other emissions limitations." 25 Pa. Code § 127.206(i). Stated in a positive way, Pennsylvania requires that mandatory limitations on emissions from a facility be achieved at the facility itself. 25 Pa. Code § 127.12b. If a facility emits substances in excess of the rate set forth in its permit, then the facility is in violation of its mandatory limitations and subject to enforcement action. *See* 25 Pa. Code § 127.25.

One of the areas of strong contention in this case concerns the term "class or

category of source" in the LAER definition. We agree with Appellants that "the concept of 'source category' and its interpretation is critical to the outcome of this proceeding." The term is not defined in the Clean Air Act, nor in the Code of Federal Regulations. Nor is it defined in the Pennsylvania Code. It is, however, present in the definition of LAER as set forth above.

The Department presents a strong argument that the determination of "class or category of source" for purposes of LAER is its responsibility as the permitting agency. Even Appellants' extremely knowledgeable expert witness, Mr. Powers, concedes that the determination of "class or category" is within the permitting agency's discretion. (N.T. 72, Vol. 6) Mr. Charlton, the Department's New Source Review Section Chief and a self-described "boiler geek," who has years of experience with New Source Review permitting, testified that determining "class or category" for LAER is part of the Department's engineering evaluation of the application. (N.T. 99, Vol. 1)

In determining the "class or category of source" to which the Wellington Project belongs, the Department focused on fuel type and combustion technology as the primary bases for the determination. The Wellington Facility will produce electricity by burning bituminous waste coal in two circulating fluidized bed combustors (also referred to as CFB combustors or CFB's). The Department of Environmental Protection determined, after careful study, that the initial LAER step of determining class or category of source is the class of circulating fluidized bed combustors burning bituminous waste coal. Although this class or category of source has some comparable

characteristics to other equipment and fuel, its unique characteristics require this grouping.

Appellants contend that the Department's determination somehow violates the federal Environmental Protection Agency's regulations even though Appellants cannot point to any provision in the Clean Air Act or Code of Federal Regulations that enumerates "classes or categories of sources" for LAER purposes. Instead, they point to analogous groupings and argue that these groupings make sense to apply to determine "classes or categories" of sources under LAER.

The Environmental Protection Agency has approved Pennsylvania's own unique regulations as an amendment to Pennsylvania's state implementation plan, giving the Department the authorization to perform New Source Reviews and issue New Source Review Permits under the Pennsylvania regulations. 62 Fed. Reg. 64722-25 (1997) (codified at 40 C.F.R. § 52.2020(c)(107). Moreover, the Department correctly points out that after the Environmental Protection Agency approves a state's implementation plan authorizing it to administer the New Source Review program, only the state's regulations are to be used to evaluate the proposed sources. In other words, the federal regulations no longer apply. 40 C.F.R. § 52.24(a) and (b). Moreover, once the state is granted approval to administer the New Source Review Program, as the Pennsylvania Department of Environmental Protection was granted here, the Environmental Protection Agency is no longer involved in the permitting process in that state. Instead, the responsibility for LAER determinations, and other permitting decisions, is the sole

responsibility of the Pennsylvania Department of Environmental Protection (at least until the determination is appealed to the Pennsylvania Environmental Hearing Board).

Appellants cleverly try to argue that several groupings found in the Clean Air Act which are not related to NO_x LAER determinations should determine the class or category of source for LAER purposes. We agree with the Department that these groupings were developed for different purposes, such as thresholds for different aspects of Prevention of Significant Deterioration review. For example, Appellants refer to a grouping in the New Source Performance Standards (NSPS). However, the standard and reasons for NSPS are different than LAER. Although the Congress of the United States directed the Environmental Protection Agency to "consider" emission limitations achieved in practice when establishing an NSPS limit, it did not require NSPS to be the "most stringent" emission limitation "achieved in practice," as LAER requires. 42 U.S.C. § 7411(b)(1)(b). Thus, for the criteria pollutants, the grouping of sources for NSPS can be less exacting than LAER's "class or category of source." Therefore, a broader range of sources can meet an NSPS emission limit than could meet LAER.[12]

Appellants' arguments for groupings are interesting but are broad and certainly not as detailed as the Department's determinations of "class or category of source."

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[12] Using the instant case as an example, the Department contends that the new NSPS emission limitation for NO_x converts to 0.11 lb/MM BTU. (N.T. 208-13, Vol. 8; N.T. 83-84, Vol. 9) This is obviously less stringent than LAER as determined by the Department for the Wellington Plan Approval. The NO_x emission limitation in the Wellington Plan Approval for this averaging time is 0.08 lb/MM BTU.

We find the Department's reasoning persuasive concerning why fuel type and combustion technology should be the primary basis for distinguishing among sources of different classes or categories.[13]

One of the problems with Appellants' "one size fits all" approach is that they completely ignore the differences between both 1) pulverized coal plants and circulating fluidized bed combustor plants and 2) coal and bituminous waste coal. Bituminous waste coal, the major component of the intended fuel for the project, is rejected coal. It is garbage that was created with no quality control and no uniformity. (N.T. 223-24, Vol. 8; N.T. 206, Vol. 13; N.T. 122, Vol. 14) Moreover, the ash content in bituminous waste coal is just not noncombustible material; it is often rock, which is difficult to use as a fuel and creates challenging equipment maintenance problems. (N.T. 222, Vol. 8; N.T. 206, Vol. 13; N.T. 122, Vol. 14)

Indeed, after carefully reviewing the testimony we are convinced that combusting waste coal is more challenging than even burning a poor quality coal such as lignite. As Wellington's expert, Mr. Campbell testified, even poor quality coal has consistency and uniformity which makes the technical aspects of combusting this coal source much more predictable and easier to operate than burning waste coal. (N.T., 60, 122, Vol.

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[13] After a thorough review of the transcript, exhibits, and briefs we are doubtful that Appellants, their counsel, or experts would be happy with any power plant fueled by, in particular, "dirty coal." They are clearly entitled to this belief and it certainly comes through in their argument. Whatever the merits of this position, it is a fact that plants burning coal are entitled to operate in Pennsylvania and the United States as long as they meet the strict requirements of our environmental laws.

12)

A circulating fluidized bed combustor is the only type of commercial combustion unit that is capable of burning bituminous waste coal. Pulverized coal units cannot burn waste coal. (N.T. 100, Vol. 1) Moreover, a pulverized coal unit burning bituminous coal and a circulating fluidized bed combustor are very different in terms of their equipment, combustion, operation and emission characteristics. (N.T. 72-88, Vol. 1) Bituminous waste coal's composition is variable, which makes its emission variable and difficult to control. (N.T. 222-232, Vol. 8; N.T. 217-221, Vol. 14)

Both Appellants' expert, Mr. Powers, and Wellington's expert, Mr. Campbell, are extremely knowledgeable and competent professional engineers. A thorough review of Mr. Powers' testimony leads us to the inescapable conclusion that he never really considered these variables (or in any event internalized them). Although Mr. Powers is imminently qualified and we certainly find his testimony in conformance with the *Frye*[14] standard, we find Mr. Campbell's testimony on this issue more credible for several reasons. Mr. Campbell has much more "hands-on" experience in developing, permitting, and operating both pulverized coal units and circulating fluidized bed units. This is the first project Mr. Powers has worked on involving a circulating fluidized bed. Although he is aware of the many other circulating fluidized beds operating in Pennsylvania, he has neither looked at the Department's files on them nor has he gone

[14] *Frye v. United States*, 293 F.1013 (D.C. 1923). See detailed discussion of the *Frye* standard later in this Adjudication.

on a site visit to study them in operation. Mr. Campbell was more acutely aware of all of the variables that impact the design and operation of the units directly related to his vast experience in all facets of circulating fluidized bed combustors.

When we compare Mr. Campbell's testimony with Mr. Powers' testimony we believe Mr. Campbell's explanation of the category by class and fuel type of the Wellington Facility as a circulating fluidized bed combustor burning bituminous waste coal is more persuasive than Mr. Powers' broader grouping of the Wellington Facility with pulverized coal units. Mr. Campbell indicated that the intent was to define this class or category so that they could "do the best possible job with the physical situation that we were presented." (N.T. 63, Vol.14) That situation is heavily dependent on the fuel and equipment available to burn that fuel.

We agree with the Department's determination that bituminous waste coal combustion and bituminous coal combustion are separate classes or sources and cannot be equated together for purposes of establishing the Lowest Achievable Emission Rate. This is because, to repeat ourselves, bituminous waste coal and bituminous coal have different physical and chemical characteristics, waste coal is far less uniform than coal, and the technologies used to burn the coal are much different. (N.T. 68-69, 72-77, 81-85, 99-100, Vol.1; N.T. 105-108, 205-223, Vol. 14) Recognizing that the proper "class or category of source" for the Wellington Facility is "bituminous waste coal fired circulating fluidized bed combustor" is not "parsing" of the source category, but accurately delineating a class which is substantially different. Mr. Powers, for whom we have the

utmost respect, wants to compare "fruits with fruits" which results in comparing "apples to oranges" in his examples. We think Mr. Campbell's testimony on this subject is more persuasive as he compares "apples with apples."

We reject Appellants' contention that the Texas State Implementation Plan for the Dallas/Ft. Worth area of 0.033 lb/MMBtu should be applicable to the Wellington Facility for several reasons. First, Texas allows the rate to be achieved by applying credits purchased, while Pennsylvania requires the facility to reach the limit by measuring what "comes out of the smoke stack." Any facility to which the Dallas/Ft. Worth emission rate applies may still legally emit NO_x at a rate greater than the 0.033 lb/MMBtu, as long as those excess emissions are offset by emission reduction credits obtained from other sources. *See* Tex. Admin. Code § 117.108, § 117.570.

Pennsylvania specifically prohibits this type of "cap and trade" system as a means of complying with an emission limitation. Emission reduction credits in Pennsylvania "may not be used to achieve compliance with...BACT, LAER or other emission limitations required by the Clean Air Act or the [Air Pollution Control] Act." 25 Pa. Code § 127.206(i).

Under LAER, once an emission rate is established for a source, that should then be the benchmark for the future. In Texas, the Dallas/Ft. Worth rate does not even apply state-wide. For example, Texas sets the NO_x emission rate for the Beaumont/Port Arthur area at 0.10 lb/MMBtu. 30 Tex. Admin. Code § 117.106(a). If the Dallas/Ft. Worth emission rate sets the LAER standard in Texas, then the Texas state

implementation plan could not establish higher emission rates in other Texas non-attainment areas.[15]

Mr. Powers, on behalf of Appellants, cannot point to any CFB's that are in operation and have emission limits less than 0.10 lb/MMBtu. He directed our attention to various readings across the nation where rates of below 0.10 lb/MMBtu have been obtained over various periods of time. Mr. Campbell readily acknowledged these selected lower readings and explained how this occurs. Rather than weakening Wellington's position, his explanation strengthened it. Mr. Campbell expects that Wellington may be able to obtain similar results but that the Plan Approval's permit limits will strain the present day technology and operational abilities to the maximum.

NO_x is formed during the combustion of coal. In general, NO_x emissions from coal combustion can be reduced using either combustion controls or flue gas treatment including Selective Non-Catalytic Reduction (SNCR) or Selective Catalytic Reduction (SCR). Circulating fluidized bed combustion of coal produces lower NO_x emission rates than other coal combustion technologies due to low and uniform combustion temperatures and good fuel and air mixing. Selective Non-Catalytic Reduction, using

[15] Although Appellants and Mr. Powers trumpet the Dallas/Ft. Worth emission rate and for the first time in their post-hearing brief propose an alternative emission limitation of 0.045 lb/MMBtu which is the emission rate for certain types of pulverized coal boilers in the Houston/Galveston ozone non-attainment region, their post-hearing brief completely omits the third emission rate discussed above for the Beaumont/Port Arthur ozone non-attainment region, of 0.10 lb/MMBtu. We also reject the Dallas/Ft. Worth and the Houston/Galveston emission rates as the Appellants have not carried their burden of proof on this issue to convince us that these rates are applicable to CFB boilers burning waste coal such as the Wellington Facility. All of the reasons cited earlier explaining the difference between pulverized coal units and

either aqueous ammonia, anhydrous ammonia, or urea, works very well in circulating fluidized bed combustors. Selective Non-Catalytic Reduction involves the reaction of ammonia with NO_x in the 1,600°F. to 1,800°F. range. Mr. Campbell described the "sweet spot" that is readily achieved in practice that allows the Selective Non-Catalytic Reduction system to work at optimum levels.

All circulating fluidized bed combustors built to date either rely on their inherent ability to control NO_x or also use Selective Non-Catalytic Reduction. None use Selective Catalytic Reduction.

The Appellants and Mr. Powers make a strong argument that Selective Catalytic Reduction technology should be required on the Wellington circulating fluidized bed combustor. Selective Catalytic Reduction can achieve 90% or greater NO_x removal. (Ex. W-83D; N.T. 158, Vol. 5) Selective Catalytic Reduction can be placed in several positions in the exhaust train. (Ex. A-93; N.T. 149, Vol. 5)

Selective Catalytic Reduction is a process that involves post-combustion removal of NO_x from flue gas with a catalytic reactor.. In the Selective Catalytic Reduction process, ammonia injected into the exhaust gas reacts with nitrogen oxides and oxygen to form nitrogen and water. The reactions take place on the surface of a catalyst. It can either be hot side Selective Catalytic Reduction or tail-end Selective Catalytic Reduction. Tail-end Selective Catalytic Reduction is a configuration in which the Selective Catalytic Reduction device is positioned downstream of other pollution control

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circulating fluidized beds are applicable in this analysis.

devices which remove sulfur dioxide, particulate matter and other pollutants.

Appellants argue that the giant German company Staeg has used Selective Catalytic Reduction technology for years on pulverized coal burning plants burning a poor quality of coal which they equate with the waste coal Wellington will use as its fuel source. Though Selective Catalytic Reduction controls are increasingly common for pulverized coal burning plants in this country, tail-end applications are extremely rare in the United States. There is only one tail-end application of Selective Catalytic Reduction on a pulverized coal burning plant in the United States and that is the Mercer pulverizing coal burning plant in New Jersey. (N.T. 25, Vol. 11; N.T. 8-9, 42, Vol.14) There are two other pulverized coal plants with tail-end Selective Catalytic Reduction that are not yet operational. These plants are being built in Salem Harbor, Massachusetts and Hudson, New Jersey. (N.T. 133, Vol. 11) There are no tail-end or hot side Selective Catalytic Reduction units on any circulating fluidized bed combustor.

Mr. Powers assumed based upon a single line from a power point slide show presented at a conference he did not attend that Staeg, a German company, burns waste coal in many of its pulverized units in Europe. (N.T. 220-21, Vol.11) Staeg is able to successfully lower NO_x emission on these pulverized coal burning plants through the use of SCR technology. The Department's Mr. Charlton, who did attend the conference and questioned the Staeg representative on this issue, testified that it was his understanding that this "waste coal" was really a poor quality fuel like lignite rather than the waste coal Wellington would utilize. Mr. Campbell also testified that the

European waste coal would be more akin to what he identified as "opportunity coal" which he claims is far different than Wellington's waste coal. Waste coal is variable, non-homogeneous waste product while coal and even lignite are generally consistent and processed in a way to enhance its uniformity. (N.T. 60, 122, Vol. 7) Mr. Powers dismisses these fears and feels that these differences are exaggerated and that the Wellington Facility could obtain optimum results with Selective Catalytic Reduction.

Mr. Campbell candidly testified that more emission control is achieved with Selective Catalytic Reduction than with Selective Non-Catalytic Reduction. He also believes that Selective Catalytic Reduction is the wave of the future and although it may be, strictly speaking, technologically feasible today, he testified at great length as to why Selective Catalytic Reduction is not employed on a single circulating fluidized bed combustor. He testified to the many technical problems preventing the use today of Selective Catalytic Reduction on circulating fluidized bed combustors fueled by waste coal. There are major problems with dust and the size and shape of the particulates in a circulating fluidized bed boiler. In a pulverized coal boiler the coal is of a much finer consistency. Even with pulverized coal boilers, Mr. Campbell detailed the many problems encountered in the United States in importing this Selective Catalytic Reduction technology. It took years to resolve these problems with "hot-side" Selective Catalytic Reductions.

This is not a situation, as so clearly enunciated in the Department of Environmental Protection's Reply Brief, where this technology could simply be shipped

across the ocean and bolted onto American power plants. (Department Reply Brief at 46-47) As Mr. Campbell explained, because of significant differences between the fuels - American coal and European coal - a long period of testing and modification is needed before this European pollution control technology could be effectively used on American coal fired plants. (N.T. 258-259, Vol. 14)[16]

Mr. Campbell further explained that a circulating fluidized bed combustor has numerous chemical processes taking place. The addition of Selective Catalytic Reduction to such a process would have many chemical effects on the process. Not all of these changes can be accurately predicted at this time. There has been no research and development or construction of test equipment in order to develop SCR technology on circulating fluidized bed combustors. In short, Selective Catalytic Reduction, and especially tail-end Selective Catalytic Reduction, is not a well established control technique for circulating fluidized bed combustors. Tail-end Selective Catalytic Reduction technology is still in its developmental infancy in the United States, and (as with hot-side Selective Catalytic Reduction) is completely untried on any circulating fluidized bed combustor in the world.

The Appellants and Wellington spent a great deal of time explaining and attacking

[16] To use a sports analogy, what Europeans call football is very different from the game played by the Pittsburgh Steelers and the Philadelphia Eagles. There are important differences in the rules, number of players, the way the game is played, and equipment. The strategy and tactics are also very different. Likewise, we are not convinced that the waste coal used in Europe is comparable to the waste coal Wellington will use, nor are we at all certain that the types of Selective Catalytic Reduction units used in Europe would be readily transferable to circulating fluidized bed combustors manufactured in the United States.

each other's cost estimates for a hypothetical tail-end Selective Catalytic Reduction. Appellants believe the costs set forth by Wellington and their consultants are highly inflated while Wellington argues that there are so many intangibles in this untried system on circulating fluidized bed combustors that their estimates, based mainly on the Mercer pulverized coal burning tail-end unit, are very accurate. We find that Mr. Powers' figures are likely more accurate in this regard than those provided by Bechtel to Mr. Campbell. However, these costs are irrelevant to our analysis since we do not believe SCR technology should be required at the Wellington Facility because of the many technical problems set forth by Mr. Campbell.

Appellants have the burden of proof in this proceeding. 25 Pa. Code § 1021.122(c)(2). They make many valid points. We agree that just because a system has never been utilized on a particular source does not mean it should not be used. One of the purposes of LAER is to "push the technological envelope" to assure that the pollution control limitations in non-attainment areas are the lowest achievable. Such a program will result in important environmental benefits to all.

However, Appellants have failed to convince us that Selective Catalytic Reduction is a viable and workable technology at present on a waste coal fired circulating fluidized bed combustor. (N.T. 157, Vol. 1; N.T. 226-227, Vol. 13; N.T. 63, Vol.14) We find Mr. Campbell's testimony persuasive on this issue. We are also mindful that Mr. Powers has never operated a circulating fluidized bed combustor or a pulverized coal boiler; nor has he seen a waste coal fired circulating fluidized bed combustor in

operation. (N.T. 20, 29-30, 37-38, Vol. 5; N.T 46-47, Vol. 11) Mr. Campbell is vastly more experienced in this highly complex technical area, and his experience carries the day for us.

Mr. Campbell testified at length and in great detail concerning the many technical concerns preventing the even limited use today of Selective Catalytic Reduction technology on circulating fluidized bed boilers burning waste coal. There are major problems with dust and the size and shape of the particulates in a circulating fluidized bed combustor. These problems could wreak havoc on the catalysts utilized in Selective Catalytic Reduction technology. Moreover, other chemicals, including arsenic could poison the catalyst. There would be chemical reactions that Mr. Campbell cannot now predict, but based on his wide experience in the field, we believe would cause massive operational problems for Wellington and end up potentially harming the environment.

We must also keep in mind that this plant has stringent limits in place that easily meet LAER requirements. If Wellington is able to run the plant and meet the 0.08 lb/MMBtu for NO_x then it will establish the Lowest Achievable Emission Rate standard worldwide for this source. If not, then it will still have to meet the 0.10 lb/MMBtu rate for NO_x which is the leading standard currently. Based on the evidence presented, we believe the Wellington Facility, as permitted, will be a state of the art facility with world class environmental controls.

Computer Modeling

Because the Greene Energy facility is not yet constructed or in operation, computer modeling must be utilized in order to predict the facility's impact on air quality in potentially affected areas. Air quality modeling is required under 40 C.F.R. § 52.21(l), which states as follows:

> Air quality models
>
> (1) All estimates of ambient concentrations required under this paragraph shall be based on applicable air quality models, data bases, and other requirements specified in appendix W of part 51 of this chapter (Guideline on Air Quality Models)

The air quality model that was used by Wellington in this case is known as "CALPUFF." (Ex. B-9, S. 50) It is commonly used for Class I modeling and was approved for use by EPA in 2003. (Ex. B-9, S. 27 and 50) CALPUFF is an air dispersion model that utilizes a "puff" distribution rather than a steady state distribution. Whereas the steady state model shows a basic plume that simply expands over time due to dispersion, the puff model is so-named because it involves emissions leaving the facility in circular forms or "puffs." (N.T. 22-23, Vol. 2) The advantage to using a puff model is that it takes into account varying wind direction and shows the orientation of the plume over a geographic location more accurately than does a steady state model. (N.T. 23, Vol. 2)

The air model selects hundreds or thousands of receptors in the area of interest and then predicts the concentration of pollution at each of the receptors based on the

averaging time for which the increment is set, such as three hours, 24 hours, or one year. The model is run separately for each pollutant.

