COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

ADJUDICATIONS

VOLUME I

1985

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE
ADJUDICATIONS

1985

Chairman.....MAXINE WOELFLING

Member .....ANTHONY J. MAZULLO, JR.

Member .....EDWARD GERJUOY

Secretary.....M. DIANE SMITH

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Environmental Hearing Board Reporter

Thus: 1985 EHB 1

FORWARD

In this volume are contained all of the final adjudications of the Environmental Hearing Board issued during the calendar year 1985.

This Environmental Hearing Board was created by the Act of December 3, 1970, P.L. 834, which amended the Administrative Code of 1929, Act of April 7, 1929, P.L. 177, as amended. The Act of December 3, 1970, commonly known as "Act 275", was the Act that created the Department of Environmental Resources. Section 21 of that Act, §1920-A of the Administrative Code, provides as follows:

> "§1921-A Environmental Hearing Board
>
> (a) The Environmental Hearing Board shall have the power and its duties shall be to hold hearings and issue adjudications under the provisions of the act of June 4, 1945 (P.L. 1388), known as the "Administrative Agency Law," or any order, permit, license or decision of the Department of Environmental Resources.
>
> (b) The Environmental Hearing Board shall continue to exercise any power to hold hearings and issue adjudications heretofore vested in the several persons, departments, boards and commissions set forth in section 1901-A of this act.
>
> (c) Anything in any law to the contrary notwithstanding, any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law, but no such action of the department adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board; provided, however, that any such action shall be final as to any person who has not perfected his appeal in the manner hereinafter specified.
>
> (d) An appeal taken to the Environmental Hearing Board from a decision of the Department of Environmental Resources shall not act as a supersedeas, but, upon cause shown and where the circumstances require it, the department and/or the board shall have the power to grant a supersedeas.

(e) Hearings of the Environmental Hearing Board shall be conducted in accordance with rules and regulations adopted by the Environmental Quality Board and such rules and regulations shall include time limits for taking of appeals, procedures for the taking of appeals, location at which hearings shall be held and such other rules and regulations as may be determined advisable by the Environmental Quality Board.

(f) The board may employ, with the concurrence of the Secretary of Environmental Resources, hearing examiners and such other personnel as are necessary in the exercise of its functions.

(g) The Board shall have the power to subpoena witnesses, records and papers and upon certification to it of failure to obey any such subpoena, the Commonwealth Court is empowered after hearing to enter, when proper, an adjudication of contempt and such order as the circumstances require."

In addition, the Board hears civil penalties cases pursuant to the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4009.1; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605(a); the Dam Safety and Encroachment Act, Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.21; and the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, 58 P.S. §601.506. Also, the Board reviews the Department's assessment of civil penalties under the Bituminous Mine Subsidence and Land Conservation Act, Act of April 27, 1966, P.L. 31, as amended, 52 P.S. §1406.17(f); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605(b); the Coal Refuse Disposal Act, Act of September 24, 1968, P.L. 1040, as amended, 52 P.S. §30.61; the Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, 35 P.S. §721.13(g); the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, §6018.605; and the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.22.

Although the Board is made, by §62 of the Administrative Code, 71 P.S. 62 an administrative board within the Department of Environmental Resources, it is functionally and legally separate and independent. Its Chairman and two members are appointed directly by the Governor, with the consent of the Senate[1] and their salaries are set by statute.[2] Its Secretary is appointed by the Board with the approval of the Governor.

The department is always a party before the Board. Other parties include recipients of DER orders, penalties assessments, permit denials and modifications and other DER actions. Third party appeals from permit issuances are also common in which cases the permittees are also parties. In third party appeals from permit issuances, the department often does not actively participate in the appeal, but lets the permittee defend the permit issuance.

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1 Section 472 of the Administrative Code, 71 P.S. §180-2.

2 Section 709 of the Administrative Code, 71 P.S. §249(m).

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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

COMMONWEALTH OF PENNSYLVANIA :
PENNSYLVANIA GAME COMMISSION :

: Docket No. 82-284-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and GANZER SAND AND GRAVEL, INC., Permittee
and HAMMERMILL PAPER COMPANY, INC., Intervenor

ADJUDICATION

By Edward Gerjuoy, Member, January 17, 1985

Syllabus

This appeal of a solid waste permit under the Solid Waste Management Act, 35 P.S. §6018.101 et seq. is dismissed. The appellant, the Pennsylvania Game Commission, has failed to meet its burden of proof. DER has complied with Article 1, Section 27 of the Pennsylvania Constitution and with the applicable statutes and regulations. No showing has been made that, despite such compliance, the grant of the permit is an abuse of discretion because of a threat to the public health, safety and welfare resulting from the operation of the landfill.

In reaching this determination the Board has ruled that the Commission does not have standing to raise DER's failure to require compliance with the Dam Safety and Encroachments Act, 32 P.S. §693.1 et seq. The Act is not applicable in the context of this appeal.

25 Pa. Code §75.33(h)(3)(iii), rather than 25 Pa. Code §75.38(c)(5), is

the applicable regulation since DER made a responsible and adequate determination that the wastes to be deposited in the landfill do not adversely affect the environment. This holding is based on all the evidence at the Board's de novo hearing, including the evidence that after its original determination the Bureau of Solid Waste Management carefully reevaluated the pertinent data and came to the same determination.

INTRODUCTION

This matter has reached the Board via an appeal--by the Pennsylvania Game Commission ("Commission")--of the DER Solid Waste Permit No. 300795 granted to Ganzer Sand and Gravel ("Ganzer") for construction of a 40-acre residual waste landfill. The residual waste is expected to come from a plant operated by the Hammermill Paper Company ("Hammermill"), which has been granted intervenor status.

Initially the Board was uncertain whether the Commission, a sister Commonwealth agency to DER, had standing to appeal DER's decision to grant Ganzer a solid waste permit. Eventually the Board decided the Commission indeed did have standing to prosecute this appeal. Pennsylvania Game Commission v. DER (Opinion and Order, February 3, 1984). The Commission's standing was limited, however; the Commission was allowed to challenge only those aspects of DER's action which threatened the Commission with substantial, immediate and direct injuries lying within the Commission's zone of interests delineated by the legislation defining the Commission's powers and responsibilities. Pennsylvania Game Commission, supra; William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). In particular, the Commission was not given

standing to allege that DER, in granting the permit, had ignored regulations promulgated by the Environmental Quality Board ("EQB") under the authority of the Dam Safety and Encroachments Act ("DSEA"), 32 P.S. §§693.1 et seq.

In due course, the merits of this appeal were given a full hearing, within the standing limitations just described. In all, nine days of hearings were held, during the period February 27, 1984 to August 9, 1984. Thereafter, post-hearing briefs were filed by the Commission and by Ganzer and Hammermill (who filed jointly); DER, though given an opportunity to file a post-hearing brief, advised the Board it did not intend to do so.

Therefore, this matter now is ripe for adjudication, as follows.

FINDINGS OF FACT

1. Appellant is the Pennsylvania Game Commission ("Commission"), the agency of the Commonwealth empowered to establish and maintain State Game Refuges and Preserves for the protection and propagation of game. 71 P.S. §674.

2. The Appellees are the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER") and Ganzer Sand and Gravel, Inc. ("Ganzer").

3. DER is the agency of the Commonwealth empowered to enforce the provisions of the Solid Waste Management Act ("SWMA") 35 P.S. §6018.101 et seq., the Clean Streams Law ("CSL") 35 P.S. §691.1 et seq., and the Dam Safety and Encroachments Act ("DSEA") 32 P.S. §693.1 et seq.

4. Ganzer is the recipient of Solid Waste Permit No. 300795, issued pursuant to the SWMA, which forms the subject matter of this appeal. The permit authorizes the operation of a landfill. (J.Ex. 7).[1]

---

1. "J.Ex. denotes "Joint Exhibit"; similarly, Commission exhibits will be denoted by "C.Ex.", Ganzer exhibits by "G.Ex.", and the sole Board exhibit (a stipulation concerning the Joint Exhibits) by "Bd.Ex." DER offered no exhibits.

5. Hammermill Paper Company, Inc. ("Hammermill"), intervenor herein, is the source of the residual waste which is to be deposited at the permit site. (J.Ex. 8)

6. The proposed Ganzer landfill site lies on land which abuts Siegel Marsh, a State game land, which is owned by the Commonwealth and administered and operated by the Commission; however, the outer limits of the landfill do not reach the perimeter of the Ganzer property. (J.Ex. 4)

7. The proposed landfill site will be above the water table. The only water entering the site will be from natural precipitation and from the washing plant on the site. (J.Ex.8)

8. The proposed landfill will be above LeBoeuf Creek, which runs close to the landfill site. (Tr. 500).

9. The proposed landfill will be above Siegel Marsh. (Tr. 500)

10. The landfill will not have a liner or a leachate collection system. (J.Ex. 8)

11. The landfill will have a minimum of forty inches of renovative soil base between the high water table and the waste fill. (J.Ex. 8)

12. With the exception of the first 16 feet of compacted waste, the ratio of waste to renovative soil base will be two to one; i.e., for each two feet of waste above the first 16 feet an additional foot of renovative soil base (beyond the 40-inch minimum) will be provided. (J.Ex. 8)

13. The recommendation of the DER Meadville Regional Office (who had the original responsibility for reviewing the permit application) was that a one-to-one ratio of waste to renovative soil base be required for the construction of the landfill, as specified by the regulation 25 Pa. Code §75.38(c)(5).

14. On February 2, 1982 a meeting was held in the office of Peter Duncan, then Secretary of DER. (Tr. 740-741).

15. A representative of Ganzer was present at the February 2nd meeting. (Tr. 718).

16. DER's Chief of the Division of Operations for the Bureau of Solid Waste Management, Dwight Worley, was present at the February 2nd meeting. (Tr. 718)

17. No representatives from the Meadville staff were present at the meeting of February 2nd. (Tr. 396,718,1427). Indeed, no DER representative at the meeting was sufficiently familiar with the technical details of the proposed permit to intelligently rebut the Ganzer representative.

18. At the February 2nd meeting, Secretary Duncan determined that the permit would be issued requiring a two to one, rather than one to one, ratio of waste to renovative soil base. (Tr. 754).

19. This decision in favor of the two to one ratio was based upon the finding that the Hammermill wastes would not adversely affect the environment. (J. Ex. 12)

20. The decision in favor of the two to one ratio was reached without the opportunity to review the technical recommendations of the Meadville Staff. (Tr. 751)

21. The Meadville staff continue to oppose the use of a two to one ratio for the Ganzer landfill site. (Tr. 260-268, 315-360, 1387)

22. More recently, after the original decision to allow the two to one ratio was made, Mr. Worley's technical staff have reviewed the data upon which the original decision was based and have affirmed that decision. (Tr. 760-765)

23. The design of the Ganzer landfill is not likely to result in sidewall leachate breakout. (Tr. 335-336)

24. The Lowville site is a solid waste disposal site located in Venango Township, Erie County, Pennsylvania; it is in present operation, under the authority of a permit issued in 1978 to Adam W. Nicholson, Inc. (G.Ex. 10b)

25. Since 1978, the waste deposited at the Lowville site has been generated exclusively by Hammermill; the Hammermill waste streams being deposited at Lowville are chemically very similar to those proposed for disposal at the Ganzer site. (Tr. 153, 226-227)

26. The permit for the Lowville site requires a two to one ratio of waste to renovative soil base. (Tr. 153,770)

27. There are a number of monitoring wells at the Lowville site; for some of these monitoring wells, however, a determination of whether they are up-gradient or down-gradient from the landfill cannot be made based upon the record. (Tr. 233-241; G.Ex. 10b, p.15)

28. Of the Lowville monitoring wells studied by Anthony Talak, a DER Meadville technical staff member who testified as a Commission witness, the monitoring wells 6 and 7 are down-gradient. (Tr. 264; G. Ex. 10b, p.15)

29. Lowville monitoring wells 6 and 7 showed marked increases over time in sodium and chloride concentrations, and less marked increases in sulfate concentrations and specific conductance. (Tr. 316-317, 1058-1061)

30. Residential water wells located in the vicinity of the Lowville site showed increasing concentrations of sodium, chloride and increased specific conductance over time. (C. Ex.12, 13; J. Ex.21; Tr. 220)

31. Data from the Lowville monitoring wells show no discernible trends in aluminum concentrations.

32. Increased concentrations of sodium and chloride may be regarded as indicators, i.e., predictors, of dangerous ground water pollutants. (Tr. 370-371)

33. No evidence was presented to suggest that the demonstrated levels of sodium and chloride were harmful in themselves.

34. Except for one DER analysis showing a high level of barium in Lowville monitoring well 7, there was no evidence of abnormally high levels of dangerous pollutants in any of the monitoring wells studied.

35. Other than the aforementioned "indicators" (Finding of Fact 34), no evidence was presented to suggest that dangerous pollutants will be observed in the Lowville monitoring wells in the future.

36. At the Lowville site, sixty per cent of the landfill has only forty inches of renovative base. (Tr. 1133)

37. At the Ganzer site, only three per cent of the landfill will have forty inches of renovative base; the average renovative base depth at the Ganzer site will be twelve feet. (Tr. 1133, 923-925; J. Ex. 15)

38. Except for Anthony Talak, the testimony offered by the Commission's witnesses concerning the alleged deficiencies of the Lowville landfill were totally speculative, irrelevant or unconvincing.

39. Leaching analyses of the Hammermill wastes showed low concentrations of heavy metals; these leaching analyses gave much the same results as leaching analyses of Siegel Marsh soil. (J. Ex. 11b, 11d; Tr. 953-961)

DISCUSSION

In this appeal, it is the Commission's burden to show that DER's grant of the appealed-from solid waste permit was an abuse of discretion or an arbitrary exercise of its duties or functions.[2] 25 Pa. Code §21.101(c)(3); Warren Sand and Gravel Company, Inc. v. DER, 20 Pa. Cmwlth. 186,341 A.2d 556 (1975). In attempting to meet this burden, the Commission has put forth numerous contentions, all falling into one of the following two categories:

> 1. The permit grant violates pertinent statutes passed by the legislature, and/or pertinent regulations promulgated by the EQB.
>
> 2. Even if no pertinent statutes or regulations have been violated, operation of the landfill under the permit will endanger the environment.

We proceed to discuss the Commission's contentions, beginning with those falling into the first category.

I. Does the Permit Violate Pertinent Statutes and/or Regulations

Initially the Commission maintained that DER, in granting the permit, had violated the DSEA and the regulations promulgated thereto. For example, the Commission's pre-hearing memorandum contended that-- because the landfill was a water obstruction -- DER should not have granted the appealed-from Solid Waste Permit without first requiring an application for a permit under the DSEA. The Commission's pre-hearing memorandum also contended, e.g., that the proposed landfill was within 300 feet of important wetlands, in violation of 25 Pa. Code §105.17 (b) because DER and/or Ganzer had not demonstrated the public benefits of the proposed landfill justified such proximity to wetlands.

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2. In the interests of brevity the phrase "abuse of discretion" will be employed to denote our complete scope of review, recognizing that in the context of the instant appeal "an arbitrary exercise by DER of its duties or functions" would be an abuse of discretion as well.

A. Standing to Assert the DSEA

On February 3, 1984, however, prior to these hearings, the Board ruled that the Commission did not have standing to raise violations of the DSEA or the regulations promulgated thereto, as already mentioned supra; such regulations include those in 25 Pa. Code Chapter 105, Dam Safety and Waterway Management. The Board's precise language was:

> At present the Board concurs with DER's view that the existing regulatory scheme consists of regulations promulgated under the SWMA, and does not include regulations promulgated under the DSEA (unless such DSEA regulations are specifically called for by SWMA regulations). At the hearing on the merits of this matter, we will permit the Commission to argue to the contrary. However, unless we are convinced that regulations promulgated under the DSEA are germane to this appeal under the criteria enunciated in the preceding paragraph, evidence that such regulations have been ignored will not be admissible in the instant proceedings.

The "preceeding paragraph" referred to in this quotation read:

> On the other hand we agree with Ganzer that the Commission cannot be allowed to "act as a private or Commonwealth attorney general, looking over DER's shoulders" as DER administers the Solid Waste Management Act or the Dam Safety and Encroachments Act. Every allowable Commission claim of procedural or substantive error by DER in granting Ganzer its permit must be related to the Commission's alleged injuries under the William Penn standard. Furthermore, if the Commission intends to argue that the existing regulatory scheme relied on by DER is insufficient to protect the wildlife and wildlife habitats for which the Commission is responsible, the Commission will have to overcome the presumption that the existing regulatory scheme meets the objectives of the Legislature. (citations omitted)

On February 29, 1984, during the third day of the hearings, the Commission was permitted to argue that it had standing to assert DER's failure to take into account the DSEA and regulations promulgated thereunder (Tr. 464-476).

The Board affirmed its February 3, 1984 rulings, quoted supra, but did offer the Commission's counsel a renewed opportunity to change the Board's mind on this standing issue, via a Memorandum of Law. (Tr. 475-6). The Commission did not file such a Memorandum of Law. Indeed, during a later colloquy in the hearing counsel for the Commission stated that he now agreed with the Board's ruling on the Commission's standing to assert the DSEA. The colloquy ran as follows (Tr. 838):

> MR. BLIWAS: I would like to just address two points which you just spoke to, Mr. Gerjuoy. I have been trying for four days to show that the Department did not comply with its regulations with respect to the distance that a landfill must be with respect to important wetlands.
>
> You have ruled, and as far as I can tell, ruled correctly that we do not have standing to bring that issue before you.
>
> THE EXAMINER: No, no, no, no. Just be careful. Are we talking about the Dam Safety and Encroachments Act? What are you talking about?
>
> MR. BLIWAS: Yes.
>
> THE EXAMINER: I don't think the Dam Safety and Encroachments Act has anything to do with this.
>
> MR. BLIWAS: I agree, I agree with you that we don't have standing on that.

In view of this seemingly unequivocal concession by councel for the Commission, the Board is surprised that the Commission's post-hearing brief once again raises the issue of DER's failure to comply with the DSEA, though this time doing so in the context of the Pennsylvania Constitution Article I Section 27, as interpreted by the Commonwealth Court in Payne v. Kassab, 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973). The first prong of the Payne v. Kassab three-fold test for compliance with Article I Section 27 is:

(1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?

The Commission, reiterating its contention that the landfill is a water obstruction, now argues that DER's failure to require a permit under the DSEA is a violation of this first prong of the Payne v. Kassab test, amounting to an abuse of DER's discretion.

Except for their reference to Article I Section 27, these post-hearing arguments by the Commission merely repeat their earlier contentions. The gravamen of the Commission's appeal, now and when the appeal was initiated, is the Commission's allegation that operation of the landfill will produce polluted ground water and surface water runoff which ultimately will adversely affect the Siegel Marsh ecosystem near the landfill. This allegation was the basis for giving the Commission standing to appeal (see our February 3, 1984 Opinion and Order). The statutory and regulatory scheme designed to prevent polluted water produced in a landfill from causing environmental damage in areas near the landfill is provided primarily by the SWMA and the regulations thereto, notably 25 Pa. Code Chapter 75, Solid Waste Management. The CSL, through 35 P.S. §691.307, also has a part to play in this statutory scheme; however, we see no reason to believe the Legislature also intended that the DSEA play a role in preventing environmental degradation stemming from landfill-generated polluted water. 32 P.S §693.2.

In other words, the injury alleged by the Commission, namely environmental degradation by landfill-generated polluted water, does not lie within the zone of interests which the DSEA is intended to protect or regulate. Sierra Club v. Morton, 405 U.S. 727, 92 S.Ct. 1361 (1972); Franklin Township v. DER, 452 A. 2d 718 (Pa. 1982). It is true, as the Commission asserts, that Section 502 of the SWMA, 35 P.S §6018.502 provides:

> (d) The application for a permit shall set forth the manner in which the operator plans to comply with the requirements of... the act of November 26, 1978 (P.L. 1375, No. 325), known as the "Dam Safety and Encroachments Act," as applicable. No approval shall be granted unless the plan provides for compliance with the statutes hereinabove enumerated...

But the Legislature's language carefully included the phrase "as applicable." The DSEA is not applicable, despite the Commission's insistence to the contrary.

At the outset of the hearings, the parties stipulated to a number of joint exhibits "with respect to which there is no objection to authenticity or admission into evidence" (Bd. Ex. 1). One of these joint exhibits (J. Ex. 8) includes the permit application. The Engineering Narrative portion of J. Ex. 8 states:

> The site is higher than the surrounding land... There is no watershed above the site. No streams or drainage courses flow through it. The only water entering the site is from natural precipitation and leaks and overflows from the washing plant.

Module No. 2 of the permit application states the minimum depth to the water table is approximately four feet, and -- referring to a U.S. Geological Service map of flood prone areas -- asserts the site will never be inundated. The Commission's witness Hugh Palmer agreed on cross examination that the fill area would be 10 feet above the LeBoeuf Creek and Siegel Marsh neighboring the site (Tr. 500). Although the Commission argues strenously that the definition of "water obstruction" in 32 P.S. §693.3 implies the landfill falls under the DSEA, the Board refuses to concede that the DSEA is concerned with any "water obstruction" which never obstructs any water.

In sum, the Board remains of the opinion -- apparently once shared by the Commission's counsel-- that the DSEA is irrelevant to this appeal, and therefore that the Commission does not have standing to raise DER's failure to require a DSEA permit. This conclusion pertains to the Commission's post-hearing arguments concerning Article I Section 27 no less than to the Commission's pre-hearing

contentions. Evidence bearing on failure to comply with the DSEA or the regulations in 25 Pa. Code Chapter 105 was correctly excluded from the hearing; correspondingly, the DSEA and regulations thereunder will be ignored in the remainder of this adjudication. We add that the Commission's allegations that DER failed to comply with the requirements of Article I Section 27 were concerned solely with the DSEA and the first prong of the Payne v. Kassab test; the Commission did not allege, and we therefore deem to be waived, any claims that there was no compliance with the second and third prongs of the Payne v. Kassab test. Consequently, in view of the foregoing discussion, the Commission's claim of violation of Article I Section 27 is rejected; Article I Section 27 also will be ignored in the remainder of this adjudication.

B. The Required Renovative Base

The Commission also contends that DER's grant of the permit was in violation of regulations promulgated under the SWMA, notably 25 Pa. Code §75.38 (c)(5). Section 75.38 is headed, "General standards for industrial and hazardous waste disposal sites." Subsection (c)(5) reads:

> All disposal sites constructed without liners or leachate collection systems must have renovating soil beneath the waste and above the high ground water table or bedrock. If more than one lift is proposed, an additional amount of soil must be provided below the first lift which would be equal to the depth of the additional lifts proposed.

"Lift" is defined in 25 Pa. Code §75.1, as "An accumulation of up to eight feet of compacted refuse layers upon which cover material has been placed."

This landfill will not have a liner or a leachate collection system (see the permit application, J. Ex. 8, which is made part of the permit, J. Ex. 7). Nevertheless, the Engineering Narrative in the permit application (J. Ex. 8, also made part of the permit according to J. Ex. 7) states:

Operational and Design Concept

> It is proposed to landfill non-toxic industrial wastes in the gravel mine by first establishing a renovating soil base above the high water table. The renovating soil base will be a minimum of 40-inches thick for the first two 8-foot lifts plus one foot of additional soil base for each two feet of waste over the first two lifts. The minimum base thickness at any point in the operation will be 40-inches. Therefore for a waste depth of up to 16-feet, there will be a minimum thickness of 40-inches (3 ft.-4 in.) of renovating soil base between the high water table and the waste fill; for a waste depth of 20-feet, there will be a minimum soil base thickness of 64-inches (5 ft.-4 in.), etc.

Evidently the "two to one" ratio, of additional (beyond two lifts) waste depth to additional renovating soil base thickness, proposed in the above quotation and accepted in the permit, is inconsistent with the corresponding "one to one" ratio mandated by 25 Pa. Code §75.38 (c)(5), quoted supra.

DER and Ganzer maintain, however, that this inconsistency is not a violation of regulatory requirements because 25 Pa. Code §75.38 (c)(5) is not controlling. 25 Pa. Code §75.38 (b)(2), under "application requirements", reads:

> (2) Nature of the waste by source and type of material. Industrial wastes that do not adversely affect the environment as determined by the Department based on the waste characteristics or a chemical or leaching analysis provided by the applicant shall comply with §75.33 of this title (relating to standards for construction and demolition waste disposal).

25 Pa. Code §75.33 (h)(3)(iii) merely imposes the requirement that the high water table be a minimum of 40 inches below the waste. No "one to one", "two to one", or any additional waste depth to additional renovating soil base thickness is mandated by §75.33. DER did evaluate a leaching analysis of the Hammermill waste stream, and determined that these wastes would not adversely affect the environment (Tr. 1428-9, J. Ex. 12). Therefore, Ganzer and DER assert, the landfill design is fully in compliance with the applicable regulatory

requirements, namely those of 25 Pa. Code §75.33 (h)(3)(iii). The Commission does not disagree that the landfill design comports with 25 Pa. Code §75.33 (h)(3)(iii), but argues (in effect) that DER's decision under 25 Pa. Code §75.38 (b)(2) to impose the requirements of Section 75.33 (h)(3)(iii) rather than Section 75.38 (c)(5) was an abuse of DER's discretion, because -- the Commission maintains -- there is a high probability the 2 to 1 ratio employed in the design of this particular landfill will adversely affect the environment.