The computer model may be run to determine the concentration of pollution for just the source in question, in this case the Greene Energy facility, or a combination of sources, such as Greene Energy plus other power plants and facilities. The latter is called a cumulative modeling analysis because it predicts the cumulative impact of multiple sources.

Testimony on computer modeling was provided at trial by Dennis Hlinka, senior meteorologist with Sullivan Environmental, on behalf of the Appellants; Robert Paine, ENSR's technical director of air pollution science, on behalf of Wellington; and, on behalf of the Department, Tim Leon-Guerrero, chief of its air quality modeling section. All of these gentlemen were recognized as experts in air quality modeling.

Significant Impact Levels

An issue over which the Appellants disagree with the Department and Wellington involves the use of what are known as "significant impact levels." Significant impact levels are used by the Department in two situations: 1) determining whether a proposed source will cause or contribute to an increment violation and 2) determining whether public notice must be provided for the degree of increment consumption expected to result from a proposed source at a Class I area. It is the Appellants' contention that there is no justification for the use of significant impact levels in either of these situations since there is no mention of them in the applicable regulations.

The intent behind the Prevention of Significant Deterioration program is to ensure

that the air quality in those attainment areas never degrades to the point where they become non-attainment areas. (N.T. 59, Vol. 1) An "increment" is the amount of new contamination that may be added to the ambient air above the baseline concentration. (N.T. 64, Vol. 1) Different increments are established for different pollutants. "Increment consumption" is the amount of increment that a proposed source uses up. Emissions from new or modified sources subject to the Prevention of Significant Deterioration requirements may consume all of the increment so long as the cumulative impact does not exceed the increment more than one time per year[17] at any one location. 40 CFR § 52.21(c) (N.T. 64, Vol. 1; N.T. 152-53, Vol. 8) An "increment violation" occurs when the cumulative concentration exceeds the increment twice in a given year at the same location, in which case, the second high is evaluated. 40 CFR § 52.21(c) (N.T. 155-56, Vol. 8)

The term "*significant impact level*" is not specified in either Pennsylvania's or the federal regulations, but according to the Department, significant impact levels "are a common sense, reasonable threshold for evaluating a proposed project's impact on the air quality increment at a particular receptor or location." (Department Post-Hearing Brief, p. 17) Significant impact levels are referenced in certain policy and guidance documents (N.T. 60, Vol. 3; N.T. 157-58, Vol. 8) and are generally accepted by air quality regulators and air quality professionals. (N.T. 120, Vol. 12) As applied, different significant impact levels exist for Class I and Class II areas and for different contaminants and averaging times.

[17] No exceedances are allowed for the *annual* monitoring period. 40 CFR § 52.21(c).

The Department only considers amounts above what it has determined to be the significant impact level in determining whether a proposed source will contribute to an increment violation or whether public notice of degree of increment consumption needs to be given. We shall examine each of these areas separately.

Sulfur Dioxide Class I Increment – Shenandoah National Park

The Appellants argue that the Greene Energy facility will contribute to a violation of the Class I 24-hour sulfur dioxide increment at Shenandoah National Park. This controversy centers on the Department's use of significant impact levels and its interpretation of what it means to "contribute to an increment violation."

Pennsylvania has adopted by reference the federal Prevention of Significant Deterioration regulations found at 40 CFR Chapter 52. 25 Pa. Code § 127.83. The Appellants point to Subsection (k) of 40 CFR § 52.21 stating in relevant part as follows:

> (k) Source impact analysis
>
> The owner or operator of the proposed source shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions), would not cause or contribute to air pollution in violation of :
>
> . . .
>
> (2) Any applicable maximum allowable increase (i.e. increment) over the baseline concentration in any area.

There is no dispute among the parties that the CALPUFF modeling shows that on certain occasions, the cumulative impact of all sources exceeds the 5.0 microgram per cubic meter 24-hour Class I increment for sulfur dioxide at Shenandoah National Park. This occurs even without the proposed Greene Energy facility's emissions. (Ex. B-25)

Based on this, the Appellants assert that Greene Energy will contribute to an increment violation for sulfur dioxide at Shenandoah National Park and should, therefore, not have been issued a plan approval. The Department and Wellington contend there is no increment violation because Greene Energy's contribution is below the significant impact level.

The Appellants point out that the term "significant impact level" does not appear in the existing regulation, 40 CFR § 52.21(k). They argue that since there are other places in the regulations that use the term "significant," the lack thereof in § 52.21(k) means that it was intentionally and purposefully excluded.

In response, Wellington and the Department cite the recent decision of the Environmental Appeals Board in *In re Prairie State Generating Co.*, 2006 EPA App. LEXIS 38 (E.A.B., August 24, 2006), issued after the close of the trial in this matter. In that case, the Environmental Appeals Board stated as follows:

> Courts have long recognized that EPA has discretion under the Clean Air Act to exempt from review "some emission increases on grounds of de minimis or administrative necessity." *Alabama Power Co. v. Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979) [footnote omitted] EPA has long interpreted the phrase 'cause or contribute' to refer to *significant, or non-de minimis* emission contributions. This interpretation is reflected in both applicable EPA regulations and in long-standing EPA guidance.

Id. at *266-67 (emphasis added).

Although the Environmental Appeals Board in *Prairie State* considered the question of whether a proposed facility would "cause or contribute to" a violation of

the National Ambient Air Quality Standards as opposed to an increment violation, the logic is the same. We read the *Prairie State* decision as recognizing and upholding the use of significant impact levels.

We further agree that EPA has interpreted the Prevention of Significant Deterioration regulations as incorporating a significance threshold. In a 1988 memorandum, EPA stated as follows:

> [A] modeled violation of a NAAQS [National Ambient Air Quality Standards] or PSD [Prevention of Significant Deterioration] increment may be predicted within the impact area, but, upon further analysis, it is determined that the proposed source will not have a significant impact (i.e., will not be above *de minimis* levels) at the point and time of the modeled violation. When this occurs, the proposed source may be issued a permit (even when a new violation would result from its insignificant impact)....

(Ex. C-31, p. 2) This EPA memorandum is relied upon as guidance by air quality regulators and professionals in the field. (T. 130, Vol. 3)

In 1990 EPA published its New Source Review Workshop Manual. (Ex. B-15) Despite the fact it is labeled a "draft," it also is relied upon by air quality regulators and professionals. (T. 32, Vol. 5) The Manual states as follows:

> When a violation of any NAAQS or increment is predicted at one or more receptors in the impact area, the applicant can determine whether the net emissions increase from the proposed source will result in a significant ambient impact at the point (receptor) of each predicted violation, and at the time the violation is predicted to occur. The source will not be considered to cause or contribute to the violation if its own impact is not significant at any violating receptor at the time of each predicted violation. In such a case, the

> permitting agency, upon verification of the demonstration, may approve the permit. However, the agency must also take remedial action through applicable provisions of the state implementation plan to address the predicted violation(s).[18]

(Ex. B-15, p. C-52) (emphasis in original)[19]

The Class I significant impact levels used by the Department appeared in regulations proposed by EPA in 1996. In the proposed rule, EPA considered a number of items related to its New Source Review program, including the use of significant impact

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[18] In response to the New Source Review Workshop Manual's admonition that the state must take remedial action to address the violations, the Department in its Reply Brief contends that "the increment violations and the significant contributors to the violations were in states other than Pennsylvania, and tying permitting actions by the Department to evidence of specific State Implementation Plan changes by other states would be infeasible." (Department's Reply Brief, p. 15)

We agree with the Environmental Appeals Board's holding in *Prairie State* that says the completion of remedial action is not a prerequisite to the granting of the plan approval and that the Department's investigation of the causes of the violations and possible remedial action is a matter independent of this permitting action. *Prairie State*, *supra* at *274, n. 122. Therefore, the Department should look at its State Implementation Plan and its enforcement procedures regarding Pennsylvania's contributions to the violations to see if there is some manner in which Pennsylvania can address these violations and, if necessary, take enforcement action. Of course, the particulars of any such actions are committed to the Department's discretion. This, however, has no bearing on Wellington's plan approval since Wellington's contributions fall under the significant impact level.

[19] We do not see our reliance on EPA guidance materials as conflicting with our recent decision in *United Refining Co. v. DEP*, EHB Docket No. 2006-007-L (Opinion and Order on Motion for Summary Judgment issued November 16, 2006), which held that the Department could not impose civil penalties under the Air Pollution Control Act for a violation of a requirement that was set forth only in a guidance document, notwithstanding the fact that parts of the guidance document were incorporated into the regulation by reference. In that opinion, Judge Labuskes, writing for the Board, correctly noted that a guidance manual does not have the force of law but is merely a statement of policy. Here, we have not looked to EPA guidance documents or proposed regulations as having the force of law, but simply as guidance in interpreting what is meant by "increment consumption" where that term is not defined in either the state or federal regulations at issue.

levels to determine whether a source will contribute to a violation of a Class I increment. *See* 61 Fed. Reg. 38,249; 38,291-92 (July 23, 1996). The proposed regulation was never finalized.

The Appellants argue that reliance on the never-adopted regulation violates the Commonwealth Documents Law, citing *Department of Environmental Resources v. Rushton Mining Co.*, 591 A.2d 1168 (Pa. Cmwlth. 1990). *Rushton* dealt with certain standard conditions in coal mining permits that the Environmental Hearing Board struck down as invalid, having found them to constitute regulations that should have been promulgated pursuant to the Commonwealth Documents Law. In affirming the Board, the Commonwealth Court stressed the importance of the notice and comment procedures in the promulgation of regulations. In the present case, the Appellants argue that since the use of significant impact levels was never formally adopted in a regulation, we cannot read it into the regulation but, instead, must follow the clear and plain language of 40 CFR § 52.21(k).

The Department argues that it is not establishing a binding norm but merely interpreting the "cause or contribute" language of Section 52.21(k). It asserts that its interpretation of statutory or regulatory language is not subject to the Commonwealth Documents Law, also citing *Rushton.* 591 A.2d at 1174-75.

It is true that we cannot treat the 1996 proposed regulation as binding since it was never promulgated as a final regulation. *Rushton, supra.* This does not necessarily mean, however, that we should reject the idea of significant impact levels, particularly where both EPA and the EPA Environmental Appeals Board have recognized their usage, as

discussed above.

We also find the Department's explanation for the use of significant impact levels to be persuasive. The significant impact levels relied upon by the Department are at *de minimis* levels. For example, the 24-hour significant impact level for sulfur dioxide is 0.2 micrograms per cubic meter. (N.T. 123, Vol. 3; N.T. 124-25, Vol. 12) On an occasion when modeling showed an increment violation at Shenandoah National Park for 1992, Greene Energy's contribution was .02 micrograms per cubic meter. (N.T. 124-25, Vol. 12)[20] One microgram is one millionth of a gram. (N.T. 63, Vol. 1) This is an extremely small reading.

The Department argues that adopting the Appellants' non-zero approach would be impractical, particularly as new software develops that allows modelers to measure even smaller amounts at greater distances. As the Department correctly points out, the Appellants' approach would depend solely on what measurement, no matter how small, is generated by a computer model and not whether a proposed source's impact has any significance to air quality. Simply stated, merely because a computer model can generate a number does not necessarily make it significant in our analysis.

The fact that the air dispersion model is capable of calculating infinitesimally small values does not mean that those values are meaningful outside the realm of pure mathematics. In fact, the Class I 24-hour significant impact level for sulfur dioxide is actually below the detection limit for ambient monitors used in the field. (N.T. 63, Vol.

[20] An April 12, 2005 memorandum by ENSR incorrectly stated this reading as .002 micrograms

1) The models have predicted something that cannot be verified or even detected reliably. We agree with the Department that there has to be some common sense threshold to make mathematical modeling methods realistic and meaningful.

Based on what we find to be both EPA's clear intent to allow for the use of significant or non-*de minimis* impact levels, upheld by the Environmental Appeals Board in *Prairie State*, and our finding that significant impact levels are a valid method for determining increment consumption, we conclude that the Department properly found that Greene Energy will not cause or contribute to an increment violation of sulfur dioxide at Shenandoah National Park because Greene Energy's contribution is below the significant impact level.

Air Quality Related Values – Visibility

The CALPUFF model was used to predict how the proposed Greene Energy facility would affect visibility and regional haze in the four Class I areas at issue in this appeal. (Ex. B-9, S. 46 and 47) The Prevention of Significant Deterioration regulations require that proposed new major sources of air pollutants evaluate whether they will have an adverse impact on air quality related values in Class I areas. 40 CFR § 52.21(p). If the Federal Land Manager for a Class I area demonstrates to the satisfaction of the permitting authority that emissions from a proposed source will have an adverse impact on visibility or regional haze, a permit may not be issued. 40 CFR § 52.21(p)(4).

In the first round of modeling, Wellington's consultant, ENSR, followed the

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per cubic meter (Ex. B-25), but testimony by ENSR's technical director of air pollution science,

modeling parameters set forth in the Federal Land Managers' Air Quality Related Values Workgroup Phase I Report (known as the FLAG guidance manual). The initial analysis indicated that air quality related values in the Class I areas would be adversely affected. (Ex. B-26, p. 1)

ENSR then incorporated what it considered to be refinements to the FLAG model. ENSR replaced the f(RH) values of the FLAG guidance manual with the values updated by EPA in 2003 in an effort to account for the effect of humidity on visibility. (N.T. 153, Vol. .12)

In the next phase, ENSR further refined the model by accounting for sea salt, which its technical director of air pollution science, Robert Paine, testified is a naturally occurring particle that is not taken into consideration by the FLAG guidance manual. (N.T. 153, Vol. 12) According to Mr. Paine, sea salt can be expected to a small degree even as far inland as the proposed Greene Energy facility, and not accounting for it results in the model producing a higher percentage change in visibility. (N.T. 153-54, Vol. 12)

ENSR applied one final set of refinements that took into account meteorological interferences. (N.T. 154, Vol. 12) Upon completion of its refined modeling, ENSR determined there was no adverse impact on visibility in any of the Class I areas.

The Appellants assert that we should exclude all testimony and exhibits relating to the refinements to the modeling conducted by ENSR, arguing that the methodology ENSR employed to obtain the results does not satisfy the requirements of Rule 702 of the

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Robert Paine, clarified that the actual figure was .02. (N.T. 124, Vol. 12)

Pennsylvania Rules of Evidence, which states as follows:

> If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

Pennsylvania continues to follow the standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. 1923), for determining whether expert testimony may be offered on a particular scientific subject. *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1043-44 (Pa. 2003); *McManamon v. Washko*, 906 A.2d 1259, 1273 (Pa. Super. 2006); *Exeter Citizens Action Committee v. DEP*, 2005 EHB 306, 333-34. This standard provides that an expert opinion based on a scientific technique is admissible if the technique is generally accepted as reliable in the relevant scientific community. *Id.* It is up to the proponent of the scientific evidence to demonstrate that the underlying theory upon which the expert testimony will be predicated meets this test. *Grady*, 839 A.2d at 1045. Whether the witness is qualified to render an expert opinion and whether his testimony passes the *Frye* test are two distinct inquiries that must be ruled upon separately by the trial court. *Id.* at 1045-46. Therefore, even though Mr. Paine was found to be qualified to render an expert opinion in the area of air pollution modeling, the inquiry raised by the Appellants is whether Wellington has demonstrated that the methodology employed by ENSR with regard to the visibility modeling is generally accepted.

We find that Mr. Paine's testimony meets the *Frye* standard. Although the Appellants may not agree with the revisions that ENSR made to the FLAG procedure for

visibility modeling, there is no evidence to conclude that Mr. Paine's testimony regarding the modeling is not within the scope of *Frye*. In *Exeter Citizens Action Committee, supra*, Judge Miller considered a *Frye* challenge to testimony by a landfill's expert regarding a visibility analysis. Although the expert's own testimony was that the study was novel, the methodology involved was based on sound engineering practices and, therefore, found to be acceptable under *Frye*. 2005 EHB at 334. In the present case, upon reviewing Mr. Paine's testimony, we conclude there is a healthy debate over whether the model for evaluating visibility set forth in the FLAG guidance manual should be updated. For instance, the f(RH) values set forth in the FLAG guidance manual were updated by EPA in 2003. (N.T. 153, Vol. 12) Additionally, there is debate over whether the threshold limit for determining adverse impact to visibility should be raised. (N.T. 75, Vol. 13)

The one part of ENSR's testing that does raise a question is the decision to factor the effect of sea salt into the modeling. One would not expect sea salt to have an impact on visibility in Western Pennsylvania. However, the Federal Land Managers have informally approved a change to their equation that now takes sea salt into account. (N.T. 84-85, Vol. 13) Although the change has not yet been published in the Federal Register, the fact that the Federal Land Managers believe this change is appropriate causes us to accept it as methodology generally accepted in the relevant scientific community.

Simply because we find that Mr. Paine's testimony is admissible under the *Frye* test, however, does not mean that we are bound by his conclusions. In particular, we

note that the Federal Land Manager for Shenandoah National Park, i.e., the National Park Service of the Department of the Interior, was critical of the data that ENSR used to conduct the meteorological interference refinement to the visibility modeling. In comments sent to the Department, the National Park Service expressed concern that the data that was relied upon was not representative of actual conditions. For instance, it felt that most of the observations were based on valley locations where the ground fogs are unlikely to be representative of what occurs at higher elevations of the Class I areas. It further found that even where ENSR's modeling relied on conditions that were more representative of Class I areas, they were conditions typically leading to the worst visibility impacts. (N.T. 152-53, Vol. 13) In other words, the National Park Service felt that ENSR established a baseline visibility that was worse than actual conditions.

The National Park Service expressed its concern that the Greene Energy facility would impact air quality related values in the park to the Department. (Ex. B-17) These comments, as well as comments from the Forest Service, were treated as an adverse impact determination by the Department.[21] (N.T. 188-89, Vol. 8) As a result, the Department required Wellington to develop a mitigation plan. The mitigation proposals were accepted by the Forest Service (N.T. 193, Vol. 8; Ex. B-16) and were made part of the plan approval.

At the time of the plan approval, the National Park Service had not indicated its

[21] The parties disagree over whether the comments of the National Park Service and Forest Service were a determination of adverse impact within the meaning of 40 CFR § 52.21(p). We treat them as such since the comments clearly expressed a concern that visibility would be impacted and since they were handled as such by the Department.

acceptance of the mitigation plan. (N.T. 198, Vol. 8) The Department went ahead with issuing the plan approval because the National Park Service had not provided a justification for rejecting the mitigation plan and, further, because of its determination that the more heavily impacted areas were those under the protection of the Forest Service. (N.T. 198, Vol. 8) After the plan approval was issued, the Department revisited the issue of mitigation with the National Park Service and further mitigation was agreed to by Wellington. (N.T. 201, 204, Vol. 8) The plan approval was modified to incorporate the additional changes to the mitigation plan. (N.T. 206, Vol. 8)

The National Park Service never removed its determination of adverse impact; nor, however, did it appeal either the original plan approval or the modification thereto. In a letter to the Department dated July 28, 2005, the National Park Service stated it believed the mitigation measures would eliminate sulfur deposition impacts in the Class I areas and, therefore, was not appealing the plan approval. (Ex. B-32) The letter did not state whether the visibility issues had been addressed. Specifically, the letter stated as follows:

> The DOI [Department of Interior] again acknowledges the environmental benefits of the Greene Energy project, and we appreciate Wellington Development's efforts to purchase and retire the additional sulfur dioxide ERCs [emission reduction credits]. Therefore, with respect to Shenandoah National Park, we concur with the Forest Service's conclusion that the 30-day average control efficiency increase and the permanent retirement of the ERCs would mitigate sulfur deposition impacts to affected Class I areas. DOI has therefore decided not to appeal the PA DEP's decision to issue the Plan Approval to the Pennsylvania Environmental Hearing Board.
>
> As we have discussed, DOI remains interested in working

> with Wellington Development and the Commonwealth of Pennsylvania to ensure that short-term sulfur dioxide emissions at the facility – which could affect visibility at Shenandoah National Park – are ultimately permitted to reflect maximum operational control efficiency. Accordingly, we appreciate and concur with your decision to modify the Plan Approval to require Wellington Development to give DOI a copy of the draft Operating Permit and Application, along with operating data sufficient to determine the 24-hour, 30-day rolling, and annual average sulfur dioxide emissions and control efficiencies, along with any PA DEP staff analysis – at least 30 days prior to publishing Notice of an Intent to issue an operating permit for the Greene Energy facility.

(Ex. B-32)

The Appellants assert that the Department issued the plan approval without responding to the National Park Service's determination of adverse impact on visibility, which they contend is a violation of 40 CFR § 52.21(p). They note that the National Park Service's findings of adverse impact to Shenandoah National Park covered two areas: 1) adverse impacts to aquatic resources from sulfur deposition and 2) adverse impacts to visibility. According to the Appellants, sulfur deposition, in terms of its adverse impact on aquatic resources, is measured in the amount of sulfur deposited on a *yearly* basis (citing Ex. B-26, p. 9), while adverse impact on visibility is determined by analyzing impacts on an *hourly* basis and then averaging them into a 24-hour average (citing N.T. 156, Vol. 12) Because all of the reductions in emission limits and emission offsets in the mitigation plan were in terms of tons of pollution per year (citing N.T. 30, Vol. 9) and not in terms of pound per hour or 24-hour emission rates, the Appellants argue that the mitigation measures imposed on Wellington only addressed

the National Park Service's adverse impact determination for sulfur deposition but not for visibility. It is the Appellants' contention that the National Park Service's July 28, 2005 letter was an indication that its concerns regarding sulfur deposition had been addressed, but was *not* an indication that its concerns regarding visibility were addressed.

It is true that the National Park Service's letter makes reference to the impacts of sulfur deposition being addressed by the mitigation plan, but does not specifically say whether the mitigation plan addressed its concerns with regard to visibility. Thus, we are placed in the unenviable position of having to interpret what was meant by the National Park Service's silence with regard to visibility issues. The agency's silence could mean that it believed visibility issues were no longer a concern, or it could mean that the visibility concerns had not been addressed. We will never know what the National Park Service intended by its July 28, 2005 letter since it chose not to participate in this proceeding. The National Park Service refused a request made by the Appellants to testify in this matter.[22]

We do note that the National Park Service's letter said that it elected not to appeal the plan approval, which could be an indication that its concerns were addressed. The Appellants disagree, noting that in *Matter of: Hadson Power 14 – Buena Vista*, 4 E.A.D.

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[22] The request was made pursuant to *United States ex rel. Touhy v. Regan*, 340 U.S. 462 (1951), often cited as recognizing the authority of a federal agency to limit the testimony of its employees by regulation. The Department of the Interior's regulations at 43 CFR, Part 2, Subpart H contain restrictions on employees testifying regarding official matters in any proceeding where the United States is not a party. The nature of a *Touhy* request is discussed in

258, 1992 EPA App. LEXIS 44 (U.S. EPA E.A.B. Oct. 5, 1992), the Environmental Appeals Board refused to make any such inference from the Federal Land Managers' decision not to file a petition for review of the permit in question in that proceeding. In so ruling, the Environmental Appeals Board stated as follows:

> There are many possible considerations that may affect a FLM's [Federal Land Manager's] decision whether to file a petition for review, and speculation as to those reasons is not productive. Therefore, we find it irrelevant that neither FLM petitioned for review of the permit.

1992 EPA App. LEXIS at *46-*47, n. 27.

We recognize that an entity's decision not to file an appeal of a plan or permit approval does not necessarily mean that it has no issues with the action. However, in this case, the National Park Service's letter makes it clear that it chose not to appeal because it felt its concerns had been addressed, at least with regard to the impact of sulfur deposition. The letter says the National Park Service believed the measures required by the Department "would mitigate sulfur deposition impacts in affected Class I areas" and the National Park Service "has *therefore* decided not to appeal..." (Ex. B-32, emphasis added) Had the National Park Service still had an issue with regard to visibility it could have raised it in that letter. It could have said it believed the mitigation measures adequately addressed the impacts of sulfur deposition in affected Class I areas and, even though it still had concerns regarding visibility, it was electing not to appeal the plan approval. Its letter made no mention at all of continuing concerns regarding visibility.

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more detail elsewhere in this Adjudication.

We believe this omission is an indication that the National Park Service no longer had concerns regarding the impact of the Greene Energy facility on visibility at Shenandoah National Park. However, regardless of whether the National Park Service lifted its determination of adverse impact, we find based on the evidence presented at the trial, that the mitigation methods incorporated into the plan approval serve to adequately address any potential impact the project may have on visibility in Shenandoah National Park and that the Department acted reasonably and in conformance with the law when it ultimately determined there was no adverse impact by the project on the park. The plan approval includes significantly lower sulfur dioxide emissions limits than what were originally proposed, the retirement of 2,499 tons of sulfur dioxide emissions reduction credits, an addition of a nitrogen oxides limit and participation by the National Park Service in establishing final operating permit terms and conditions. (N.T. 193-206, Vol. 8; N.T. 162, Vol. 12) We find that these measures adequately protect visibility at Shenandoah National Park.

Public Notice

The air quality regulations require that the Department "prepare a notice of action to be taken on applications for plan approvals" for sources subject to New Source Review or Prevention of Significant Deterioration review. The notice must be sent to the applicant, the Environmental Protection Agency, any state within 50 miles of the facility and any contiguous state whose air quality may be affected, published in a newspaper in the county where the facility is to be located and, finally, published in the *Pennsylvania*

Bulletin. 25 Pa. Code § 127.44 (a), (b) and (c). For sources subject to review under the Prevention of Significant Deterioration requirements, the notice must include "the degree of increment consumption expected to result from the operation of the plant or facility." 25 Pa. Code § 127.45 (4).

The Department admits that its initial publication failed to include the degree of increment consumption expected to result from operation of the Greene Energy facility for Class I areas. (N.T. 104-05, Vol. 1; Ex. B-9, S-54) While the notice contained the degree of increment consumption for Class II areas, it omitted such information for Class I areas. Department witnesses testified that this occurred because no Class I areas exist in Pennsylvania. (N.T. 105, Vol. 1; N.T. 147, Vol. 8) As a result, the staff reviewing Wellington's application inadvertently failed to include the degree of increment consumption for Class I areas in the notice.

Following issuance of the plan approval to Wellington, the Department published a supplemental notice that included certain Class I information. The notice included the degree of increment consumption for only one of the Class I areas for which computer modeling was done, the James River Face Wilderness Area. No notice was provided for the remaining three Class I areas that were evaluated, namely Shenandoah National Park, Dolly Sods Wilderness Area and Otter Creek Wilderness Area, based on the Department's interpretation of "degree of increment consumption."

The Appellants contend that the Department failed to give proper notice on two grounds: first, that no Class I notice was given *prior* to the plan approval's issuance and, second, when notice was given after the plan approval, it was given for only one of the

Class I areas. We examine each of these issues separately.

Failure to publish Class I information until after the plan approval:

Clearly, 25 Pa. Code § 127.44 envisions notice to be given prior to action being taken on the plan approval. That was not done here with regard to Class I increment consumption. The question is does this omission constitute grounds for rescinding the plan approval? We find that it does not.

The Board has, on numerous occasions, considered whether an error in the permitting or plan approval process requires a rescission of the permit. As Judge Labuskes held in *O'Reilly v. DEP*, 2001 EHB 19:

> There will be errors in virtually every permit application review of even modest complexity. If the errors have been corrected, there is no need to dwell upon them. Errors may have been rendered immaterial or moot by subsequent events or even the passage of time. A party who would challenge a permit must show us that *errors committed during the application process have some continuing relevance*.

Id. at 51 (emphasis added). *See also*, *Kleissler v. DEP*, 2002 EHB 737, 751 (quoting *O'Reilly*).

Likewise, in *Kwalwasser v. DEP*, 1986 EHB 24, 55, the Board held that it would not rescind a permit where errors made in the permit review process were "purely procedural, easily correctable and environmentally inconsequential." The question, then, is whether the Department's failure to publish notice regarding Class I areas prior to the plan approval has any continuing relevance.

On various occasions, the Pennsylvania Environmental Hearing Board has

considered whether a permit or plan approval should be overturned where there has been an error or alleged deficiency in the public notice requirement. In *Hopewell Township v. DEP*, 1996 EHB 956, 970, the Board rejected the appellants' argument that public notice of a permit application was not published in the proper newspaper since, regardless of whether this argument were correct, the appellants had actual knowledge of the application and, therefore, were not harmed as a result of the alleged violation.

In *Fontaine v. DEP*, 1996 EHB 1333, the Board considered what remedy was appropriate where the recipient of a permit to construct and operate a landfill expansion failed to provide notice of its application to a county and township in which a portion of the existing landfill was located. In an opinion authored by Judge Miller, the Board remanded the matter to the Department for further consideration after giving the appropriate notice to the county and township.

Ainjar Trust v. DEP, 2001 EHB 927, *aff'd*, 806 A.2d 482 (Pa. Cmwlth. 2002), dealt with the Department's approval of an Act 537 sewage planning module. One of the appellant's arguments was that the planning module had not been properly noticed because changes that occurred to the project during the review process were not published. Chief Judge Krancer, writing for the Board, held that the test for whether there has been adequate public notice and participation in the review process is whether the appellant had "'access'" to the action being appealed in order "'to comment on [it].'" 2001 EHB at 980 (quoting *Green Thornbury Committee v. DER*, 1995 EHB 636). On appeal, the Commonwealth Court affirmed, holding that the appellant had failed to explain how he was actually prejudiced in properly commenting on the planning module.

806 A.2d at 489.

As in *Ainjar Trust* and *Green Thornbury*, we find that there was ample and wide-spread opportunity for public participation in the plan approval process. The Federal Land Managers, who are responsible for protecting and preserving the Class I areas, were given notice of the proposed project by Wellington more than a year before the application was filed. At that time, representatives from Wellington and ENSR met in person with representatives from the Forest Service and by phone with individuals from the National Park Service to explain the project and answer questions. The Department also took part in the meeting by telephone. Shortly thereafter, Wellington submitted its proposed protocol for modeling the impacts of the Greene Energy facility's emissions on Class I areas to the Federal Land Managers. During the Department's review of the plan, there was extensive contact among the Federal Land Managers, Wellington, ENSR, and the Department. Where the Federal Land Managers expressed concerns, Wellington made efforts to address those concerns. (F.F. 67)

There was also plenty of opportunity for public comment. Concurrent with the Department's publication of its notice of intent to approve the plan, the Department published notice of a public conference concerning the application. The public conference was held in March, 2005. Following the public conference, the Department made substantial changes to the proposed plan approval. (F.F. 83)

It is important to note that public notice *was* given about the Greene Energy facility; it simply did not contain all of the required information about affected Class I areas. We are not dealing with a situation where there was no public notice given about

the project, but a public notice that did not contain all the requisite information. In such a case, we believe the appropriate remedy would have been to remand the matter to the Department to republish the notice including the previously omitted information and to consider any comments received with regard to the republished notice. *Fontaine, supra.* That has already been done here. As soon as the Department discovered its omission it took immediate steps to remedy the error and provide an opportunity for public participation. In its notice, the Department invited public comment on issues related to Class I increment consumption. No comments were submitted by the Appellants or anyone else.

We understand and appreciate the Appellants' frustration with this method of correcting the public notice error. The Appellants question whether being given an opportunity for public comment *after* a plan approval has been issued is as meaningful as having that same opportunity prior to the Department taking any action on the application. Comments received during the course of the plan review may have resulted in a different outcome, either different conditions being placed in the plan approval or outright denial of the plan. Once the plan has been approved, the public may decide that it is fruitless to comment at that point in the process. However, had comments been received that required a re-evaluation of the project, the Department's hands were not tied. It could have modified the plan approval. It could have imposed new conditions, as it did after receiving comments from the National Park Service with regard to visibility, as discussed elsewhere in this Adjudication. It is even possible that the Department could have revoked the plan approval had the comments provided a basis for doing so. In the

end, however, no comments were received and, therefore, no changes were made to the plan approval.

The Department points to the decision by Chief Judge Krancer in *PRIZM Asset Management Co. v. DEP*, 2005 EHB 819, which involved an incomplete public notice for an NPDES permit application. The NPDES permit authorized water to be discharged to two watersheds, but the public notice had identified only one. Judge Krancer ordered the Department to re-notice the permit application with the appropriate information and receive and evaluate comments on it, but allowed the permit to remain in place while this occurred. We find that the matter at hand requires a similar remedy, which the Department has undertaken. Its initial notice provided increment consumption information for all affected Class II areas, and the omission of Class I areas was corrected in the subsequent notice for which public participation and comment were accepted.

The Appellants are correct in pointing out that *PRIZM* involved a supersedeas proceeding where there is a different balancing of factors. For example, in a supersedeas hearing the remedy may be temporary and the burden may not necessarily be on the same party as in the trial on the merits. These circumstances may require a different outcome than would otherwise be appropriate following a trial on the merits. However, that is not the case here. The remedy requested by the Appellants, that of rescinding the permit while the Department republishes notice regarding Class I increment consumption, seems to us to be quite severe, particularly given the fact that notice was republished with this information and no comments were received.

Moreover, the Appellants have not shown that they suffered harm from the

Department's initial failure to include Class I increment consumption information in the public notice. They were provided with an opportunity to submit comments to the Department following the Class I notice but did not do so. They have also been provided with an opportunity before this Board to have their objections heard, and the Appellants presented an excellent case on these issues. Pursuant to the Board's power of *de novo* review, any matters not addressed by the Department in the plan approval review process may be considered by this Board, and we have carefully considered each of the matters raised by the Appellants in this case. *Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998); *Warren Sand & Gravel v. DER*, 341 A.2d 556 (Pa. Cmwlth. 1975); *Smedley v. DEP*, 2001 EHB 131.

Therefore, we find that the Department's republishing of the notice to include information regarding degree of increment consumption in Class I areas, even though done after the plan approval, provides a sufficient remedy. As in *PRIZM*, we believe "this approach strikes the appropriate balance between the substantial interest in effective and proper public notice," 2005 EHB at 851, and allowing for the correction of errors in the plan approval process.[23]

Failure to include information about all four Class I areas:

The second argument put forth by the Appellants is that even the Department's republishing of the notice was insufficient because it only contained information regarding degree of increment consumption at one of the Class I areas in question, James River Face. It is the Appellants' contention that the Department was obligated to publish

the degree of increment consumption by Greene Energy at all of the Class I areas evaluated, which would include not just James River Face but also Dolly Sods, Otter Creek and Shenandoah National Park. According to the Department and Wellington, notice is required only for those areas where computer modeling shows that certain conditions are met.

To evaluate this argument, we turn to the Department's interpretation of "degree of increment consumption." This term is not defined in the state or federal regulations. It is the Department's interpretation, with which Wellington agrees, that degree of increment consumption need only be reported where the proposed facility's impact is greater than the "significant impact level" at the time-receptor pairing at which increment is consumed to the greatest degree by all relevant sources. In other words, the Department considers degree of increment consumption to be reportable when the facility in question (in this case, Greene Energy) 1) exceeds the significant impact level 2) at a time when the cumulative air contamination from all relevant sources (including the proposed project) is at its highest in the Class I area under consideration.

Under the Department's interpretation, if air quality impacts are below the significant impact level when the initial screening model is run, no further evaluation of the Class I area is needed. In other words, if the additional contamination that a new source is predicted to add to a specific location is below what has been determined to be the significant impact level for a particular contaminant at that location, then increment consumption need not be further evaluated at that location. When a source's modeled

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[23] We also suspect that the Department will not make this mistake again.

impact is below the significant impact level, the Department does not consider it to consume increment.

According to the Department, the air quality modeling showed that there were only two occasions on which the predicted impact from the Greene Energy facility was greater than the significant impact level at a time-receptor pairing at which increment was cumulatively consumed to the highest degree: November 22, 1996 and December 14, 1996 at James River Face for the 24 hour standard for sulfur dioxide. (N.T. 171, Vol. 8; N.T. 81, Vol. 9) Therefore, this was the only information regarding degree of increment consumption for a Class I area that the Department published. (Ex. B-29 and B-30)

The Appellants assert that we should reject the Department's definition of increment consumption for the following reasons: 1) the Department should not rely on significant impact levels in its interpretation of degree of increment consumption, 2) the applicable regulation, as interpreted by EPA's Environmental Appeals Board, requires public notice of all impacted Class I areas, 3) the Department's interpretation results in public notice being given of the least impacted Class I area in this particular case.

As noted earlier in this adjudication, there is strong support in EPA policy for the Department's use of significant impact levels and we find them to be a valid method for determining increment consumption. *See* discussion earlier in this Adjudication. As the Department notes, adopting the Appellants' position of requiring public notice for any impact above zero would be impractical, particularly as new software develops and allows modelers to measure smaller and smaller amounts at greater distances. Some

minimum level is necessary in order to provide meaningful information to the public.

In support of their argument that the Department was required to publish notice of increment consumption at *all* Class I areas involved in this case, the Appellants refer us to the decision of the EPA Environmental Appeals Board in *Matter of: Hadson Power 14 – Buena Vista*, 4 E.A.D. 258, 1992 EPA App. LEXIS 44 (U.S. EPA E.A.B. Oct. 5, 1992), which involved two of the Class I areas at issue in the present case, Shenandoah National Park and James River Face Wilderness Area. In that case, the permitting authority, the Virginia Department of Air Pollution Control (Virginia), published the degree of increment consumption for only James River Face, which it determined to be the area where the worst impact would be expected from the proposed power plant in question. Virginia argued that its regulation, which required "the degree of increment consumption expected from the source or modification" required reporting only the maximum increment consumed.

The Environmental Appeals Board rejected Virginia's interpretation and held that the phrase "degree of increment consumption" could not be read in a way that limited the publication of degree of increment consumption to information for only one location. The Environmental Appeals Board stated as follows:

> To allow for meaningful comment, the public must be apprised of all of the proposed source's increment consumption as determined through the modeling analysis. We do not believe that the phrase "degree of increment consumption" can be read as allowing for providing data at only one location, albeit the one with the greatest projected consumption. Different potential commenters may have an interest in different areas to be impacted and would want,

> and would reasonably be entitled to, available data on increment consumption at the areas of their particular concern. Otherwise, their ability to comment on the air quality impact and proposed alternatives would be severely limited.

1992 EPA App. LEXIS at *33-*34.

We do not read the *Hadson* decision as rejecting the use of significant impact levels, as asserted by the Appellants, but as simply saying that it is not enough to provide public notice for the most impacted Class I area where there is more than one area impacted.[24] For instance, in the present case, if the Department had determined that the Greene Energy facility was expected to consume increment at more than one of the Class I areas in question, it could not simply publish notice of the degree of increment consumed at the most impacted of those areas, but would be required to provide notice for all impacted areas. Because the Department determined that increment would be consumed only at James River Face, based on its definition of "increment consumption," that was the only area for which notice of degree of increment consumption was required.

The Environmental Appeals Board in *Hadson* did not address the underlying question of what constitutes "increment consumption" that triggers the obligation to publish notice in the first place. According to the Department's definition, increment is consumed only when the facility in question exceeds the significant impact level at a time and receptor where the cumulative concentration from all emitting sources is at its highest. We have determined that the use of significant impact levels is valid, and we

[24] And as we have noted earlier in this Adjudication, the EPA Environmental Appeals Board condoned the use of significant impact levels in *Prairie State, supra*, which was decided after

now turn to the second half of the Department's test, i.e., that the concentration from all sources is at its highest.

If the Department is permitted to rely on significant impact levels, the Appellants question why it should not be required to report occasions when the significant impact level is exceeded even when the cumulative concentration is not at its highest. (Appellants' Reply Brief, p. 35-36) At trial, the Department's Program Manager for Air Quality, Mark Wayner, acknowledged that even where modeling showed the significant impact level would be exceeded, no publication of notice was required unless it occurred in combination with the highest cumulative reading. (N.T. 159-63, Vol. 8; Ex. C-66)

Mr. Wayner explained that the Department looks at the highest modeled reading because the "highest represents when the cumulative model impacts actually consume increment, and that's fundamental to a PSD [Prevention of Significant Deterioration] review." (N.T. 152, Vol. 8) In its reply brief, the Department explains this second half of the equation as follows:

> [I]ncrement is consumed when modeled or predicted ambient impacts are highest. Thus, the requirement to publish Class I increment consumption is triggered at the high level if the proposed source's impact is non-trivial.

(Department's Reply Brief, p. 21)

Wellington adds in its post hearing brief:

> [Prevention of Significant Deterioration] "increment consumption" occurs when the cumulative ambient impact above baseline from all [Prevention of Significant Deterioration] sources, including the source or modification

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Hadson.

being permitted, is highest ("increment consuming event").

(Wellington Brief, p. 112) Wellington argues that to focus solely on the modeled contribution from the proposed facility without also considering cumulative increment consumption "overlooks the 'degree of increment consumption' part of the regulation." (Wellington Reply Brief, p. 61)

We agree that in order to measure "degree of increment consumption" as required by 25 Pa. Code § 127.45(4), it must be measured at a time when increment is consumed, which is when the concentration of all sources is at its highest.

The Appellants complain that the Department's interpretation of "increment consumption" in this case resulted in notice being provided only for the *least* impacted of the Class I areas, which it argues is an absurd result. They contrast this situation with *Hadson, supra*, discussed above, where the Commonwealth of Virginia was chided for publishing notice for only the *most* impacted of the Class I areas, which was found not to be sufficient.