In so arguing, the Commission mistakes its burden; in fact the Commission has assumed a greater burden than necessary. At this stage of the argument, it is sufficient for the Commission to show that DER has not complied with its regulations. The Commonwealth Court has instructed DER to enforce regulations literally. East Pennsboro Township Authority v. DER, 334 A.2d 798 (Pa. Cmwlth 1975). Failure to do so must be considered an abuse of DER's discretion, unless DER can point to suitable exceptional circumstances justifying its failure to abide by its regulations. General Electric Landfill Opposition Committee v. DER, Docket No. 80-141-S, 1982 EHB 63; Sanitary Authority of the City of Duquesne v. DER, Docket No. 83-055-G (Opinion and Order, April 25, 1984). But such justification is DER's burden; if the Commission can show that DER's decision to accept a 2 to 1 rather than a 1 to 1 renovative base really is inconsistent with the regulations, it is not necessary for the Commission to make the further showing that DER's decision is likely to produce adverse environmental effects. Moreover, DER has made no attempt to demonstrate the existence of "exceptional circumstances" justifying failure to abide by the regulations.

It follows that, to show DER has failed to comply with its regulations and thereby has abused its discretion, it is sufficient (and necessary) for the Commission to show that DER's aforementioned determination concerning the Hammermill waste stream -- namely that these wastes would not adversely affect the environment — itself was an abuse of discretion. This crucial issue, about which the parties have presented much testimony and argued mightily, now will be examined and adjudicated.

C. DER's Determination That Hammermill Wastes Will Not Adversely Affect Environment.

The appealed-from permit was issued by DER's Meadville Regional Office (J. Ex. 7). Correspondingly, the permit application originally was submitted to the Meadville Office (J. Ex. 8), and was evaluated by that Office. The initial unanimous recommendation of the Meadville technical staff was that a 1 to 1 ratio be required (Tr. 396-8). This recommendation was supported by Russell Crawford, the Meadville Regional Solid Waste Manager (Tr. 752-3). On February 2, 1982, however, a meeting was held in the Harrisburg office of Peter Duncan, then Secretary of DER (Tr. 740-1). Present at that meeting, inter alia, were Secretary Duncan, Dwight Worley who is DER's chief, Division of Operations, Bureau of Solid Waste Management, and William Kelly who is counsel for Ganzer in this appeal (Tr. 718). Mr. Kelly made a presentation on behalf of Ganzer, and there was a discussion of the 2 to 1 v. 1 to 1 issue (Tr. 753). Toward the end of the meeting Secretary Duncan agreed that the Ganzer permit would be issued with the 2 to 1 (rather than 1 to 1) requirement, provided the so-called Phase II portion of the permit application (the design portion) was properly completed (Tr. 754). This agreement was memoralized by Secretary Duncan in a letter to William Kelly, dated March 2, 1982, signed by the Secretary but prepared for him by Mr. Worley (J. Ex. 12, Tr. 757).

The statements in this letter (J. Ex. 12) include:

> As you know, it was only at our February 2, 1982 meeting that it was agreed to change the required amount of subbase because of the new information provided to us. If we had been required to act prior to our last meeting, we would have denied the application...
>
> During our February 2, 1982 meeting we passed a major milestone in regard to the Ganzer permit application in that we have determined that the Hammermill Paper residual waste is similar in chemical characteristics to Class 3 demolition waste, thus allowing us to modify our previous position of requiring a 1:1 ratio of subbase to waste.

Ganzer argues vigorously that the evidence summarized in the preceding paragraph is not germane to this adjudication, in that the Commission is not entitled to inquire into DER's internal decision-making procedures. In general the Board agrees with this contention. Very early in the hearings, the Board member conducting the hearing refused to allow Mr. Worley to testify about the February 2, 1982 meeting, because he did not believe the hearing should be examining DER's decision-making process (Tr. 18). Eventually, however, Mr. Worley was allowed to testify at some length about the February 2, 1982 meeting and other meetings (Tr. 739-783), because it had become apparent that such testimony was germane to the basis for DER's determination that the Hammermill waste would not adversely affect the environment. Making this determination without a responsibly adequate basis would be an abuse of DER's discretion, amounting to irresponsible enforcement of the EQB's carefully constructed regulatory system; 25 Pa. Code §75.38 (c)(5) obviously intends that a 1 to 1 ratio be required unless -- according to 25 Pa. Code §75.38 (b)(2) -- there is a responsible and adequately-based determination that relaxing the 1 to 1 ratio will not adversely affect the environment.

DER's February 2, 1982 determination that the Hammermill wastes do not adversely affect the environment, so that the 1 to 1 ratio required by Section 75.38 (c)(5) could be relaxed, did not have a responsibly adequate basis. The DER participants at the February 2, 1982 meeting in Secretary Duncan's office did not include the Meadville technical staff who had made the original recommendation (which the February 2, 1982 meeting reversed) that a 1 to 1 ratio be required (Tr. 396, 718, 1427). Mr. Worley testified that he first became aware of the pending Ganzer permit application when he was invited to attend the February 2, 1982 meeting (Tr.8). Secretary Duncan had not received -- and therefore did not have the opportunity to review -- the DER technical staff recommendations prior to the meeting (Tr. 751); Mr. Worley testified that immediately prior to the meeting, "we were trying to discuss with him (Secretary Duncan) what some of the regulations were with regard to the handling of residual wastes and trying to familiarize him with the regulations" (Tr. 751). Obviously no DER representative at the meeting was sufficiently familiar with the technical details of the proposed Ganzer permit to intelligently rebut Mr. Kelly, who can be very persuasive as these hearings have shown. After the February 2, 1982 decision was made, but before preparing the March 2, 1982 letter (J. Ex. 12) quoted supra which memorialized the decision, Mr. Worley did not even check with the Meadville staff to get their reactions to Mr. Kelly's arguments (Tr. 410-411).

It follows that if we were writing his adjudication immediately after March 2, 1982, we almost certainly would be deciding -- under the facts just recounted -- that DER's decision to permit a 2 to 1 rather than a 1 to 1 ratio

in the Ganzer landfill was in violation of the regulations, and therefore an abuse of DER's discretion. This adjudication is being prepared in December 1984, however, not in March 1982, after extensive de novo hearings. Warren Sand and Gravel, supra; Township of Salford v. DER, 1978 EHB 62; Melvin D. Reiner v. DER, 1982 EHB 183. Mr. Worley testified that more recently than March 1982 he and his Harrisburg technical staff have reviewed the data on which the decision to allow the 2 to 1 ratio rested, and have affirmed their earlier decision (Tr. 760-65). This more recent review was based on a thorough re-examination of all available data (Tr. 768-778, 1429-1452) including the data in C. Ex. 14, on which the Meadville staff who continue to oppose the 2 to 1 ratio heavily relied (Tr. 260-268, 315-360, 1387). Mr. Worley's technical experience relative to problems of landfill design is extensive (Tr. 766, 1422-1426); he has the competence, and it is his responsibility, to review -- and if necessary to revise -- the technical decisions made by less senior technical staff in Meadville. Although the Board wishes that the reasons for Mr. Worley's disagreement with the Meadville technical staff recommendations had been more explicitly spelled out in the hearings,[3] nevertheless Mr. Worley's later review of the rationale for accepting a 2 to 1 rather than a 1 to 1 ratio appears to have been responsible and adequate; certainly the Commission has not met its burden of showing otherwise.

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3. Although Mr. Worley offered to give a detailed explanation of his technical disagreements with the Meadville recommendations, and named members of his Harrisburg staff who could do likewise, no such detailed testimony was actually elicited from any witness (Tr. 765).

We conclude DER's determination that the Hammermill waste will not affect the environment was not an abuse of DER's discretion, and therefore that DER's decision to allow a 2 to 1 rather than a 1 to 1 renovative base ratio was consistent with applicable regulations (and statutes). In other words, this appeal cannot be sustained on the basis of the Commission's contentions in category 1, listed supra.

II Will Operation of the Landfill Endanger the Environment

The mere fact that the landfill comports with all applicable statutes and regulations does not of itself imply that issuance of the Ganzer permit was within DER's discretion. As we have pointed out in Coolspring Township v. DER, Docket No. 81-134-G (Adjudication, August 8, 1983), the EQB -- when promulgating a regulatory scheme — cannot envision all the complex factual circumstances which may occur. It is conceivable that under the facts of the instant appeal the regulatory scheme available to DER is insufficient to protect the public health, safety and welfare. If so, it would be an abuse of DER's discretion to insist that Ganzer's compliance with the regulations suffices per se to warrant the appealed-from permit grant. As DER regularly recognizes, and as it has recognized in the instant permit (J. Ex. 7), the regulatory requirements often have to be supplemented with additional special conditions, deemed necessary by DER to ensure operation under the permit will not endanger the public health, safety, and welfare.

On the other hand, as we also stated in Coolspring, supra, " Where there exists an applicable regulatory scheme, duly promulgated by the EQB, there is a presumption that the regulatory scheme does meet the objectives of the underlying statute", in this case the SWMA. Therefore, in the instant appeal, once

we have decided (as we now have decided) that there has been no showing DER failed to abide by its regulations, it is the Commission's burden to show DER has abused its discretion by issuing a permit whose operation can result in undesired and undesirable environmental effects, capable of endangering the public health, safety and welfare. Moreover, again quoting from Coolspring:

> To meet his burden of showing DER has abused its discretion, an appellant need not show that the undesired and undesirable effects discussed in the preceding paragraph are certain to occur, or even very probably will occur. Requiring such a showing often would be inconsistent with the basic objectives of protecting the public's health, safety and welfare. If the effects, once they have occurred, are sufficiently calamitous, then even a small probability of occurrence may be intolerable; a nuclear power plant meltdown is a compelling, though extreme, illustration. But in any given fact situation, whatever the tolerable probability of occurrence of unwanted effects may be, it is the appellant's burden to show convincingly that this probability will be exceeded. The mere speculative possibility of undesirable effects, without the additional showing just described, cannot overcome the presumption of validity attached to duly promulgated regulations of the EQB.

We believe this formulation of the Commission's burden is quite consistent with the holding of Marcon v. DER, 76 Pa. Cmwlth 56, 462 A.2d 969 (1983). The Commission is mistaken in its apparent belief that Marcon implies the burden of justifying the landfill design shifts to DER and Ganzer once the Commission "has sufficiently alerted the Board that certain problems relating to Solid Waste Permit 300795 have more than a mere probability of unwanted effects". In the first place, Marcon merely shifts the burden of going forward with the evidence; under Marcon the burden of proof remains as assigned by 25 Pa. Code §21.101 (c)(3), namely on the Commission. Secondly, even the burden of going forward does not shift under Marcon until and unless the Commission presents credible evidence that

the objected-to permit will deleteriously affect the environment; just "alerting" the Board to problems having "more than a mere probability of unwanted effects" is not sufficient to shift to Ganzer and DER the Commission's burden of going forward.

Our examination of the Commission's contentions that operation of the landfill will endanger the environment, to which we now proceed, must keep in mind the immediately foregoing considerations. These contentions involved mainly the claim that known facts about operation of the Lowville site (which presently handles Hammermill waste and also employs a 2 to 1 renovative base ratio, see infra) imply the Ganzer site will endanger the environment. The Commission did present some testimony to the effect that -- irrespective of the previously discussed 2 to 1 vs. 1 to 1 issue, and without any reference to Lowville experience -- the landfill's design was faulty, thus inadequate to protect the environment; for example, the Commission's expert Dr. Raymond Regan testified that the Ganzer site's design would result in leachate breakout through the side of the landfill (Tr. 136-139). However, Dr. Regan's testimony was unconvincing; though an Associate Professor of Civil Engineering at Penn State University, he has designed no landfills (Tr. 80-82). Moreover, even the DER Meadville technical staff, who opposed issuance of the permit on the 2 to 1 ratio basis, did not agree that the Ganzer landfill design was likely to result in sidewall leachate breakout (Tr. 335-6). Actually, although the Commission did propose a few Findings of Fact which could imply the Ganzer landfill design was inadequate in ways beyond failure to require a 1 to 1 ratio (and which could be seen to be inadequate without reference to Lowville experience), no

arguments based on such Findings were included in the Commission's post hearing brief.

Consequently we have no hesitation in ruling that -- except for the 2 to 1 v. 1 to 1 issue as illuminated by experience at the Lowville site -- the Commission utterly has failed to meet its burden of showing that the Ganzer landfill, as designed, will endanger the environment. If the Commission has any possibility of meeting its immediately aforementioned burden, this possibility must reside in the implications of the Lowville experience, to which we next turn.

A. The Lowville Site

The Lowville solid waste disposal site, located in Venango Township, Erie County, received a DER permit in 1978. The site is owned and operated by Adam W. Nicholson, Inc. Waste disposed of at the site is generated at the Hammermill plant in Erie, and transported by truck to the disposal site. Since 1978, the site has been used exclusively for the disposal of Hammermill wastes. (G. Ex. 10b, 10c). The Lowville site was approved with the same renovative base requirements as were proposed for the Ganzer site, namely a 40 inch minimum thickness with a 2 to 1 ratio after the first two lifts (Tr. 153, 770); the Hammermill waste streams being used at Lowville and projected for Ganzer are chemically very similar (Tr. 153, 226-7).

The Commission argues that these facts justify the use of the already operating Lowville site to measure the suitability of the Ganzer site's design, especially of the 2 to 1 ratio feature of that design. The Commission further contends that the Lowville site is adversely affecting the environment. The Commission's evidence for this contention rests squarely on the testimony of

Anthony Talak, a DER Bureau of Solid Waste Management Regional Engineer stationed at Meadville; Mr. Talak was one of the Meadville technical staff personnel who originally recommended that the permit not be issued without a 1 to 1 ratio requirement (Tr. 217, 396-8). The Board has reviewed, and herewith is rejecting, as totally speculative and/or unconvincing and/or irrelevant, the testimony offered by the Commission witnesses concerning Lowville's failings, e.g., William Guff and Ronald Kurtz.

Mr. Talak plotted and statistically analyzed water sample data from monitoring wells and residential water wells near the Lowville site. There was some uncertainty about whether some of the monitoring wells sampled were upgradient or downgradient of the Lowville site (ground water is expected to flow from the site toward downgradient points), but there appears to be no dispute that monitoring wells 6 and 7 were downgradient. (Tr. 233-241, 264, G. Ex. 10b, p. 15). Consequently, insofar as the Lowville monitoring wells are concerned, we shall concentrate on Mr. Talak's testimony about Lowville monitoring wells 6 and 7; it will be apparent from what follows that for the purposes of giving Mr. Talak's testimony proper weight in the adjudication, concentrating on the Lowville monitoring wells 6 and 7 is quite sufficient.

The monitoring well data examined by Mr. Talak were taken at approximately three months intervals, during the period November 1979 to late 1983 (C. Ex. 14, J. Ex. 21, Tr. 266, 320-1, 1215-1217). These data showed marked increases over time in sodium and chloride concentrations, and rather less marked increases in sulfate concentrations, total dissolved solids and specific conductance (a measure of the amount of electrically conducting ionized

particles dissolved in the water samples, Tr. 316-317, 1058-1061). Similar trends were observed for sodium, chloride and specific conductance in the residential water well samples Talak studied, notably the wells belonging to Borkowski and to Lindenberg (C. Ex. 12, 13, J. Ex. 21, Tr. 220). Mr. Talak also plotted aluminum levels for these residential wells, and felt these plots indicated increasing aluminum concentrations, but the Board agrees with Ganzer's expert witness Richard Deiss that the aluminum data show no discernible trends (G. Ex. 15, Tr. 280, 979).

In evaluating the significance of the above facts, we do note that on cross examination Mr. Talak admitted he had not plotted all available data points, and further admitted that some of his plotted points were in error (Tr. 1215-1219, G. Ex. 17). On the other hand, as the Commission rightly argues, Ganzer has not shown, and has made no attempt to show, that inclusion of the extra data points and correction of the erroneous points would have materially changed Mr. Talak's aforementioned findings that sodium and chloride concentrations -- and to a lesser extent sulfate concentrations, total dissolved solids and specific conductance -- increased in monitoring wells 6 and 7 and in the Borkowski and Lindenberg residential wells, during the approximate period 1979-1983. Therefore we will adopt these Talak findings.

These findings appear to be the last solid plank in the Commission's case, however. Despite the Commission's exhortations, we see no rational way to proceed from these findings to the conclusion that the Commission has met its burden of showing there is an intolerably high probability the permitted Ganzer design, with its 2 to 1 ratio, will adversely affect the public health, safety and welfare (recall the Coolspring quote, supra). As Mr. Talak himself testified, and as the Commission argues, the increases (in sodium, chloride, etc.) found by

Mr. Talak primarily are to be regarded as indicators, i.e., predictors, of dangerous ground water pollutants; for instance, sodium and chlorine are very mobile ions and therefore will lead the less mobile more dangerous ions in the "leachate plume" penetrating into the ground water (Tr. 370-371). There was no evidence that the levels actually attained by Mr. Talak's increasing indicators were dangerous in and of themselves. Moreover, although the Commission has pointed strenuously to one DER analysis showing a high level of barium in Lowville monitoring well number 7 during March 1984 (Tr. 1432-1436, C. Ex. 21), there was no real evidence that the wells Mr. Talak studied had abnormally high levels of truly dangerous pollutants (e.g., metallic ions).

Nor is there any reason to believe such dangerous pollutants would be observed at Lowville in the future for the wastes generated by Hammermill. Rather, the evidence showed that the Hammermill waste is comparatively benign. Leaching analyses of the Hammermill waste showed low concentrations of heavy metals; indeed these leaching analyses gave much the same results as leaching analyses of the soil in the Siegel Marsh whose ecological integrity the Commission seeks to defend (J. Ex. 11b, 11d; Tr. 953-961). If there are very low concentrations of dangerous pollutants (e.g., heavy metals) in the Hammermill wastes, there is no reason to believe that the presently observed increased indicator levels (e.g., sodium and chloride levels) in the Lowville wells are precursors of future high levels of dangerous pollutants in those wells; these Talak-postulated future high levels of more dangerous pollutants will not occur without a source in the Hammermill waste. Also, if water percolating through the Siegel Marsh soil leaches out much the same concentrations of heavy metals as does water percolating through

Hammermill wastes, the water reaching the Siegel Marsh via percolation through the Ganzer landfill will have no different concentrations of heavy metals than the vastly huger quantities of groundwater already percolating through the Siegel Marsh soil into the Siegel Marsh wetlands. The testimony by the Commission's biologist expert witnesses, e.g., Hugh Palmer, concerning the detrimental effects on the Siegel Marsh ecology which high concentrations of heavy metals (e.g, selenium) would cause, was quite correctly cut off by the hearing examiner as irrelevant in the absence of any showing that operation of the Ganzer landfill had a serious likelihood of producing such concentrations (Tr. 536-540, 553-582).

In addition, when considering the relevance of the Lowville observations to the expected effects of the Ganzer landfill operations on the environment, we cannot ignore the fact that the average renovative soil thicknesses in the Ganzer landfill will very considerably exceed the corresponding averages at Lowville. At Lowville, 60 percent of the landfill has only 40 inches of renovative base immediately underneath the waste; on the Ganzer landfill, only three percent of the landfill would have this minimum 40 inches of renovative base permitted by 25 Pa. Code §75.33 (h)(3)(iii) (Tr. 1133). The average renovative base depth at the Ganzer site, before any waste whatsoever is deposited, will be 12 feet (J. Ex. 15, Tr. 923-925).

For all the foregoing reasons, we conclude that the Commission has not met its burden of showing the appealed-from Ganzer permit, though in compliance with applicable regulations, was an abuse of DER's discretion because

operation of the landfill will have an intolerably high probability of adversely affecting the Siegel Marsh wetlands which the Game Commission has standing to defend and which DER is expected to protect.

III Summary

We have carefully examined the very voluminous evidence in this appeal, developed via nine days of testimony and numerous exhibits. We have considered the Commission's contentions in the light of this evidence, and have fully discussed all those Commission contentions we deemed possibly meritorious. We specifically state that Commission contentions which have not been discussed supra are rejected as insufficiently meritorious to warrant discussion. Our deliberations lead to the conclusion, fully explained supra, that DER's grant of the Ganzer permit was not an abuse of discretion in the light of our de novo hearing, although there is considerable doubt that DER's original February 2, 1982 decision to accept a 2 to 1 rather than a 1 to 1 renovative base ratio was responsibly adequately taken at the time.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the subject matter of this appeal. 71 P.S. §510-21(a).

2. The Commission bears the burden of proof in this appeal. 25 Pa. Code §21.101 (c)(3).

3. It is the Commission's burden to show that DER's grant of the permit was an abuse of discretion or an arbitrary exercise of DER's duties or functions.

4. The Commission has standing to appeal those aspects of DER's grant of the permit which threaten the Commission with substantial, immediate and direct injuries lying within the zone of interests delineated by the legislation defining the Commission's powers and duties.

5. The injury alleged by the Commission, namely environmental degradation as a result of landfill-caused polluted ground water and surface water runoff, is not within the zone of interests which the Dam Safety and Encroachments Act is intended to protect or regulate.

6. The Dam Safety and Encroachments Act and the regulations promulgated thereunder, are not applicable to this appeal, either under the requirements of Art.1, section 27 of the Pennsylvania Constitution, or otherwise.

7. The Commission does not have standing to raise the failure of DER to require a permit under the Dam Safety and Encroachments Act.

8. DER complied with its duties under Art.1, section 27 of the Pennsylvania Constitution when issuing the permit.

9. The Commission has not met its burden of proving that DER failed to comply with the applicable regulations.

10. 25 Pa. Code §75.38 (c)(5) is not applicable in the context of the Ganzer permit.

11. 25 Pa. Code §75.33 (h)(3)(iii) is applicable to the Ganzer permit.

12. A determination that 25 Pa. Code §75.33, rather than 25 Pa. Code §75.38, is applicable to the Ganzer permit, would be an abuse of discretion if made without a responsibly adequate basis.

13. Although the Board normally does not inquire into DER's decision-making process, testimony about the February 2, 1982 meeting in Mr. Duncan's office was admissible in this appeal, because such testimony was germane to the basis for DER's determination that the Hammermill waste would not adversely affect the environment.

14. The determination reached as a result of the February 2, 1982 meeting in Secretary Duncan's office, that 25 Pa. Code §75.33 rather than 25 Pa. Code §75.38 is applicable to the Ganzer permit, was made without a responsibly adequate basis.

15. In light of the reevaluation of the pertinent data conducted by the Bureau of Solid Waste Management after the February 2, 1982 meeting, DER's determination that 25 Pa. Code §75.33 is applicable was not an abuse of discretion, because it had a responsibly adequate basis.

16. Once it has been decided that there has been no showing DER failed to abide by its regulations, it is the Commission's burden to show DER has abused its discretion by issuing a permit whose operation, despite compliance with applicable regulations, would endanger the public health, safety and welfare.

17. The Commission has not met its burden of proving that issuance of the permit was an abuse of discretion because, despite compliance with the applicable regulations, operation of the landfill would threaten the public health, safety and welfare.

18. Before the burden of going forward with the evidence shifts to the appellee, the appellant must present credible evidence that the appealed-from permit will adversely affect the environment.

19. The Board's hearings are de novo, and can be based on evidence acquired after the appealed-from DER action took place.

20. Evidence on the biological effects high selenium levels might have on the Siegel Marsh ecology was properly ruled inadmissible in the absence of any showing that operation of the Ganzer likelihood had a serious likelihood of inducing such levels.

O R D E R

WHEREFORE, this 17th day of JANUARY, 1985, the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR., Member

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: January 17, 1985

cc: Howard J. Wein, Esquire
Paul F. Burroughs, Esquire
Stuart M. Bliwas, Esquire
William J. Kelly, Esquire
Daniel Brocki, Esquire
Bureau of Litigation

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
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TOWNSHIP OF CONCORD,	:	Docket No. 84-245-M
Appellant	:	(issued 1-17-85)
	:	-Sewage Facilities Act, 35 P.S. §750. et seq.
v.	:	-official sewage facilities plan revision following private request
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES,	:	
Appellee	:	
and GEORGE SHARP, III,	:	
Intervenor	:	

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

By; Anthony J. Mazullo, Jr., Member, January 17, 1985.

Syllabus

Appellant Concord Township's appeal of a DER letter requiring Concord to revise its official sewage facilities plan (OSFP) to provide for an adequate method of sewage disposal for intervenor's, George Sharp, II, property, located in Concord Township, is dismissed.

A resident or property owner has the right to request a permit to construct an individual package plant, one type of an off-site sewage treatment and disposal system. Sewage Facilities Act (SFA), 35 P.S. §750.5(b); 25 Pa. Code §71.17. DER has the concomitant statutory

authority to order a municipality to revise its OSFP to permit the construction of an individual package plant. 35 P.S. §750.10.

INTRODUCTION

Appellant, Township of Concord (Concord), appeals an order issued by appellee, Commonwealth of Pennsylvania, Department of Environmental Resources (DER) on June 19, 1984, which directed Concord to submit within one hundred and twenty (120) days of that order a revision of Concord's official sewage facilities plan (OSFP) for the purpose of providing an adequate method of sewage disposal for intervenor's, George Sharp, III, projected sewage needs on a one acre tract located at 882 Shavertown Road, Concordville, in Concord Township, Delaware County, Pennsylvania. DER's order was issued in response to Mr. Sharp's private request for an adequate sewage facility, submitted to DER on December 9, 1982, and pursuant to the Sewage Facilities Act (SFA), 35 P.S. §750.1 et seq., and DER Rules and Regulations, 25 Pa. Code §71 et seq.