The Department acknowledges that Greene Energy's impacts on Otter Creek, Dolly Sods and Shenandoah National Park were greater than the highest modeled impact on James River Face, yet degree of increment consumption was published only for James River Face. The Department's explanation is that the public notice requirement of 25 Pa. Code § 127.45(4) does not direct the Department to publish notice of "the greatest impact on the ambient air expected to result from the operation of the plant or facility, but ignore increment consumption." (Department's Post Hearing Brief, p. 118)

We agree with the Department that, by its very language, 25 Pa. Code § 127.45(4) is intended to provide notice of impact by a proposed new source and not to serve as a general notice of air quality at impacted Class I areas. The fact that Shenandoah, Dolly Sods and Otter Creek may be more heavily affected by overall air pollution than James River Face has no bearing on the Department's duty under Section 127.45(4), which simply requires it to publish the degree of increment consumption by Greene Energy, regardless of whether it occurs at the least impacted, most impacted, or every Class I area under consideration.

Finally, the Appellants argue that the Department's interpretation of "increment consumption" is not entitled to deference where the Pennsylvania regulation, 25 Pa. Code § 127.45(4), simply parrots the federal regulation, 40 C.F.R. § 52.21(q). In support of this proposition, the Appellants cite the decision of the United States Supreme Court in *Gonzales v. Oregon*, __ U.S. __, 126 S.Ct. 904, 916 (2006), which held, "An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected to paraphrase the statutory language." While the *Gonzales* case is not directly on point with the matter before us, we do agree that where the state regulation under review is based on a federal regulation or was adopted in order to obtain primacy under a federal program, it may not be prudent simply to defer to the interpretation put forth by the state agency.[25] Here, the

[25] We do not see this as contrary to the holding in *Department of Environmental Protection v. North American Refractories Co.*, 791 A.2d 461 (Pa. Cmwlth. 2002), which said that the Department's interpretation of an environmental regulation is entitled to deference where it is not erroneous and where it comports with the regulation's plain language and is consistent with the

Pennsylvania regulation on public notice tracks the language of the federal regulation. In such a case, the reviewing court may look to federal case law and rulings of the federal governing agency in discerning the meaning of the regulation. *Gosewich v. Commonwealth, Department of Revenue*, 397 A.2d 1288, 1293 (Pa. Cmwlth. 1979). We have certainly done so here, by looking to EPA Environmental Appeals Board case law, and in doing so, we find the Department's interpretation of "increment consumption" and its application thereof under 25 Pa. Code § 127.45(4) to be logical and reasonable.

We further note that this is a matter of first impression. In the best of all worlds, as much information as possible should be given to the public regarding a pending plan approval. However, we sympathize with the Department's position that new and more refined technology allows the compilation of ever expanding amounts of information. This is magnified under the labyrinth of state and federal regulations dealing with air quality. Here, as noted earlier, every effort was made by the Department to notify both the public and, in particular, the Federal Land Managers of every aspect of this proposed project. In addition, the federal protectors of the Class I areas, the Federal Land Managers, were provided with all of this information directly by Wellington and its professional consultants. Moreover, what is being debated here are readings that are *de minimis*. We reiterate our statement earlier that the Appellants,

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statute under which the regulation was promulgated. Where the regulation is adopted pursuant to a federal program, as with Pennsylvania's air regulations, it may be necessary to look to federal law in order to determine whether the Department's interpretation is appropriate.

represented by exceptional counsel in this matter,[26] were able to bring their concerns to the Environmental Hearing Board. That those concerns were disputed by the Department and Wellington, also represented by exceptional counsel,[27] allowed these matters to be fully litigated before the Board, and we conducted a *de novo* trial of all the issues raised by the Appellants.

In conclusion, we find that the public notice provided by the Department was adequate and does not constitute a basis for overturning the plan approval.

Role of the Federal Land Managers

We are troubled by the lack of participation by the Federal Land Managers in this proceeding. The federal Prevention of Significant Deterioration regulations spell out the significant role of Federal Land Managers as follows:

> [The Federal Land Managers]...have an *affirmative duty* to protect air quality related values (including visibility) of such lands and to consider, in consultation with the [EPA] Administrator, whether a proposed source or modification will have an adverse impact on such values.

40 CFR § 52.21(p)(2) (emphasis added).

Although Federal Land Managers do not have the authority to issue permits under the Prevention of Significant Deterioration program, they must be consulted and are authorized to comment on applications that may impact air quality related values in the parks, forests and wilderness areas that they have been charged with protecting. The

[26] Appellants were represented at trial by Attorneys Robert Ukeiley and Michael Fiorentino.
[27] Wellington was represented at trial by Attorneys Glenn Unterberger, Brendan Collins and Sabrina Rudnick. The Department's trial team was led by Attorney Michael Heilman, who was

Federal Land Managers' FLAG guidance manual, issued in December 2000, sets forth the procedures Federal Land Managers will follow in discharging their duties. (Ex. W-90)

The offices of two Federal Land Managers – the National Park Service and the Forest Service – were intimately involved with reviewing and commenting on the proposed Greene Energy facility. Wellington and its consultants were in communication with the Federal Land Managers as early as July 2003, one year before the application was filed with the Department. One year later, in July 2004, the Federal Land Managers also received a copy of the complete application package that Wellington filed with the Department. The Federal Land Managers submitted comments to the Department regarding adverse impacts they believed the project might have on the Class I areas they protect. Neither appealed the plan approval nor sought to intervene in this appeal. That is their prerogative, as each government agency, like any potential appellant, must determine whether they have an issue that is appealable and whether the cost of litigation is justified and feasible. Additionally, there is much in the record that leads us to believe the Federal Land Managers were satisfied with the mitigation measures ultimately imposed by the Department on the project.

What is disturbing, however, is the refusal of the Department of the Interior, under whose jurisdiction lies the National Park Service, to allow two National Park Service employees to testify in this matter. Counsel for the Appellants served a request

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ably assisted by Attorneys John Herman and Marianne Mulroy.

on the Department of the Interior, in accordance with proper federal procedure, for the deposition and trial testimony of two National Park Service employees, Don Shepherd and John Notar. The request was denied. (Ex. B-7) According to Appellants' counsel, this is the norm and not the exception in *state* proceedings of this nature. (N.T. 66, Vol. 2)

The Department of the Interior's decision not to produce Mr. Shepherd and Mr. Notar for deposition or trial is based on its regulations, purportedly adopted pursuant to the federal housekeeping statute, at 5 U.S.C. § 301, and the United States Supreme Court's decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

The housekeeping statute currently reads as follows:

> § 301. Departmental regulations
>
> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. *This section does not authorize withholding information from the public or limiting the availability of records to the public.*

5 U.S.C. § 301 (emphasis added) The statute applies both to testimony as well as the production of documents. *Exxon Shipping Co. v. Department of Interior*, 34 F.3d 774, 777 (9th Cir.1994).

The last sentence of the statute was added in 1958. Prior to that, the Supreme Court examined the scope of the housekeeping statute in a 1951 decision that addressed the problem of federal employees caught between court orders requiring the production

of information and agency regulations requiring that such information be withheld. *Touhy, supra,* involved a habeas corpus proceeding brought by a state prisoner in which a subpoena *duces tecum* was served on an employee of the Federal Bureau of Investigation (FBI). The FBI employee refused to comply with the subpoena, relying on an order of the Attorney General that withheld from subordinates the power to release agency documents but authorized them to submit the subpoenaed materials to the court for a determination of whether they were material and whether disclosure was in the best interest of the public. The Supreme Court held that the FBI employee could not be held in contempt for his failure to comply with the subpoena when his failure to comply was required by agency order, which the Court held to be a valid exercise of authority under the housekeeping statute (then codified at 5 U.S.C. § 22 and minus the last sentence appearing above). In reaching this decision, the Court noted that the employee had not been asked to submit the subpoenaed materials to the lower court for a determination of their materiality or appropriateness of disclosure in the public interest. Furthermore, the Court refused to reach the question of how far the Attorney General, as agency head, could go in refusing to produce evidence without a specific claim of privilege.

In 1958, the last sentence of the statute was added in order to "'correct' a situation that had arisen in which the executive branch was using the housekeeping statute as a substantive basis to withhold information from the public." *Exxon Shipping,* 34 F.3d at 777 (citing H.R. No. 1461, 85th Cong., 2d Sess. (1958), *reprinted*

in 1958 U.S.C.C.A.N. 3352, 3353). In *Chrysler Corp. v. Brown*, 441 U.S. 281 (1978), the Supreme Court again addressed the scope of 5 U.S.C. § 301, stating "it is indeed a 'housekeeping statute,' authorizing what the [Administrative Procedure Act] terms 'rules of agency organization, procedure or practice,' as opposed to 'substantive rules.'" 441 U.S. at 310. The Court also cited a report of the House Committee on Operations stating that § 301 "'merely gives department heads authority to regulate within their departments the way in which requests for information are to be dealt with - for example, by centralizing the authority to deal with such requests in the department head.'" *Id.* at n. 41 (citing H.R. Rep. No. 1461, 85th Cong., 2d Sess., 7 (1958)) The same report said that § 301 was originally adopted "'to provide for the day-to-day office housekeeping in the Government departments, but through misuse it has become twisted into a claim of authority to withhold information.'" *Id.* (citing H.R. Rep. No. 1461, at 12)

The Court of Appeals for the Ninth Circuit seemed to lay the matter to rest, at least with regard to actions brought in federal court, as follows:

> Thus, neither the statute's text, its legislative history, nor Supreme Court case law supports the government's argument that § 301 authorizes agency heads to withhold documents or testimony from federal courts.

Exxon Shipping, 34 F.3d at 778. The court noted, "Every commentator we are aware of who has addressed the issue has reached the same conclusion [citations omitted]." *Id.* at n. 6.

Unfortunately, § 301 and *Touhy* continue to be cited by federal agencies as a basis for withholding documents or refusing to produce employees of their agencies for testimony.[28] Where the matter is brought in state court, the additional issue of sovereign immunity may arise. However, that question was not reached in the present case since no subpoenas were served on the federal employees in question, and it was not brought to our attention until after the trial had begun.

Specifically, the Department of the Interior responded to the Appellants' request for the deposition and trial testimony of the National Park Service employees as follows:

> Dear Mr. Parker:
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> I am responding to your request for the deposition and trial testimony of Don Shephed [sic] and John Notar in connection with the above referenced litigation. The litigation concerns the Pennsylvania Department of Environmental Protection's approval of a permit to construct and operate an electric generation facility known as the Greene Energy Resource Recovery Project. The facility is designed to burn waste coal generated from coal impurities.
>
> On April 04, 2005, the Department of the Interior (DOI) – pursuant to its authorities and responsibilities under the Clean Air Act's Prevention of Significant Deterioration provisions – notified the Pennsylvania Department of Environmental Protection (DEP) that the Greene Energy Project could adversely impact air quality related values in Shenandoah National Park. The Office of the Assistant Secretary for Fish and Wildlife and Parks is the designated

[28] William Bradley Russell, Jr., Note, *A Convenient Blanket of Secrecy: The Oft-Cited but Nonexistent Housekeeping Privilege*, 14 Wm. & Mary Bill of Rts. J. 745 (2005); Milton Hirsch, *The Voice of Adjuration: The Sixth Amendment Right to Compulsory Process Fifty Years After United States ex rel. Touhy v. Ragen*, 30 Fla. St. U.L. Rev. 81 (2002).

authorized official for conclusions of potential adverse impact at "Class I" areas (such as Shenandoah National Park) managed by DOI. Mr. Shepherd and Mr. Notar are technical staff employed at the National Park Service's Air Resources Division to assist the Deputy Assistant Secretary in his evaluation of potential air quality impacts on park resources and visitors.

The Clean Air Act provides that if a permitting agency such as DEP is satisfied with the Federal Land Manager's demonstration of potential adverse impacts, the permit should be denied. 42 USC 7475(d)(2)(C)(ii). In this case, DEP decided to issue the permit on June 21, 2005. On July 28, 2005, DOI notified DEP that it would not seek to appeal the permit before the Pennsylvania Environmental Hearings [sic] Board. Accordingly, DOI is not a party to this lawsuit.

DOI's *Touhy* regulations at 43 CFR Part 2, Subpart H, contain restrictions on DOI employees testifying regarding official matters in any proceeding where the United States is not a party. These regulations are derived from 5 USC sec. 301 the United State's [sic] Supreme Court's recognition that Federal agencies have the authority to limit the diversion of employees from official duties to give testimony or produce information for proceedings that do not involve the United States. *See U.S. ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

It is DOI's general policy to not allow its employees to testify in proceedings that do not involve the United States. 43 CFR 2.81. This policy ensures the orderly execution of DOI's mission and programs, while not impeding any proceeding inappropriately. *Id.* I have reviewed your request and consulted with Mr. Shepherd, Mr. Notar, and their supervisor. For the following reasons, I have decided to deny your request.

In this case, as you point out in your letter, DOI submitted comments, on the record, about the proposed plant and concluded the project could adversely affect air quality related values at Shenandoah National Park. This

information, and the data and analysis that underlie it are all part of the record before the Pennsylvania Environmental Hearing Board. If necessary, DOI is willing to authenticate that [sic] DOI's written comments pursuant to 43 CFR 2.86.

DOI manages 69 Clean Air Act-designated "Class I" areas, and technical staff review and analyze emissions permits, and work with the Assistant Secretary's office to make policy decisions and formal recommendations on the potential affects [sic] of dozens of emissions permits each year on our resources. The technical work is complex and extremely labor-intensive. Time spent preparing for testimony in proceedings that involve permits which we have already formally commented on would impair our ability to review and analyze new permits. This would limit DOI's ability to conduct official business unimpeded (*See DOI Touhy Regulations* at 43 CFR 2.88(c)(1)). Moreover, granting your request could impair our ability to avoid the negative cumulative effect of granting similar requests (43 CFR 2.88(c)(5)), and avoid undue burden on our limited resources (43 CFR 2.88(c)(7)). Additionally, you have failed to show why DOI's comments and statements for the record could not be used in lieu of employee testimony. 43 CFR 2.84(e).

Accordingly, I have determined that it would negatively impact the orderly execution of DOI's mission to permit the deposition and trial testimony of Mr. Shepherd and Mr. Notar in this matter. If you have questions, please contact John Carlucci, at the Solicitor's Office Division of Parks and Wildlife in Washington, D.C. at (202) 208-4145.

Sincerely,

Paul Hoffman
Deputy Assistant Secretary for Fish and Wildlife

(Ex. B-7)

Section 2.81 of the Department of the Interior regulations, cited in the letter,

reads as follows:

> § 2.81 What is the Department's policy on granting requests for employee testimony or Department records?
>
> (a) Except for proceedings covered by § 2.80(c) and (d), it is the Department's general policy not to allow its employees to testify or to produce Department records either upon request or by subpoena. However, if you request in writing, the Department will consider whether to allow testimony or production of records under this subpart. The Department's policy ensures the orderly execution of its mission and programs while not impeding any proceeding inappropriately.
>
> (b) No Department employee may testify or produce records in any proceeding to which this subpart applies unless authorized by the Department under §§ 2.80 through 2.90. *United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951).*

43 CFR § 2.81. Section 2.80 (c) lists the situations where it is the Department of the Interior's policy to allow its employees to testify. Among other things, this includes federal but not state administrative proceedings. *Id.* at (c) (3).

Section 2.88 of the Department of the Interior's regulations sets forth the factors the agency will consider in granting a request for its employees to testify. They are as follows:

> § 2.88 What criteria will the Department consider in responding to my Touhy Request?
>
> In deciding whether to grant your Touhy Request, the appropriate Department official will consider:
>
> (a) Your ability to obtain the testimony or records from another source;

(b) The appropriateness of the employee testimony and record production under the relevant regulations of procedure and substantive law, including the FOIA or the Privacy Act; and

(c) Our ability to:

(1) Conduct our official business unimpeded;

(2) Maintain impartiality in conducting our business;

(3) Minimize the possibility that we will become involved in issues that are not related to our mission or programs;

(4) Avoid spending public employee's time for private purposes;

(5) Avoid the negative cumulative effect of granting similar requests;

(6) Ensure that privileged or protected matters remain confidential; and

(7) Avoid undue burden on us.

43 CFR § 2.88.

In *Kauffman v. U.S. Dept. of Labor*, 1997 U.S. Dist. LEXIS 20802 (E.D. Pa. 1997), the United States District Court for the Eastern District of Pennsylvania considered a challenge brought by plaintiffs against the Department of Labor when it refused a request to allow one of its employees to be deposed in connection with a wrongful death action brought in state court. In that case, the plaintiffs had sought to interview and depose the Occupational Safety and Health Administration (OSHA) inspector who investigated the industrial accident giving rise to the action. The

Department of Labor denied the request based on its regulation that mirrored the language of 5 U.S.C. § 301. The District Court held that the plaintiffs' reliance on the *Exxon Shipping* case was misplaced since it involved a subpoena issued by a federal court, but noted that "a federal agency decision not to allow an employee to testify may still be challenged under the Administrative Procedure Act" and the agency decision "may be set aside if it is found to be 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.'" [29] *Id.* at *6-*7 (citations omitted). In that case, the court found that the Department of Labor's decision was not arbitrary, capricious or unlawful given OSHA's limited resources, the large number of requests it receives for testimony, the release to the plaintiffs of the OSHA file and the OSHA inspector's averment that he had no independent recollection of his interview with the employee who had conducted the safety inspection of the plant where the accident occurred.

Whether the National Park Service employees in question in the present case could have been compelled to testify in this proceeding is not before us since no subpoenas were served on the employees following the Department of the Interior's response to the Appellants' *Touhy* request. Accordingly, no motion to quash was filed in which the issue might have come before the Board. However, there are ample grounds for finding the Department of the Interior's failure to produce the National

[29] Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, deals with judicial review of federal agency action and states that it shall hold unlawful any agency action found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Id.* at §

Park Service employees to constitute an abuse of discretion, particularly since this action involved a challenge to a plan approval in which they were intimately involved over a multi-year period. We find that where a federal agency, in this case the United States Environmental Protection Agency, has delegated its authority to a state government agency, in this case the Pennsylvania Department of Environmental Protection, to handle the review and issuance of a permit or plan approval, and where federal agencies, such as the National Park Service and Forest Service, are actively involved in that plan approval review, in the interest of comity and due process, neither § 301 nor any agency regulations adopted pursuant thereto should be used as a basis for refusing to allow the employees of those federal agencies to testify in an action involving the very plan approval they were actively involved in reviewing. We further caution that where the office of a Federal Land Manager declines to produce its employees for testimony in a proceeding before this Board, they run the risk of having their determination of adverse impact overturned.

The Department of the Interior's letter in response to the Appellants' request for their employees' testimony states that the "information, and the data and analysis that underlie it [relating to the project's effect on air quality values at Shenandoah National Park] *are all part of the record before the Pennsylvania Environmental Hearing Board.*" (Ex. B-7, emphasis added) This is completely untrue. As in any court proceeding, none of this information or the data and analysis underlying it is part of the

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706 (2)(A).

record unless it was properly introduced as evidence at trial. Because employees of the National Park Service or Forest Service did not testify at trial, much of the information could not be admitted because it was hearsay and the authors of the letters were not available for cross-examination. Pa.R.E. 802. *See also Wood v. DER*, 1994 EHB 347, 369 (Portions of letters from the National Park Service to DER employees expressing opinions concerning water quality were stricken as hearsay); *Muro v. DER*, 1990 EHB 1153, 1158-59 (Without the testimony of the witness who prepared letters, reports and other documents submitted with a permit application, they are hearsay and cannot form the basis of an adjudication). Alternatively, some of the information was admitted for the limited purpose of showing that the National Park Service or Forest Service related their concerns to the Department of Environmental Protection and/or that the Department did or did not take action based on those concerns, but not for the truth of the matters asserted. As to the basis for the concerns or whether they were resolved, we have little information on the record.

Much of the confusion about the intent of the Federal Land Managers' comments on the plan application would have been avoided had they simply provided testimony in this proceeding. Much of the trial was spent trying to decipher what was meant by the Federal Land Managers' comments and whether the National Park Service's determination of adverse impact remained in place or was withdrawn. Had the Federal Land Managers themselves provided this testimony, there would have been no need for such speculation. The Federal Land Managers' refusal to testify in this proceeding

made an already difficult case even more so for all of the parties and for the Board. We find it surprising that the Department of the Interior did not consider the protection of air quality values at Shenandoah National Park to be an appropriate exercise of the National Park Service's resources.[30]

Given the National Park Service's lack of participation, we find it admirable that the Appellants, and primarily Mr. Phil Coleman, who sat through nearly the entire fifteen-day trial, and their counsel, Attorneys Ukeiley and Fiorentino, proceeded in the face of such difficult odds. This was an extremely hard-fought case on all sides, with excellent cases presented by all parties, particularly considering the grueling schedule leading up to it. We applaud Mr. Coleman's pioneering spirit and his courage, as well as that of his counsel, and we commend all parties and counsel for their exceptional work in this matter.