Concord filed a Petition for Supersedeas, duly amended, and the Board, Member Anthony J. Mazullo, Jr. presiding, conducted a hearing on both the supersedeas petition and the merits on August 9, 1984. DER did not participate and Mr Sharp proceeded pro se at the hearing. Following receipt of Concord's Post Hearing Brief on October 4, 1984, the record was presented for adjudication. While a proposed adjudication was under review by the Board, a Post Hearing Brief was filed on behalf of Mr. Sharp by his newly retained attorney. Following the submission of Supplemental Post Hearing Briefs by both parties, the record was reexamined and presented for final adjudication.

FINDINGS OF FACT

1. Appellant is the Township of Concord (Concord), located in Delaware County, Pennsylvania.

2. Appellee, Commonwealth of Pennsylvania, Department of Environmental Resources (DER), is the administrative agency of the Commonwealth of Pennsylvania which has the duty and responsibility of administering, inter alia, the Sewage Facilities Act, 35 P.S. §750.1 et seq., DER Rules and Regulations promulgated thereunder, 25 Pa. Code §71 et seq., the Clean Streams Law, 35 P.S. §691.1 et seq., and DER Rules and Regulations promulgated thereunder, 25 Pa. Code §91 et seq.

3. Intervenor, George Sharp, III, submitted a private request to DER on December 9, 1982, wherein Mr. Sharp sought a DER order directing Concord to revise its official sewage facilities plan for the purpose of permitting Mr. Sharp to construct and operate a private, off-site sewage treatment plant at his one acre lot located on 822 Shavertown Road, in Concordville, Concord Township, Delaware County, Pennsylvania.

4. Mr. Sharp's private request was submitted to DER pursuant to Section 5(b) of the Sewage Facilities Act (SFA) and 25 Pa. Code §71.17, which provide:

> "[a]ny person who is a resident or property owner in a municipality may request the department [DER] to order the municipality to revise its official plan where said person can show that the official plan is inadequate to meet the resident's or property owner's sewage disposal needs."

35 P.S. §750.5(b); 25 Pa. Code §71.17 (import of Section 71.17 of 25 Pa. Code is identical to Section 5(b) of SFA, with only minor syntactic variations).

5. Mr. Sharp's private request was submitted to DER after prior demand upon (by letter dated November 12, 1982) and refusal by Concord (by township resolution dated December 7, 1982) to revise its official sewage facilities plan. 35 P.S. §750.5(b).

6. DER's order of June 19, 1984 was issued pursuant to Section 10 of the SFA, 35 P.S. §750.10, which grants DER the power to order municipalities to submit official sewage facilities plans and revisions thereto.

7. DER's order of June 19, 1984 states, in pertinent part:

> "7. The Department has evaluated [Mr.] Sharp's petition pursuant to 25 Pa. Code §71.17 and has found and determined that: [Concord] Township's plan does not provide for adequate sewage services for [Mr.] Sharps [sic] property. The plan calls for the use of on-site systems with public sewers programmed by 1990. The site is considered unsuitable for an on-site system due to the unavailability of sufficient areas of suitable soils. Furthermore, [Concord] Township is not progressing towards implementing the regional sewer system as shown in [Concord] Townships [sic] plan[,] in that [Concord] Township has not applied for any of the required water quality management permits needed to implement the plan[,] nor has it updated its plan since 1971."

8. DER's order of June 19, 1984 also states, in pertinent part:

> "6. On February 15, 1983, in response to the Department's request for written comments about the plan revision, [Concord] Township cited a concern about proliferation of small and ineffective treatment plants, the concern about the satisfactory operation and maintenance of small treatment plants, the concern that the proposal was inconsistent with [Concord] Township['s] position of providing sewage treatment on a Regional or subregional basis[,] and a Township preference for land application systems."

9. Philip E. Masciantonio, Jr. is employed as a plumbing inspector and sewage enforcement officer by Concord Township.

10. Mr. Masciantonio has been licensed by the Commonwealth of Pennsylvania as a sewage enforcement officer since 1968.

11. Mr. Masciantonio's duties as a sewage enforcement officer for Concord Township include administering the provisions of the SFA.

12. Mr. Masciantonio has been employed as a plumbing contractor since 1953.

13. As part of his duties as a plumbing contractor, Mr. Masciantonio has on occasion installed various types of sewage disposal systems.

14. Prior to submitting a private request to DER for an off-site sewage treatment and disposal system, Mr. Sharp applied to Concord Township for an on-site sewage system.

15. Mr. Sharp's application to Concord Township for an on-site sewage system was denied by Concord because of the unsuitability of the soils at Mr. Sharp's property.

16. Concord Township's official sewage facilities plan permits only on-site sewage treatment and disposal systems.

17. Concord Township's official sewage facilities plan has been revised to permit State Farm Insurance Company to construct and operate an off-site sewage treatment and disposal system located in Concord Township.

18. State Farm Insurance Company's sewage system is a tertiary treatment plant with a capacity of twenty-five thousand (25,000) gallons per day.

19. Operating an off-site sewage treatment and disposal system involves the discharge of effluent off the property from where the

sewage originates.

20. As part of his duties as Concord Township's sewage enforcement officer, Mr. Masciantonio is responsible for issuing permits for various types of sewage treatment and disposal systems. 25 Pa. Code §71.1 (definition of sewage enforcement officer).

21. The off-site sewage treatment and disposal system requested by Mr. Sharp is also referred to as an individual package plant.

22. Mr. Masciantonio's concerns about the operation of an individual package plant in Concord Township include the following possibilities: proliferation of individual sewage systems; degradation of the water quality of receiving streams; inadequate state inspections; insufficient owner monitoring; contamination of ground water; and, system malfunctions resulting in the contamination of receiving streams.

23. Concord Township has failed to move forward with its plan for a regional sewer system.

24. DER's order of June 19, 1984 directs Concord Township to revise its official sewage facilities plan to provide an adequate method of sewage disposal for Mr. Sharp's property, without informing Concord as to the exact method of sewage treatment and disposal.

25. DER's order of June 19, 1984 was issued in response to Mr. Sharp's private request for a specific type of sewage treatment and disposal system-- to wit, an individual package plant, which would involve the discharge of treated sewage into Commonwealth waters.

26. Mr. Sharp seeks to construct and operate an individual package plant-- the same type of sewage system, albeit on a larger scale, which State Farm Insurance Company currently operates in Concord Township.

27. In operating an individual package plant, Mr. Sharp would be required to comply with the same state imposed regulations with respect to monitoring, inspections, sampling and testing which State Farm Insurance Company must comply with in its operation of an individual package plant located in Concord Township.

28. The Sewage Facilities Act permits Mr. Sharp to construct an individual package plant, 35 P.S. §§750.2 (definition of individual sewage system); 750.7, provided that such construction is consistent with the official sewage facilities plan of the municipality or consistent with said plan as revised by the municipality upon it own initiative or upon DER order, 35 P.S. §750.7(b)(4), and provided that the attendant stream discharge upon operation of the system is permitted by the Clean Streams Law, 35 P.S. §§691.202; 691.207.

29. DER Rules and Regulations promulgated under the Sewage Facilities Act permit Mr. Sharp to construct an individual package plant, 25 Pa. Code §§71.1 & 73.1 (definition of individual sewage system); 73.11(d), provided that such construction is consistent with the official sewage facilities plan of the municipality or consistent with said plan as revised by the municipality upon its own initiative or upon DER order, 25 Pa. Code §71.32, and provided that the attendant stream discharge upon operation of the system is permitted by the Clean Streams Law, 35 P.S. §§691.202; 691.207.

30. Section 202 of the Clean Streams Law states, in part:

> "No municipality or person shall discharge or permit the discharge of sewage in any manner, directly or indirectly, into the waters of the Commonwealth unless such discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department."

35 P.S. §691.202.

31. John W. Cornell is Township Manager of Concord Township.

32. Mr. Cornell's concerns about Mr. Sharp's operation of an individual package plant are identical to the concerns expressed by Mr. Masciantonio. (See Finding of Fact No. 22).

33. In filing his application for an individual package plant, Mr. Sharp was made aware of the responsibilities he would be charged with in operating such a sewage system.

34. Mr. Sharp's individual package plant would discharge treated sewage into Chester Creek.

35. Mr. Sharp is employed as a maintenance mechanic and he is familiar with the operation of an individual package plant.

36. Mr. Sharp consulted an engineer (not identified) to design a proper package plant, which design was subsequently approved by DER.

37. Mr. Sharp intends to maintain a residence for himself on the property for which he seeks a permit for an individual package plant.

38. Two safeguards-- an electronic alarm and a mechanical alarm-- are part of the design of Mr. Sharp's proposed package plant.

39. The two alarms referred to in Finding of Fact No. 38 would not indicate the quality of water being discharged from the system but would alert the operator about system malfunctions.

40. Mr. Sharp's proposed package plant would also include some reserve capacity built into the system so that the system could still be used for a limited period of time in the event of malfunction.

41. The unsuitability of soils at Mr. Sharp's property led Mr. Masciantonio to deny Mr. Sharp's previous application for an elevated sand mound sewage system.

42. Despite the fact that DER Rules and Regulations with respect to elevated sand mound requirements have been revised subsequent to Mr. Sharp's application for a permit to operate such a system, his property would still not pass the elevated sand mound requirements as revised.

43. Mr. Sharp was cognizant of his right to be represented by counsel before the Environmental Hearing Board.

44. Mr. Sharp waived his right to be represented by counsel before the Environmental Hearing Board.

45. Mr. Sharp was afforded adequate and proper notice of the time, date and place of the Environmental Hearing Board's hearing of this appeal.

46. In response to DER's request for Concord Township's comments about Mr. Sharp's private request, the Township Manager, Mr. Cornell, sent a letter to DER, dated February 10, 1983, which set forth Concord's objections to and concerns about Mr. Sharp's private request.

47. An "individual sewage system" is defined as:

> "...a system of piping, tanks or other facilities serving a single lot and collecting and disposing of sewage in whole or in part into the soil or into any waters of this Commonwealth or by means of conveyance to another site for final disposal..."

35 P.S. §750.2; 25 Pa. Code §§71.1; 73.1.

48. DER's order of June 19, 1984, states, in part:

> "It is hereby ordered that the Supervisors of Concord Township, Delaware County, shall, pursuant to Section 5 of the Pennsylvania Sewage Facilities Act, 35 P.S. §750.5, and 25 Pa. Code ...[§§]71.14 and 71.16(a) and (b), submit within 120 days to the Department of Environmental Resources, in compliance with applicable provisions of the Sewage Facilities Act, a revision to the Official Township Sewage Facilities Plan that will provide an adequate method of sewage disposal for [Mr.] Sharp's project."

49. Section 7(a) of the Sewage Facilities Act provides, in pertinent part:

> "No person shall install, construct, or request bid proposals for construction, or alter an individual sewage system or community sewage system or construct, or request bid proposals for construction, or install or occupy any building or structure for which an individual sewage system or community sewage system is to be installed without first obtaining a permit indicating that the site and the plans and specifications of such system are in compliance with the provisions of this act and the standards adopted pursuant to this act."

35 P.S. §750.7(a).

50. Section 7(b)(4) of the Sewage Facilities Act provides, in its entirety:

> "The local agency shall not issue permits for individual sewage systems or community sewage systems unless the system proposed is consistent with the official plan of the municipality in which said system is to be located and the municipality is adequately implementing the official plan. In the event that the municipality has no plan or has not revised or implemented its plan as required by the rules and regulations of the department or by order of the department, no permits may be issued under section 7 of this act in those areas of the municipality for which an official plan, revision thereto or implementation thereof is required, until the municipality has submitted the said official plan, or revision to, and received the approval of, the department, or has commenced implementation of its plan or revisions in accordance with a schedule approved by the department."

35 P.S. §750.7(b)(4).

DISCUSSION

The Board's responsibility when reviewing orders issued by DER is to determine whether or not such issuance constituted an abuse of discretion or amounted to arbitrary or capricious action. Morcoal Company v. DER, 74 Pa. Cmwlth. 108, 116, 459 A.2d 1303, 1307 (1983); Warren Sand and Gravel Company, Inc. v. DER, 20 Pa. Cmwlth. 186, 203-4, 341 A.2d 556, 565 (1975); Strasburg Associates v. DER, EHB Docket No. 83-097-M (issued 10-30-84) (citations omitted). The burden of proof in the present appeal rests upon appellant, Concord Township.[1]

The essential facts and circumstances leading up to the present appeal are not in dispute and the main issue of contention concerns DER's authority to issue its order of June 19, 1984, which required Concord Township to revise its official sewage facilities plan to provide for an adequate method of sewage disposal for Mr. Sharp's one acre lot. There is no quarreling with the fact that DER possesses the authority to order municipalities to submit official sewage facilities plans and revisions thereto; Section 10 of the Sewage Facilities Act grants DER such authority. 35 P.S. §750.10. Also, there is no allegation that intervenor, Mr. Sharp, failed to comply with the statutory requirements covering private requests, particularly the requirement that such requests be submitted to the municipality prior to their submission to DER. (See Finding of Fact No. 5).

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[1] 25 Pa. Code §21.101(a); Lathrop Township Board of Supervisors v. DER, 1979 EHB 259.

Rather, Concord Township raises the narrow issue of whether or not DER possesses the authority to order Concord to revise its official sewage facilities plan to permit the construction of an individual package plant. Further, Concord questions the authority of DER to initially approve the official sewage facilities plan of a municipality which neither provides for nor permits individual package plants if DER can subsequently order the municipality to revise its plan to permit such a system. Essentially, Concord takes issue with DER's actions leading up to the present appeal by positing the question of whether a municipality has any power to set its sewage policies if DER is free to do what it has done in the present appeal, which, in effect and according to Concord, thwarts Concord's attempts to follow its own chosen path of sewage system development within its boundaries.

With regard to DER's authority to order a municipality to revise its official sewage facilities plan to permit the construction of an individual package plant, there is no question that the Sewage Facilities Act (SFA) and DER Rules and Regulations permit such an order. As noted previously, DER possesses the authority to order municipalities to revise their official sewage facilities plans. 35 P.S. §750.10. Further, Mr. Sharp, as a resident or property owner, is within his statutory rights to request a permit to construct an individual package plant. 35 P.S. §750.5(b); 25 Pa. Code §71.17. While the term "individual package plant" does not appear in the SFA or in DER Rules and Regulations, and while the term seems to be a substitute expression referring to

a private, off-site, individual sewage treatment and disposal system (see Findings of Fact Nos. 21 & 47), it necessarily follows that DER has the authority to order a municipality to revise its official plan to permit the construction of an individual package plant. Section 5(b) of the SFA provides a mechanism whereby residents or property owners may request an official plan revision for the purpose of adequately meeting their sewage needs. 35 P.S. §750.5(b). See also 25 Pa. Code §71.17. Section 5(b) is not limited by its terms to delineating the types of private sewage systems an applicant may request a permit for the purpose of meeting his or her sewage needs. Rather, DER Rules and Regulations permit the use of, and set forth the requirements for, a variety of both on-site and off-site sewage treatment and disposal systems. 25 Pa. Code §73 et seq. In view of the fact that Mr. Sharp is unable to obtain a permit for an on-site sewage system due to the unsuitability of the soils at his property (see Findings of Fact Nos. 15, 41 & 42), it necessarily follows that he has the statutory right to request a permit for the construction of an off-site system such as an individual package plant in order to adequately meet his sewage needs and that DER has the concomitant statutory authority to order a municipality to revise its official sewage facilities plan to permit the construction of an individual package plant.

With regard to the broader issue of the power of a municipality to chart its own course of sewage system development within its boundaries, it is clear that Concord raises an issue which is outside the purview of the Board. In light of the Board's holding that DER has the authority under the SFA to order a municipality to revise its official sewage facilities plan for the purpose of permitting the construction of an individual package plant, we are unable to address Concord's broader concerns about the power of a municipality vis-a-vis DER in the area of sewage system development within the boundaries of that municipality. If Concord is not satisfied with the regulatory scheme, the permitting process, the provisions of the SFA, or DER's authority thereunder and the township's lack thereof, then Concord must present the issue to the General Assembly, which unlike the Board, has the wherewithal to rectify the situation.

Concord Township raises other issues which the Board hereby addresses.

First, Concord raises the all too familiar argument that, in issuing its order, DER did not carry out its responsibilities as a trustee of the Commonwealth's public natural resources under Article I, Section 27 of the Pennsylvania Constitution as interpreted in Payne v. Kassab, 11 Pa.Cmwlth. 14,29-30, 312 A.2d 86,94 (1973) aff'd, 468 Pa. 226, 361 A.2d 263 (1976).

The first of Payne's threefold test requires DER to comply with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources. However, Concord bears the burden of proving that DER failed to comply with applicable statutes and regulations. Unfortunately for Concord, however, there has been absolutely no showing of any failure to comply on DER's part. Concord contends that DER failed to consider the statutory factors enumerated in the Clean Streams Law (CSL), which DER is required to consider when issuing orders pursuant to the CSL. Concord's argument attempts to place upon DER the burden of proving compliance with the CSL; however, Concord fails to answer the threefold question of whether the factors enumerated in the CSL are applicable to the DER order at issue herein, which was promulgated pursuant to the SFA rather than the CSL. In view of the fact that there is no allegation that DER failed to comply with the SFA and 25 Pa. Code §71 et seq., and in view of the fact that Concord has failed to point out any other applicable statutes or regulations, the Board finds no violation on DER's part under the first prong of Payne's threefold test.

The second prong of Payne's threefold test requires the Board to determine whether the record demonstrates a reasonable effort by DER to reduce the environmental incursion to a minimum. Concord's main concerns, as expressed by its sewage enforcement officer (see Finding of Fact No. 22), all reflect a fear of what could happen in the future should Mr. Sharp be permitted to construct an individual package plant. However, at this stage

of the process, an order merely requiring Concord to revise its OSFP does not threaten the environment in any way. Until there is a showing of possible environmental harm, the issue of reducing the environmental incursion to a minimum does not arise. Township of Indiana and Concerned Citizens of Rural Ridge v. DER and Duquesne Light Company, EHB Docket Nos. 82-099, 100-G (Adjudication, January 3, 1984).

The third prong of Payne's threefold test requires a balancing between the environmental harm and the benefits to be derived from the proposed sewage system. However, because Concord has failed to show any environmental harm will result from requiring Concord to revise its OSFP, no balancing under Payne is required.

Finally, Concord requests that the Board order DER to provide more specific direction to Concord because the township apparently cannot identify what type of "amendment" would comply with the SFA and at the same time provide an adequate method of sewage disposal for Mr. Sharp's prolect. Of course, DER's order directs Concord to revise its official sewage facilities plan, not to amend it--not an insubstantial difference under the SFA. However, even if the Board views Concord's request as a contention that DER's order amounts to an abuse of discretion because it is not sufficiently specific, we do not agree with such a contention because DER's order is clear enough when it is read in conjunction with the applicable provisions of the SFA and DER Rules and Regulations promulgated thereunder, 25 Pa. Code §§71 & 73.

Accordingly, for the foregoing reasons, the Board holds that DER's issuance of its June 19, 1984 order, directing Concord Township to revise its official sewage facilities plan for the purpose of permitting an adequate method of sewage disposal for Mr. Sharp's project, neither amounted to an abuse of discretion nor constituted arbitrary or capricious action on DER's part; therefore, Concord Township's appeal of said order is hereby dismissed.

CONCLUSIONS OF LAW

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

2. The Sewage Facilities Act permits Mr. Sharp to construct an individual package plant, 35 P.S. §§750.2 (definition of individual sewage sytem); 750.7, provided that such construction is consistent with the official sewage facilities plan of the municipality or consistent with said plan as revised by the municipality upon its own initiative or upon DER order, 35 P.S. §750.7(b)(4), and provided that the attendant stream discharge upon operation of the system is permitted by the Clean Streams Law, 35 P.S. §§691.202; 691.207.

3. DER Rules and Regulations promulgated under the Sewage Facilities Act permit Mr. Sharp to construct an individual package plant, 25 Pa. Code §§71.1 & 73.1 (definition of individual sewer system); 73.11(d), provided that such construction is consistent with the official sewage facilities plan of the municipality or consistent with said plan as revised by the municipality upon its own initiative or upon DER order, 25 Pa. Code §71.32, and provided that the attendant stream discharge upon operation of the system is permitted by the Clean Streams Law, 35 P.S. §§691.202; 691.207.

4. DER's issuance of its order of June 19, 1984, directing Concord Township to revise its official sewage facilities plan for the purpose of providing an adequate method of sewage disposal for Mr. Sharp's project, neither constituted an abuse of discretion nor amounted to arbitrary or capricious action on DER's part.

5. The burden of proof in the present appeal rests upon appellant, Concord Township, and appellant has failed to meet its burden of proving that DER's issuance of its order of June 19, 1984 amounted to an abuse of discretion or arbitrary or capricious action.

6. DER possesses the authority to order municipalities to submit official sewage facilities plans and revisions thereto. 35 P.S. §750.10.

7. Mr. Sharp followed the statutorily mandated procedures for the filing of a private request under the Sewage Facilities Act. 35 P.S. §750.5.

8. DER possesses the authority to order a municipality to revise its official sewage facilities plan for the purpose of permitting the construction of an individual sewage system.

9. DER possesses the authority to order a municipality to revise its official sewage facilities plan for the purpose of permitting the construction of an individual package plant.

10. DER possesses the authority to order Concord Township to revise its official sewage facilities plan for the purpose of permitting Mr. Sharp to construct an individual package plant at his property located at 822 Shavertown Road, in Concordville, Concord Township, Delaware County, Pennsylvania.

11. DER met its responsibilities as trustee of the Commonwealth's public natural resources under Article I, Section 27 of the Pennsylvania Constitution as those responsibilities are interpreted in Payne v. Kassab, supra, when it issued its order

of June 19, 1984, directing Concord Township to revise its official sewage facilities plan for the purpose of providing an adequate method of sewage disposal for Mr. Sharp's project.

ORDER

AND NOW, this 17th day of January, 1985, in consideration of the within Findings of Fact and Conclusions of Law, the appeal of appellant, Concord Township, at EHB Docket No. 84-245-M is hereby dismissed.

Concord Township is ordered to comply with DER's order of June 19, 1984 within sixty (60) days of receipt of this order of the Environmental Hearing Board.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: January 17, 1985.

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COMMONWEALTH OF PENNSYLVANIA

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FRANK C. and MARIANNE V. URRARO :

:

Docket No. 83-206-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By: Edward Gerjuoy, Member,

Syllabus

This is an appeal of a DER compliance order requiring Appellants to take certain actions with regard to property owned by them and used as a solid waste disposal facility. The parties have entered into a partial consent adjudication which has disposed of every issue raised in the appeal with a single exception, namely the adequacy of the material employed by Appellants as final cover for the site. Appellants applied the cover material without first obtaining DER approval as required by the compliance order. The Board rejects Appellants' argument that DER cannot reasonably require Appellants to comply with 25 Pa. Code §75.24(c) because Appellants have already placed the cover material on the site. However, Appellants are afforded the opportunity to cover only those portions of the site which DER agrees have not already been covered in compliance with the requirements of 25 Pa. Code §75.24(c).

FINDINGS OF FACT

1. Appellants are Frank C. and Marianne V. Urraro, who reside at 5305 West 38th Street, Erie, PA 16505.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), the agency of the Commonwealth charged with the duty of enforcing the Solid Waste Management Act, 35 P.S. §6018.101 et seq.

3. Appellants own a parcel of land in Fairview Township, Erie County, Pennsylvania bearing Property Index No. 21-56-78-3 located to the west of Millfair Road and bordered on the north and south by railroad tracks.

4. From at least October 1978 until and including the present, Appellants have permitted use of the said land as a solid waste disposal facility in which solid waste was dumped or disposed, which solid waste includes but is not necessarily limited to construction and demolition wastes, waste soil, 6-volt lantern size batteries, foundry sand, foundry phenolic binders, foundry cores, slag, debris and municipal wastes.

5. The landfill is encroaching on wetlands, drainage of which flows toward public community water supply wells and private wells.

6. Appellants have never applied for nor received a permit from the Department pursuant to the Solid Waste Management Act, the Act of June 31, 1968, P.L. 788, Act 241, as amended, 35 P.S. §6001-§60017, as succeeded by the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, No. 97, 35 P.S. §6018.101 et seq. (hereinafter "Solid Waste Management Act") to dispose of solid wastes at the landfill.

7. In a letter dated October 1, 1980, the Department advised Appellants that the landfill was being operated in violation of the Solid Waste Management Act and that the landfill must close in accordance with Department regulations

or that a permit would have to be obtained to operate the landfill.

8. On or about November 10, 1980, Appellants were advised by the Department not to operate or permit the operation of the landfill without a permit and not to dump or permit the dumping of any more wastes and to close the site in accordance with Department regulations.

9. On or about November 10, 1980, the Department informed Appellants that access to the site must be limited to prevent unauthorized dumping of solid waste.

10. On or about November 10, 1980, Appellants, at a meeting with the representatives of the Department, agreed to retain the services of an engineering consultant to provide engineering services including obtaining surface and ground water information, testing surface water samples, and to develop a closure plan. Appellants failed to undertake any of these specified activities prior to April 22, 1982.

11. On or about April 22, 1982, at a meeting with representatives of the Department, Appellants again agreed to retain the services of a consulting engineer for purposes of collecting information on surface and ground water in the area of the landfill, to take ground water samples and to develop a closure plan.