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[30] This statement is true even if the Department of the Interior was fully satisfied with the conditions imposed on Wellington by the plan approval. This appeal primarily involves Class I areas that the Federal Land Managers have an "affirmative duty to protect" by federal regulation. All of the parties incurred substantial costs in litigating this matter. Moreover, the Pennsylvania Environmental Hearing Board devoted an enormous amount of its resources to adjudicating this appeal. The Board's costs for the transcript alone amounted to $20,000.00. This appeal was especially hard fought. The Board issued numerous opinions and held many conference calls with the parties, most of which were held on the day they were requested. Orders resolving the disputes were generally issued that day or the following day. The Board held an *en banc* oral argument in Pittsburgh (that required cross state travel by four of the five judges). The trial lasted the entire month of June, and the parties put a considerable amount of time into preparing detailed and extensive briefs. Since that time the preparation of this adjudication has consumed nearly all of the time of the presiding judge as well as that of the Pittsburgh staff, including evenings and weekends. All of the judges on the Board have devoted substantial time to reviewing the briefs, record and writing of this adjudication. The Department of the Interior's statement that "[t]ime spent preparing for testimony in proceedings that involve permits which we have already formally commented on would impair our ability to review and analyze new permits" and would cause an "undue burden on our limited resources" is met with little

Health Effects

In their post hearing brief, the Appellants discuss the impact on health and public welfare that is associated with ozone and the emission of sulfur dioxide, both of which will be generated by the Greene Energy facility. The Appellants note that the EPA has found that exposure to ozone can lead to respiratory problems, increased asthma attacks and permanent damage of the lungs, as well as cause damage to vegetation and ecosystems. (Appellants' Post Hearing Brief, p. 7-8, citing 70 Fed. Reg. 25,161; 25,169 (May 12, 2005)) They cite similar findings for exposure to sulfur oxide emissions. (Appellants' Post Hearing Brief, p. 8-9, citing an EPA report). They further cite a decision of the U.S. Court of Appeals for the Sixth Circuit, stating "there is now no longer any doubt that high levels of pollution sustained for periods of days can kill." (Appellants' Post Hearing Brief, p. 8-9, quoting from *Ohio Power Co. v. Environmental Protection Agency*, 729 F.2d 1096, 1098 (6th Cir. 1984).

Prior to the trial, Wellington filed a motion in limine seeking to exclude certain documents that the Appellants had listed in their pre-hearing memorandum. The documents were scientific studies on the health effects of air pollution on children. Wellington opposed the introduction of the studies on the basis that the issue of health effects of air pollution on children had not been raised in the Appellants' notice of appeal or amendments thereto, and no expert report had been submitted on this subject; Wellington also argued that the studies were not relevant to the appeal since health effect claims had already been evaluated by the EPA prior to adopting regulations in this area.

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sympathy by this Board.

The Department joined in the motion but said the Board did not need to reach the issue of relevance since the documents were inadmissible as hearsay. The Board agreed and ruled the documents inadmissible as hearsay since they were authored by persons not associated with the proceeding out of court. *Groce v. DEP*, EHB Docket No. 2005-246-R (Opinion and Order on Motions in Limine issued June 1, 2006), *slip op.* at 5.

Any claim of health effects was required to be raised in the notice of appeal and properly supported by an expert report and expert testimony at the trial. Since that was not the case here, the issue is not before us.

Wellington's Attack on 18-Month Period to Commence Construction

For the first time in this appeal late in its post-hearing brief, Wellington protests Condition 3.d(1) of the plan approval. This condition is based on Section 127.13(b) of the Pennsylvania Code which provides:

> If construction, modification or installation is not commenced within 18 months of the issuance of the Plan Approval or if there is more than an 18 month lapse in construction, modification, or installation, a new Plan Approval application that meets the requirement of this subchapter....shall be submitted.

25 Pa. Code Section 127.13(b).

Condition 3.d(1) of the plan approval likewise provides:

> This approval to construct shall become invalid if (1) construction is not commenced (as defined in 40 CFR Section 52.21(b)(8)) within 18 months after the date of this approval...

Exhibit C-8, Para. 3.d(1). Therefore, under these provisions if Wellington does not

commence construction of the project within 18-months of the plan approval issuance the plan approval becomes null and void. Since the date of the plan approval was June 21, 2005, according to condition 3.d(1) the plan approval "will 'become invalid' if Wellington does not commence construction...by December 21, 2006." (Wellington Post-Hearing Brief, page 131)

The Department amended and re-issued the plan approval during the second week of the trial on June 12, 2006 (the 2006 plan approval), based on deficiencies noted by Attorney Fiorentino during cross examination at trial. (Exhibit C-73) The 2006 plan approval contains an identical 18-month "must commence construction" provision. Wellington argues that the original deadline of December 21, 2006 has been superseded by the 2006 plan approval.

In the alternative, Wellington contends that the original 18- month provision is extremely unfair because it is doubtful that it can attract a suitable equity investor in the project and commence construction by the due date. In Wellington's view, "it is neither reasonable nor fair to demand that Wellington either forfeit its rights under the Plan Approval on December 21, 2006, or conclude a $1.3 billion transaction that involves not only financing arrangements, but real property closings, construction contracts, electric power sales agreements and arrangements for the construction of transmission lines and a sub-station to receive power to be generated by the Project." (Wellington Post-Hearing Brief, page 132) Wellington contends that if the original deadline has not been superseded by the 2006 plan approval, then if the Board does not

grant relief to Wellington from the December 21, 2006 deadline, we have really ruled in favor of the Appellants. If we do not accept that the original 18-month deadline has been superseded by the 2006 plan approval, then Wellington requests that we "turn the clock back" and modify Condition 3.d(1) of the plan approval by adding to the 18-month period "additional time equal to the interval between June 21, 2005 and the date of the Board's Adjudication," November 22, 2006.

Wellington contends that the Board has the authority to lengthen the regulatory deadline as an exercise to preserve our own jurisdiction and to discharge our statutory obligations. In Wellington's view, the 18-month commencement of construction deadline places such a time crunch on this case that it will render our decision moot and provide the Appellants with a veto over the Department's decision to issue the plan approval.

Wellington further contends, for the first time, that condition 3.d(1) of the plan approval and the Pennsylvania and federal regulations supporting it are "unconstitutionally vague." After detailing a litany of confusion allegedly shown by six Environmental Protection Agency guidance documents regarding what actually constitutes "commencing construction" under the regulations, Wellington concludes that to commence construction it would have to enter into a binding contract with Bechtel that would impose a cancellation penalty of $130 million. Wellington argues that is a "frightfully high price for Wellington to pay so that Appellants could have their month in court." (Wellington Post-Hearing Brief, page 137)

Moreover, Wellington voices a concern that Condition 3.d(1) of the plan approval is self-executing, meaning that if Wellington does not commence construction by December 21, 2006, the plan approval automatically becomes "invalid." Wellington argues that no matter what it does to commence construction, a citizen suit by Appellants or some other third parties could be filed long after December 21, 2006 raising this issue. *See Grand Canyon Trust v. Tucson Electric Power Co.*, 291 F.3d 979 (9th Cir. 2004) (allowing a citizen suit filed in 2001 to proceed based on a power company's failure to "commence construction" in 1979, despite the operation of the power plant for at least ten years).

Not surprisingly, Appellants hold a different view. They correctly point out that the 18-month commencement of construction deadline is an important component of the regulatory scheme. The rather tight deadline ensures that the emissions limitations that facilities such as Wellington's must meet are not stale but reflect the latest technological improvements. It also keeps companies from "reserving" increment which are awarded on a first come first served basis. Appellants also contend that the 2006 plan approval should not be viewed as extending the 18-month clock since the Department did not review or reconsider the original plan's emissions limits when it issued the 2006 plan approval. Appellants point out that if a permittee could restart the 18-month clock every time its plan approval was revised, it would result in a series of trivial permit condition changes that would allow new facilities to be built with what could very well be outdated pollution controls.

Finally, Appellants argue that condition 3.d(1) tracks the language of 25 Pa. Code Section 127.13(b) which by its express terms requires construction to commence within 18-months of the plan approval.

The Department of Environmental Protection strongly opposes Wellington's request for relief from the 18-month commencement of construction requirement on several grounds. First, the Department argues that Wellington never filed an appeal of plan approval Condition 3.d(1). Second, it raises the doctrine of administrative finality and argues that since Wellington did not appeal this condition to its plan approval, then the condition or any issues associated with the plan approval are administratively final as to Wellington and cannot be collaterally attacked in Wellington's Post-Hearing Brief. The Department acknowledges that the Appellants filed numerous objections to the plan approval but quickly notes that the Appellants did not challenge the 18-month commencement of construction provision. Therefore, the Department contends this issue is not before the Board.

Third, the Department contends that its regulations do not provide for the extension of the 18-month commencement of construction deadline. The Department contrasts its regulation with its federal counterpart. The Pennsylvania regulation is more stringent than the federal regulation. Under the federal regulatory framework "The administrator [of the Environmental Protection Agency] may extend the 18-month period upon a satisfactory showing that an extension is justified." *See* 40 C.F.R. Section 52.21(r)(2). This language does not appear in Pennsylvania's regulation. It is

Pennsylvania's prerogative, of course, to create a regulatory requirement that is more stringent than the corresponding federal regulation. *See* 42 U.S.C.A. § 7416.

Fourth, the Department argues that Wellington's contention that the term "commencement of construction" and Pennsylvania's regulatory framework are unconstitutionally vague represents a pre-enforcement challenge to the regulations that should be ignored by the Board.

Interestingly, the Department does not respond to Wellington's contention that the 2006 plan approval supersedes the original 18-month deadline.

In its reply brief, Wellington does not abandon its arguments on the fairness and constitutionality issue, but stresses that we should lean toward declaring that the commencement of construction deadline was extended until December 2007 by operation of the 2006 plan approval.

We are not without sympathy for Wellington's position. According to them, this project will cost $1.3 billion and they need a deep pocketed equity investor or investors to take this project to the next step. They also contend that no equity investor would invest the necessary funds as long as this appeal was before the Board. At the same time, both the Appellants and the Department advance strong and persuasive reasons why we should not grant the relief requested by Wellington.

In conclusion, we find as follows: As to the fairness or constitutionality of Condition 3.d(1) and 25 Pa. Code § 127.13(b), which does not authorize the Department to extend the 18-month deadline as does its federal counterpart, we find

that Wellington has waived this argument. 25 Pa. Code § 1021.52(a)(1). Wellington never appealed Condition 3.d(1) within 30 days of receiving notice of the plan approval. It cannot at this late date attack the provision or the regulation on which it is based under the guise of seeking a remedy in this case.[31]

As to Wellington's argument that the 2006 plan approval supersedes the original 18-month deadline, thereby extending the commencement of construction deadline to December 12, 2007, we find that it is not ripe for review since the Department has made no determination as to the original plan approval becoming null and void. We note that the 2006 plan approval contains the same Condition 3.d(1) as the original and says in relevant part, "This approval to construct shall become invalid if (1) construction is not commenced ...within 18-months after the date of *this approval* ... " (Ex. C-73, p.2) (emphasis added). Whether by "this approval" the Department meant the original plan approval or the revised 2006 plan approval, which merely corrected an error in the original plan approval, we can only speculate. Without further information as to the Department's intention, we cannot rule at this time. Of course, if the

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[31] We further note that the Commonwealth Court, in considering a similar "sunset provision" under the Solid Waste Management Act regulation at 25 Pa. Code § 271.211(e), held as follows:

> Notably, the sunset regulation does not authorize DEP to extend the regulatory deadline for concerns such as litigation. Other environmental permitting regulations explicitly authorize DEP to grant extensions for litigation [noting the Noncoal Act regulation at 25 Pa. Code § 77.128(b)]

Eagle Environmental, L.P. v. Department of Environmental Protection, 833 A.2d 805, 811, n.7, (Pa. Cmwlth. 2003), *appeal denied*, 854 A.2d 968 (Pa. 2004). Likewise, the regulation in question here, 25 Pa. Code § 127.13(b), contains no authorization to extend the commencement of construction deadline in the event of litigation.

Department is called upon at a later date to make a decision on this issue and it is appealed by a party, the issue will then be ripe for our review.

Conclusions of Law

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

2. An organization may have standing in its own right or as a representative of its members. *Pennsylvania Trout v. DEP*, 2004 EHB 310, 373.

3. All of the Appellants have standing to pursue this appeal because either they or their members will be substantially, directly and immediately affected by the construction and operation of the Greene Energy facility. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975).

4. The Board's scope of review in this matter is *de novo*. *Smedley, supra.*

5. As the party challenging the Department's issuance of the plan approval, the Appellants have the burden of proving by a preponderance of the evidence that the plan approval should not have been issued. 25 Pa. Code § 1021.122(c)(2).

6. The testimony of both Mr. Paine and Mr. Powers meets the test set forth in *Frye v. United States*, 293 F. 1013 (D.C. 1923).

7. The emissions limits set by the Department for the Greene Energy facility meet the LAER and BACT standards.

8. The Department's use of significant impact levels to determine increment consumption and for purposes of public notice was proper. *Prairie State, supra.*

9. The Department properly found that operation of the Greene Energy facility will not cause or contribute to an increment violation for sulfur dioxide in Shenandoah National Park.

10. The mitigation measures contained in the plan approval adequately protect visibility in the Class I areas.

11. The Department provided adequate public notice regarding degree of increment consumption in Class I areas.

12. The Department's interpretation of a regulation is not necessarily entitled to deference when the state regulation is derived from a federal regulation. *Gonzales v. Oregon*, 126 S.Ct. 904, 916 (2006).

13. In such a case, the reviewing court may look to federal law to discern the meaning of the regulation. *Gosewich v. Department of Revenue*, 397 A.2d 1288, 1293 (Pa. Cmwlth. 1979).

14. Based on EPA Environmental Appeals Board case law and EPA policy, we accept the Department's interpretation of "increment consumption" as reasonable.

15. Based on the evidence before the Board, the Department did not act unreasonably or unlawfully in issuing the plan approval to Wellington.

16. Where the United States Environmental Protection Agency or other federal agency has delegated its authority to the Pennsylvania Department of Environmental Protection to handle the review and issuance of a permit or plan approval, and where federal agencies are actively involved in that plan approval review, in the interest of comity and due process, neither 5 U.S.C. § 301 nor any federal agency regulations

adopted pursuant thereto should be used as a basis for refusing to allow the employees of those federal agencies to testify in an action involving the very plan approval they were actively involved in reviewing.

17. Neither 5 U.S.C. § 301 nor the decision of the United States Supreme Court in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) authorizes federal agencies to withhold testimony in court proceedings.

18. Wellington's challenge to Condition 3.d(1) of its plan approval and 25 Pa. Code § 127.13(b) is untimely since it was not raised in an appeal of the plan approval. 25 Pa. Code § 1021.52(a)(1).

19. Section 127.13(b) contains no authorization to extend the commencement of construction deadline set forth therein in the event of litigation. 25 Pa. Code § 127.13(b).

20. Wellington's argument that the 2006 plan approval extends the 18 month deadline is not ripe for adjudication since the Department has made no determination as to the expiration of the original plan approval.

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 – WVDT, LLC, Permittee	:	

ORDER

AND NOW, this 22nd day of November 2006, in accordance with the foregoing Adjudication, the appeal is **dismissed.**

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

EHB Docket No. 2005-246-R

GEORGE J. MILLER
Judge

THOMAS W. RENWAND
Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

DATED: November 22, 2006

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

SNYDER BROTHERS, INC.	:	
	:	
v.	:	**EHB Docket No. 2006-002-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KENNETH W. HARPER, Intervenor	:	**Issued: December 4, 2006**

OPINION AND ORDER DENYING APPELLANT'S MOTION FOR SUMMARY JUDGMENT

By Michael L. Krancer, Chief Judge and Chairman

Synopsis:

The Board denies the Appellant's Motion for Summary Judgment from a Department Order requiring it to perform testing on its gas well which was proximate to a fatal gas explosion.

Factual and Procedural Background

Before us today is Snyder Brothers' Motion for Summary Judgment (Motion) in an appeal by Snyder Brothers of a Department Order dated December 20, 2005 (Order). The genesis of this case was a natural gas explosion which killed three people. The explosion occurred on March 5, 2004 at the Harper residence located at 365 Sheep Farm Road, Clover Township, Jefferson County (Harper property). Mr. and Mrs. Harper and their grandson were killed.

The Department of Environmental Protection (DEP or Department) began an

investigation into the cause of the fatal explosion. The Department investigated the status of all of the 16 known gas wells located within 3,000 feet of the Harper property. Order, ¶ K. The Department determined from its investigation that the cause of the explosion was the migration of natural gas to the Harper property. Order, ¶¶ I, J. Thus, the Department determined that it needed to continue its investigation. Order, ¶ Y.

The Department thus issued the Order to Snyder Brothers and others who are identified as the past or present owners or operators of the wells subject to the investigation. The Department cites the Oil and Gas Act, 58 P.S. §§ 610.101 – 601.605 (the Act), and Section 1917-A of the Administrative Code, 71 P.S. § 510-17, as the basis of its Order.

The Order contains three operative paragraphs. The first two require the submission of certain documentation and information regarding the wells and that the parties account for the disposition of any records no longer in the parties' possession. That part of the Order is not a subject of appeal as Snyder Brothers has already complied with those provisions.

The third paragraph of the Order, which is at the heart of this litigation and the current motion for summary judgment, requires that Snyder Brothers hire a contractor to perform certain testing on the well known as Shields 9. The Order states, ". . . the Department deems it necessary to require Snyder Brothers to conduct mechanical integrity testing on well 37-065-23922." Order, ¶ Z. The Department's Order further states ". . . the migration of gas from a gas well through a subsurface which causes an explosion and results in the death of citizens constitutes a public nuisance at common law." Order, ¶ AA.

Snyder Brothers argues that, as a matter of law, the Department has no authority under either the Oil and Gas Act or the Administrative Code to require it to hire a consultant to do testing. Snyder Brothers does not argue that the Department may not do the testing itself, or

conduct an investigation, or that the information required by Paragraph 3 of the Order is off limits to the Department. Indeed, Section 508 of the Act specifically authorizes the Department to "make such inspections, conduct such tests or sampling or examine books, papers and records pertinent to any matter under investigation pursuant to this act as it deems necessary to determine compliance with this act..." 58 P.S. § 610.508(a). Its argument is that the Department cannot order Snyder Brothers, itself, to do the testing.

After both Snyder Brothers and the Department had submitted briefs on the Motion, the Board issued an Order dated October 11, 2006 requiring supplemental briefing to address two Commonwealth Court decisions, namely, *A. H. Grove & Sons, Inc. v. DER*, 452 A.2d 586 (Pa. Cmwlth. 1982) and *Al Hamilton Contracting Co., Inc. v. DER*, 659 A.2d 31 (Pa. Cmwlth. 1995). The parties duly submitted their supplemental briefs and the Motion is ripe for disposition.

Discussion

For the Board to grant summary judgment, the record, which is defined as the pleadings, depositions, answers to interrogatories, admissions, affidavits, and certain expert reports, must show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.2; *Holbert v. DEP*, 2000 EHB 796, 807-809, *citing County of Adams v. DEP*, 687 A.2d 1222, 1224 (Pa. Cmwlth. 1997). In reviewing a motion for summary judgment, the Board views the record in a light most favorable to the nonmoving party. *Holbert*, 2000 EHB at 808. For Snyder Brothers to prevail at this stage on its Motion, we must conclude that, under the circumstances here, as they are known at this stage of the proceedings, the Department, as a matter of law, may not order a well owner or operator to perform testing of its well. We cannot and do not so conclude. Therefore we will deny Snyder Brothers' Motion.

The parties have focused on Section 503 of the Act which provides:

> . . . the department shall have the *authority to issue such orders as are necessary to aid in the enforcement of the provisions of the act.* An order issued under this act shall take effect upon notice, unless the order specifies otherwise. The power of the department to issue an order under this act is in addition to any other remedy which may be afforded to the department pursuant to this act or any other act.

58 P.S. § 610.503(a) (emphasis added). Snyder Brothers' Motion rests on the proposition that Section 503 of the Oil and Gas Act does not allow the Department to order a party to do testing if the party is not in current violation of the Act. Snyder Brothers argues that the phrase "necessary to aid in the enforcement of the provisions of the act" is a limitation on the Department's authority such that it may issue orders requiring a party to do testing only when the ordered party is in current violation of the Act. We cannot accept Snyder Brothers' proviso on Section 503.

Section 503 does not contain the proviso Snyder Brothers urges. The Act does not say that the Department may issue such orders as are necessary to aid in the enforcement of the provisions of the act, *provided that the ordered party is in current violation of the Act.* While it is true that Section 508 of the Act specifically authorizes the Department to make inspections and conduct testing of wells, that does not mean that Section 503 prohibits the Department from issuing orders requiring the owner or operator to do testing or that the Department may do so only if the owner or operator is in current violation of the Act.

In any event, we agree with the Department that its Order is at least facially within the scope of Section 503 because it is aimed at and tied to accomplishing the purposes set forth in the Act. Section 102 of the Oil and Gas Act is the "Declaration of Purpose" section of the Act and it states in relevant part:

> The purposes of this act are to:
>
> (1) Permit optimal development of the oil and gas resources of Pennsylvania consistent with the protection of health, safety, environment and property of the citizens of the Commonwealth.
>
> (2) . . .
>
> (3) Protect the safety and property rights of persons residing in areas where such exploration, development, storage or production occurs.

58 P.S. § 601.102. In this case we have a natural gas explosion which killed three people caused by the migration of stray natural gas. We do not find it hard to conclude that an order requiring the owner or operator of a gas well in proximity to the explosion to perform investigatory steps on its well is within the ambit of the "development of oil and gas resources...consistent with the protection of health, safety, environment and property of the citizens of the Commonwealth" and "protect[ing] the safety and property rights of persons residing in areas where such exploration, development, storage or production occurs."

As stated earlier, the Board ordered both Snyder Brothers and the Department to file additional briefing on the Motion for Summary Judgment with respect to two Commonwealth Court decisions: *A. H. Grove & Sons, Inc. v. DER*, 452 A.2d 586 (Pa. Cmwlth. 1982) and *Al Hamilton Contracting Co., Inc. v. DER*, 659 A.2d 31 (Pa. Cmwlth. 1995). In *A.H. Grove*, the Department determined that several wells were contaminated with gasoline, oil and solvents. *A. H. Grove*, 452 A.2d 586. After conducting an investigation, the Department found that the contaminated wells were down slope and in line with A.H. Grove's property. The Department issued an order under Section 316 of the Clean Streams Law (CSL), 35 P.S. § 691.316, requiring A.H. Grove to

do testing in order to determine the extent of the pollution for purposes of abatement.[1] A.H. Grove appealed the order to the EHB. The EHB found that the Department was justified in ordering A.H. Grove to perform testing since the Department had proven groundwater contamination and established A.H. Grove as the most probable source of the contamination. *Id.* at 587.

On appeal to the Commonwealth Court, A.H. Grove asserted that the Department was without authority under Section 316 of the CSL to order testing to prove the source of the contamination at his expense. *Id.* at 589. The Court reviewed the language of Section 316 and upheld the EHB's decision. The Court reasoned that no other conclusion was logical except that the groundwater pollution resulted from conditions on A.H. Grove's property and the order that DEP issued was directed toward abating the pollution as provided by Section 316. *Id.* at 590.

In *Al Hamilton*, the Department issued an order, as in *A.H. Grove,* under Section 316 of the CSL. The order stated that Al Hamilton's mine site was the most likely source of contamination of neighboring properties and Al Hamilton must perform investigatory self-testing of groundwater to be submitted to the Department. *Al Hamilton*, 659 A.2d at 33. Al Hamilton appealed the order and the EHB held that the Department had met its burden of establishing by a preponderance of the evidence that ordering Al Hamilton to do the groundwater study itself was not contrary to the law or an abuse of discretion. *Id.* at 34. At the trial before the EHB, the EHB found that DER had made a *prima facie* showing of a causal connection between its operation

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[1] Section 316 provides:

> Whenever the Department finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth, the *Department may order the landowner or occupier* to correct the condition in a manner satisfactory to the Department or it *may order such owner or occupier to allow . . . [a] person or agency of the Commonwealth access to the land* to take such action.

35 P.S. § 691.316 (emphasis added).

and the pollution in question. Al Hamilton filed an appeal to the Commonwealth Court and asserted that the Department's order to require investigatory self-testing was beyond its statutory authority under Section 316.

The Commonwealth Court stated that Section 316 was not applicable since it dealt with abatement orders and the *Al Hamilton* case dealt with the initiation of studies, *i.e.* investigation. The Court stated, "Section 316 allows DER to require studies only in the context of an abatement order, just as DER did in . . . *A.H. Grove*." *Id.* at 39. The Court continued by stating that although it did not agree that Section 316 authorized the Department to issue such an order, Section 610 of the CSL, 35 P.S. § 691.610, did give authority to the Department to order Al Hamilton to conduct groundwater studies even in the absence of an abatement order. *Id.* Section 610 of the CSL provides: "The department may *issue such orders as are necessary to aid in the enforcement of the provisions of this act* . . . ." 35 P.S. § 691.610 (emphasis added). This is the same language which we find in Section 503 of the Oil and Gas Act. The Court held that the self-testing order under CSL Section 610 was sustainable because the Department had shown at trial by a preponderance of the evidence that the Al Hamilton operation was the source of the pollution. *Al Hamilton,* 659 A.2d at 39.

We think that the analysis of *A. H. Grove* and *Al Hamilton* support our conclusion here that the Order can at least survive a summary judgment challenge. The *Al Hamilton* court, facing the same statutory language, concluded that a self-testing order was authorized. The problem, of course, is that the *Al Hamilton* case came up after a trial and there was a finding that Al Hamilton's site was the most likely source of the problem. *Al Hamilton Contracting Company v. DER*, 1994 EHB 1027. We do not have a trial or supersedeas record here establishing or refuting any causal linkage between the Shields 9 well and the fatal explosion at the Harper

property. The Order does, however, at least state that the Department's initial investigation determined that the explosion was caused by the migration of stray natural gas onto the Harper residence.

We think (but are not holding now) that in light of *Al Hamilton*, the Department will have to show by a preponderance of the evidence a causal link between Shields 9 and the explosion. In any event, whether the Order can survive a supersedeas trial or a trial on the merits is another question for another day.

Accordingly, we deny Snyder Brothers' Motion and enter the following order:

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

SNYDER BROTHERS, INC.	:	
	:	
v.	:	**EHB Docket No. 2006-002-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and KENNETH W. HARPER, Intervenor	:	

ORDER

AND NOW, this 4th day of December 2006, IT IS HEREBY ORDERED that the Appellant's Motion for Summary Judgment is **denied**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

DATED: December 4, 2006

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DONALD MARTZ, JR.	:	
	:	**EHB Docket No. 2004-241-MG**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 6, 2006**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Judge

Synopsis

The Board grants a motion for summary judgment by the Department and dismisses the appeal of an administrative order directing the removal of fill and waste from a wetland. There are no genuine issues of material fact in dispute and the Department has proven that the factual circumstances justified the issuance of the order and that the Department's action was reasonable and authorized by law.

OPINION

Before the Board is a motion for summary judgment by the Department of Environmental Protection which seeks to dismiss the appeal of Donald Martz, Jr. That appeal challenged a September 2004 administrative order directed to the Appellant and

his siblings which required the removal of waste and fill from wetlands located on property owned by them.

Procedural Background

The Department filed this motion for summary judgment in July 2005. Although the Appellant briefly secured representation by an attorney, that counsel was discharged by the Appellant in August 2005, and the Appellant has continued to pursue his appeal pro se. When the Appellant failed to respond to the Department's motion, the Board held a conference call with the Appellant and the Department. Thereafter proceedings were stayed to allow the Department and the Appellant an opportunity to make arrangements for the removal of the garbage and fill which was the subject of the administrative order. Department counsel worked diligently and was able to secure some funding for the removal of some of the material, and the Appellant also did some work to remove the materials from the Site. The Board monitored the parties' progress as they continued to work together until September, 2006, when work at the Site by the Appellant stopped. According to the Department's last status report, although it received approval to use funds from the Solid Waste Abatement Fund to clean up the Site, the Appellant and his siblings were not able to participate in the bidding process to provide labor for the clean-up. Accordingly, the Department requested that the Board lift the stay and proceed with the July motion for summary judgment.

The Board granted the Department's request and ordered the Appellant to respond to the Department's motion on or before October 23, 2006. To date, the Appellant has not

filed any response to the Department's motion. As we explain in more detail below, we will grant the Department's motion and dismiss the Appellant's appeal.[1]

Factual Background

The Appellant, along with his siblings, inherited a parcel of property from his parents identified as Tax Parcel Number 3-23-11, Deed Book 154, Page 1438, located in Derry Township, Montour County (hereinafter referred to as "the Site".) There is a jurisdictional wetland located on the Site. Over the last ten years household garbage has been dumped and buried on the Site and wood from remodeling work has been burned there. Fill was placed in the wetland on the Site. Much of this dumping was done by Donald Martz, Sr. (the Appellant's father) and Michael Martz who currently resides on the property. The Appellant also admitted that he and other members of the family also dumped, burned and buried waste on the Site over the last ten years. The Department has inspected the Site several times since 2002 and informed both Donald Martz, Sr. and Michael Martz that the dumping of garbage and fill at the Site violated the Solid Waste Management Act and that the material would have to be removed. Donald Martz, Sr. died in 2003, but Michael Martz continued to reside at the Site and the Department continued its inspections and attempts to persuade the Martz's to stop dumping and burning and remove some of the waste. After a January 2004 inspection where the Department

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[1] The Board will only grant summary judgment where the evidentiary materials which support the motion demonstrate that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *E.g. Scalice v. Pennsylvania Benefits Trust Fund,* 883 A.2d 429 (Pa. 2005); *Jones v. SEPTA*, 772 A.2d 435 (Pa. 2001); *Global Ecological Services, Inc. v. Department of Environmental Protection,* 789 A.2d 789 (Pa. Cmwlth. 2001); *Barra v. DEP*, EHB Docket No. 2003-038-L (Opinion issued April 24, 2006).

inspector observed a significant amount of waste dumped on the ground and buried in the wetland, the Department issued a Notice of Violation to Michael Martz. When another inspection in April 2004 revealed that Michael Martz continued to dump and burn on the Site, the Department issued a field order which directed Michael Martz to cease burning, burying and dumping any solid waste at the Site and to remove waste visibly dumped on the surface of the ground by April 29, 2004. Thereafter Michael Martz was found guilty by a district magistrate of dumping waste without a permit.

On April 26, 2004, the Department conducted a follow-up inspection of the Site. At that time some waste had been removed. The Appellant arrived at the Site and agreed to help Michael Martz remove the visible garbage. Yet in a May inspection, the Department observed that the Site remained unchanged from conditions during the April 26 inspection. The Department again inspected the Site on August 24, 2004, and observed no solid waste on the surface of the ground. However, on September 27, 2004, the Department issued an administrative order to the Appellant, Michael Martz and the other Martz siblings which required further remediation at the Site. The Department charged that the burning, burying and disposing of solid waste at the Site violated the Solid Waste Management Act, and the placement of fill in the wetland violated the Clean Streams Law and the Dam Safety and Encroachment Act.

The Appellant filed a timely appeal from the Department's order,[2] and raised three general objections: (1) the Martz children do not own the Site; (2) because waste was removed from the surface of the ground, removal of the buried waste and wetland fill is

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[2] John Martz, Sr. also appealed, but his appeal was dismissed because it was untimely filed. *See Martz v. DEP*, 2005 EHB 349.

not necessary; and (3) since the Department did not previously focus its enforcement action on the wetland fill, it is not appropriate to do so now.

Where the Department issues an order which is appealed, it is the Department who bears the burden of proof.[3] Accordingly, in order to prevail it must prove the factual basis for the enforcement action, that the enforcement action was authorized by law, and that the order was reasonable.[4]

The Appellant has not filed any response to the Department' motion. The Board's rules provide authority to grant the Department's motion for that reason alone.[5] The Board has granted summary judgment motions and dismissed appeals where a party fails to respond to a dispositive motion many times.[6] However, we will nevertheless address the merits of the Department's motion. The factual averments made by the Department were supported by the record. We find that the facts support the Department's conclusion that the Solid Waste Management Act and the Clean Streams Law were violated by the placement of solid waste on the Site and fill in the wetlands on the Site.

In his notice of appeal, the Appellant contends that he does not own the property. The Department argues that pursuant to the Probate, Estate and Fiduciaries Code, the Appellant inherited the property from his parents as a matter of law.[7] There is no evidence that the property was transferred. Therefore, as an owner of the Site, the

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[3] 25 Pa. Code § 1021/122(b)(4).

[4] *See, e.g., Starr v. DEP*, 2003 EHB 360.

[5] *Lucas v. DEP*, 2005 EHB 913, and the cases cited therein. *See also* 25 Pa. Code § 1021.94a(h)(rule promulgated February 2006 which codifed Board practice).

[6] *Lucas.*

[7] 20 Pa. C.S. § 2103.

Appellant is responsible for the fill placed in the wetland.[8] Further, the Solid Waste Management Act precludes any person from storing, collecting or disposing of solid waste without a permit. Since the Appellant has not denied that he participated in the placement of waste on the Site, he is also in violation of the Solid Waste Management Act.

The Clean Streams Law, Dam Safety and Encroachments Act and the Solid Waste Management Act invest the Department with broad authority to issue orders to individuals in order to secure compliance with those statutes and protect the environment of the Commonwealth.[9] We find nothing unreasonable or extreme in the administrative order issued to the Appellant which requires him to remove waste that was unlawfully deposited and stored at the Site. In the circumstances presented here, it is well within the Department's authority to require the buried waste to be removed and for the fill to be removed from the wetland. That the focus of the Department's enforcement efforts may have focused more on the waste that was deposited and buried than the fill that was left in the wetlands, does not preclude it from seeking compliance with its wetland regulations now.[10]

In short, we conclude that there are no genuine issues of material fact in dispute which support a conclusion that the Department's order was factually justified and

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[8] Section 316 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.316.

[9] Clean Streams Law, 35 P.S. § 691.5; Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. § 693.20; Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.602.

[10] *Lackawanna Refuse Removal, Inc. v. Department of Environmental Resouces,* 442 A.2d 423 (Pa. Cmwlth. 1982)(prior lax enforcement does not preclude the Department from later performing its duty to enforce the law).

reasonable. We therefore grant the Department's motion for summary judgment and dismiss the Appellant's appeal. We enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONALD MARTZ, JR.	:	
	:	**EHB Docket No. 2004-241-MG**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 6th day of December, 2006, the motion for summary judgment by the Department of Environmental Protection is hereby **GRANTED**. The appeal of Donald Martz, Jr. in the above-captioned matter is hereby **DISMISSED**.

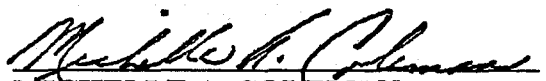
ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Chief Judge and Chairman

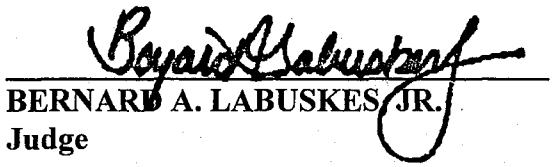
GEORGE J. MILLER
Judge

THOMAS W. RENWAND
Judge

EHB Docket No. 2004-241-MG



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

DATED: December 6, 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: December 18, 2006**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis:

In an appeal from a compliance order, the Board holds that loading noncoal materials into trucks at a permitted noncoal surface mine fits within the definition of surface mining activities.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Noncoal Surface Mining Conservation and Reclamation Act, 52 P.S. § 3301 *et seq.* (the "Act"), and the rules and regulations promulgated thereunder.

2. Robachele, Inc. ("Robachele") is a Pennsylvania corporation with a mailing address of 51 Laurel Brook Drive, Bear Creek, Pennsylvania 18702.

3. McClure Enterprises, Inc. ("McClure") holds a noncoal surface mining permit authorizing it to mine a five-acre site in Duryea Borough, Luzerne County (the "site"). (Commonwealth Exhibit ("C.Ex.") 1; Robachele Exhibit ("R.Ex.") 1, 2; Transcript pages ("T.")

8, 10, 16, 62-63.)

4. On April 8, 2005, the Department observed Robachele on the site loading a stockpile of previously screened, sand-like material onto trucks. The material was being loaded with a backhoe owned by Robachele and operated by an employee of Robachele into trucks owned by Robachele. (T. 10-11, 14-16, 40-41.)

5. The noncoal material being loaded had originally been excavated at the site by McClure. (T. 24, 38-40, 77, 81-84, 86.)

6. The material had been processed in a screening unit to remove rocks and debris. It is not clear who screened the material. (T. 83-86.)

7. McClure used the material to build roads on another mine site. (T. 81-82.)

8. Robachele hauled the material away for use in building a residence at a site in Bear Creek. (T. 11.)

9. Robachele did not have a license to mine. (T. 20.)

10. Robachele did not have a permit to mine on the site. (T. 19.)

11. The Department did not approve Robachele as a subcontractor in McClure's permit. (R.Ex. 1, 2; T. 9, 19-20, 22, 67-68.)

12. The Department issued the compliance order that is the subject of this appeal to Robachele on April 8, 2005 (the "Order"). (C.Ex. 1; T. 10, 16.)

13. The Order cited Robachelle for mining without a license or a permit. The Order required Robachele to immediately cease all mining activity. The Order stated that Robachele could only restart operating on the site "with permission of the Permittee." (C.Ex. 1.) The Department issued an inspection report at the same time to the same effect. (C.Ex. 1.)

DISCUSSION

Surface Mining

Robachele's first objection to the Order is that its activities on the site did not meet the definition of "surface mining." The Act provides that "[n]o person shall conduct a surface mining operation unless the person has first applied for and obtained a license from the Department." 52 P.S. § 3305(a). *See also* 25 Pa. Code § 77.51(a) (a person who conducts noncoal surface mining as an operator shall obtain a license.) The Act defines "surface mining" and "operation" separately. "Surface mining" is

> [t]he 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, including, but not limited to, strip mining, auger mining, dredging, quarrying and leaching and all 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; but it does not include those mining operations carried out beneath the surface by means of shafts, tunnels or other underground mine openings.

52 P.S. § 3303. *See also* 25 Pa. Code § 77.1 (defining "surface mining activities" the same way). "Operation" is defined as

> [t]he pit located upon a single tract of land or a continuous pit embracing or extending upon two or more contiguous tracts of land."

52 P.S. § 3303. "Pit" is defined as "[t]he place where minerals are being mined by surface mining." *Id.* An "operator" is a person "engaged in a noncoal surface mining as a principal as distinguished from an agent or an independent contractor." 25 Pa. Code § 77.1.

The Act also says that no person shall operate a surface mine without a permit. 52 P.S. § 3307(a). The corresponding regulation states that a "person may not conduct noncoal mining

activities" without a permit. 25 Pa. Code § 77.101(a).

Robachele does not dispute what occurred on the site. (Robachele Brief at 8.) Robachele entered onto McClure's mine site, loaded screened, sand-like material that had been excavated on the site into trucks, and hauled it away. The record does not support a finding that Robachele did anything else.

Most of the cases that have addressed the definition of surface mining have focused on whether a particular operation as a whole was a surface mining operation. *See Gintner Coal Co. v. EHB*, 306 A.2d 416 (Pa. Cmwlth. 1973) (removing coal from culm banks constitutes surface mining); *Holbert v. DEP*, 2000 EHB 796 (picking bluestone from old bluestone piles constitutes surface mining); *Linde Enterprises, Inc. v. DEP*, 1996 EHB 382, *aff'd*, 692 A.2d 645 (Pa. Cmwlth. 1997) (borrow pit constitutes a surface mine). These cases are not directly on point here because there is no dispute in this appeal that the McClure site is a surface mine and that regulated surface mining activity was taking place at the site. The precise issue in this case is whether Robachele's activity should be considered part of that surface mining operation. In other words, we must decide whether there is any reason to treat Robachele's role separately from the other mining activity on the site.

While loading finished product may or may not be mining *per se*, the statutory definition of surface mining goes well beyond paradigmatic mining to encompass all surface activity "connected with" surface mining. 52 P.S. § 3303. This Board has previously held that handling material that was already extracted, processed, and segregated constitutes surface activity "connected with" the surface mining itself. *Bedford County Stone and Lime Co. v. DER*, 1987 EHB 91, 93-94. *See also Holbert*, 2000 EHB at 805 n.15 (discussing *Bedford Stone and Lime*). Thus, activity on a permitted site that involves the handling of the noncoal minerals that were

excavated on the site is activity "connected with" mining. Any party engaged in that activity must obtain authorization to do so from the Department.

Conceding *arguendo* that its activity was mining, Robachele contends that its activity "was so *de minimus* as to not warrant a violation by DEP." Robachele does not cite any authority in support of a *de minimus* exception and we are not independently aware of any such exception. Even if there were such an exception, the record would not support its application here. Robachele handled multiple truckloads of material over the course of five or six days. (T. 14, 40.)

Robachele argues that its activity qualified as an exception to the definition of surface mining for the "extraction of minerals by a landowner for his own noncommercial use from land owned or leased by him." 52 P.S. § 3303(1). Robachele claims that it could have proven that it had the landowner's permission to remove the material but was precluded from doing so at the hearing. We will assume for our current purposes that Robachele did indeed have the landowner's permission to take the material. The exception nevertheless does not apply because Robachele was not extracting materials for the *landowner's* noncommercial use. Robachele removed the material for its own use in building a residence in Bear Creek. (T. 11.)

Permission to be on the Site

Robachele argues that it had McClure's and/or the landowner's permission to be on the site. It argues that we erred by excluding evidence that would have shown that it had permission to remove the material. Specifically, we excluded the testimony of Harold Clemo, who Robachele offered to show that Robachele had McClure's permission to be on the site (Brief at 11-12; T. 49-50, 53-55, 58), and we limited Robachele's cross-examination of David Domiano, a principal of McClure, regarding the permission issue (T. 70, 88).

We hereby incorporate into this Adjudication our previous discussion regarding this issue that was set forth in our prior Opinion and Order granting the motion to quash Clemo's subpoena:

> 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 permission to mine on 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 Robachele 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.
>
> * * *
>
> 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.

(Opinion and Order, May 26, 2006). For the same reasons, it was appropriate to limit Robachele's cross-examination of Domiano on the permission issue.