12. Subsequent to the aforesaid meeting, Appellants retained the services of Moody and Associates, Inc. who on behalf of Appellants established five (5) monitoring wells on-site and collected samples from said monitoring wells on or about August 2, 1982. The said monitoring wells were designated as wells 1, 2, 3, 4, and 5 in the report of Moody and Associates, Inc. and exhibits dated August 17, 1983 to which reference is hereby made.

13. Inspections by the Department or by representatives of the Department on February 24, 1981, March 2, 1981, April 24, 1981, June 19, 1981, July 28,

1981, November 20, 1981, April 21, 1982, May 3, 1982, May 10, 1982, June 15, 1982, July 16, 1982, July 13, 1982, July 14, 1982, July 28, 1982, August 2, 1982, August 19, 1982 and November 16, 1982 revealed that access to the site had not been limited in that construction and demolition wastes, municipal and residual waste, were continuing to be dumped at the landfill.

14. Analyses of samples collected on August 3, 1982 from monitoring wells on the landfill site reveal the presence of phenols, lead, iron, manganese, copper, zinc and the indicators C.O.D., alkalinity and specific conductance at the levels set forth in the chemical analyses of the Department dated August 3, 1982 and Moody and Associates, Inc. dated August 2, 1982 to which reference is hereby made.

15. Use of the said site has resulted in contamination of the waters of the Commonwealth.

16. Continued use of the site and failure to properly close the site may result in further contamination and pollution to the waters of the Commonwealth.

17. On August 10, 1983, the Department issued an Order to Appellants requiring Appellants inter alia, to restrict access to the site, hire a consultant to study the landfill site and any impacts it may have had upon the waters of the Commonwealth and to close the landfill site based upon said study subject to the approval of the Department.

18. Appellant placed final cover material on the site without first obtaining DER approval.

19. The site has not been closed in a manner consistent with the terms of the DER order, except possibly in limited portions of the site; these portions have been spelled out in a letter from DER dated January 2, 1985.

DISCUSSION

This appeal is taken from a DER compliance order which required Appellants to take certain actions to clean up an area which had been used for the disposal of solid waste. Appellants own the land in question; they have never applied for or received from DER a permit for the operation of a solid waste disposal facility as required by the Solid Waste Management Act, 35 P.S. §6018.101 et seq. The DER order required Appellants to submit a closure plan to DER for approval. After DER approval, the plan was to be implemented.

Appellants and DER have entered into a partial consent adjudication which has been approved by this Board. The consent adjudication resolves all issues except one: the adequacy of the cover material which has been placed on the site; this issue is discussed herein. A hearing on the merits of this issue was held December 4, 1984. At this hearing, the Appellants seemed to be resting this case on purely legal grounds, which the Board rejected; therefore, the hearing was confined to legal argument, i.e., no evidence was put on the record during the hearing. However, the findings of fact contained in the partial consent adjudication have been adopted by this Board for the purpose of this adjudication.

The DER order required that the closure plan provide for final site configuration and cover revegetation. Appellants--without first obtaining approval from DER--placed cover material on the site. They maintain that it is pointless for DER to insist that there be cover material placed which conforms to the requirements of 25 Pa. Code §75.24(c) since the area has already been covered. DER contends that the Appellants must comply with all applicable regulations.

We concur with DER's point of view. Indeed, under the holding of East Pennsboro Township Authority v. DER, 334 A.2d 794 (Pa. Cmwlth. 1975), no other conclusion is tenable. The Pennsboro court wrote:

> Once the EQB (Environmental Quality Board) has established the regulations, DER has the duty of enforcing them. As we perceive the regulatory scheme, if the EQB has established a regulation whereby a specific requirement or prohibition is set forth,..., then DER is under an obligation to enforce such language literally.

There is no reason to believe this Commonwealth Court mandate upon DER is vitiated by the fact that Appellants chose to ignore DER's order--well within DER's discretion-- to submit a closure plan to DER for approval before covering the site.

Appellants have not argued that they were unaware of the requirement that they obtain DER approval for a closure plan prior to closing the site. Had they filed such a plan, DER would have reviewed it for compliance with the applicable regulations. For this reason, and in view of the other circumstances of this appeal (reviewed supra), the Board holds that DER is not abusing its discretion by insisting that the site now be re-covered via (in effect) a plan DER has been able to review and approve for consistency with the regulations.

In summary, Appellants have not demonstrated any satisfactory reason why they should not comply with 25 Pa. Code §75.24(c). Nor is there any reason to hold that DER's appealed-from order--or DER's present insistence that Urraro cover the landfill in accordance with the order (which required a prior plan approval)--represent an abuse of DER's discretion or an arbitrary exercise of DER's powers. In other words, this appeal must be dismissed. It is possible, however, that the soil which has been placed on the site as final cover is--on some portions of the site--adequate in quantity and quality to conform with the requirements of 25 Pa. Code §75.24(c). Therefore, in the interest of sparing the

Appellants any unnecessary expenditures, at the conclusion of the aforesaid hearing the Board ordered DER to inspect the site once again, so that DER might inform the Appellants how they might demonstrate to the satisfaction of DER that the present cover material really is adequate. We emphasize that the Appellants were given this opportunity not because at the hearing they made a showing sufficient to cast doubt upon the propriety of the DER order, but rather and solely to avoid unnecessary deterioration of Appellants' financial condition.

DER now has written Appellants as follows (on January 2, 1985):

> Based upon an inspection of the above-referenced site on December 14, 1984, the Department has determined that a major portion of that site lacks suitable soil cover as set forth under Sections 75.24(c)(2)(ix) and (xxi) of the Pennsylvania Solid Waste Management Rules & Regulations, 25 Pa. Code 75.1 et seq. Further, the site was found to lack a suitable vegatative cover. Therefore, two (2) feet of soil meeting the specifications set forth in Section 75.24(c)(2)(ix) should be placed over the entire site, except for the area of the site described as follows:
>
> a. That area seventeen (17) feet south from the mid-point of the site access road southward to the stream, and from the eastern edge of the site westward of approximately two hundred-twenty (220) feet from that eastern edge; and
>
> b. That area seventeen (17) feet north from the mid-point of the site access road northward to the northern edge of the site, and from the eastern edge of the site westward approximately one hundred-eighty (180) feet from that eastern edge.
>
> The site access road to a point seventeen (17) feet on either side of the mid-point of the access road, and the remaining western portion of the fill should be covered, graded and mulched to prevent erosion until the spring (1985) when seeding to establish an adequate vegetative cover should occur.
>
> This evaluation by the Department precludes the necessity to sample and analyze site soils and to evaluate results of those analyses.

In view of this letter, the Board sees no reason to further delay this adjudication. The appeal must be dismissed, as we already have said. However, we will permit the Appellant to save whatever money he can by covering the site only as prescribed by the above letter.

The accompanying order is consistent with the foregoing. Because the parties were advised at the conclusion of the hearing and in a telephone conference call after receipt of the January 2, 1985, letter that the Board intended to issue an Order along the lines which follow, (N.T. 18-24), and have made no objection, we deem waived any contention that the Board's Order goes beyond the precepts of Warren Sand and Gravel Company, Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975).

CONCLUSIONS OF LAW

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

2. Appellants have failed to obtain a permit for the landfill as required by the Solid Waste Management Act, 35 P.S. §6018.101 et seq., or to close the landfill in accordance with the provisions governing closure contained in 25 Pa. Code Chapter 75.

3. The operation of the landfill without a solid waste permit is a violation of §§201, 301, 501, 601 and 610 of the Solid Waste Management Act, 35 P.S. §§6018.201, 6018.301, 6018.501, 6018.601 and 6018.610.

4. Failure to restore the area affected by the landfill constitutes a public nuisance pursuant to §601 of the Solid Waste Management Act and is a violation of §610(4) of the Solid Waste Management Act, 35 P.S. §6018.601 and §6018.610(4).

5. 25 Pa. Code 75.23(c) is applicable to Appellants' landfill.

6. DER is required to enforce a regulation when circumstances indicate that the regulation is applicable.

7. Appellants have not satisfactorily demonstrated why they chose to cover the site without first obtaining DER approval, as required by the appealed-from compliance order.

8. DER has not acted arbitrarily or abused its discretion in insisting upon compliance with the applicable regulation.

O R D E R

WHEREFORE, this 28th day of January , 1985, it is ordered that:

1. The appeal is dismissed, and the previously filed partial consent adjudication is affirmed, as to all issues not pertinent to the issue of final cover which is the subject of the above Opinion.

2. The appeal is dismissed as to the issue of final cover not resolved by the aforesaid consent adjudication.

3. However, Urraro may comply with the appealed-from order by:

a. Obeying DER's appealed-from Order as originally issued including putting on the entire site a new cover approved by DER as being in conformity with the applicable regulations, notably 25 Pa. Code §75.24(c)(2)(ix); or

b. Obeying DER's appealed-from Order as modified by DER's above-quoted January 2, 1985, letter.

4. In view of the fact that paragraph 3 (b) gives Urraro a wider option than would otherwise follow from paragraph 3(a), the Board will not accept yet another appeal from Urraro challenging DER's findings and conclusions in its January 2, 1985, letter.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO,JR
Member

EDWARD GERJUOY
Member

DATED: January 28, 1985

cc: Bureau of Litigation
Paul F. Burroughs, Esq.
Frank L. Kroto, Jr., Esq.

COMMONWEALTH OF PENNSYLVANIA

BEFORE THE

ENVIRONMENTAL HEARING BOARD

FLOYD AND JANET KEIM, et al.	:	EHB DOCKET NO. 82-254-M
Appellants	:	
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
Appellee	:	
TOWNSHIP OF SALISBURY, Permittee U.G.I. DEVELOPMENT CORPORATION, and U.G.I. REALTY, INC., Intervenors	:	

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

By: Anthony J. Mazullo, Jr., Member, February 12, 1985

SYLLABUS

Floyd and Janet Keim, et al., appellants, have appealed the Department of Environmental Resources' (DER's) approval of a revision to the Township of Salisbury's (Township's) Official Sewage Facilities Plan. This revision accomodates the development by Intervenors (UGI) of 351 single family dwelling house lots on a 141 acre tract of land in the Township. The Township though not an appellant, contends that although DER did not abuse its discretion in approving the revision, DER should never have required the revision. DER did not abuse its discretion in either requiring or approving the revision, and this appeal is therefore dismissed.

DER's approval of the revision complied with the applicable statutes, the Clean Streams Law, 35 P.S. §§691.1-691.1001, and the Sewage Facilities Act, 35 P.S. §§750.1-750.20. The approval of the revision also complied with the applicable regulations, 25 Pa. Code §§71.1-71.76. The only statute which appellants contend was violated was 35 P.S. §691.4, the declaration of policy of the Clean Streams Law. Appellants maintain that the approval of the revision violated this statute because of surcharging problems in the sewage sys-

tem to which UGI's development will be connected. The evidence established, however, that the surcharging problem will be corrected by the time UGI's development is built.

DER's approval of the revision complied with the requirements of Article I, Section 27 of the Pennsylvania Constitution. There was compliance with all applicable statutes and regulations, UGI is committed to taking many measures to reduce environmental incursion to a minimum, and the environmental impact of UGI's proposed development will be minimal, especially when compared to the benefits which will be derived from it. Thus, appellants did not sustain their burden of proof under 25 Pa. Code §21.101(c)(3) of showing that DER abused its discretion in approving the revision.

DER has the authority under 25 Pa. Code §71.16 to require revisions to municipalities' Official Sewage Facilities Plans. Although §71.16 allows municipalities, under certain circumstances to supplement their Official Plans rather than revise them, this is an administrative matter within the province of DER, to which the Board gives great deference. A DER decision to require a revision or a supplement in a DER review of a planning request under the Sewage Facilities Act is not a decision on the merits of the proposal, but only a decision on the form or technique to be used in DER's review. DER ultimately approved the Township's planning request, and the Board here sustains this approval. The Board will not now hold that the technique used by DER in reviewing the Township's planning request was an abuse of discretion.

INTRODUCTION

Floyd and Janet Keim, et al., appellants, filed this appeal on October 18, 1982, protesting the approval by the Department of Environmental Resources of a revision to the Township of Salisbury's Official Sewage Facilities Plan. Evidentiary hearings were held in this matter for six days, and post-hearing memoranda of law were submitted by the parties.

FINDINGS OF FACT

1. Appellants are the Salisbury Association, an unincorporated association located in Emmaus, Pennsylvania; the Alton Park Homeowners' Association, an unincorporated association located in Allentown, Pennsylvania; Floyd and Janet Keim, Douglas P. and Cynthia Sherly, Dale P. and Margia Smith, John and Margie Thomas, Walter and Shirley Wilson, Richard T. and Sandra F. D'Agostino, Allan N. and Evelyn Dicks, and James A. and Penelope A. Pantano, all of Emmaus, Pennsylvania; and William and Mary DeWalt of Allentown, Pennsylvania (collectively, "Appellants").

2. Permittee is Salisbury Township, a township of the first class located in Lehigh County, Pennsylvania ("Township").

3. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), the agency of the Commonwealth authorized to administer the Pennsylvania Sewage Facilities Act, 35 P.S. §§750.1-750.20, and the Clean Streams Law, 35 P.S. §§691.1-691.1001, and the rules and regulations promulgated under these acts.

4. Intervenors are the U.G.I. Development Corporation and U.G.I. Realty, Inc. (collectively , "U.G.I."), corporations with their principal offices in Valley Forge, Montgomery County, Pennsylvania.

5. U.G.I. is the owner and proposed developer of a vacant tract of land on which U.G.I. wants to build a residential development called Devonshire. The tract comprises 141 acres in the Township.

6. In 1976, U.G.I. submitted to the Township plans for a planned residential development of approximately 900 dwelling units on the Devonshire tract.

7. The Township has a municipal sanitary sewer system that consists of street sewers and interceptors within the Township that are used to collect sewage, which is then transported by means of interceptor sewers of the City of Allentown to the Allentown Wastewater Treatment Plant for treatment and disposal according to legal agreements between the Township and the City of Allentown.

8. By a resolution adopted on June 15, 1967, the Board of Commissioners of the Township adopted as the Township's official sewage plan ("Act 537 Plan") under the Sewage

Facilities Act, 35 P.S. §§750.1-750.20, the "Water Supply and Sewage Facilities Plan, Lehigh Valley, Pa. 1966-2020," prepared by the Joint Planning Commission Lehigh-Northampton Counties ("JPC"). The JPC's plan was a sewage facilities plan for all of Lehigh and Northampton Counties, including the Township of Salisbury.

9. On the Township's Act 537 Plan, adopted in 1967, the Devonshire tract was shown as not being served by the Township's municipal sanitary sewer system.

10. In 1970, the JPC issued its "Water Supply and Sewage Facilities Plan Update - 1970," which was an update of the 1966 plan, and on which the Devonshire tract was still shown as not being served by the Township's municipal sewer system.

11. Prompted at least in part by the planned residential development proposed by U.G.I., the Township undertook a complete revision and updating of its Act 537 Plan, and on April 9, 1976, the Township officially submitted to DER its revised and updated Act 537 Plan.

12. After an administrative hearing held at the request of the Salisbury Association (a citizens' group consisting of many of the appellants in this appeal), and after receipt of additional information from the Township, DER notified the Township on February 23, 1977, that it had approved the Township's revised and updated Act 537 Plan.

13. The Township's revised and updated Act 537 Plan provided for the entire Devonshire tract to be served by the Township's municipal sewer system.

14. On May 9, 1977, the Salisbury Association appealed to this Board, DER's approval of the Township's revised and updated Act 537 Plan.

15. On August 25, 1977, the Board entered an order at EHB Docket No. 77-052-W, dismissing the appeal of the Salisbury Association on the ground that the appeal had been filed beyong the thirty day appeal period and there was no allegation of any facts that would justify the allowance of an appeal nunc pro tunc. No appeal was taken from this Order.

16. Although the Township gave preliminary approval to U.G.I.'s proposed planned residential development, U.G.I. never built the planned residential development.

17. In 1979, the JPC issued its "Water and Sewage Facilities Plan Update - 1979," a further update of its original plan adopted in 1966.

18. On September 28, 1979, U.G.I. submitted to the Township, its preliminary plans to develop the Devonshire tract by subdividing it into 351 single-family dwelling house lots.

19. The Township has a Subdivision and Land Development Ordinance, and the Township processed U.G.I.'s plans in accordance with these ordinances in two stages -- the Preliminary Plan stage, and the Final Plan Stage.

20. The Township sent the preliminary plans for review and comment to two neighboring municipalities, the City of Allentown and the Borough of Emmaus; to the JPC; to the Pennsylvania Department of Transportation; to Gilbert Associates, Inc., the consulting engineers for the water and sewer authority; to A.W. Martin Associates, the Township engineers; to the Zoning Officer of the Township, and to the Solicitor for the Township and the water and sewer authority.

21. U.G.I. submitted preliminary plans and final plans to the Township Planning Commission for review and comment, and then to the Township Board of Commissioners for final decision.

22. The Board of Commissioners gave final approval to the final plans at a meeting held September 25, 1980. This approval was subject to fifteen conditions imposed upon U.G.I.

23. When U.G.I. submitted preliminary plans for Devonshire to the Township in September 1979, the Township submitted the plans to DER to supplement the Township's Act 537 Plan.

24. By letter dated June 12, 1980, the Sewage Facilities division of DER's Bureau of Water Quality Management informed the Township that the plans it had submitted for the Devonshire development amounted to a revision of its Act 537 Plan, pursuant to 25 Pa. Code Ch. 71, and not a supplement as the Township had characterized them. The June 12, 1980 letter also requested, citing Article I, Section 27 of the Pennsylvania Constitution, additional information concerning Devonshire's potential environmental impact.

25. DER required the Township to provide the additional information concerning Devonshire in the form of a questionnaire known as "Component VI,", which requested infor-

mation on such diverse environmental issues as proximity of scenic rivers, potential impact of development on neighborhood traffic, and proximity of archaeological sites.

26. On July 9, 1980, the Township appealed to this Board, DER's letter of June 12, 1980. The Township contended in its appeal that the plans it had submitted to DER regarding Devonshire constituted a supplement to its Act 537 Plan, and that DER should not have required a revision because the Township's Act 537 Plan was sufficient to accomodate Devonshire.

27. By Opinion and Order dated September 19, 1980, the Board dismissed the Township's appeal for lack of jurisdiction because the DER letter of June 12, 1980 was not an appealable action. Township of Salisbury v. Department of Environmental Resources, 1980 EHB 444.

28. Under a cover letter dated September 24, 1981, U.G.I.'s engineer, Frank Moyer, submitted to DER the information requested in Component VI.

29. On May 13, 1982, the Township passed, under protest, Resolution No. 449, in which the Township adopted and submitted to DER for approval, as a revision to the Township's Act 537 Plan, U.G.I.'s planning module for Devonshire.

30. By letter dated May 28, 1982, the JPC said that it had reviewed the Township's Act 537 Plan revision, and commented, "Public sewers to serve the Devonshire development is consistent with the JPC 'Water Supply and Sewage Facilities Plan Update-1979.' The Commission, therefore, offers its support for the planning module and sewer plan revision."

31. By letter dated June 8, 1982, DER Sewage Facilities Consultant Glen Stinson informed the Township that DER had received a copy of the Township's Resolution No. 449, and a copy of the JPC's comments, and that DER would publish notice in the Pennsylvania Bulletin of the request for plan revision approval.

32. On June 26, 1982, DER published notice in the Pennsylvania Bulletin that it had received the Township's request to revise its Act 537 Plan. The notice solicited comments from the public. 12 Pa. Bull. 1973.

33. After the June 26, 1982 publication, DER received letters from residents of

the vicinity of the Devonshire tract, expressing concern about the Devonshire development's potential environmental impact.

34. DER investigated the concerns raised by the citizens under six different headings: (1) the ability of the sewage system to which Devonshire was to be connected to handle the increased volume; (2) erosion and sedimentation control and storm water management; (3) adequacy of water supply to the proposed development; (4) potential impact of Devonshire on historic or archaeological sites; (5) traffic impact of Devonshire on its neighborhood; and (6) aesthetic and visual impact of Devonshire.

35. There are two sewer interceptors that are part of the Township's sanitary system, which cross the Devonshire tract. Sewage collected from the Devonshire development will be collected in these interceptors and transported through the City of Allentown interceptor system to the City of Allentown Wastewater Treatment Plant for treatment and disposal.

36. DER examined the City of Allentown's Waste Load Managment Report (94 Report), and determined that it needed more information to make an evaluation. DER then met with representatives of the City of Allentown's tributary permittee, Lehigh County Joint Authority (LCJA), and had the LCJA submit documentation concerning the number of connections already made to the proposed receiving interceptor, results of LCJA system inspections, and the status of construction of proposed permanent relief interceptors for the system.

37. Surcharging has occurred in the LCJA system and has caused some sewage overflow to enter the Little Lehigh River at the City of Allentown's interceptor at Schreiber's Bridge, which is located approximately one-half mile upstream from the water filtration plant of the City of Allentown; and at the City of Allentown's interceptor at Keck's Bridge, which is located approximately four and one-half miles upstream from the water filtration plant of the City of Allentown.

38. The surcharging problem and Schreiber's Bridge is being corrected by the construction of a permanent relief interceptor line, which, at the time of the hearings held in this matter, was expected to be completed within a few months.

39. Two programs are underway to correct surcharging at the Keck's Bridge interceptor. First, the City of Allentown intends to construct a permanent relief interceptor at its expense, for which money has already been allocated in the City's capital budget, and for which construction is expected to be completed by the end of 1984 or early in 1985. Second, the municipalities that are served by the interceptor at Keck's Bridge are engaged in Sewer System Evaluation Surveys (SSES), which are programs to examine sewer systems for sources of infiltration and inflow, and to repair the conditions giving rise to the infiltration and inflow. These SSES programs will greatly reduce the infiltration and inflow of rain and groundwater into the LCJA interceptor that connects to the City of Allentown interceptor at Keck's Bridge.

40. The capacity of the City of Allentown's interceptor at Keck's Bridge is 7,000,000 to 8,000,000 gallons per day. The average daily sewage flow from the Devonshire development once it is fully built will be approximately 70,000 gallons, or approximately one percent of the capacity of the interceptor at Keck's Bridge. The estimated flow of 70,000 gallons of sewage per day will not be reached for at least seven years.

41. DER concluded, after reviewing the construction schedules of the relief interceptors on the LCJA system, the build-out schedule of Devonshire, and the LCJA's supplemental documentation of its 94 Report; that based on gallonage figures, the LCJA system would be able to accomodate the Devonshire development.

42. U.G.I. will construct, at its expense, an extensive storm water management system, which will include two detention ponds. Also, U.G.I. will rip-rap, for their entire length, two intermittent streams that run through the Devonshire tract. Rip-rapping is a process of channelling, which will allow the intermittent streams to better accomodate water flow and thus prevent flooding over their banks.

43. The storm water calculations upon which Devonshire's proposed storm water management system is based, demonstrate that the rate of discharge from the storm water management system when the project is developed will be less than the rate of run-off from the Devonshire tract in its undeveloped state. These calculations were reviewed by the Township's engineer, the Lehigh County Soil Conservation District, and by DER during its review of U.G.I.'s application for an Erosion and Sedimentation Control Permit.

44. DER's Bureau of Soil and Water Conservation is prepared to issue U.G.I. a permit for Devonshire pursuant to 25 Pa. Code §102; however, this permit is being withheld until all other permits required by DER for this project are ready for issuance.

45. Although DER is not required to consider the volumetric adequacy of water supplies to proposed new developments in its reviews under the Sewage Facilities Act, U.G.I. has provided documentation of adequate water supply in the form of an agreement between U.G.I. and the City of Allentown for water service. In exchange for the City of Allentown's providing water service to the Devonshire tract, U.G.I. has made a commitment to make improvements to the City's water system at an estimated cost to U.G.I. of $100,000.

46. To address the potential impact of the Devonshire project on historic or archaeological sites, DER held a meeting on February 9, 1982, with representatives of U.G.I., the City of Allentown, and Salisbury Township. All parties to this appeal agree that only one site on the Devonshire tract is of potential archaeological significance. Even appellants' expert witness, John P. McCarthy, testified that the portion of archaeological site located on the Devonshire tract was of no significance, and that he was only concerned with the impact the proposed development would have on archaeological sites near the tract because of the development's potential for off-site erosion.

47. As a result of the February 9, 1982, meeting, U.G.I. agreed to the previously mentioned rip-rapping, which will minimize off-site erosion. U.G.I. also agreed to pay up to $10,000 to excavate the potentially significant archaeological site on its tract. U.G.I. will not develop this site, but will dedicate it to the Township's as part of the Township's park system. In addition, U.G.I. agreed to contribute $10,000 to the City of Allentown to further any historic purpose within the general area of the Devonshire site that the City sees fit.

48. DER determined that U.G.I. was committed to the protection and retrieval of archaeological resources potentially affected by Devonshire. DER based this determination upon the results of the February 9, 1982 meeting, and upon reports prepared for U.G.I. by archaeological consultants.

49. U.G.I. commissioned a consultant to assess the traffic impact of Devonshire,

and the consultant recommended control measures. U.G.I. intends to implement these recommendations, and U.G.I. submitted them to DER as part of Component VI.

50. In considering Devonshire's potential visual and aesthetic impact on its vicinity, DER took into account development plans, maps, Component VI, and a report by a DER field representative that the Devonshire tract is one of the last undeveloped tracts of significant size in a developing area.

51. The Township's proposed Act 537 Plan revision to accomodate Devonshire was approved by DER by letter dated September 14, 1982, and signed by DER's Norristown Regional Water Quality Manager, C.T. Beechwood.