Waiver and Estoppel

Robachele contends that the Department knew that Robachele and/or additional persons other than McClure previously operated on the site. "As a result, DEP has waived and/or should be estopped from pursuing the April 8, 2005 violation...." (Brief at 10.) In order to apply the doctrine of equitable estoppel against a government agency, it must be shown that the agency intentionally or negligently represented some material fact and induced the party to act to its detriment, knowing or having reason to know that the other party would justifiably rely on the misrepresentation. *Bolduc v. Bd. Of Supervisors of Lower Paxton Twp.*, 618 A.2d 1188 (Pa. Cmwlth. 1992); *Attawheed Foundation v. DEP*, 2004 EHB 858, 879; *Kane Gas Light & Heating Co. v. DEP*, 1997 EHB 451, 454. Robachele provided no evidence to suggest that the Department misrepresented any material facts or that the Department induced Robachele to operate without a license, or that the Department would have any reason to know that Robachele would rely on anything that it said or did.

We do not believe the record supports Robachele's allegation that the Department was aware of other unpermitted operators on the site (T. 36-44), but even if it was aware, the Department does not forfeit its ability to enforce the law because of mistaken indulgence or laxity in the past. *Altoona City Authority v. DER*, 1992 EHB 779, 783; *Lackawanna Refuse Removal, Inc. and Northeastern Land Development Company v. Department of Environmental Resources*, 442 A.2d 423, 426 (Pa. Cmwlth. 1982).

Due Process

Robachele points out that it is entitled to due process of law in administrative proceedings. That is obviously true, but it is not entirely clear how Robachele contends that it was deprived of its constitutional rights. It appears that Robachele's primary complaint is that it

was misled by Department's inspection report and the Order because the documents cited Robachele for mining without McClure's permission, said that "Robachele cannot take material without permission of permittee," and "Robachele can only restart with permission of Permittee." (C.Ex. 1.) We would have to agree that the language regarding McClure's permission is somewhat superfluous. We do not agree, however, that the language causes unreasonable confusion regarding the precise statements of the violations that Robachele was accused of; namely, mining without a license and without a permit. To the extent that Robachele argues that the Order deprived it of reasonable notice of the citations against it and thereby deprived it of due process, the argument has no merit. Robachele offered no testimony in support of a contention that it was misled by the Order. We do not read the Order to suggest to a reasonable person that obtaining McClure's permission would be enough to continue operating on the site. Robachele needed McClure's permission to continue surface mining on McClure's permitted site, 52 P.S. § 3308, but the Order makes it clear that it also needed the Department's permission, 52 P.S. §§ 3305, 3307, and 3308. These authorizations are not mutually exclusive. Assuming as we have in this Adjudication that Robachele had McClure's permission, it still needed the Department's authorization, and the Order cannot be read to suggest otherwise.

To the extent that Robachele contends that the Order gave rise to an estoppel claim, the argument is without merit. Even if the Order constituted a misrepresentation of the law (which it did not), it was issued *after* Robachele's violation of the Act. Any misrepresentation contained in the Order could not have induced Robachele to act differently before the April 8, 2005 Order was issued.

To the extent that Robachele contends that it was deprived of due process by our evidentiary rulings, again, the argument has no merit. Although a party has a right to

administrative review of a Departmental action, it does not have the right to present irrelevant evidence. *Leeward Construction v. DEP*, 821 A.2d 145, 155 (Pa. Cmwlth. 2003). As discussed above, evidence as to whether McClure gave its permission for Robachele to be on the site simply has nothing to do with the violations cited in the Order, which go to the relationship between the Department and Robachele, not Robachele and McClure.

Finally, in connection with its claim that it was deprived of due process, Robachele objects to our ruling excluding from evidence a complaint filed in a federal lawsuit brought by McClure alleging that Departmental employees were coerced or bribed. Robachele says that the question of bribery or coercion "goes to the propriety of the complaint made by the permittee in this case and the credibility of permittee and the credibility of Mike Soloski [the Departmental inspector] who testified." (Brief at 15.) Robachele does not explain why the "propriety of the complaint made by the permittee" has any bearing in this appeal. Robachele is apparently referring to the fact that the Department inspected the site and discovered Robachele's violations in response to a telephone call from McClure. (T. 10.) McClure's motivation for calling the Department, however, has no relevance to the pertinent issue in this case; namely, whether Robachele was mining without proper DEP authorization.

As to its use as an impeachment device, the key facts in this case are undisputed. Robachele loaded sand on the site and it did not have a license or a permit authorizing it to do so. There was no contrary testimony to impeach. The only factual dispute in Robachele's mind was whether Robachele had McClure and/or the landowner's permission to be on the site, but as we have now repeated *ad nauseum*, that dispute is irrelevant.

The Failure to Comply Order

In its notice of appeal, Robachele identified the "action being appealed" as the April 8,

2005 order that we have been discussing. Robachele, however, failed to attach a copy of that order to its appeal as required by our rules. We issued an order directing Robachele to perfect its appeal by submitting a copy of the "action being appealed." In response, Robachele filed several documents, including the April 8 order but also including a separate order issued by the Department on April 12 citing Robachele for failing to comply with the April 8 order. (Robachele continued to haul sand away after the April 8 order.) Robachele submitted the packet of documents on May 19, 2005, which was past the 30-day deadline for filing an appeal from the April 12 order. Robachele contends that this submission was enough to constitute an appeal from the April 12 order as well as the April 8 order. We disagreed and granted the Department's motion in limine to exclude evidence regarding the April 12 order at the hearing. Robachele maintains in its post-hearing brief that we erred in granting the Department's motion.

We stand by our original ruling. The opportunity to *perfect* an appeal is not an opportunity to file a separate, late appeal. Robachele clearly identified the April 8 order as the action being appealed. Its notice of appeal otherwise objected solely to the April 8 order. The only purpose of our perfection order was to obtain a copy of that order, not to provide Robachele with an opportunity to file a late appeal from a separate order.

After we granted the Department's motion in limine, Robachele moved to amend its appeal from the April 8 order to include an appeal from the April 12 order. We denied that motion, first at the hearing, and later in response to a written motion to amend that Robachele filed after the hearing. *Robachele v. DEP* (Opinion and Order issued June 14, 2006). Robachele continues to claim that we erred by not allowing the amendment. Again, we stand by our earlier rulings. As we explained in our June 14, 2006 Opinion and Order,

> [a]n 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.
>
> * * *
>
> 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.

(Opinion and Order, June 14, 2006.)

Evidence Regarding Civil Penalties

The Department apparently assessed penalties for Robachele's violations as documented in the April 8 and 12 orders. Robachele argues that we erred by excluding evidence regarding those penalty assessments at the hearing. Robachele's argument is without merit. Robachele did not appeal the civil penalty assessments. Those assessments are not before us and are outside the scope of our inquiry in the appeal challenging the legitimacy of the April 8 order.

Robachele cites *Kent Coal Mining Company v. DER*, 550 A.2d 279 (Pa. Cmwlth. 1988), for the proposition that it can challenge civil penalties simply by appealing an order, but the issue in *Kent Coal* was whether an appellant who challenges a penalty assessment can at the same time challenge a previously issued compliance order giving rise to the penalty even though the appellant did not appeal from that order. 550 A.2d at 279. Here, the opposite situation is presented. Robachele appealed from the order but not from the civil penalty assessment. *Kent* is not on point.

CONCLUSIONS OF LAW

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

2. When the Department issues a compliance order it bears the burden of proving by a preponderance of the evidence that (1) the facts support the order, (2) the order was authorized by law, and (3) the order was a reasonable exercise of the Department's discretion. 25 Pa. Code § 1021.122(b)(4); *Banfe Soil & Mulch, Inc. v. DEP*, EHB Docket No. 2005-359-MG slip op. at 4 (September 20, 2006); *Carignan v. DEP*, 2004 EHB 730, 736; *Strubinger v. DEP*, 2003 EHB 247, 250.

3. No person may operate a noncoal surface mine without first obtaining a permit. 52 P.S. § 3307(a); 25 Pa. Code § 77.101(a).

4. No person may conduct a noncoal surface mining operation without first obtaining a license. 52 P.S. § 3305(a); 25 Pa. Code § 77.51(a).

5. No person may conduct noncoal surface mining activity as a contractor without being listed as a contractor in a permit application and approved by the Department prior to engaging in surface mining operations. 52 P.S. § 3308(b)(2); 25 Pa. Code § 77.126(a)(7).

6. "Surface mining" as defined in the Act includes not only mining *per se*, but all

surface activity on the mine site that is connected with the mining. 52 P.S. § 3303.

7. Any activity on the mine site that involves handling the noncoal materials that were excavated on the site is activity connected with mining.

8. On April 8, 2005, Robachele conducted surface mining activity on the site. Therefore, it was required to obtain a mining license, a permit, and/or status as a Department-approved subcontractor on the permit.

9. Although Robachele needed McClure's permission as a practical matter to operate on the site, it also needed the appropriate authorizations from the Department. The evidence regarding whether Robachele had the landowner or the permittee's permission to be on the site was irrelevant in assessing the validity of the Department's Order.

10. The Department was not barred by estoppel or waiver from issuing the Order.

11. Robachele was not deprived of due process of law.

12. Robachele did not file timely appeals from the Department's April 12, 2005 failure-to-comply order or the civil penalty assessments issued in connection with the violations noted in the April 8 and April 12 orders.

13. Robachele may not employ an amendment to an appeal from Department action as a device for filing an untimely appeal from a second Department action.

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 18th day of December, 2006, it is hereby ordered that Robachele's appeal 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: December 18, 2006

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

For the Commonwealth, DEP:
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Southcentral Regional Counsel

For Appellant:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

STEVE and KAREN SCHAFFER	:	
	:	
v.	:	**EHB Docket No. 2005-087-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 21, 2006**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis:

In an appeal from a compliance order requiring appellants to remove encroachments from a floodway and wetlands, the Board modifies the order to provide the appellants with an opportunity to apply for after-the-fact permits for some of the encroachments.

FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") is the agency of the Commonwealth with the duty and authority to administer and enforce the Dam Safety and Encroachments Act, 32 P.S. § 693.1 *et seq.* ("Encroachments Act"), the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17, and the rules and regulations promulgated under those statutes.

2. Steven J. Schaffer ("Schaffer") is an adult individual who lives in Sandy Township near DuBois, Pennsylvania. Karen Schaffer is Schaffer's wife.

3. Schaffer and his wife own a 17-acre parcel of land in Sandy Township, Clearfield

County, which is located along Van Tassel Road across from Schaffer's home (the "site").

4. Reisinger Run, a Cold Water Fishery, bisects the site into an east and west side. (25 Pa. Code § 93.9s; Commonwealth Exhibit D-47 (hereinafter "C.Ex. 47") and C.Ex. 50.)

5. The Site contains 3.5 acres of widely dispersed wetlands. (C.Ex. 48.) Schaffer has had the wetlands delineated. (C.Ex. 1, 47.) The delineation of the wetlands on the *west* side of Reisinger Run is not disputed by the Department. The delineation on the *east* side of Reisinger Run has varied over time (C.Ex. 1 v. 47) and is the subject of disagreement.

6. A copy of "Attachment 1-Map of Schaffer Property" is attached hereto as Appendix A. This exhibit is Commonwealth Exhibit 50 and was attached to the order under appeal. The map is not entirely accurate but is helpful as a schematic only in understanding this Adjudication.

7. Schaffer has partially developed the site by filling in a potential home site along Van Tassle Road and building a private driving range with certain appurtenant features, including a gravel road starting at the home site fill and crossing Reisinger Run to provide access to the driving range. The access road connects to a cart path that leads to a tee box. (C.Ex. 47.)

8. Other than being a record owner of the site, Karen Schaffer did not participate in any construction activity on the site. (Transcript of Proceedings page ("T.") 459, 535.)

9. The subject of this appeal is an order dated March 11, 2005 issued by the Department to Steven and Karen Schaffer (the "Order").

10. The Order found that the following unpermitted water obstructions and encroachments had been constructed on the site:

1. Seven wetland crossings identified in Attachment #1 as "Wetland Crossing 1" through "Wetland Crossing 7";

2. Four wetland fills identified in Attachment #1 as "Wetland

Fill 1" through "Wetland Fill 4";

3. Two floodway fills identified in Attachment #1 as "Floodway Fill 1" and "Floodway Fill 2";

4. One diversion of wetland hydrology across the Site to Reisinger Run using drainage pipes, in order to effectively drain wetlands, identified in Attachment #1 as "Wetland Diversion" and "Drainage Pipes"; and

5. A nine foot wide, timber deck, steel arch bridge which had been constructed across Reisinger Run (hereinafter "Bridge Crossing").

(Order, Paragraph I.)

11. The Order revoked two general permits for minor road crossings previously obtained by Schaffer and ordered Schaffer "to remove all unauthorized Water Obstructions and Encroachments identified in Paragraph I and to restore the Site to pre-construction contours, elevations and hydrology." (Order, Paragraph 2.)

Wetland Fill 1

12. Wetland Fill 1 is an area of built up earth designed to function as a tee box for the driving range. (T. 539; C.Ex. 24, 25, 49.)

13. Wetland Fill 1 is at least partially constructed in wetlands and in a location where there used to be a natural flow path for sheet flow of surface water. (T. 392-95, 423; C.Ex. 49 (Item 2).)

14. The exact extent of the encroachment as it relates to former wetlands and the former flow path has not been precisely delineated in the field. (T. 137, 166-67, 506; C.Ex. 47, 50.)

15. Schaffer did not obtain a permit to place a portion of Wetland Fill 1 in wetlands. (T. 143.)

Wetland Fill 2

16. Wetland Fill 2 is rip rap that partially fills in a bow-shaped overflow channel of Reisinger Run on the east side of the stream. (T. 508; C.Ex. 26, 27, 49 (Item 2).)

17. There is no evidence that Wetland Fill 2 is in a wetland.

18. Wetland Fill 2 is immediately adjacent to Reisinger Run and in the floodway of Reisinger Run. (C.Ex. 47.) The overflow channel actually floods during some heavy rains. (C.Ex. 49 (Item 2).)

19. Schaffer did not obtain a permit authorizing him to install Wetland Fill 2. (T. 143, 320.)

Wetland Fill 3

20. Wetland Fill 3 is an area where Schaffer intended to build a house that he filled in with material taken from an off-site construction project. (T. 141-42, 477-78; Ex. 28, 29.)

21. Wetland Fill 3 partially encroaches into wetlands. (T. 395, 409.)

22. The exact extent of the encroachment has not been precisely delineated. (T. 161-62, 303-04, 389-395, 463-65, 539; C.Ex. 47, 50.)

23. In order to delineate the extent of the encroachment, it will be necessary to dig test pits to determine what lies below the fill. (T. 303, 410.)

24. Schaffer did not obtain a permit for Wetland Fill 3. (T. 142.)

Wetland Fill 4

25. Wetland Fill 4 is an area on the northern edge of Wetland Fill 3 where a spring flows. (T. 261; C.Ex. 30, 47, 50.)

26. The spring formerly provided hydration to wetlands in the area. (T. 261.)

27. Wetland Fill 4 at least partially encroaches into wetlands. (T. 417.)

28. A box culvert (storm drain) has been installed in the Wetland Fill 4 area that serves to collect flow that would have otherwise hydrated wetlands in the area. (T. 147, 261-62; C.Ex. 30.)

29. The exact extent of the encroachment has not been precisely delineated. (T. 261-62, 417.)

30. Schaffer obtained General Permit GP-7 Number 071798501 ("GP-7-1") from the Department's delegatee, the Clearfield County Conservation District, on or about February 27, 1998. (C.Ex. 1.)

31. Although Wetland Fill 4 is in the same vicinity as "Wetlands Crossing A" in Schaffer's GP-7-1, that permit did not authorize fill (as opposed to a crossing) or a storm drain. Wetland Fill 4, therefore, is not permitted. (T. 78, 261-62, 299, 318, 328, 468; C.Ex. 1, 47, 50.)

Floodway Fill 1

32. Floodway Fill 1 is a slightly built up area of fill designated as a parking and turn-around area for the driving range. (T. 556, 566; C.Ex. 31.)

33. Floodway Fill 1 is within a few feet of the stream bank and it is in the floodway of Reisinger Run. (T. 54, 133, 542; C.Ex. 9, 30, 47, 50.)

34. There is no FEMA map designating the floodway of Reisinger Run on the site. (T. 100.)

35. Reisinger Run has flooded in the past. (T. 416; C.Ex. 49 (Item 2).)

36. Schaffer did not obtain a permit authorizing Floodway Fill 1. (T. 55, 320, 557.)

Floodway Fill 2

37. Floodway Fill 2 is a slightly built up cart path. It varies from being flush with the original surface to several inches above the surface. (T. 97, 509, 554, 576; C.Ex. 13-18, 25, 33.)

38. The majority of Floodway Fill 2 is within 50 feet of the stream bank and in the floodway of Reisinger Run. (T. 417, 553; C.Ex. 9, 50.)

39. Schaffer did not obtain a permit authorizing Floodway Fill 2. (T. 52, 320, 553.)

40. The Sandy Township Engineer determined that the cart path will not result in any increased threat to property or life. (S.Ex. 19.)

Wetland Crossings 1 through 4

41. Wetland Crossings 1 through 4 are actually sections of the cart path (Floodway Fill 2) that are designated as crossing wetlands. (C.Ex. 13-18, 50.)

42. Wetland Crossings 1, 2, and 3 are in wetlands. (C.Ex. 47.)

43. Wetland Crossings 2, 3, and 4 are within 50 of the stream bank of Reisinger Run and in the floodway of Reisinger Run. (T. 62-63, 66, 68-69; C.Ex. 9, 50.)

44. Wetland Crossing 4 is also in an actual overflow channel of Reisinger Run. (T. 414-15.) There is no evidence that Wetland Crossing 4 is in a wetland.

45. Schaffer did not obtain permits authorizing the construction of Wetland Crossings 1, 2, 3, or 4. (T. 62, 66, 68-69.)

Wetland Crossing 5, 6, and 7

46. Wetland Crossings 5, 6, and 7 are part of the roadway leading to the driving range. (C.Ex. 20-23, 47, 50.)

47. Wetland Crossings 5, 6, and 7 are in wetlands. (T. 417; C.Ex. 47.)

48. GP-7-1 authorized the construction of three minor road crossings across wetlands. (C.Ex. 1.)

49. Wetland Crossings 5, 6, and 7 were not installed where they were authorized to be installed by GP-7-1. (T. 32, 38-39, 128, 130-31 (stipulation); C.Ex. 1, 47, 50.)

50. Schaffer obtained General Permit GP-7 No. 071798502 ("GP-7-2") from the Conservation District on or about February 27, 1998. (C.Ex. 2.)

51. GP-7-2 authorized Schaffer to build an eight-foot wide, 25-foot long foot bridge with steel girders and a wood deck across Reisinger Run for access to the driving range. (C.Ex. 2.)

52. Schaffer's testimony that he was advised by the Conservation District and that he otherwise believed that GP-7-2 permitted him to install Wetland Crossings 5, 6, and 7 (T. 474) is not credible. (T. 32, 95, 559-60; C.Ex. 1, 2, 49; Schaffer Exhibit S-8 ("S.Ex. 8").)

53. Neither GP-7-1 nor GP-7-2 in fact authorized Schaffer to install Wetland Crossings 5, 6, and 7. They are unpermitted. (FOF 49-52.)

54. All of the wetland crossings are either properly constructed or might require minor adjustments. (T. 83, 85.)

55. There is no evidence that Floodway Fills 1 and 2 or any of the wetland crossings are causing or threatening any harm to the environment or the public health, safety, and welfare.

Bridge Crossing

56. Schaffer constructed a bridge across Reisinger Run to provide access to the driving range. (C.Ex. 31, 32, 45, 46, 49.)

57. The bridge was not authorized by GP-7-2 because it was built after the right to build a bridge pursuant to that permit had expired. (C.Ex. 49 Paragraph Q.1; S.Ex. 9.)

58. Instead of a bridge, Schaffer originally installed fill with an inadequately sized pipe running through it, which is not what was described in GP-7-2. (T. 32, 46, 419, 482-83; S.Ex. 9.)

59. The bridge is not authorized by any valid permit. (T. 46; S.Ex. 8; FOF 58.)

60. The bridge as currently but belatedly constructed is generally consistent with what was described in GP-7-2. (T. 83.)

61. There is no evidence that the bridge is causing harm or poses a threat to individual property rights, the environment, or the public health, safety, and welfare.

The Wetland Diversion and Drainage Pipes

62. A 1.6-acre area east of Reisinger Run has been designated as the driving range. (T. 156; C.Ex. 38-44, 47, 50.)

63. Schaffer dug ditches and/or deepened existing swales from east to west across the middle of the driving range. (T. 245, 263, 392, 487, 558, 598, 601; S.Ex. 9.) The ditches drained wetlands. (T. 246, 558.)

64. Schaffer's work in constructing and deepening the drainage ditches encroached into wetlands. (T. 262-63, 392, 598, 601; C.Ex. 49; S.Ex. 18.)

65. The Department directed Schaffer in communications prior to the Order to restore the ditches to approximate original contour; i.e., shallow swales (C.Ex. 5, 8.) Schaffer did so. (T. 393-95, 489, 559; C.Ex. 16.)