52. DER published its approval of the Township's Act 537 Plan revision in the Pennsylvania Bulletin on September 25, 1982. 12 Pa. Bull. 3454.

53. By letter dated September 17, 1982, DER Sewage Planning Chief Charles Rehm sent a copy of Beechwood's September 14, 1982 letter of approval to those citizens and groups who had commented on the proposed revision in response to the June 26, 1982 Pennsylvania Bulletin notice.

54. After receiving Mr. Rehm's September 17, 1982 letter advising them of DER's approval, appellants filed the instant appeal on October 18, 1982.

D I S C U S S I O N

Floyd and Janet Keim, et al., appellants, have appealed the approval by DER of a plan revision to the official Act 537 Plan of the Township of Salisbury. This revision accomodates the development of U.G.I.'s Devonshire tract. Appellants maintain that DER abused its discretion in granting this approval because DER violated the constitutional mandate to assess the environmental impact of the proposed development, and DER also violated applicable statutes and regulations.

Appellants have the burden of proving that DER abused its discretion in approving the revision of the Township's Act 537 Plan. 25 Pa. Code §21.101(c)(3).[1] Swartwood v. Department of Environmental Resources, 1979 EHB 248, aff'd 56 Pa. Cmwlth. 298, 424 A.2d 995 (1981). This Board's scope of review is to determine whether DER, in approving the Act 537 Plan revision, acted arbitrarily and capriciously, or in violation of law. Warren Sand & Gravel Co. v Department of Environmental Resources, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975); Board of Supervisors of Springfield Township v. Department of Environmental Resources, 1982 EHB 104; Czambel v. Department of Environmental Resources, 1981 EHB 88.

Municipalities in the Commonwealth of Pennsylvania are required to have "official plans" under the Sewage Facilities Act, 35 P.S. §§750.1-750.20. An "official plan" is defined in the Sewage Facilities Act as a "comprehensive plan for the provision of adequate sewage systems adopted by a municipality or municipalities possessing authority or jurisdiction over the provisions of such systems and submitted to and approved by the State Department of Environmental Resources as provided herein." 35 P.S. §750.2. DER is authorized by 35 P.S. §750.10(1), "to order municipalities to submit official plans and revisions thereto within such time and under such conditions as the rules and

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1. 25 Pa. Code §21.101 Burden of proceeding and burden of proof.

(c) A party appealing an action of the Department shall have the burden of proof and burden of proceeding in the following cases unless otherwise ordered by the Board:

(3) where a party who is not the applicant or holder of a license or permit from the Department protests its issuance or continuation.

regulations promulgated under this act may provide," and DER is authorized by 35 P.S. 750.10(2), "to approve or disapprove official plans and revisions thereto."

The relevant regulations are 25 Pa. Code §71.1-71.76, and are captioned, "Administration of the Sewage Facilities Program." Specifically, 25 Pa. Code §71.16 sets forth the requirements for approval of plans and revisions. Appellants have not sustained their burden of proving that DER's approval of the revision was in violation of 25 Pa. Code §71.16.

First, to approve a revision, DER must have evidence that establishes municipal adoption. 25 Pa. Code §71.16(b)(1). In this case, the Township did adopt on May 13, 1982, by Township Resolution No. 449, a revision of its Act 537 Plan. Second, DER must have "a statement by the appropriate planning agency with area wide jurisdiction, if one exists." 25 Pa. Code §71.16(b)(2). Here, the Joint Planning Commission Lehigh-Northampton Counties (JPC), by letter dated May 28, 1982, said that it had reviewed the Township's plan revision, that public sewers to serve the Devonshire development were consistent with the JPC's "Water Supply and Sewage Facilities Plan Update - 1979," and that the JPC offered its support for the sewer plan revision. By letter dated June 8, 1982, DER Sewage Facilities Consultant, Glenn Stinson, advised the Township that DER had received a copy of the Township's Resolution No. 449 and a copy of the comments by the JPC on the revision, and that submission of these documents satisfied the requirements of §71.16(b). This letter also advised the Township that DER was ready to publish notice in the Pennsylvania Bulletin of the request for plan revision approval, and that the remainder of DER's review would focus on the requirements of §71.16(e).

Section 71.16(e) of 25 Pa. Code sets forth the factors which DER must consider in its decision whether to approve a plan revision. In addition to the requirements of Chapter 71, DER must consider whether the revision is consistent with a comprehensive program of water quality management in the watershed as a whole, as set forth in 25 Pa. Code §91.31,[2] and whether the revision furthers the policies established by

2. 25 Pa. Code §91.31(a) provides that DER will not approve a project unless the project is included in and conforms with a comprehensive program of water quality management and pollution control.

§3[3] of the Sewage Facilities Act, 35 P.S. §750.3, and §§4[4] and 5[5] of the Clean Streams Law, 35 P.S. §§691.4 and 691.5. 25 Pa. Code §71.16(e)(1) and (2).

The only specific statute or regulation that appellants allege DER has violated by the approval of the revision is 35 P.S. §691.4, the declaration of policy of the Clean Streams Law. Appellants contend that this statute is violated because there is sewage surcharging from the Little Lehigh interceptor and flowing into the Little Lehigh River.

Surcharging has occurred at the City of Allentown's interceptors at Schrieber's Bridge and at Keck's Bridge during periods of unusually heavy rainfall, and has caused some sewage overflow to enter the Little Lehigh River. The surcharging problem at Schreiber's Bridge, however, is being corrected by the construction of a permanent relief interceptor line, which at the time the hearings were held in this matter, was expected to be completed within a few months. Also, two programs are underway to correct surcharging at the Keck's Bridge interceptor. First, the City of Allentown intends to construct a permanent relief interceptor at its expense, for which money has already been allocated by the City in the City's capital budget, and for which construction is expected to be completed by the end of 1984 or early 1985. Second, the municipalities that are served by the interceptor at Keck's Bridge (including Salisbury Township) are engaged in Sewer System

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2. Continued.
25 Pa. Code §91.31(b) provides that the determination of whether a project is included in an conforms to a comprehensive program of water quality management shall be based upon appropriate comprehensive water quality management plans approved by the Department, and official plans for sewage systems which are required by Chapter 71 of this title.

3. Section 3 of the Sewage Facilities Act, 35 P.S. §750.3 is the provision which sets forth a declaration of policy for the Sewage Facilities Act.

4. Section 4 of the Clean Streams Law, 35 P.S. §691.4, is the provision which sets forth the declaration of policy for the Clean Streams Law.

5. Section 5 of the Clean Streams Law, 35 P.S. §691.5, is the provision which sets forth the powers and duties of DER to implement the policy set forth in Section 4 of the Clean Streams Law.

Evaluation Surveys (SSES), which are programs to examine sewer systems for sources of infiltration and inflow, and to repair the conditions giving rise to the infiltration and inflow. These SSES programs will greatly reduce the infiltration and inflow of rain and groundwater into the LCJA interceptor that connects to the City of Allentown's interceptor at Keck's Bridge.

The capacity of the City of Allentown's interceptor at Keck's Bridge is 7,000,000 to 8,000,000 gallons per day. The average daily sewage that will flow from the Devonshire development once it is fully built will be approximately 70,000 gallons, or approximately one percent of the capacity of the interceptor at Keck's Bridge. The estimated flow of 70,000 gallons of sewage per day will not be reached for at least seven years.

DER concluded, after reviewing the construction schedules of the relief interceptors on the LCJA system, the build-out schedule of Devonshire, and the LCJA's supplemental documentation of its Waste Load Management Report (94 Report), that based on gallonage figures, the LCJA system would be able to accomodate the Devonshire development. The evidence presented shows that the surcharging problem in the LCJA system will be resolved by the time Devonshire is built. Thus, appellants have not sustained their burden of proving that DER's approval of the revision of the Township's Act 537 Plan will result in the discharge of sewage into waters of the Commonwealth, causing pollution of the waters of the Commonwealth in violation of the stated policy of the Clean Streams Law, 35 P.S. §691.4.

Appellants also contend that DER, in approving the revision to the Township's Act 537 Plan, has violated its duties under Article I, Section 27 of the Pennsylvania Constitution.[6] In the first case to interpret Pa. Const. Art. I, §27, the Commonwealth Court held, "It is difficult to conceive of any human activity that does not in some degree impair the natural, scenic and esthetic values of the environment." Commonwealth of Penn-

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

sylvania v. National Gettysburg Battlefield Tower, Inc., 8 Pa. Cmwlth. 231, 249, 302 A.2d 886, 895 (1973) aff'd 454 Pa. 193, 211 A.2d 588 (1973). The Commonwealth Court later held that Art. I, §27 does not preclude all development of property in the Commonwealth, but instead, Art. I, §27 allows the normal development of property in the Commonwealth and at the same time affixes a public trust concept to the management of the public natural resources of Pennsylvania. Payne v. Kassab, 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973), aff'd 468 Pa. 226, 361 A.2d 263 (1976). The court recognized in Payne that decision makers charged with administering Art. I, §27 would be faced with the task of weighing conflicting environmental and social concerns, and the court set forth the following three-prong test fo reviewing compliance with Art. I, §27:

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

Payne, 11 Pa. Cmwlth. at 29-30, 312 A.2d at 94.

It is well established that when proceeding under the Clean Streams Law or the Sewage Facilities Act, DER must operate within the limitations of Art. I, §27. Further, Art. I, §27 does not expand the statutory powers of DER, but operates only to limit such powers as have been expressly delegated by the proper enabling legislation. Community College of Delaware County v. Fox, 20 Pa. Cmwlth. 335, 358, 342 A.2d 468, 482 (1975).

The applicable statutes and regulations for the protection of the Commonwealth's public natural resources, in this case, are the Clean Streams Law, the Sewage Facilities Act, and the regulations promulgated under these acts. As already discussed in this adjudication, the approval by DER of the revision to the Township's Act 537 Plan complied with all applicable statutes and regulations. In particular, as previously discussed, the approval complied with 35 P.S. §691.4, the only statute that appellants contend the appro-

val violated. Thus, DER's approval of the revision to the Township's Act 537 Plan met the requirement of the first prong of the test set forth in Payne.

The gist of appellants' argument in this case, however, is that the requirements of the second and third prongs of the Payne test have not been met. The Board finds compliance with both the second and third prongs of the Payne test because the record demonstrates a reasonable effort to reduce the environmental incursion to a minimum, and the approval by DER of the Act 537 Plan revision does not result in environmental harm that outweighs the benefits to be derived from the approval.

The record demonstrates that DER and the Township thoroughly reviewed the potential environmental impact of the Devonshire development, and that U.G.I. agreed to take many measures to minimize this environmental impact. U.G.I. submitted its plans for this project to the Township in 1979, and the Township then submitted these plans to DER as a supplement to its Act 537 Plan. DER then informed the Township that revision to its Act 537 Plan was necessary, and citing Art. I, §27, DER requested additional information concerning Devonshire's potential environmental impact. DER required the Township to provide the additional information in the form of a questionnaire known as "Component VI," which requested information on such diverse environmental issues as proximity of scenic rivers, potential impact of development on neighborhood traffic, and proximity of archaeological sites. Under a cover letter dated September 24, 1981, U.G.I.'s engineer, Frank Moyer, submitted to DER the information requested in Component VI.

After DER received copies of the Township's resolution adopting a revision to its Act 537 Plan, and the comments of the JPC supporting the revision, DER published notice of the proposed revision in the Pennsylvania Bulletin, soliciting comments from the public. DER received letters from residents of the vicinity of the Devonshire tract, and DER investigated the concerns raised by these citizens under the following headings: The ability of the sewage system to which Devonshire was to be connected to handle the increased volume, erosion and sedimentation control and storm water management, adequacy of the water supply to the proposed development, potential impact of Devonshire on historic or archaeological sites, traffic impact of Devonshire on its neighborhood, and aesthetic and visual impact of Devonshire.

There are two sewer interceptors that are part of the Township's sanitary system, which cross the Devonshire tract. Sewage collected from the Devonshire development will be collected in these interceptors and transported through the City of Allentown interceptor system to the City of Allentown Wastewater Treatment Plant for treatment and disposal. DER examined the City of Allentown's Waste Load Managment Report (94 Report) and determined it needed more information to make an evaluation. DER then met with representatives of the City of Allentown's tributary permittee, Lehigh County Joint Authority (LCJA), and had the LCJA submit documentation concerning the number of connections already made to the proposed receiving interceptor, results of LCJA inspections, and the status of construction of the proposed permanent relief interceptors. As previously discussed, there are programs underway to correct surcharging problems that occur in the system during periods of heavy rainfall, and DER concluded, after reviewing the construction schedules of the relief interceptors on the LCJA system, the build-out schedule of Devonshire, and the LCJA's supplemental documentation of its 94 Report, that based on gallonage figures, the LCJA system would be able to accomodate Devonshire.

U.G.I. will construct, at its expense, an extensive storm water management system, which will include two detention ponds. Also, U.G.I. will rip-rap, for their entire length, two intermittent streams that run through the Devonshire tract, allowing them to better accomodate water flow, and thus prevent flooding over their banks. The storm water calculations upon which Devonshire's proposed storm water management system is based, demonstrate that the rate of discharge from the storm water management system when the project is developed will be less than the rate of run-off from the Devonshire tract in its undeveloped state. These calculations were reviewed by the Township's engineer, the Lehigh County Soil Conservation District, and by DER in connection with its review of U.G.I.'s application for an Erosion and Sedimentation Control Permit. DER's Bureau of Soil and Water Conservation is ready to issue to U.G.I. a permit for Devonshire pursuant to 24 Pa. Code §102, but this permit is being withheld until all other permits required by DER for this project are ready for issuance.

Although DER is not required to consider the volumetric adequacy of water supplies to proposed new developments in its reviews under the Sewage Facilities Act, U.G.I. has provided documentation of adequate water supply in the form of an agreement between U.G.I. and the City of Allentown for water service. In exchange for the City of Allentown's providing water service to the Devonshire tract, U.G.I. has made a commitment to make improvements to the City's water system at an estimated cost to U.G.I. of $100,000.

To address the potential impact of the Devonshire project on historic or archaeological sites, DER held a meeting on February 9, 1982 with representatives of U.G.I, the City of Allentown, and Salisbury Township. All parties to this appeal agree that only one site on the Devonshire tract is of potential archaeological significance. Even appellants' expert witness, John P. McCarthy, testified that the portion of the archaeological site located on the Devonshire tract was of no significance, and that he was only concerned with the impact the proposed development would have on archaeological sites near the tract because of the development's potential for off-site erosion.

As a result of the February 9, 1982 meeting, U.G.I. agreed to the previously mentioned rip-rapping, which will minimize off-site erosion. U.G.I. also agreed to pay up to $10,000 to excavate the potentially significant archaeological site on its tract. U.G.I. will not develop this site but will dedicate it to the Township as part of the Township's park system. In addition, U.G.I. agreed to contribute $10,000 to the City of Allentown to further any historic purpose within the general area of the Devonshire site that the City sees fit. DER determined that U.G.I. was committed to the protection and retrieval of archaeological resources potentially affected by Devonshire. This determination was based upon the results of the February 9, 1982 meeting, and upon reports prepared for U.G.I. by archaeological consultants.

U.G.I. commissioned a consultant to assess the traffic impact of Devonshire on its neighborhood, and the consultant recommended control measures. U.G.I. intends to implement these recommendations, and U.G.I. submitted them to DER as part of Component VI. In considering Devonshire's potential visual or aesthetic impact on its vicinity, DER took

into account development plans, maps, Component VI, and a report by a DER field representative that the Devonshire tract is one of the last undeveloped tracts of significant size in a developing area.

DER finally approved the Township's proposed revision of its Act 537 Plan on September 14, 1982, some three years after U.G.I. first submitted its plans for the Devonshire development to DER. The evidence of record establishes that during this three year period, DER conducted a thorough review of the potential environmental impact of Devonshire, and the evidence also establishes that U.G.I. is committed to taking many measures to minimize the environmental impact of the development. Therefore, DER's approval of the revision to the Township's Act 537 Plan met the requirement of the second prong of the Payne test.

The third prong of the Payne test requires a determination of whether the environmental harm that will result from the challenged decision or action so clearly outweighs its benefits, that to proceed further would be an abuse of discretion. The record shows that the environmental harm that will result from this project will be minimal. Although the project involves the development of 351 houses on an undeveloped tract, Art. I, §27 was not intended to preclude all development, but rather, to allow normal development of property in the Commonwealth. The surcharging problem in the sewer system will be resolved by the time the development is completed, erosion and storm water run-off will be controlled, and archaeological sites will be protected. Further, the surrounding communities will derive various benefits from the development. U.G.I. will make improvements to the City of Allentown's water system at locations other than the Devonshire tract at an estimated cost to U.G.I. of $100,000. U.G.I. will contribute $10,000 to the City of Allentown to further any historic purpose within the general area of the Devonshire site that the City sees fit. A portion of the Devonshire tract will be dedicated to the Township as part of its park system. Also, there was testimony regarding U.G.I.'s commitment to pay the Township for various municipal services, and there was also testimony indicating that the development of the Devonshire tract will result in increased tax revenue for the Township and increased jobs in the construction industry of the area. Thus, DER's approval

of the Township's Act 537 Plan revision complied with the third prong of the Payne test.

The Township of Salisbury raises another issue in this appeal. Although the Township contends that DER did not abuse its discretion in approving the revision of its Act 537 Plan, the Township argues that DER abused its discretion in requiring the Township to revise its Act 537 Plan, rather than allowing the Township to supplement the plan regarding the Devonshire development. When DER first notified the Township in a letter dated June 12, 1980, that a revision was required rather than a supplement, the Township appealed this decision to this Board, and on September 19, 1980, this Board dismissed the Township's appeal for lack of jurisdiction, holding that DER's June 12, 1980 letter was not an appealable action. Township of Salisbury v. Department of Environmental Resources, 1980 EHB 444. The Township then revised its Act 537 Plan, under protest, and DER ultimately approved this revision. Now that appellants have appealed the revision approval in the instant matter, where the Township is a party because it is the permittee, the Township is again raising the argument that DER should never have required a revision, but rather, a supplement to its Act 537 Plan would have been sufficient.

The regulations promulgated under the Sewage Facilities Act set forth at 25 Pa. Code §71.15, when a revision is required, and when a supplement is sufficient. In particular, §71.15(a)(2) provides, "When the Department determines that an official plan, or any of its parts, is inadequate for the needs of the municipality to which it relates because of changed or newly discovered facts, conditions, or circumstances, the Department may upon written notice require a revision to the plan to be submitted within 120 days." Section 71.15(b)(2) provides, "A revision shall not be required under this subsection where the official plan adequately meets the sewage disposal needs of a proposed subdivision. The Department shall make such determination upon submission to it in writing from the municipality of a letter indicating information required by subsection (c) of this section pertaining to supplements to official plans." Section 71.15(c)(1) provides, "If the proposed subdivision as defined in the Act adequately meets the sewage disposal needs of the municipality as reflected in their official plan, a plan revision shall not be required; however, the municipality shall submit to the Department a supplement to its plan

indicating the information required under section 71.14(b) of this Chapter."

The Township contends that DER should not have required it to revise its Act 537 Plan to accomodate Devonshire because its Act 537 Plan already provided for Devonshire to be served by the Township's municipal sewer system. When this Board dismissed the Township appeal of the DER letter requiring the Township to revise its Act 537 Plan, the Board stated, "It is clear that appellants will have their day in court when and if DER does finally refuse their planning request regardless of whether the decision is based on the submission being a revision or supplement, and our review can properly follow." Township of Salisbury, 1980 EHB at 445. A DER decision of whether to require a revision or a supplement in a DER review of a planning request is not a decision on the merits of the proposal, but only a decision on the form or technique to be used in DER's review. As such, this Board has given wide latitude to DER decisions of whether to require a revision or a supplement. In a previous case deciding this issue, the Board held:

> After a thorough review of all provisions relating to both supplements and revisions, it is our view that the final decision as to which procedure to use should be made by DER on this purely administrative matter. It is clear that DER may rely initially upon the municipality in reaching its decision, but once made, we today decide that this is a discretionary matter properly left to DER to which this Board will give wide latitude. The regulations contemplate the use of a plan revision where the changes from the base plan cannot be covered by a supplement. We acknowlege that this line is, of necessity, imprecise and ad hoc decisions are called for. Once this administrative decision has been made by DER, this Board will, of course, then review the approval or denial itself, as to its substantive provisions.
>
> Swartwood v. Department of Environmental Resources, 1979 EHB 248, 254, aff'd 56 Pa. Cmwlth. 298, 424 A.2d 993 (1981).

The Commonwealth Court, in affirming Swartwood, held, "The Department made what the Board correctly characterized as a purely administrative decision with respect to approval of 'supplements.'" Swartwood, 56 Pa. Cmwlth. at 303-304, 424 A.2d at 995.

In this adjudication, the Board has reviewed, on the merits, DER's approval of the Township's revision to its Act 537 Plan, and has sustained the approval. The Board will not now hold that the technique used by DER in reviewing the Township's planning request was an abuse of discretion because the decision of which technique to use is an administrative matter within the province of DER, and to which the Board gives great defer-

ence. Further, since surcharging was occuring in the LCJA system, it was reasonable for DER to require the Township to submit more information than the amount the regulations require for a supplement.

CONCLUSIONS OF LAW

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

2. Pursuant to 25 Pa. Code §21.101(c)(3), appellants, Floyd and Janet Keim, et al., have the burden of proof in their appeal of the approval by DER of a revision to the Township of Salisbury's Official Sewage Facilities Plan.

3. DER's approval of the revision to the Township of Salisbury's Official Sewage Facilities Plan complied with all applicable provisions of the Clean Streams Law, 35 P.S. §§691.1-691.1001, and the Sewage Facilities Act, 35 P.S. §750.1-750.20, and all applicable regulations promulgated under these acts.

4. DER's approval of the revision to the Township of Salisbury's Official Sewage Facilities Plan complied with DER's obligations under Article I, Section 27 of the Pennsylvania Constitution.

5. Appellants have not sustained their burden of proving that DER's approval of the Township of Salisbury's Official Sewage Facilities Plan was an abuse of DER's discretion.

6. DER did not abuse its discretion when, reviewing the Township of Salisbury's planning request, it required the Township of Salisbury to submit a revision of its Official Sewage Facilities Plan, rather than allowing the Township of Salisbury to supplement its Official Sewage Facilities Plan.

O R D E R

AND, NOW, this 12th. day of FEBRUARY, 1985, upon consideration of the findings of fact and conclusions of law made by the Board, the appeal of Floyd and Janet Kein, et al., at EHB Docket No. 82-254-M is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

TED: February 12, 1985

: Bureau of Litigation
Kenneth A. Gelburd, Esquire for DER
Thomas A. Wallitsch, Esquire for Appellants
James G. Kellar, Esquire for Permittee Salisbury Township
Joseph A. Fitzpatrick, Jr., Esquire of Butz, Hudders & Tallman for Intervenor U.G.I.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

RALPH BLOOM, JR. :

:

Docket No. 84-145-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By Edward Gerjuoy, Member, February 20, 1985

Syllabus

Appellant has challenged a DER compliance order which required him to submit a repermitting application in conformity with the requirements of section 315 of the Clean Streams Law, 35 P.S. §691.315 and 25 Pa. Code, Chapter 86. The Board rejects appellant's argument that he should be allowed to operate under the law as it existed prior to Pennsylvania's attainment of primary jurisdiction in the enforcement of its mining laws. Appellant is, in effect, seeking an exemption from the current law, despite the fact that there is none expressly stated in the statutes or regulations. Appellant has not satisfactorily demonstrated that the legislature intended to exempt operations such as his from the requirements of the current law. Therefore, the appeal is dismissed.

OPINION

Appellant, Mr. Ralph Bloom, Jr., herein appeals a DER compliance order which required him to cease operations at his mine until he submits a repermitting application pursuant to 25 Pa. Code § 86.12. Appellant has refused to comply with the DER order because he contends that the law which DER seeks to apply is inapplicable to his operation.

The parties have stipulated to the relevant facts and have submitted briefs on the legal issue presented by this appeal. A joint factual stipulation has been incorporated into the findings of fact which follow. With the agreement of the parties, no hearings have been held on the issues raised and decided herein. Because this procedure has been adopted, Bloom has been unable to put on the record some alleged facts which he filed as an affidavit with the Board, but to which DER refused to stipulate. The Board did not feel these alleged facts were germane to this adjudication, and therefore did not call for an evidentiary hearing on those factual allegations. In all fairness, however, in order to fully preserve Bloom's possible bases for appeal, these alleged facts are summarized here. In particular, Bloom has alleged that: his mining operation, presently, and at all prior times, is virtually identical to the operation as it existed when Morton v. Bloom, 373 F. Supp. 974 (W.D. Pa. 1973) was decided; Bloom does not pay and has not paid, and the federal government has not asked Bloom to pay any Federal Reclamation Fee for operation of his mine; and the Bloom Number One Mine affects less than two acres of surface area. Bloom also has indicated that, had there been an evidentiary hearing, he would have offered into evidence a reclamation plan for the Bloom Number One Mine, dated August 31, 1984, prepared by the consultant engineering firm of Shelly and Loy.

FINDINGS OF FACT

1. The Appellant is Ralph M. Bloom, Jr., of R.D. #1, Holtsopple, Pennsylvania, 15935.

2. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, the agency of the Commonwealth vested with the authority and the duty to administer the provisions of the Surface Mining Conservation and Reclamation Act 52 P.S. §1396.1 et seq. and the Clean Streams Law, 35 P.S. §691.1 et seq.

3. The action from which this Appeal is filed is a Compliance Order signed by Dr. Hugh V. Archer, the Regional Water Quality Manager of DER's Pittsburgh regional office.

4. The Order was received by Appellant on April 13, 1984, and thereafter a timely appeal to the Environmental Hearing Board was filed.

5. Appellant filed a Petition for Supersedeas. A hearing was held May 21, 1984, at which attorneys for Appellant and for DEP presented oral argument. Briefs had previously been filed. No testimony was offered or received at the time of the supersedeas argument.

6. The Board denied the Petition for Supersedeas in an Opinion and Order dated July 3, 1984.

7. The effect of the appealed-from order was to immediately cease the operation of the mine, and to require submission of either a repermitting application within sixty (60) days of the date of the Order, or, in the alternative, a reclamation plan submitted within ninety (90) days of the date of the Order. The Order further required that if a reclamation plan was submitted, that it must be completed within sixty (60) days of the date of approval of the reclamation plan by the Department.

8. The coal mine that is the subject of the Order is known and referred to as the Bloom Number One Mine, located on legislative Route T-688 off of Route T-748, approximately two miles south of Seanor, Pennsylvania, in Paint Township, Somerset County.

9. From 1968 until March 2, 1984, the Bloom Number One Mine was operating under Permit No. 467M034, which had been validly issued by the Pennsylvania Sanitary Water Board, predecessor agency to the Department of Environmental Resources.

10. From and after 1968 up until the time of issuance of the Order, the Bloom Number One Mine was operating as an active mine.

11. The Bloom Number One Mine is a one-man mining operation, owned and operated by Appellant himself. Appellant has no employees.

12. The coal from Appellant's mine does not enter interstate commerce.

13. The mine in question is an underground mine.

14. It is been previously held in the case of Morton v. Bloom, 373 F. Supp. 797 (1973) that Appellant's mine did not affect interstate commerce and was not subject to the provisions of the Federal Coal-Mine Health and Safety Act, 30 USCA §801 et seq.

15. On August 26, 1981, the United States Department of Interior, Office of Surface Mining entered into a Consent Decree regarding Appellant's mine.

16. The Bloom Number One Mine has approximately 3.5 acres of coal remaining to be mined Appellant has extracted approximately 2,200 tons per year of coal, on the average, since 1968, which comprises approximately .33 acres per year of coal mining.

17. Appellant is harmed by the cessation order in that his source of income has been terminated.

DISCUSSION

The DER compliance order which forms the subject matter of this appeal requires Appellant to cease his coal mining operation until such time as he submits a complete repermitting application pursuant to 25 Pa. Code §86.12. The order is based upon DER's determination that Appellant's prior permit has expired and that Appellant would have to reapply for a permit under the regulations now in force, i.e., the regulations which were adopted by the Environmental Quality Board in conjunction with Pennsylvania's attainment of primary jurisdiction for the enforcement of its mining laws (primacy). Appellant contends that his operation should not be subject to the primacy regulations, but rather, should be governed by the law which was in effect prior to the attainment of primacy.

The DER compliance order cites Appellant for violations of section 315 of the Clean Streams Law, 35 P.S. §691.315, and of 25 Pa. Code sections 86.11, 86.12 and 86.13. Section 315 of the Clean Streams Law reads in pertinent part as follows:

> (a) No person or municipality shall operate a mine . . . unless such operation . . . is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the department. 35 P. S. §691.315

Section 315 is the source of the basic permit requirement which DER is seeking to enforce in the instant compliance order. The language quoted above was not changed by the adoption of certain amendments to the Clean Streams Law

which were required in order for Pennsylvania to attain primacy from the federal government. A permit was required prior to primacy. However, many significant changes were effected by the primacy amendments. Under the federal Surface Mining Control and Reclamation Act, 30 U.S.C. §§1201 et seq., (the "federal act") in order to be granted primacy a state must adopt a regulatory scheme which is at least as stringent as the federal law. 30 U.S.C. § 1253. The primacy amendments with which this appeal is concerned were contained in two acts: the Act of October 10, 1980, P.L. 894, No. 157 (amending the Clean Streams Law), and the Act of October 10, 1980, P.L. 835, No. 155 (amending the Pennsylvania Surface Mining Conservation and Reclamation Act, 52 P.S. §§1396.1 et seq., (the "Surface Mining Act"). The regulations which were cited in the compliance order (25 Pa. Code §§86.11, 86.12, and 86.13) were promulgated pursuant to inter alia, the Clean Streams Law and the Surface Mining Act, as amended. (Chapter 86 was promulgated the day after the federal government granted Pennsylvania primacy. See 12 Pa. Bull. 2882, (July 31, 1982); 47 Fed. Reg. 33,050 - 83 (July 30, 1982.))

Before addressing Appellant's arguments, a brief recounting of the facts of this appeal is appropriate. Appellant operates a deep bituminous coal mine in Somerset County, Pennsylvania. He performs all the duties incident to operation of the mine himself and has no employees. From 1968 until March 2, 1984, Appellant was operating under a permit which had been issued to him by the Pennsylvania Sanitary Water Board, the predecessor agency to the Department of Environmental Resources. DER has determined that this permit expired on March 2, 1984. The compliance order from which this appeal is taken was issued as a result of this determination. Appellant has refused to comply with the compliance order because he believes, in essence, that DER is applying the "wrong" law to his operation.

Appellant offers two main arguments, which can be summarized as follows. Appellant first argues that when the Pennsylvania legislature adopted the primacy amendments, it was its intention to change Pennsylvania law to the minimum extent possible consistent with the requirement of the federal Act that the state law be at least as stringent as the federal. Therefore, Appellant asserts, he should not be required to submit a repermitting application merely because the State has amended its mining laws in order to gain primacy. In support of this argument, Appellant relies heavily upon two statements made by the legislature in conjunction with the adoption of the primacy amendments. The first of these is that:

> It is hereby determined that is is in the public interest for Pennsylvania to secure primary jurisdiction over the enforcement and administration of Public Law 95-87, the Federal Surface Mining Control and Reclamation Act of 1977, and that the General Assembly should amend this act in order to obtain approval of the Pennsylvania program by the United States Department of the Interior. It is the intent of this act to preserve existing Pennsylvania law to the maximum extent possible. (emphasis supplied).

The second statement which Appellant cites reads:

> In order to maintain primary jurisdiction over coal mining in Pennsylvania, it is hereby declared that for a period of two years from the effective date of this act the department shall not enforce any provision of this act which was enacted by these amendments solely to secure for Pennsylvania primary jurisdiction to enforce Public Law 95-87, the Federal Surface Mining Control and Reclamation Act of 1977(30 U.S.C.A. § 1201 et seq.) if the corresponding provision of that act is declared unconstitutional or otherwise invalid due to a final judgment by a Federal court of competent jurisdiction and not under appeal or is otherwise repealed or invalidated by final action of the Congress of the United States.

> If any such provision of Public Law 95-87 is declared unconstitutional or invalid, the corresponding provision of this act enacted by these amendments solely to secure for Pennsylvania primary jurisdiction to enforce the Federal Surface Mining Control and Reclamation Act of 1977, Public Law 95-87 shall be invalid and the secretary shall enforce this act as though the law in effect prior to these amendments remained in full force and effect.

Section 6 of the Act of October 10, 1980, P.L. 894, No. 157 (amending the Clean Streams Law) and section 17 of the Act of October 10, 1980, P.L. 835, No. 155 (amending the Surface Mining Act).

Secondly, Appellant argues that the federal government itself would not subject him to the more stringent requirements found in the federal Act, if the federal law were being applied to his operation. Section 528 of the federal Act provides:

> The provisions of this chapter shall not apply to any of the following activities:
> * * *
> (2) the extraction of coal for commerical purposes where the surface mining operation affects two (2) acres or less.
> 30 U.S.C. § 1278.

Appellant claims that his mine is small enough to fall within the language of this statutory provision. (DER disputes this contention. Because we have determined that the existence of the federal exemption is irrelevant to the resolution of this appeal, we need not decide this factual dispute.) Thus, he contends, since the federal government does not require that mines such as his be subject to the federal Act, DER's application of the requirements of the federal Act through the mechanism of a repermitting application cannot be necessary because of primacy concerns. Further, when the Pennsylvania legislature adopted the primacy amendments, it expressly stated that it intended to alter Pennsylvania law to the least extent possible. In fact, Appellant argues, it showed that it intended to tie the new

Pennsylvania requirements directly to the federal by stating that if any provision of the federal law were declared unconstitutional, otherwise invalid, or were repealed, the corresponding state provision would be deemed invalid. Therefore, he concludes, DER's application of the more stringent post-primacy requirements to his operation is inconsistent with the legislative intent, in that DER is applying something more than the minimum necessary to conform with the primacy requirements, thereby disregarding the legislative resolve to change existing law to the minimum extent necessary in order to attain primacy. Appellant believes the preprimacy requirements should apply since they constituted the pre-existing state law which it was the legislature's intention to preserve.

Appellant's argument is not without some merit. Nevertheless, we cannot accept it. In effect, Appellant is arguing that DER is precluded from reevaluating his permit under the presently existing standards because this reevaluation would amount to a change in existing law. In a sense, this is true; the post-primacy regulations will be applied in review of the repermitting application. However, it cannot be said that requiring periodic review of a permit is itself a change in the Pennsylvania law as it existed prior to primacy. Certainly, DER possesses the inherent authority to review permits. When it does so it must apply the law that is currently in force. In essence, Appellant is asking the Board to grant him an exemption from the application of the presently existing law, despite the fact that no such exemption is apparent on the face of the statutes or regulations.

The mandate of section 315 of the Clean Streams Law is unequivocal:

> No person shall operate a mine unless such operation is authorized by the rules and regulations of the department or such person has first obtained a permit from the department. 35 P.S. §691.315.

In conformity with section 315, 25 Pa. Code §86.13 provides:

> Compliance with permits. No persons may conduct coal mining activities except under permits issued pursuant to this chapter and in compliance with the terms and conditions of the permit and the requirements of this chapter, Chapter 87 (relating to surface mining of coal), Chapter 88 (relating to anthracite coal), Chapter 89 (relating to underground mining of coal and coal preparation facilities), and Chapter 90 (relating to coal refuse disposal), and the statutes pursuant to which they were promulgated.

Many of the provisions cited in §86.13 were adopted in conjuction with the attainment of primacy. Appellant argues that DER cannot apply these regulations to his mining operation. However, he does not suggest by what authority DER should disregard the regulation. He admits that the state scheme provides no exception such as that afforded by section 528 of the federal Act, (Appellant's brief at 13), and he has pointed to no other portion of the Clean Streams Law, the Surface Mining Act, or the regulations promulgated thereunder which would operate as an exemption from the requirements of 25 Pa. Code, Chapter 86. The Board is aware of none.

DER has little choice other than to apply a duly promulgated regulation. The Commonwealth Court has stated that:

> Once the EQB (Environmental Quality Board) has established the regulations, DER has the duty of enforcing them. As we perceive the regulatory scheme, if the EQB has established a regulation whereby a specific requirement or prohibition is set forth . . . then DER is under an obligation to enforce such regulation literally. East Pennsboro Township Authority v. DER, 18 Pa. Commonwealth 58, 334 A.2d 798, 803 (1975).

Furthermore, if a regulation of an administrative agency is consistent with the statute under which it is promulgated, the agency's interpretation of that regulation is entitled to controlling weight except where the interpretation is clearly erroneous or inconsistent with the regulation. Lisa H. v. State Board of Education, 447 A.2d 669 (Pa. Cmwlth. 1982); Einsig v. Pennsylvania Mines Corp., 452 A.2d 558 (Pa. Cmwlth. 1982). In citing these cases, we are aware of, and see no inconsistency with, our discussion--in Del-AWARE, Unltd. v. DER, Docket Nos. 82-177-H and 82-219-H (Adjudication dated June 18, 1984) at p95ff.--of the deference which this Board should pay to DER interpretation of its regulations.

Appellant has not expressly raised the argument that 25 Pa. Code §86.13 is inconsistent with the statutes under which it was promulgated. Appellant's argument regarding the legislative intent manifested by sections 6 and 17 of the primacy amendments (quoted supra) is not convincing. Surely simple considerations of judicial economy might have prompted the legislature to state that a federal court's finding of unconstitutionality or invalidity would be conclusive within the state system as well. A requirement that the state law be treated as invalid if the corresponding federal provision is no longer effective does not imply that the legislature intended to adopt the federal Act line for line, or that it intended to grant an exemption such as that found in section 528 of the federal Act (quoted supra). Furthermore, the "automatic repeal" provision was not intended to be a permanent portion of the Clean Streams Law and the Surface Mining Act. By its own terms, the provision expired October 10, 1982, and is no longer of any effect.

In short, DER is under an obligation to apply the currently existing law to Appellant's operation. It does not have the discretion to do otherwise. We cannot accept Appellant's argument that he should be exempt from the operation of

the currently existing law where there is absolutely no indication that the legislature intended to exempt small coal operations (such as Appellant's) from that law.

Moreover, there is ample evidence in the state regulatory program that the application of the post-primacy regulatory requirements to operations such as Appellant's is consistent with the legislative intent. Under section 3 of the Surface Mining Act, 52 P.S. §1396.3, certain non-coal mining activities are excluded from the definition of surface mining, and hence from the permit requirements of section 4 of the Act, 52 P.S. §1396.4. The definition of surface mining provides in pertinent part as follows:

> "Surface mining" shall mean . . . all surface activity connected with surface or underground mining . . . Surface mining shall not include (i) the extraction of minerals (other than anthracite and bituminous coal) by a landowner for his own noncommerical use from land owned or leased by him. . .
> (Emphasis supplied)

As we recently have held, the exclusion of coal mining from this statutory exception "lends credence to the argument that the legislature intended that any removal of coal, no matter what the amount might be, should be considered surface mining" (and hence subject to the permit requirements of the Surface Mining Act). Black Fox Mining and Development Corporation v. DER, (EHB Docket No. 84-114-G; Opinion and Order dated September 25, 1984). Indeed, this explicit exclusion indicates that the legislature gave consideration to the possibility of granting exemptions.[1] Under these circumstances, we are extremely hesitant to

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[1] This language, although part of the existing Pennsylvania law prior to adoption of the primacy amendments, was reenacted by the legislature at the time those amendments were passed. (Section 2 of the Act of October 10, 1980, P.L. 835, No. 155.)

adopt any suggestion that the legislature intended (explicitly or implicitly) to incorporate an exemption such as that contained in section 528 of the federal Act, quoted supra.

The existence of the Small Operator's Assistance Fund, contained in 25 Pa. Code §§86.81 - 86.95, (promulgated as a result of the attainment of primacy), likewise suggests that the Commonwealth contemplates that even small coal mine operators must comply with the permitting requirements of Chapter 86. Under this program DER will provide funding and services to qualified small operators who request assistance. An applicant qualifies for assistance if he intends to apply for a permit under Chapter 86 and establishes that the probable total and attributable production of the applicant for each year of the intended permit will not exceed 100,000 tons. 25 Pa. Code §86.83.

Pennsylvania, of course, possesses the authority to enact regulations more stringent than the federal requirements, so long as the state requirements do not conflict with the federal scheme. The federal Act contains an explicit provision which ensures that the state's authority is left undisturbed whereever possible. Section 505 of the federal Act, 30 U.S.C. §1255, provides:

> State Laws:
> No State law or regulation in effect on the date of enactment of this Act or which may become effective thereafter, shall be superseded by any provision of this Act or any regulations issued pursuant thereto, except insofar as such State law or regulation is inconsistent with the provisions of this Act.

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[2]Appellant has extracted approximately 2200 tons of coal per year, on the average, since 1968 (Joint Stipulation of Facts, paragraph 16).

> Any provision of any State law or regulation in effect upon the date of enactment of this Act (enacted August 3, 1977), or which may become effective thereafter, which provides for more stringent land use and environmental controls and regulations of surface coal mining and reclamation operation than do the provisions of this Act or any regulation issued pursuant thereto shall not be construed to be inconsistent with this Act. The Secretary shall set forth any State law or regulation which is construed to be inconsistent with this Act. Any provision of any State law or regulation in effect on the date of enactment of this Act (enacted August 3, 1977), or which may become effective thereafter, which provides for the control and regulation of surface mining and reclamation operations for which no provision is contained in this Act shall not be construed to be inconsistent with this Act.

Appellant does not contend that the State's imposition of its permit requirements under circumstances where the federal law would grant an exemption does violence to the federal regulatory scheme. Since such a requirement is "more stringent" than the federal requirements, it, as a matter of law, is "not to be construed to be inconsistent with (the federal Act)." In Pennsylvania Coal Mining Association v. Watt, 562 F. Supp. 741 (M.D.Pa. 1983), the court upheld the approval by the Secretary of the Interior of a Pennsylvania regulatory program enacted pursuant to the federal Act even though the Pennsylvania regulation was more stringent than the federal requirements. In light of this holding, any argument that the federal government disapproves of more stringent state regulatory provisions cannot prevail.

Appellant cites Arsenal Coal Company v. DER, 477 A.2d 1333 (Pa. 1984) as support for his argument that application of the post-primacy regulations to his operation is inconsistent with the stated legislative intent to preserve existing state law and to adopt only those requirements necessary to attain primacy. Contrary to Appellant's assertions, Arsenal does not hold that state law prohibits the Environmental Quality Board from enacting regulations above and beyond those necessary for primacy. The Arsenal court was ruling on the

jurisdiction of Commonwealth Court to entertain pre-enforcement challenges to regulations affecting Pennsylvania's anthracite industry. Since the Court ruled that Commonwealth Court erred in refusing to exercise its jurisdiction it remanded the case without having to address the issue of the propriety of the regulations. It did note, however, that the federal Act specifically exempts the regulation of anthracite mining from the federal requirements and permits the states to continue with their own programs in certain areas. Therefore, the issue of the regulations' conformity with the primacy requirements was not squarely presented to the Court.

Since we have determined that DER has the authority and indeed, the duty, to apply the regulations contained in 25 Pa. Code, Chapter 86, we need not address Appellant's contention that the federal courts have declared his mine exempt from the federal mining laws. The requirements imposed by the Pennsylvania law are tied to the federal only insofar as they establish a minimum standard of compliance, that necessary for primacy. Pennsylvania is free to impose more stringent requirements and it has done so.

We recognize that the DER compliance order has deprived Appellant of his source of income. But the ultimate cause of this income loss is Appellant's refusal even to apply for renewal of his permit; there is no indication that DER will refuse to renew Appellant's permit if he would submit a properly completed repermitting application. We simply cannot read into the law an exemption that does not exist. Appellant would have us imply an exemption from the repermitting requirement based upon nothing other than two not unambiguous statements of legislative intent. (See discussion supra.) When the language of the statute

or regulation is clear and unambiguous (as is that of 35 P.S. §691.315 and 25 Pa. Code §86.13) the plain language cannot be disregarded in the pretext of pursuing its spirit. 1 Pa. C.S.A. § 1921(b).

Finally, we affirm our ruling of July 3, 1984, (opinion and order at this docket number) that section 315 (1) of the Clean Streams Law, 35 P.S. §691.315(1), does not operate to grant an exemption from the general permit requirements of that Act. We find no merit in Appellant's request (at page 20 of his brief) that we modify this ruling.

In summary, we hold that DER's order has ample basis in the law and therefore, does not constitute an abuse of DER's discretion or an arbitrary exercise of its powers or duties. The appeal is dismissed.

CONCLUSIONS OF LAW

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

2. Section 315 of the Clean Streams Law, 35 P.S. §691.315, requires a permit for the operation of a mine.

3. Chapter 86 of 25 Pa. Code was promulgated pursuant to the Clean Streams Law, 35 P.S. §691.1 et seq., (as amended by the Act of October 10, 1980, P.L. 894, No. 157) and the Pennsylvania Surface Mining Conservation and Reclamation Act 52 P.S. §1396.1 et seq., (as amended by the Act of October 10, 1980, P.L. 835, No. 155).

4. Neither the Clean Streams Law nor the Surface Mining Act provides an exemption from the presently existing permit requirements for small coal mine operators.

5. Chapter 86 of 25 Pa. Code provides no exemption from the presently existing permit requirements for small coal mine operators.

6. Appellant's coal mine operation is subject to regulation under the presently existing provisions of 25 Pa. Code, Chapter 86, and the Clean Streams Law, 35 P.S. §691.1 et seq.

7. The Pennsylvania legislature did not intend to provide small coal mine operators within the commonwealth with an exemption such as that contained in the Federal Surface Mining Control and Reclamation Act, 30 U.S.C. § 1278.

8. Section 315(1) of the Clean Streams Law, 35 P.S. §691.315(1) does not operate to grant an exemption from the general permit requirements of that Act.

9. Whether or not Appellant's operation would qualify for exemption under the federal law, the state law is fully applicable and requires that Appellant submit a repermitting application pursuant to 25 Pa. Code §86.12 prior to commencing mining activities.

10. Where the Environmental Quality Board has promulgated a regulation, DER normally is under an obligation to enforce such language literally.

11. DER has not abused its discretion or arbitrarily exercised its powers and duties by requiring Appellant to cease his mining activities until such time as he submits a repermitting application pursuant to 25 Pa. Code §86.12.

O R D E R

AND NOW, this 20th day of February , 1985, it is ordered that the appeal captioned above is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: February 20, 1985

cc: Bureau of Litigation
Diana J. Stares, Esq., for DER
Eugene E. Dice, Esq., Dice & Childe, Harrisburg, for Appellant

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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KING COAL COMPANY :

:

Docket No. 83-112-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

P A R T I A L A D J U D I C A T I O N

By: Edward Gerjuoy, Member, March 18, 1985

Syllabus

This is an appeal of several DER forfeitures of bonds posted in conjunction with surface mining permits obtained by King Coal pursuant to the Surface Mining Conservation and Reclamation Act, 52 P.S. 1396.1 et seq. The forteitures are affirmed in part and vacated in part.

The Board's scope of review is to determine whether DER has abused its discretion or has performed an arbitrary exercise of its duties or functions. In the context of a bond forfeiture appeal, where DER has met its burden of showing a failure to comply with applicable statutes, regulations or rules, but where DER has not met its burden of justifying the amount of the forfeiture it seeks, the Board may modify the amount of the forfeiture where it appears that the computation of that amount by DER was in error, either because of mechanical computational error or because of DER's misapprehension of the law.

Where DER has established that more than de minimis violations exist on any portion of the permitted area for which the bond was posted, and where the bond provides that liability shall accrue in proportion to the acreage affected by the mining operation, DER is entitled to forfeit that portion of the bond which corresponds to the acreage affected multiplied by the per acre liability specified in the bond terms, whether or not a portion of the permit area has been reclaimed. Where the bond language provides that liability shall accrue in proportion to the acreage affected at a fixed sum "per acre or part thereof", a fraction of an acre is treated as equivalent to a full acre for the purpose of determining the amount of liability accrued.

Where the bond does not provide that liability shall accrue in proportion to the acreage affected, but rather provides that liability shall be for the full amount of the bond, DER is entitled to forfeit the entire amount of the bond if it is demonstrated that more than de minimis violations exist on any portion of the permit area for which the bond was posted.

Where, but only where, the operator has substantially completed reclamation of the permit area for which a bond was posted, and no other violations exist, DER is not entitled to forfeit any portion of the bond unless it can be said with a substantial degree of certainty that the operator has neither the ability nor the intention to wholly complete reclamation. However, DER need not wait indefinitely for performance of the operator's obligation to wholly reclaim.

Where there is established a causal connection between environmental damage on an unpermitted area and violations of applicable statutes, regulations or rules on a bonded permitted area, said environmental damage is the legal equivalent of a direct violation of the bond conditions and the existence of

such off-permit environmental damage can justify forfeiture of the bond posted for the permitted area. In the absence of such a causal connection between off-permit environmental harm and violations existing on the permitted area, in general, liability on a bond may be triggered only by violations of the permit(s) specifically referred to in the bond itself.

INTRODUCTION

This appeal is a consolidation, under the above docket number, of five separate appeals filed by King Coal ("King"). Each of these separate appeals was from an action of the Department of Environmental Resources ("DER") forfeiting surface mining bonds furnished by King. The amounts of these bonds, and their associated mining sites and permit numbers, are stated infra, in our Findings of Fact.

Hearings on the merits of this consolidated appeal were held on August 20 and 21, 1984. DER and King have filed post-hearing briefs. Therefore, this matter is ripe for adjudication, as follows.

FINDINGS OF FACT

1. The Appellee in these consolidated appeals is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), which is the agency of the Commonwealth empowered to administer and enforce the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. Section 691.1 et seq. ("CSL"), the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. Section 1396.1 et seq. ("SMCRA"), and the rules and regulations of the Environmental Quality Board ("EQB") adopted thereunder.

2. Appellant is the King Coal Company ("King"), a partnership with a mailing address of 413 "The Bigelow", Pittsburgh, PA 15219.

3. King was the permittee for a surface mine located in Jenner Township, Somerset County, operated pursuant to Mine Drainage Permit No. 4077SM4 ("MDP 4077SM4") and Mining Permits Nos. 1566-6, 1566-6(A)RE and 1566-6(A)2 (Ex. 2, 3, 5-A, 7-A; Tr I 10).[1]

4. King was the permittee of a surface mine located in Jenner Township, Somerset County, operated pursuant to Mine Drainage Permit No. 4077SM3 ("MDP 4077SM3") and Mining Permits Nos. 1566-10(c), 1566-17, and 1566-4077SM3-01-1 (Ex. 1, 9-A, 11-A and 13-A).