66. At some point, Schaffer installed an earthen wetland diversion just east of the driving range in the area where the swales are located in order to focus indistinct flow coming onto the site from the east into plastic drainage pipes. The pipes extended across the entire driving range and ended at Wetland Crossing 3 in Floodway Fill 2. (T. 148-50; C.Ex. 9, 16, 17, 34-37.)

67. The diversion and pipes were installed in wetlands. (T. 262-63, 392, 598, 601; C.Ex. 49; S.Ex. 18.)

68. The diversion and pipes are gone. (T. 395.)

69. Schaffer did not have a permit authorizing the deepening of the swales, the construction of the diversion, or the installation of the pipes. (T. 148-49, 264, 315; C.Ex. 49 Paragraphs T, V.)

Other Areas of the Driving Range

70. The Order does not identify any obstruction or encroachments in the driving range outside of the tee box, cart path, and drainage-pipe area. (Order ¶ I.)

71. The Order orders Schaffer to remove all of the identified encroachments and "restore the Site to pre-construction contours, elevations and hydrology." (Order ¶ 2.)

72. There is no record that any restoration work is required or even desired in areas of the driving range beyond those just mentioned. (*See* T. 172, 318, 597.)

DISCUSSION

In an appeal from an order, the Department bears the burden of proving by a preponderance of the evidence that (1) the facts support the order, (2) the order is authorized by law, and (3) the order constitutes a reasonable exercise of the Department's discretion. 25 Pa. Code § 1021.122(b)(4); *Rockwood Borough v. DEP*, 2005 EHB 376, 384; *Carignan v. DEP*, 2004 EHB 730, 736; *Smedley v. DEP*, 2001 EHB 131.

Before we can evaluate the propriety of an order, we must first understand what an order means. As the party with the burden of persuasion, the Department must bear the adverse consequence of any vagueness or ambiguity in a compliance order.

The parties put on a great deal of evidence regarding the extent of the wetlands in the driving range. We do not understand why. We understand the relevance of the evidence regarding the tee box, cart path, and drainage-pipe area because those areas are identified in the Order. The driving range as distinct from those described features, however, is not identified as

an unauthorized encroachment in the Order. It is not shown as an encroachment on Attachment 1 to the Order, which is the map depicting the encroachments listed in the Order. The driving range is not identified as a violation that must be corrected.

The Order requires Schaffer "to remove all unauthorized Water Obstructions and Encroachments identified in Paragraph I and restore the site to pre-construction contours, elevations and hydrology." It is not clear from the face of the Order whether the duty to restore the site is limited to the unauthorized encroachments or the Department intended to include other areas as well. If the Department intended to include other areas affected by encroachments, it is difficult to understand why it would not have listed those encroachments in the Order, especially given its careful cataloguing of those other encroachments.

The record did not clarify this aspect of the Order, despite the Judge's observation at the hearing regarding the lack of evidence relating to the remedial aspect of the Order. (T. 293.) There was brief testimony that the Department is seeking "compliance with the Order," but no explanation of what that entails. (T. 597.) One Department witness testified that the Department is seeking removal of unauthorized fills and crossings (T. 318), but there is nothing to remove in the driving range. Another Department witness specifically indicated that the Department was *not* looking to Schaffer to recontour the driving range. (T. 172.)

We cannot speculate on the meaning of an order. The Department has not shown that the Order requires any restoration work in the outlying areas of the driving range. Because the Order does not address those areas, they are not relevant in this appeal. There is no need for us to resolve the parties' dispute regarding the precise extent of wetlands in the driving range or whether any encroachments occurred in those wetlands. We express no opinion on those issues.

Turning to the other areas identified in the Order, the Department's legal authority to

issue the Order is not at issue. Nor is there any doubt that it had the legal authority to issue the Order. 32 P.S. § 693.20 (the Department may issue such orders as are necessary to aid in the enforcement of the Encroachments Act); *Strubinger v. DEP*, 2003 EHB 247, 251.

As to the facts, we are satisfied that the Department has established that the identified violations occurred, and that Schaffer did not obtain the necessary permits for any of the water obstructions and encroachments. Section 6(a) of the Encroachments Act, 32 P.S. § 693.6(a), provides that "[n]o person shall construct, operate, maintain, modify, enlarge or abandon any dam, water obstruction or encroachment without the prior written permit of the Department." A water obstruction "[i]ncludes any dike, bridge, culvert, wall, wing wall, fill, pier, wharf, embankment, abutment or other structure located in, along, across or projecting into any watercourse, floodway or body of water." 32 P.S. § 693.1. An encroachment is "[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." *Id.* A floodway is defined in the regulations as follows:

> *Floodway* – The channel of the watercourse and portions of the adjoining floodplains which are reasonably required to carry and discharge the 100-year frequency flood. Unless otherwise specified, the boundary of the floodway is as indicated on maps and flood insurance studies provided by FEMA. In an area where no FEMA maps or studies have defined the boundary of the 100-year frequency floodway, it is assumed, absent evidence to the contrary, that the floodway extends from the stream to 50 feet from the top of the bank of the stream.

25 Pa. Code § 105.1.

There is no FEMA map for Reisinger Run on Schaffer's property. Schaffer's own expert found evidence of flooding (T. 416), and Schaffer himself admitted that the stream has overflowed its banks due to heavy rains (C.Ex. 49). There is no evidence as to the exact reach of

the overflow in a 100-year flood. Accordingly, the floodway is presumed to extend from the stream to 50 feet from the top of the bank of the stream. 25 Pa. Code § 105.1.

All or most of Floodway Fills 1 and 2, Wetland Fill 2, and Wetland Crossing 4 are within a few feet of the stream and well within the floodway. All of the features constitute water obstructions. Schaffer did not obtain a permit authorizing the construction of any of the features.

There is no dispute that Wetland Crossings 1 through 7 were built in wetlands. Schaffer's expert conceded that portions of the tee box (Wetland Fill 1), Wetland Fill 3, and Wetland Fill 4 encroached into wetlands. He admitted that the activity in the drainage-pipe area took place in wetlands. The tee-box and the work in the drainage-pipe area actually changed the flow of surface water. Placing fill, deepening and straightening natural swales, installing pipes, and building a wetland division all constitute encroachments and, in the case of the tee box and drainage-pipe area, obstructions.

Schaffer does not assert that he obtained permits, as he was required to do, for the tee box, the drainage-pipe area, or Wetland Fill 3. He fashions a rather strained argument that the Wetland Crossings were covered by GP-7-1 and GP-7-2, but we do not find the argument convincing or credible. The parties stipulated that GP-7-1 identified wetland crossings in different areas than Wetland Crossings 5, 6, and 7. GP-7-1 was for crossings, not the fill placed at Wetland Fill 4.

GP-7-2 was for the construction of a bridge, not wetland crossings. Schaffer claims that the Conservation District provided him with a standard drawing of wetland crossings when he obtained GP-7-2 ("Drawing 6"), but the permit on its face refers to Drawing No. 2. We have examined the permit and do not see how an intelligent, capable person such as Schaffer could believe that a bridge permit authorized wetland crossings. Schaffer later admitted that the

crossings had not been properly permitted. (T. 559-60.) We conclude that all of the wetland crossings were improperly constructed without permits.

There is no dispute that the bridge needed to be permitted. Schaffer's defense is that the bridge was permitted pursuant GP-7-2. It appears that GP-7-2 should not have been issued because it only covers bridges downstream from a drainage area of one square mile or less. The drainage area above Schaffer's bridge is somewhere between 1.21 and 1.23 square miles. But putting that difficulty aside, Schaffer admits that the permit expired before he installed the bridge. (C.Ex. 49.) Further, Schaffer's claim that he was acting in good faith is belied by the fact that he initially installed fill with inadequately sized pipes across the stream rather than the permitted bridge. It was only after his illegal crossing was discovered by the Department that he installed a bridge contemplated by the permit, but as previously noted, that was done after the permit expired.

Having determined that the facts support the Order and the Order is authorized by law, we must decide whether the Order represents a reasonable exercise of the Department's discretion. It is not enough for the Department to prove that violations occurred. It is incumbent upon the Department to prove that all aspects of its order are reasonable, including the remedial action being ordered. *Strubinger v. DEP*, 2003 EHB 247, 252-53.

The Department has satisfied its burden of proving that the removal order is reasonable as to the portions of Wetland Fills 1, 3, and 4 that actually encroach into wetlands. Schaffer's own expert admitted that Wetland Fills 1, 3, and 4 encroach into wetlands. In our opinion, the exact extent of the encroachments is not clear. A field delineation will be necessary for all three areas. There is nothing in the record to suggest that a permit is desired or would be appropriate for these fills. Wetland Fill 4 is particularly troublesome to the extent that it interferes with the flow

of a spring that was feeding a significant area of wetlands.

We do not believe that the Department has met its burden of proving that the removal requirement is reasonable with respect to the other encroachments at the site. As previously noted, there is virtually no record regarding the removal aspect of the Order. The Department's briefs shed no light whatsoever on the question.

With respect to the drainage-pipe area, the area has been recontoured and the diversion and pipes removed. This work was performed prior to the issuance of the Order. The Department has not explained why it is necessary or appropriate to order work that it concedes has already been performed.

The Floodway Fills (the cart path and the parking area) are built with compacted gravel. Except where there are wetland crossings in the cart path, they are not in wetlands. Both fills are at some points flush with the original ground surface and at other points only a few inches above ground surface. There was no testimony that the fills pose any threat to the environment or the public's safety and welfare. Common sense would suggest that they would have a trivial impact in the event of a flood, but there is no testimony one way or the other on the issue. Although not binding on the Department, the Sandy Township Engineer determined in a letter that the cart path will not result in any increased threat to property or life. (S.Ex. 19.) The record shows that Schaffer was asked to and did in fact apply for an after-the-fact permit for the encroachments on the western side of stream. (C.Ex. 48.) The Department never acted on that application. There was no explanation why the Department did not act on the application. The Department has failed to carry its burden of proving that it is reasonable to insist on the immediate removal of the features. It was improper to construct the features without a permit, but Schaffer should be provided with the opportunity to apply for an after-the-fact permit.

If the cart path is to remain, Wetland Crossings 1 through 4, which are actually part of the cart path, will be necessary. Therefore, the fate of those crossings should be evaluated in connection with the cart path. It should be noted that each crossing is very small and appears to be properly constructed. There is no evidence of any adverse impact or threat of impact to any wetlands.

We reach the same result for the bridge. The bridge was clearly constructed illegally in the sense that the permit expired before the bridge was built. On the other hand, the current bridge is well built in accordance with acceptable practices and designs. There was no evidence that the bridge is causing any harm or poses any threat. It is unreasonable to insist that Schaffer be required to remove the bridge without first being given the opportunity to apply for an after-the-fact permit.

Without the bridge, Wetland Crossings 5, 6, and 7 have no obvious purpose. With the bridge, they are necessary. There is no evidence that the crossings, which are each only a few feet across, are causing or threatening any harm. There was no evidence of any adverse impact to the wetlands involved, and the crossings appear to be properly constructed. Schaffer should be given the opportunity to apply for an after-the-fact permit.

Finally, Wetland Fill 2 is rip rap placed in a natural overflow channel. There is no record that it is in a wetland. It is in a floodway, but again, there is no proof in our record of any actual or potential harm. It is not clear what purpose would be served by removing the rip rap. There is no evidence that has materially changed the dimensions of the floodway. The Department has failed to meet its burden of proving that the removal order is reasonable with respect to Wetland Fill 2 without at least giving Schaffer the opportunity to apply for a permit.

We understand that a contentious relationship has developed between Schaffer and the

Department, but that is not a reason in itself to deny Schaffer the opportunity to obtain permits. The Department might believe that the time for permitting has passed because of its protracted but unsuccessful effort to conduce voluntary compliance. However, none of the Department's meetings, reports, and letters had the force of an order. No violations were formally declared until the Order was issued. Although Schaffer has now been found to have violated the law, he was clearly entitled to maintain and litigate his position. The Department at any time could have taken enforcement action, but chose to delay doing so for a considerable period of time. The Department has the right to pursue civil and criminal penalties, but the purpose of *orders* is to attain compliance, not to punish. *Strubinger*, 2003 EHB at 253. Our focus in this appeal is strictly limited to the Order.

The Department has met its burden of proof with respect to the revocation of the general permits. The revocations are authorized by law. 32 P.S. § 693.20. The facts support the revocations. Schaffer has not built and does not intend to build the wetland crossings noted in GP-7-1. There is no reason for the permit to remain extant. The right to build a bridge pursuant to GP-7-2 expired before Schaffer built the permitted bridge. Schaffer is being provided with the opportunity to apply for the appropriate permits. The revocations are entirely reasonable under these circumstances.

Schaffer argues that the Department is estopped from revoking the general permits. (Brief at 40, 50.) The argument is academic. It makes no difference whether the permits continue to exist because GP-7-1 provides for three wetland crossings that have not been and never will be built. The right to build a bridge pursuant to GP-7-2 expired before the bridge was built. In other words, we have concluded that the general permits would not legitimize any of the features on the site even if they continued to exist. Furthermore, we are also ordering that

Schaffer be provided with the opportunity to apply for the proper permits for the features that are the subject of Schaffer's estoppel claim. The features that we have ordered to be partially removed (Wetland Fills 1, 3, and 4) are not the subject of Schaffer's estoppel claim.

Even if it mattered, the record would not support Schaffer's estoppel theory. In order to apply the doctrine of equitable estoppel against a government agency, it must be shown that the agency intentionally or negligently represented some material fact and induced the party to act to its detriment, knowing or having reason to know that the other party would justifiably rely on the misrepresentation. *Robachele v. DEP*, EHB Docket No. 2005-091-L, slip op. at 8 (Adjudication December 18, 2006); *Bolduc v. Bd. Of Supervisors of Lower Paxton Twp.*, 618 A.2d 1188 (Pa. Cmwlth. 1992); *Attawheed Foundation v. DEP*, 2004 EHB 858, 879; *Kane Gas Light & Heating Co. v. DEP*, 1997 EHB 451, 454. The record does not support a finding that either the Department or the Conservation District told Schaffer that he could do what he did. Even as to the bridge, no one told Schaffer that he could build a bridge after the permit expired.

Along similar lines, Schaffer contends that he has a vested right in the general permits. Again, the permits do not advance his situation anyway, so there is no point in keeping them in force. Furthermore, the point is largely academic because we are providing Schaffer with the opportunity to apply for the proper permits. In any event, Schaffer has not satisfied the prerequisites for application of the vested rights doctrine. As we explained in *Attawheed Foundation v. DEP*, 2004 EHB 858, this doctrine is designed to accomplish fairness when a landowner has relied upon a permit that is subsequently found to be invalid. In evaluating a claim of vested rights, courts are to consider the following factors:

(1) due diligence in attempting to comply with the law;

(2) good faith throughout the proceedings;

(3) expenditure of substantial unrecoverable funds;

(4) expiration without appeal of the period during which an appeal could have been taken from the issuance of the permit;

(5) insufficiency of evidence to prove that individual property rights or the public health, safety or welfare would be adversely affected by the use of the permit.

Attawheed, 2004 EHB at 868. There is no record that Schaffer, who is a builder who does all of his own work, expended substantial unrecoverable funds. Even with respect to the bridge, Schaffer's initial construction of a fill crossing and construction after the permit expired belie any claim of due diligence and good faith on his part.

Schaffer has attempted to bolster his case by pointing out that the Army Corps of Engineers inspected his site and decided not to take enforcement action. We find the Corps' involvement in this case to be entirely irrelevant. The Corps operates under a different set of laws, regulations, and policies. Nothing that the Corps says or does restricts the Department in any way. Nothing that the Corps says or does can estop the Department or create a vested right in a Departmental permit.

CONCLUSIONS OF LAW

1. In an appeal from an order, the Department bears the burden of proving by a preponderance of the evidence that (1) the facts support the order, (2) the order is authorized by law, and (3) the order constitutes a reasonable exercise of the Department's discretion.

2. The Department may issue such orders as are necessary to aid in the enforcement of the provisions of the Encroachments Act, including orders suspending or revoking permits. 32 P.S. § 693.20.

3. The Department's compliance orders must clearly identify violations of the law

and remedial actions required. The Department has not satisfied its burden of proving that the Order referred to or required any action in unidentified areas of the driving range. The Board will not speculate on the meaning of a compliance order.

4. Section 6 of the Encroachments Act, 32 P.S. § 693.6(a), provides that, "No person shall construct, operate, maintain, modify, enlarge or abandon any dam, water obstruction or encroachment without the prior written permit of the [D]epartment."

5. 25 Pa. Code § 105.11(a), provides that, "A person may not construct, operate, maintain, modify, enlarge or abandon a dam, water obstruction or encroachment without first obtaining a written permit from the Department."

6. The features listed in the Order constitute encroachments and/or water obstructions as those terms are defined in the Encroachments Act. 32 P.S. § 693.1.

7. Floodway Fills 1 and 2, Wetland Fill 2, and Wetland Crossing 4 are within the floodway of Reisinger Run.

8. Schaffer did not obtain from the Department any written permit for the construction of the water obstructions and encroachments at the site listed in Paragraph I of the Order.

9. Section 18 of the Encroachments Act, 32 P.S. § 693.18(a) and (3), provides that it shall be unlawful for any person to "violate or assist in violation of any provision of [the Encroachments Act] or any rules or regulations adopted [under the Encroachments Act]" or to "construct, enlarge, repair, alter, remove, maintain, operate or abandon any dam, water obstruction or encroachment contrary to the terms and conditions of a general or Standard Joint Water Obstruction and Encroachment Permit or the rules and regulations of the [D]epartment."

10. The construction of the water obstructions and encroachments at the site by

Schaffer without a written permit from the Department and the placement of fill in the wetlands and floodway of Reisinger Run constituted violations of Sections 6 and 18 of the Dam Safety and Encroachments Act, 32 P.S. §§ 693.6 and 693.18.

11. As an owner of the property, Karen Schaffer may be ordered to address unpermitted and/or hazardous conditions on her site. *Rockwood Borough v. DEP*, 2005 EHB 376.

12. The Department must prove that all aspects of its order are reasonable, including the remedial action being ordered. *Strubinger v. DEP*, 2003 EHB 247, 252-53.

13. The Department has satisfied its burden of proving that the removal order is reasonable with respect to the portions of Wetland Fills 1, 3, and 4 that encroach on wetlands.

14. The Department has failed to satisfy its burden of proving that the other identified features in the Order should be removed without first providing Schaffer with the opportunity to obtain a permit for the features.

15. The Department has satisfied its burden of proving that Schaffer's general permits should be revoked. The permits do not authorize any encroachments on the site and there is no reason for them to exist.

16. Schaffer has failed to prove the prerequisites for application of either the estoppel or vested rights doctrines.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STEVE and KAREN SCHAFFER	:	
	:	
v.	:	**EHB Docket No. 2005-087-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 21st day of December, 2006, it is hereby ordered that Paragraph 2 of the Department's March 11, 2005 Order is modified to read as follows:

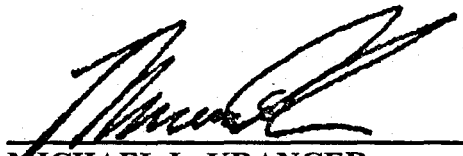
2.a. The Schaffers, and their agents, heirs, employees, successors, and assigns (the "Schaffers") shall within 60 days of this Order, weather permitting, delineate in the field the extent to which Wetland Fills 1, 3, and 4 encroach upon wetlands. The Schaffers shall advise the Department in advance of the delineation and the Department shall be given the opportunity to observe the delineation.

b. The Schaffers shall within 60 days of the Department's approval of its delineations remove those portions of Wetland Fills 1, 3, and 4 that encroach into wetlands and restore the areas where the removal takes place to preconstruction conditions.

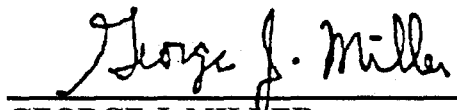
c. The Schaffers shall within 30 days of this Order meet with the Department to determine what permits will be required for the remaining features listed in Paragraph I. Schaffer will submit applications for those permits that are required within 60 days of the meeting. If the Schaffers decide not to apply for a permit for a particular feature, they shall remove the

feature and restore the site in the area of the feature to preconstruction conditions.

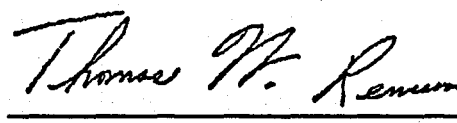
ENVIRONMENTAL HEARING BOARD



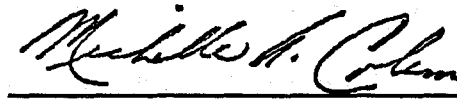
MICHAEL L. KRANCER
Chief Judge and Chairman



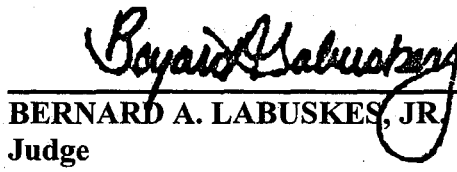
GEORGE J. MILLER
Judge



THOMAS W. RENWAND
Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

DATED: December 21, 2006

c: **DEP Bureau of Litigation:**
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Attachment 1. Map of Schaffer Property