5. King was the permittee of a surface mine located in Addison Township, Somerset County, operated pursuant to Mine Drainage Permit No. 4076SM2 ("MDP 4076SM2") and Mining Permits Nos. 1566-3, 1566-3(A), 1566-3(A)2 and 1566-13 (Ex. 1-B, 3-B, 5-B, 7-B and 9-B).

6. King was the permittee of a surface mine located in Addison Township, Somerset County, operated pursuant to Mine Drainage Permit No. 4076SM5 ("MDP 4076SM5") and Mining Permit No. 1566-11 (Ex. 2-B and 19-B).

7. King was the permittee of a surface mine located in South Bend Township, Armstrong County, operated pursuant to Mine Drainage Permit No. 35A77SM1 ("MDP 35A77SM1") and Mining Permit No. 1566-9 (Ex. 3-C).

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[1] References to the transcript on the first (August 20, 1984) and second (August 21, 1984) days of the hearing will be designated by Tr I and Tr II respectively. King introduced no exhibits; thus "Ex. 1" necessarily denotes DER Exhibit 1, and similarly for other Ex. numbers.

Jenner Township, Somerset County, MDP 4077SM4

8. Mining Permit No. 1566-6 was permitted for 21.62 acres (Tr I 12; Ex. 3).

9. With respect to, and as a condition of obtaining Mining Permit No. 1566-6, King submitted to DER Surety Bond No. BD1435, in an amount of $21,620.00 (Ex. 3).

10. Surety Bond No. BD1435 states that liability upon the bond shall accrue in proportion to the area of land affected by surface mining at a rate of one thousand dollars per acre or part thereof, but in no case shall such liability be for an amount less than five thousand dollars (Ex. 4).

11. Of the 21.62 acres permitted on Mining Permit No. 1566-6, between 19 and 20 acres have been affected by King's surface mining activities (Tr I 17).

12. On those portions of Mining Permit No. 1566-6 affected by King:

(a) Spoil material has been excavated, piled up and not reclaimed (Tr I 30-35, 82-84).

(b) An unreclaimed haul road remains on the site (Tr I 35).

13. Mining Permit No. 1566-6(A)RE was permitted for 15.52 acres (Ex. 5-A; Tr I 14-15).

14. With respect to, and as a condition of obtaining Mining Permit No. 1566-6(a)RE, King submitted to DER Surety Bond No. BD1631, in an amount of $32,235.00 (Ex. 6-A).

15. Surety Bond No. BD1631 states that liability upon the bond "shall be for the amount specified herein"; accrual of liability in proportion to the area affected is not mentioned (Ex. 6-A).

16. Of the 15.52 acres permitted on Mining Permit No. 1566-6(A)RE, 14 acres were affected by King's surface mining activities (Tr I 17-18).

17. Mining Permit No. 1566-6(A)2 was permitted for 20.19 acres (Ex. 7-A).

18. With respect to, and as a condition of obtaining, Mining Permit No. 1566-6(A)2, King submitted to DER Surety Bond No. BD1666, in an amount of $32,890.00 (Ex. 8-A).

19. The language pertaining to liability in Bond No. BD1666 is the same as in Bond No. BD1631 (see Finding of Fact 15).

20. Of the 20.19 acres permitted under Mining Permit No. 1566-6(A)2, approximately twenty acres were affected by King's mining activities (Tr I 20).

21. On those portions of Mining Permits Nos. 1566-6(A)RE and 1566-6(A)2 affected by King:

(a) Backfilling has not been accomplished (Tr I 16).

(b) A highwall, and an unreclaimed open pit containing water, extend across the two permit areas (Tr I 16-22, Exs. 19-A, 21-A).

(c) Mining equipment needed for reclamation has been removed from the permit areas (Tr I 16, 22).

Jenner Township, Somerset County, MDP 4077SM3

22. With respect to, and as a condition of obtaining the mining permits for the acreages listed below, King submitted to DER the following bonds in the indicated amounts (Exs. 10-A, 12-A, 14-A):

Mining Permit Number	Acres Permitted	Bond	Bond Amount
1566-10(c)	18.4	Surety Bond BD1830	$33,100.00
1566-17	13.7	Surety Bond BD1965	22,800.00
1566-4077SM3-01-1	10.9	Collateral Bond, Certificate of Deposit No. 20240	22,300.00

23. The language pertaining to liability in each of the bonds listed in Finding of Fact 22 is the same as in Finding of Fact 15.

24. Previously, before forfeiture of Surety Bond BD1830 was ordered, DER had approved a partial stage I release of bonds for 16.5 acres on Mining Permit No. 1566-10(c), in an amount equal to $24,800 (Tr I 41; Ex. 10-A); therefore only $8,300 of this bond now remains subject to forfeiture, in DER's possession.

25. All of the acreage permitted on Mining Permit No. 1566-10(c) was affected by King's surface mining activities (Tr I 41).

26. On the 16.5 acres on Mining Permit No. 1566-10(c) where a partial bond was released, the following conditions exist:

(a) Surface water runoff has produced an erosion channel greater than one foot deep, causing sedimentation at the lower end of the site (Tr I 42,45; Ex. 24-A).

(b) Revegetation is sparse and inadequate on portions of the site (Tr I 42,44; Ex. 23-A).

(c) An inadequately reclaimed sedimentation basin remains on the site (Tr I 42).

(d) A contour channel which is required to be removed remains on the permit area (TR I 43).

27. All of the acreage permitted on Mining Permit No. 1566-17 was affected by the surface mining activities of King Coal (Tr I 47).

28. On the area covered by Mining Permit No. 1566-17:

(a) Spoil material is piled on the site (Tr I 48-9; Ex. 26-A).

(b) There exists a discharge emanating from the toe of spoil piled on Mining Permit 1566-17, which discharge flows from the toe of spoil along the haul road and into nearby woods off the permitted area (Tr I 52, 54-56; Ex. 28-A).

(c) The discharge from the toe of spoil has a pH of 5.8, a concentration of manganese of 15.3 mg/l, and a concentration of iron of 9.2 mg/l (Ex. 15-A).

29. All of the acreage permitted on Mining Permit No. 1566-4077SM3-01-1 ("01-1") was affected by King's surface mining activities (Tr I 47).

30. On the area covered by Mining Permit 01-1:

(a) Backfilling has not been accomplished, as there exists an open pit approximately 450 feet long, 60 to 80 feet wide, and 30 to 60 feet high (Tr I 48, 60, 64; Ex. 29-A).

(b) Reclamation has not been completed (Tr I 65).

(c) There is no equipment on the site capable of performing backfilling and revegetation of the open pit (Tr I 48, 66).

Addison Township, Somerset County, MDP 4076SM2

31. With respect to, and as a condition of obtaining the mining permits for the acreages listed below, King submitted to DER the following bonds in the indicated amounts (Ex. 3-B, 4-B, 5-B, 6-B, 7-B, 8-B, 9-B, 10-B):

Mining Permit Number	Acres Permitted	Bond	Bond Amount
1566-3	13.13	Collateral Bond, Certificate of Deposit #10544	$ 7,549.75
1566-3(A)	16.03	Collateral Bond, Cashiers Check #265244	8,015.00
1566-3(A)2	10.43	Surety Bond #13366	10,430.00
1566-13	15.57	Surety Bond #13751	15,570.00

32. The collateral bond for Mining Permit No. 1566-3 states that liability upon the bond shall accrue in proportion to the area of land affected by surface mining, at a rate of $575 per acre or part thereof, but in no case shall such liability be for an amount less than $5,000 (Ex. 4-B).

33. Of the 13.13 acres permitted on Mining Permit No. 1566-3, ten acres were affected by King's surface mining activities (Tr II 10).

34. Nine of the ten acres affected on Permit No. 1566-3 have been satisfactorily reclaimed, except for a small area about 10 feet by 100 feet, on which there is some erosion (Tr II 11, 44).

35. On the remaining (not included in Finding of Fact 34) affected acre on Permit No. 1566-3, there exists a sediment pond, which cannot be removed, however, until the final vegetative growth has been approved (Tr II 45).

36. If the aforementioned 10 ft. by 100 ft. erosion area (see Finding of Fact 34) were filled in, stabilized and planted, there would be no other outstanding violations on Mining Permit No. 1566-3, and DER's inspector Joel Pontorero would be willing to grant the backfilling approval needed for King to secure partial bond release on this mining permit (Tr II 46-47).

37. The collateral bond for Mining Permit No. 1566-3(A) states that liability upon the bond shall accrue in porportion to the area of land affected by surface mining at the rate of $500 per acre or part thereof, but in no case shall such liability be for an amount less than $5,000 (Ex. 6-B).

38. Of the 16.03 acres permitted on Mining Permit No. 1566-3(A), 16 acres have been affected by King's surface mining activities (Tr II 12).

39. On the aforementioned 16 acres affected by King (Tr II 12, 48-50):

(a) Six acres have been reclaimed and planted.

(b) Eight acres have been regraded, but topsoil has not been spread, so that planting has not been accomplished.

(c) The remaining two acres contain a haul road and sedimentation pond, and have not been fully reclaimed.

(d) Accelerated erosion, accompanied by water discharges into the sedimentation pond, is occurring at a number of locations on the not fully reclaimed acreage.

(e) Aside from the fact that reclamation has not been completed on the ten acres mentioned in paragraphs (b) and (c) immediately supra, the accelerated erosion mentioned in paragraph (d) is the only violation presently observable on the site; the discharges are not in violation at this time.

(f) However, if the sedimentation pond were not collecting these discharges (e.g., if the sedimentation pond were reclaimed), the discharges probably would require treatment to prevent their leaving the site in violation of effluent limitations.

40. The surety bonds 13366 and 13751, for Mining Permits 1566-3(A)2 and 1566-13 respectively, each state that liability upon the bond shall accrue in proportion to the area of land affected by surface mining at the rate of $1,000 per acre or part thereof, but in no case shall such liability be for an amount less than $5,000 (Ex. 8-B, 10-B).

41. Of the 10.43 acres permitted on Mining Permit No. 1566-3(A)2, one acre was affected by King's mining activities, but this one acre has been reclaimed and no violations exist on Mining Permit No. 1566-3(A)2 (Tr II 51).

42. Of the 15.57 acres permitted on Mining Permit No. 1566-13, 13 acres have been affected by King's surface mining activities (Tr II 43).

43. On those portions of Mining Permit No. 1566-13 affected by King (Tr II 25-26; Ex. 18-B):

(a) Topsoil has not been spread on the area.

(b) The area has not been planted with a permanent cover species.

(c) Erosion and sedimentation controls are substandard and must be upgraded.

Addison Township, Somerset County, MDP 4076SM5

44. Mining Permit No. 1566-11 was permitted for 24.36 acres (Tr II 28; Ex. 19-B).

45. With respect to, and as a condition of obtaining Mining Permit No. 1566-11, King Coal submitted to DER Surety Bond No. 13358, in the amount of $24,360.00.

46. The language pertaining to liability in Bond No. 13358 is the same as in surety bonds 13366 and 13751 (see Finding of Fact 40).

47. Of the 24.36 acres permitted on Mining Permit No. 1566-11, 23.38 acres were affected by King Coal's mining activities (Tr II 28).

48. The following conditions exist on Mining Permit No. 1566-11:

(a) There is an absence of adequate treatment facilities (Tr II 29).

(b) There are no signs and markers to identify the operation (Tr II 29).

(c) Ground and surface water monitoring reports have not been submitted (Tr II 29).

(d) A discharge of acid mine drainage emanates from the mining permit and flows to the waters of the Commonwealth, an unnamed tributary to White's Creek, which discharge (Tr II 31-32; Ex. 22-B):

(i) contains concentrations of iron exceeding 7.0 mg/l.

(ii) contains concentrations of manganese exceeding 4.0 mg/l.

(iii) has a pH less than 6.0.

(iv) has concentrations of acid exceeding the alkalinity.

South Bend Township, Armstrong County, MDP 35A77SM1

49. Mining Permit No. 1566-9 was permitted for 10.4 acres (Ex. 2-C).

50. With respect to, and as a condition of obtaining Mining Permit 1566-9, King submitted to DER Surety Bond No. BD1428, in the amount of $5,980.00 (Ex. 3-C).

51. The language pertaining to liability in Bond No. BD1428 is the same as in the collateral bond for Mining Permit No. 1566-3 (see Finding of Fact 32).

52. All of the 10.4 acres permitted on Mining Permit 1566-9 were affected by King's surface mining activities (Tr II 69, 111).

53. King's mining activities affected over 17 acres of unpermitted land in the vicinity of Mining Permit 1566-9 (Tr II 69-70).

54. The following conditions exist on Mining Permit 1566-9:

(a) Inadequate erosion and sedimentation controls, including a breached sediment pond on the site (Tr II 68, 73; Ex. 6-C).

(b) The presence of a silt fan, a portion of which lies off the permitted area and within 100 feet of a stream barrier (Tr II 70-73; Ex.5-C, 8-C).

(c) Erosion rills and gullies which are greater than nine inches deep, including a large erosion gully which runs the entire slope length of the site and is up to six feet in depth (Tr II 68, 74-78, 82, 89; Ex. 7-C, 10-C, 14-C, 20-C, 21-C).

55. In addition to the conditions listed in Finding of Fact 54, there are improper diversion ditches and outlets on the permitted area of Mining Permit 1566-9 which have caused erosion off the permit area, including erosion gullies (Tr II 84-86).

56. King's mining activities on unpermitted land also have caused erosion (Tr 87).

In General

57. King received timely and sufficient notice of all the appealed-from forfeitures, including sufficient notice of the reasons for the forfeiture.

58. John R. Woods, one of King's two partners, conceded that King had not backfilled some of the sites whose bonds DER seeks to forfeit, e.g., the area covered by MDP No. 4077SM4 (Tr I 96-99).

59. Mr. Woods ascribed King's backfilling failures to his inability to find a subcontractor who would do the backfilling (Tr I 98-101).

60. Mr. Woods ascribed his inability to find a subcontractor to the fact that potential subcontractors were unwilling to defer their payments until DER released the bonds covering the sites these subcontractors would have backfilled (Tr I 99-103, 105-106).

61. King has not filed for bankruptcy (Tr I 107).

62. The above-stated conditions existing on the above-listed sites (see, e.g., Finding of Fact 54) typically have existed for some time; in particular, the areas covered by Mining Permit Nos. 1566-3, 1566-3(A) and 1566-3(A)2 have been in the same condition since approximately October 26, 1981 (Tr II 26).

DISCUSSION

A. Burden of Proof and Scope of Review

DER's burden of proof in this appeal is to demonstrate, for each forfeited bond, that: (1) King failed to comply with the applicable statutes, rules or regulations, and (2) the dollar amount DER seeks to forfeit has been correctly computed under applicable law. Chester A. Ogden, President Coal Hill Contracting Co., Inc. v. DER, EHB Docket No. 82-193-G (Adjudication, August 6, 1984). The Board's scope of review is to determine whether DER committed an abuse of discretion or an arbitrary exercise of its duties or functions. Warren Sand and Gravel Company, Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). Customarily the Board uses the convenient shorthand phrase "abuse of discretion" to denote this full scope of review, with full recognition [see, e.g., Coolspring Township v. DER, Docket No. 81-134-G (Adjudication, August 8, 1983), footnote 1] that the phrases "abuse of discretion" and "arbitrary exercise of duties or functions" are not wholly synonymous.

DER's post-hearing brief takes exception to the above-described scope of review, whether in its full or shorthand version. In particular, DER points out that Warren, supra states:

> The Board's duty is to determine if DER's action can be sustained or supported by the evidence taken by the Board. 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. If, however, DER acts with discretionary authority, then the Board, based on the record before it, may substitute its discretion for that of DER.

DER also points out that Morcoal Company v. DER, 459 A2d 1303 (Pa. Cmwlth 1983) after affirming the above quote from Warren, supra, has ruled that DER has a mandatory duty to forfeit surface mining bonds once DER has determined that the operator (King in the present appeal) has failed or refused to comply with the requirements of the SMCRA"in any respect for which liability has been charged on the bond." On these bases, DER's post-hearing brief proposes the following conclusion of law for the instant appeal:

> The Board's duty is to determine if DER's action can be sustained or supported by the evidence taken by the Board. Where DER, as here, acts pursuant to a mandatory provision of a statute, the only question for the Board is whether to uphold or vacate DER 's action based on the record.

In other words, DER appears to be arguing that in the instant appeal the Board can uphold or vacate each appealed-from bond forfeiture, but cannot--by substituting its discretion for DER's—modify the amount of any forfeiture.

If the immediately preceding sentence correctly states DER's position (the brief is not altogether clear on this issue), we disagree, although we agree of course that we are bound by the precepts of Warren, supra and Morcoal, supra. In the first place, as DER's post-hearing brief itself recognizes (at footnote 1), the Board surely has the discretion to correct arithmetical or other mechanical errors in the computation of the amount to be forfeited. The Board's discretion extends beyond this routine function, however. Where DER has met its burden of showing failure to comply with applicable statutes, rules or regulations, but where the Board feels DER has not met its burden of justifying the amount of forfeiture it seeks, the Board has the discretion to modify the forfeiture amount, even if the Board believes DER's sought-for amount is incorrect because of DER's misapprehension of the law (rather than merely because of a mechanical computational error).

B. Unchallenged Forfeitures

These preliminary remarks out of the way, we turn to the specific forfeitures DER seeks. Here we note first that King's brief makes only limited objections to DER's forfeitures. In particular, King challenges only the following forfeitures:

1. Surety Bond No. BD1435 on Mining Permit No. 1566-b, under MDP No. 4077SM4.

2. Collateral Bond, Certificate of Deposit No. 10544, on Mining Permit No. 1566-3, under MDP No. 4076SM2.

3. Collateral Bond, Cashier's Check No. 265244, on Mining Permit No. 1566-3(A), under MDP No. 4076SM2.

4. Surety Bond No. 13366, on Mining Permit No. 1566-3(A)2, under MDP No. 4076SM2.

5. Surety Bond No. BD 1428, on Mining Permit No. 1566-9, under MDP 35A7751.

Therefore, we deem waived by King any challenge to the appealed-from forfeitures other than to the five forfeitures listed above. Moreover, in view of the above-listed Findings of Fact for the other unchallenged forfeitures, which Findings we have carefully examined, DER obviously has met its burden of justifying these forfeitures for the amounts specified in DER's post-hearing brief. Specifically, in the unchallenged forfeitures, DER now claims--and we uphold--the following forfeited amounts:

Mining Permit Number	Bond Number	Amount Forfeited
1566-6(A)RE	Surety Bond BD1631	32,235.00
1566-6(A)2	Surety Bond BD1666	32,890.00
1566-10(c)	Surety Bond BD1830	8,300.00
1566-17	Surety Bond BD1965	22,800.00
1566-01-1	Surety Bond BD20240	22,300.00
1566-13	Surety Bond No. 13751	13,000.00
1566-11	Surety Bond No. 13358	23,380.00

We note that the above amounts do not wholly coincide with DER's originally claimed amounts. In particular, DER originally forfeited Surety Bond No. 13751 in its total value of $15,570 (Finding of Fact 31, Ex. 27-B); similarly, Surety Bond No. 13358 originally was forfeited in its total value of $24,360 (Finding of Fact 45, Ex. 28-B). For the other bonds listed immediately above, the amounts DER claims and upheld by us are the full amounts of the bonds, except in the case of Surety Bond BD 1830 where $8,300 is all that remains of the original $33,100 following a partial bond release by DER (Finding of Fact 24).

It follows that in upholding the Forfeitures listed above we simultaneously are requiring DER to return a total of $3,550 ($2,570 for Bond No. 13751 plus $980 for Bond No. 13358) from those bonds.

C. Challenged Forfeitures

1. Surety Bond No. BD 1435. King's brief does not challenge DER's testimony, embodied in Finding of Fact 12, that affected portions of Mining Permit No. 1566-6 have not been reclaimed. Therefore we conclude that DER has met its initial burden of showing King has not complied with applicable statutes, rules or regulations; in other words, forfeiture--in an appropriate amount--was justified. The issue to be decided is whether DER's requested amount of $20,000 is appropriate; King claims the amount forfeited should be $19,000. King notes that DER's inspector, Joseph Kaufman, when asked how many acres had been affected on Mining Permit No. 1566-6, said, "Approximately, nineteen to twenty acres" (see Finding of Fact 11).

On the basis of this response by Mr. Kaufman, King argues that on a preponderance of evidence standard DER has not shown more than 19 acres were

affected. Consequently, since Bond BD1435 is a "proportionate" bond, on which liability accrues in proportion to the area of land affected at a rate of $1,000 per acre (Finding of Fact 10), King concludes DER cannot forfeit more than $19,000 from this bond. DER argues that its inspector's language meant "approximately" twenty acres were affected by King's mining activities. Consequently, DER claims forfeiture of twenty acres at $1,000 per acre, totaling $20,000. In support of this claim, DER cites Southwest Pennsylvania Natural Resources v. DER, Docket No. 81-001-H, 1982 EHB 48, wherein the Board upheld a forfeiture of 20 acres at $1,000 per acre on a Finding of Fact reading, "Approximately 20 acres of land have been affected by surface mining ..."

We agree with DER's result, but not for DER's reasons. We do not now know what language by witnesses in Southwest, supra convinced the Board to find that "approximately 20 acres" had been affected in that appeal. The testimony well might have been that certainly more than twenty acres were affected, in which event the Southwest result would not support DER's argument. However, we think the $20,000 result for Bond BD1435 in the instant appeal is forced by the bond language. King seems to forget that the bond states liability accrues "at the rate of $1,000 per acre or part thereof" (emphasis added). We take Mr. Kaufman's testimony to mean that somewhat more than nineteen acres have been affected (Finding of Fact 11). King did not rebut this testimony; King merely challenges DER's interpretation of Mr. Kaufman's words. The bond language means that a full $ 1,000 liability accrues on the affected fraction of an acre in excess of the 19 affected acres. In short, we affirm a $20,000 forfeiture on Bond BD1435; DER is to return $1, 620 from the originally claimed full forfeiture of this $21,620 bond (Finding of Fact 9, Ex 16-A).

2. Collateral Bond, Certificate of Deposit No. 10544. This collateral bond is a proportionate bond, on which liability accrues at $575 per affected acre or part thereof (Finding of Fact 32). The testimony showed that ten acres were affected on Mining Permit No. 1566-3, for which this collateral bond was issued (Finding of Fact 33); of those ten acres, nine have been satisfactorily reclaimed, except for a small area of about 1000 sq. ft., on which there is some erosion (Finding of Fact 34). The Board takes judicial notice of the fact that an acre is 43,560 sq. ft. DER's own witness Joel Pontorero, the surface mining inspector for the site, testified that the remaining affected acre on the site was not in violation, though it contained a sediment pond which could not be removed until final vegetative growth on the site had been approved; in fact, of the entire affected 10 acres, only the aforementioned 100 sq. ft. could be said to be in violation (Findings of Fact 35 and 36). Nevertheless, DER argues that forfeiture of the bond is justified. King argues that failure to completely reclaim 1000 sq. ft. out of a ten acre affected area is insufficient justification for forfeiting the entire bond for those ten affected acres.

We agree with King, though with certain reservations as amplified infra. Although Morcoal, supra and Ogden, supra use language which can be taken to mean that any violation of applicable statutes, rules or regulations merits bond forfeiture, we believe that a proper reading of the law and the intent of the Morcoal and Ogden decisions is that a sanction as severe as bond forfeiture must be justified by more than de minimis violations. Or, to put it differently, and more accurately, where, but only where, a site has been substantially though not wholly completely reclaimed and where no violations beyond the failure to wholly reclaim are alleged, it is an arbitrary exercise of DER's duties or functions to forfeit the bond covering the site unless it can be said with a substantial degree of certainty that themine operator has no intention or no ability to wholly complete the reclamation. This language recognizes and

affirms that DER ultimately is entitled to full performance of the bond requirements and should not have to wait indefinitely for this performance to be accomplished.

In the instant case of Mining Permit No. 1566-3, the failure to satisfactorily reclaim 1000 sq. ft. out of 10 acres originally affected must be termed substantially complete reclamation; there are no other outstanding violations on the site, as we have explained. On the other hand, we do not feel that failure to reclaim this 1000 sq. ft. area necessarily must be regarded as a de minimis violation, which DER should be required to ignore entirely when considering whether to impose bond forfeiture. Ultimately, King should have to repair the erosion and complete the reclamation of the 1,000 sq. ft. area, and of course King ultimately also must remove and reclaim the sediment pond presently on the site (Finding of Fact 35). However, at the time of the bond forfeiture (on May 5, 1983) the complained-of (by DER) unreclaimed area had persisted no more than one and a half years (Finding of Fact 62), not--we think--a sufficient interval (in the absence of indications to the contrary, such as bankruptcy) to enable one to say with a substantial degree of certainty that King had neither the intention nor the ability to complete the reclamation. It is true that by the time these hearings began, in August 1984, the unreclaimed condition on the site had persisted for almost three years, a fact we are entitled to take into account in our de novo review of DER's action (Warren, supra); three years of inaction does suggest that DER could rightly conclude King was never going to complete reclamation. But the Board believes there also is some truth to Mr. Woods' claim (Findings of Fact 59 and 60) that his inability to secure bond releases has hindered his ability to hire subcontractors to perform needed reclamation, although we hasten to add that this

claim of Mr. Woods cannot be an acceptable excuse for King's indefinite deferral of its duty to complete all necessary reclamation.

On the basis of the above considerations we cannot determine with substantial certainty that King has neither the intention nor the ability to complete the reclamation of the ten acres affected on Mining Permit No. 1566-3. Therefore we judge that forfeiture of the collateral bond, certificate of deposit No. 10544, may have been an arbitrary exercise of DER's duties or functions. However, we now do not rule finally that this bond forfeiture was an arbitrary exercise of DER's duties or functions, warranting overturn of DER's forfeiture order, because we are unwilling to risk the chance that the bond liability--which terminates five years after surface mining operations on the site have ended--will lapse before DER justifiably can conclude King never is going to complete the reclamation and therewith justifiably can reorder the bond forfeiture. Instead, we shall defer adjudication of this particular bond appeal for a period of six months, to give King a chance to complete the needed reclamation on this site and to present evidence thereof to the Board. At the end of this six months period, if the Board has not received evidence that King has completed the needed reclamation--or at the very least is sincerely attempting to complete it--DER's forfeiture of certificate of deposit No. 10544 will be upheld. It will be King's obligation to present this evidence.

In the meantime, however, irrespective of the six month deferral announced in the preceding paragraph, DER immediately must return $1,799.75 (equals $7,549.75 minus $5,750.00, see Findings of Fact 31 and 32) from this bond to King. This is a proportionate bond, and King affected only 10 of the 13.13 originally permitted acres, at a liability accrual rate of $575 per acre

affected. Although DER originally forfeited the entire bond value of $7,549.75 (Ex. 27-B), DER's brief agrees that DER cannot forfeit more than $5,750.

3. Collateral Bond, Cashier's Check No. 265244. This collateral bond is a proportionate bond, on which liability accrues at $500 per affected acre or part thereof (Finding of Fact 37) Of the 16.03 acres on Mining Permit No. 1566-3(A), for which this collateral bond was issued, 16 acres have been affected. On a literal reading of the proportionality language in this bond, the unaffected .03 acres whereon liability never accrued, would entitle King to an immediate refund of $15. DER (at footnote 3 of its brief) argues that a concern for the difference between 16.00 and 16.03 acres affected would be "inappropriate". King makes no claim for this $15. While we do not agree it necessarily would be "inappropriate" to order return of the $15 to King, we are inclined to regard this amount as de minimis in the context of the instant appeal, wherein DER has forfeited nearly $200,000 worth of bonds. Especially in view of King's failure to object, we shall proceed as if liability had accrued on the entire $8,015 face value of the bond.

Six of the affected acres have been reclaimed and planted, i.e., have been fully reclaimed (Finding of Fact 39). On the remaining ten affected acres, however, reclamation has not proceeded past regrading, and accelerated erosion--accompanied by water discharges that may require treatment in the future--is occurring at a number of locations on these ten acres. Failure to complete reclamation is a violation of applicable law, of course; in addition, King's failure to establish and maintain adequate erosion and sedimentation controls on the site, so as to prevent the observed accelerated erosion, is a violation of 25 Pa. Code §87.106 and of 25 Pa. Code Chapter 102.

On the basis of the above facts, DER claims forfeiture of the entire face value of the bond. King argues that full forfeiture is not justified because King "has substantially complied with the portion of the bond which deals with the backfilling and grading" (King post-hearing brief, p.8); therefore, King goes on to say, King is entitled to 60% of the bond (i.e. $4,809), the percentage normally released after so-called "backfill approval" by DER, 25 Pa. Code §86.172. In the alternative, King argues that it is entitled to a return of $3,000 for having completely reclaimed six acres on which liability originally accrued at a rate of $500 per acre.

In evaluating these respective claims by DER and by King, we first remark that under the circumstances recounted in Find of Fact 39, King cannot be said to have "substantially completely" reclaimed the site; indeed, full reclamation of six acres out of 16 affected, with mere regrading of the remaining ten, would be a long way from "substantially complete" reclamation even if the reclamation insufficiencies were not being manifested by accelerated erosion. Therefore the considerations discussed supra under collateral bond, certificate of Deposit No. 10544, are not germane to the instant collateral bond, cashier's check No. 265244. There is no doubt that DER met its burden of showing the bond forfeiture action taken on cashier's check No. 265244 was justified, for King's failure to comply with applicable statutes, rules or regulations. In particular, for check No. 265244 there surely was no requirement that DER refrain from imposing forfeiture until one could be substantially certain King had neither the intention nor the ability to complete reclamation. Given Finding of Fact 39, DER 's duty to forfeit the bond without further temporizing was explicit

and incontrovertible under the rule laid down by Morcoal, supra. DER's action of forfeiting check No. 265244 is affirmed.

Thus we turn to the second prong of DER's burden, namely—granted the forfeiture action was justified—showing the dollar amount forfeited was correctly computed under applicable law. DER argues, primarily on the authority of American Casualty of Reading v. DER, 1981 EHB 1 and 441 A.2d 1383 (Pa. Cmwlth 1982), that because the bonds are penal bonds DER may forfeit the entire amount of the bond corresponding to the acreage affected for any (presumably more than de minimis) failure of King to comply with all requirements of the bond, whether or not some portion of the permit area covered by the bond has been fully reclaimed. We agree with DER's legal argument, though we do so rather reluctantly because we feel it represents poor public policy. Insisting that the entire bond can be forfeited by DER even if only a small fraction of the site (just enough to exceed de minimis) has not been adequately reclaimed, makes it rational for an operator with limited capital to reclaim no affected portion of his site unless he is confident he can marshal the capital needed to complete reclamation of the entire site. Of course, DER cannot permit surface mine operators to escape penalties for not fully completing their surface mining obligations; but it seems to us that compliance with reclamation requirements will be better fostered by punishing incomplete reclamation via civil penalties and/or other penalties provided by the SMCRA 52 P.S. §1396.22 and §1396.23, rather than via the device of regularly forfeiting the entire bond for any more than de minimis failure to completely reclaim.

These policy considerations are irrelevant, however, because we find no legal flaws in DER's argument described in the preceding paragraph.

The obligations of DER and King in this forfeiture dispute are governed by the language of the instant bond, which forms a contract between these parties. Ogden, supra. The relevant bond language, in full, is:

> NOW THE CONDITION OF THIS OBLIGATION is such that if the said surface mine operator shall faithfully perform all of the requirements of (1) Act 418, (2) the Act of Assembly approved June 22, 1937, as amended, known as "The Clean Streams Law" (Act 394), (3) the applicable rules and regulations promulgated thereunder, and (4) the provisions and conditions of the permits issued thereunder and designated in this bond (all of which are hereafter referred to as "law"), then this obligation shall be null and void, otherwise to be and remain in full force and effect in accordance with the provisions of the law.
>
> LIABILITY UPON THIS BOND shall accrue in the proportion to the area of land affected by surface mining at the rate of Five Hundred &00/100 ($500.00) Dollars per acre or part thereof, but in no case shall such liability be for an amount less than Five Thousand ($5,000) Dollars, as provided in Act 418, and shall continue thereon for the duration of surface mining at the operation conducted hereunder and for a period of five (5) years thereafter unless released in whole or in part prior thereto as provided by the law.

This language, to which King made no objection when it accepted its permit, clearly implies that the entire accrued liability (proportional to the area of land affected) may be triggered by any violation on any portion of the permit site, and does not terminate for a period of 5 years after the mining operation ceases unless released in whole or in part prior thereto.

Therefore we affirm forfeiture of the entire face value of collateral bond, cashier's check No. 265244. In so ruling, we obviously are rejecting--for the reasons explained in the preceding paragraph—King's aforementioned arguments that for this bond King is entitled to a return of either $4,809 or $3,000, depending on which of King's theories the Board cared to adopt.

We add that our ruling on this bond is consistent with our holding in Ogden, supra that:

> With regard to the six acres on each of permits 1470-1 and 1470-1A which the parties agreed had been graded to AOC, the determination of liability is slightly more complex. Grading to AOC constitutes partial compliance with the applicable law. However, to the extent that further reclamation is required, there is non-compliance. As noted above, 25 Pa. Code §87.140 requires more than grading to AOC. Section 4(h) of the SMCRA, 52 P.S. §1396.4(h), requires that DER forfeit the bond where the operator has failed to reclaim the site in accordance with the law. Consequently, we cannot find that DER has abused its discretion in forfeiting the portion of the land corresponding to the acres affected on permits 1470-1 and 1470-1A, despite the fact that partial reclamation was effected.

On the other hand, our present ruling is inconsistent with the statement in Ogden that:

> DER is justified in forfeiting only that portion of a bond which corresponds to the number of acres affected and not reclaimed multiplied by the per acre liability specified in the terms of the bond. [emphasis added]

This statement, which actually was not necessary for our actual adjudication in Ogden (i.e., was dicta in Ogden), would support King's argument that it is entitled to a refund of $3,000 for the six fully reclaimed acres on this 16.03 acre site. Consequently, for reasons explained supra, this just-quoted statement from Ogden is overbroad and herewith is repudiated, along with Ogden's Conclusion of Law No. 4 which employs same overbroad language. The statement just quoted would be correct if the emphasized phrase "and not reclaimed" were dropped.

We also add that this discussion of the legal basis for forfeiting all of cashier's check No. 265244 is germane to our previous ruling concerning forfeiture of certificate of deposit No. 10544, and indeed to essentially all

the forfeitures involved in this adjudication. For instance, concerning certificate of deposit No. 10544 we have said that we will uphold forfeiture of the full $5,750 on this bond, covering ten affected acres of which nearly nine have been fully reclaimed, unless within six months King presents evidence it has completed reclamation of the approximately one acre presently remaining unreclaimed. This holding would be incorrect had we not explicitly repudiated the above-quoted Ogden rule.

4. Surety Bond No. 13366. This is another proportionate bond, on which liability accrues at a rate of $1,000 per acre affected (Finding of Fact 40). Only one acre was affected on Mining Permit No. 1566-3(A)2 covered by this bond, and this acre has been fully reclaimed leaving no residual violations (Finding of Fact 41). Nevertheless, DER claims it is entitled to a forfeiture on this bond; in fact, DER seeks a $5,000 forfeiture, under the bond language that liability on the bond cannot be less than $5,000 (Finding of Fact 40). DER points out that Mining Permit No. 1566-3(A)2 [along with Mining Permit No. 1566-3(A)] was an amendment to Mining Permit No. 1566-3. All these three just-named mining permits were issued under the same mine drainage permit, MDP 4076SM2. DER also points out that all three bonds issued on these three mining permits contain the identical language as in the first paragraph of our quote supra from the language of collateral bond, cashier's check No. 256244. On the basis of the language in that paragraph, especially the plural "permits" in the clause "the provisions and conditions of the permits issued thereunder", DER argues that liability on bond No. 13366 covering Mining Permit No. 1566-3(A)2 is triggered by violations not only on the Permit No. 1566-3(A)2 affected area, but also by violations on the affected areas of Permits Nos. 1566-3 and 1566-3(A).

We have ruled against precisely this contention in Ogden, supra, and see no reason to modify that ruling. The bond language in the aforementioned quoted paragraph refers to the permits designated in this bond; there is no indication whatsoever that violations on permits not mentioned in surety bond No. 13366 can trigger liability on bond No. 13366 and/or prevent release of any accrued liability on that bond. Permits No. 1566-3 and 1566-3(A) are not mentioned in surety bond No. 13366. Moreover, we very much doubt that DER's unnatural reading of the bond language was within the original contemplation of either party when the bond was issued.

DER's forfeiture of surety bond No. 13366 was an arbitrary exercise of DER's duties and functions. The forfeiture is reversed. Moreover, the full value of the bond must be released to King forthwith; there is absolutely no legal basis for DER's continued retention of this bond. We recognize that in so holding we are going beyond our stated scope of review, to either uphold or vacate the forfeiture action. Requiring DER to release the bond goes beyond vacating the forfeiture; but under the facts of this bond appeal, anything less than immediate release of the bond to King is indefensible.

5. Surety Bond No. BD1428. This bond is a proportionate bond, covering Mining Permit No. 1566-9, on which liability accrues at a rate of $575 per acre affected (Findings of Fact 32 and 51). DER's inspector Russell Dill testified that all 10.4 acres under Mining Permit No. 1566-9 had been affected; John Woods, one of King's two partners, testified that only 70% of the area on this permit had been affected. We found Mr. Dill's testimony more credible (Finding of Fact52).

DER has tried to justify forfeiture of this bond on the basis that violations on the area covered by the bond have caused environmental damage to

areas outside the permit boundaries (Findings of Fact 54(b) and 55). DER correctly argues that such justification of forfeiture is not ruled out by Ogden, supra, where we held that DER could not forfeit a bond solely because the operator also had affected and not reclaimed three unpermitted acres adjacent to the site. In the circumstances considered in Ogden, there was no causal connection between conditions on the affected off-permit area and violations on the permitted area; in the instant circumstances the environmental damage on the unpermitted area has resulted from inadequate reclamation of the permitted area. Therefore, in the instant circumstances the environmental damage on the adjacent permitted area can be and should be regarded as the legal equivalent of violations of the bond conditions (in this case of bond BD1428); correspondingly, failure to remedy these off-permit violations is justification for forfeiture of bond BD1428 . Note that, consistent with Ogden, this ruling has not rested in any way on Finding of Fact 56.

King has argued against the immediately foregoing reasoning, but King's logic appears to rest largely on a misapprehension of the scope of our ruling in Ogden that failure to reclaim affected unpermitted acreage, without more, could not justify forfeiting a bond covering a permitted area. Thus we conclude that forfeiture of this bond, for its total face value, must be upheld. We note as well our agreement with DER's view that forfeiture also would be justified by the conditions described in Findings of Fact 54(a) and 54(c). However, King's post-hearing brief (at pp. 11-12) appears to challenge Findings of Fact 54(a) and 54(c). But since we hold that Findings of Fact 54(b) and 55 already justify forfeiture of bond BD1428, there is no need to further lengthen this adjudication with a discussion of our reasons for adopting Findings of Fact 54(a) and 54(c).

An Order, consistent with this Adjudication, follows.

CONCLUSIONS OF LAW

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

2. The burden of proving the facts that can justify forfeiture of the bonds which are the subject of this appeal falls on DER.

3. More particularly, DER's burden, for each forfeited bond, is to demonstrate that: (1) King failed to comply with the applicable statutes, rules or regulations, and (2) the dollar amount DER seeks to forfeit has been correctly computed under applicable law.

4. The Board's scope of review is to determine whether DER committed an abuse of discretion or an arbitrary exercise of its duties or functions,

5. For each appealed-from bond forfeiture, this scope of review means that the Board must either uphold or vacate the forfeiture action; however, once the bond forfeiture action has been upheld, the Board can substitute its discretion for DER's in setting the amount of forfeiture, if the Board decides DER's computation of the forfeiture amount was an abuse of DER's discretion.

6. King has waived any challenge to the appealed-from forfeitures other than the forfeitures of Surety Bond No. BD1435, Collateral Bond Certificate of Deposit No. 10544, Collateral Bond Cashier's Check No. 265244, Surety Bond No. 13366, and Surety Bond No. BD1428.

7. DER has met its burden of proof for all appealed-from bond forfeitures not mentioned in Conclusion of Law 6; these bond forfeitures are upheld, for amounts specified precisely in the Order which follows.

8. DER has met its burden of justifying forfeiture of Surety Bond No. BD1435, for an amount of $20,000.

9. Under the bond language, affecting between 19 and 20 acres causes a liability of $20,000 to accrue; the fractional acreage above 19 acres is treated as a full acre for this accrual purpose.

10. A sanction as severe as bond forfeiture must be justified by more than de minimis violations.

11. When (but only when) a site has been substantially though not wholly completely reclaimed, and when no violations beyond failure to wholly reclaim are alleged, it is an arbitrary exercise of DER's duties or functions to forfeit the bond covering the site unless it can be said with a substantial degree of certainty that the mine operator has no intention or no ability to wholly complete the reclamation.

12. However, ultimately DER is entitled to full performance of the bond requirements, and should not have to wait indefinitely for this performance to be accomplished.

13. Failure to satisfactorily reclaim 1000 sq. ft. out of 10 acres originally affected is substantially complete reclamation, in the absence of other violations.

14. Failure to reclaim 1000 sq. ft. out of 10 acres originally affected is not necessarily a de minimis violation.

15. Under the instant facts concerning certificate of deposit No. 10544, when the unreclaimed condition on the 1000 sq. ft. has persisted for almost three years, but King claims its inability to secure bond releases has hindered its ability to hire subcontractors to perform needed reclamation, the Board will not uphold DER's forfeiture action without first giving King another six months to show it has completed--or at least is sincerely attempting to complete—all needed reclamation on the site.

16. In the case of collateral bond cashier's check No. 265244, full reclamation of six acres out of 16 affected, with mere regrading of the remaining ten affected acres, is far from the "substantially complete" reclamation envisaged in Conclusion of Law 11.

17. DER's action of forfeiting cashier's check No. 265244 was not an arbitrary exercise of its duties or functions.

18. Under the language of collateral bond cashier's check No. 265244, and of the other bonds whose forfeitures are the subject of the instant appeal, DER may forfeit the entire bond amount for which liability has accrued if there has been a more than de minimis failure of King to comply with all requirements of the bond, whether or not some portion of the permit area covered by the bond has been partially or fully reclaimed.

19. Where the bond provides that liability accrues in proportion to the acres affected, DER is justified in forfeiting only that portion of the bond which corresponds to the number of acres affected multiplied by the per acre liability specified in the terms of the bond.

20. Conclusion of Law 19 corrects and repudiates the overbroad corresponding rule which formed Conclusion of Law No. 4 in Charles A. Ogden, President Coal Hill Contracting Company, Inc. v. DER, Docket No. 82-193-G (Adjudication, August 6, 1984).

21. Under the language of the bonds whose forfeitures are the subject of the instant appeal, liability on any such bond can be triggered only by violations of the permits specifically mentioned in that bond.

22. DER's forfeiture of surety bond No. 13366 covering Mining Permit No. 1566-3(A)2, for violations occurring on Mining Permits 1566-3 and 1566-3(A) was an arbitrary exercise of DER's duties and functions.

23. Where there is a causal connection between environmental damage on an unpermitted area and violations of applicable statutes, rules or regulations on a bonded permitted area, said environmental damage is the legal equivalent of a direct violation of the bond conditions, and failure to remedy such off-permit environmental damage can be justification for forfeiture of the bond.

ORDER

AND NOW, this 18th day of March, 1985, the above-captioned appeal is partially dismissed and partially sustained. In particular, it is ordered that;

1. For the bonds listed in the immediately following Table, DER's forfeitures are sustained for the amounts shown in the third column of the Table; DER immediately may cash those bonds and pay the sustained amounts into the Surface Mining Conservation and Reclamation Fund.

Bond Number	Amount Originally Forfeited	Forfeiture Amount Sustained	Amount Returnable to King
BD 1435	$21,620	$20,000	$ 1,620
BD 1631	32,235	32,235	---
BD 1666	32,890	32,890	---
BD 1830	8,300	8,300	---
BD 1965	22,800	22,800	---
BD 20240	22,300	22,300	---
Cashier's check 265244	8,015	8,015	---
13751	15,570	13,000	2,570

13358	$24,360	$23,380	$ 980
BD 1428	5,980	5,980	—
			$ 5,170

2. For the bonds listed in the above table, whose forfeitures have been sustained, DER is to immediately return a total of $5,170 to King.

3. The appeal of the forfeiture of surety bond 13366 is sustained, and the bond forfeiture is reversed; the full $10,430 value of this bond is to be released to King forthwith.

4. Full adjudication of King's appeal of the certificate of deposit No. 10544 forfeiture is deferred; for the present, King's appeal of this forfeiture is sustained for an amount equal to $1,799.75, which is to be returned to King forthwith.

5. Within six months from the date on which DER actually completes the payments to King which have been ordered in the preceding paragraphs of this Order, King is to file a sworn affidavit describing the status of the presently uncompleted reclamation on Mining Permit No. 1566-3; DER is to inform the Board when the aforementioned payments are completed.

6. The Board will adjudicate the fate of the remaining $5,750 being held by DER under certificate of deposit No. 10544, as soon as possible after King has filed the affidavit ordered in paragraph 5 supra and DER has had an opportunity to respond to King's filing; if necessary an evidentiary hearing will be held.

7. The Board retains jurisdiction over the appeal of the certificate of deposit No. 10544 forfeiture, but only over that appeal.

8. Failure of King to timely file the affidavit ordered in paragraph 5 will be cause for immediate dismissal of King's appeal of the forfeiture of the remaining $5,750 being retained by DER under certificate of deposit No. 10544.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: March 18, 1985

cc: Bureau of Litigation
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COMMONWEALTH OF PENNSYLVANIA

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FRANCIS LAGAN, et al.

Docket No. 84-300-M
Issued: April 12, 1985

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and THE TOWNSHIP OF HORSHAM
and THE TOWNSHIP OF HORSHAM SEWER AUTHORITY, Intervenors

ADJUDICATION

Syllabus

Appellants have appealed the approval by the Department of Environmental Resources (DER) of a revision to the Township of Horsham's official sewage facilities plan. This appeal is dismissed because appellants, upon whom the burden of proof rests, presented no evidence upon which this Board could properly sustain their appeal. Although appellants were unprepared for the hearing, the Board's denial of their request for a continuance was proper because appellants had already been granted one continuance and were warned that no further continuances would be granted, and a further continuance would have placed a financial burden on the intervenors.

INTRODUCTION

Francis Lagan, et al, appellants, timely filed an appeal, which this Board received on August 24, 1984, from an approval dated July 23, 1984, by the Department of Environmental Resources (DER) of a revision to the official sewage facilities plan of Horsham Township. On August 27, 1984, appellants filed a Petition for Supersedeas with the Board. Since Board Member Mazullo, to whom this case was assigned, was unavailable for a hearing at the time the appellants filed the supersedeas petition, Board Member Gerjuoy attempted to arrange a supersedeas hearing. Appellants, however,informed Board Member Gerjuoy that they were "not in a rush," and thus a pre-hearing conference was scheduled with Board Member Mazullo for November 7, 1984. On September 20, 1984, the Board issued an order allowing the Township of Horsham and the Township of Horsham Sewer Authority to intervene in this appeal.

Appellants are prosecuting this appeal pro se, and at the pre-hearing conference, Board Member Mazullo explained to appellants that they had the burden of proof in this appeal, and that a hearing on the merits of the appeal would be held the week of December 3, 1984, at which time appellants should be prepared to present their case. On November 23, 1984, appellants requested a continuance of the hearing, which the Board granted. The Board rescheduled the hearing for January 10, 1985, and informed appellants that no further continuances would be granted. On the day of the hearing, however, appellants requested an additional continuance because one of the appellants, Mrs. Elizabeth Steele, was ill. The Board denied this request for a

continuance because the Board had informed appellants that no further continuances would be granted, and more importantly, because an additional continuance would place a financial burden upon the intervenors, Horsham Township and Horsham Township Sewer Authority, because the project that is the subject of this appeal was to be financed in February 1985. Thus the hearing in this matter was held, as scheduled, on January 10, 1985.

FINDINGS OF FACT

1. Appellants are Francis L. Lagan, Andrew C. Kurtz, and Dorothy B. Kermick, of Horsham, PA; and Elizabeth H. Steele of Ambler, PA.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), the agency of the Commonwealth authorized to administer the Pennsylvania Sewage Facilities Act, 35 P.S. §§750.1-750.20, and the regulations promulgated under this act.

3. Intervenors are the Township of Horsham (Township), located in Montgomery County, Pennsylvania; and the Township of Horsham Sewer Authority. (Sewer Authority)

4. Certain areas of the Township; namely Hide-A-Way Hills, Cedar Hill Road, Oak Terrace Farms Development, and Fox Development, located in area of the Township known as "Area D"; have experienced severe on-site septic problems for which the Township has attempted to find a solution since 1969.

5. Ronald Mintz is an individual who owns 216 acres of land in the Township. This land is known as Country Springs, and the Township has granted conditional use approval for the construction of 648 single family dwelling units on this land.

6. No public sewer service existed near the proposed Country Springs

development, and the small lot sizes proposed for Country Springs precluded the use of on-lot sewage disposal systems. Thus, Ronald Mintz and his partners incorporated Wichard Sewer Company, Inc. (Wichard) for the purpose of constructing and operating a sewage treatment plant to service Country Springs.

7. On August 28, 1978, the Sewer Authority entered into an agreement with Mintz and the Wichard Sewer Company, which provided inter alia, that when the Wichard treatment plant was constructed it would reserve 100,000 gallons per day of sewage treatment capacity to be provided for the Sewer Authority at any time the Sewer Authority should request it.

8. DER approved a plan revision to the Township's official sewage facilities plan providing for the treatment of sewage from Country Springs by the Wichard treatment plant, and this approval was upheld on appeal to this Board, in an adjudication issued October 16, 1980. Thompson v. DER, 1980 EHB 224.

9. This Board also upheld, on appeal, DER's issuance of an NPDES permit and a water quality management permit to Wichard for the construction of the sewage treatment plant. Comly v. DER, 1981 EHB 446. The NPDES permit authorized a discharge of approximately 227,000 gallons per day at a specified level of treatment into Park Creek. In upholding this permit, the Board held, inter alia, that the approved discharge to Park Creek would not result in any environmental harm.

10. On November 9, 1983, the Township passed a resolution to adopt and submit to DER for approval, a revision to its official sewage facilities plan. The revision provided for the Cedar Hill Road, Hide-A-Way Hills, Oak Terrace Farms, and Fox developments to be serviced by the Wichard sewage treatment plant. This revision was proposed as an interim solution to the sewage

problems in these developments. Also included in the interim solution were two other areas in the township--Squire Estates and Oak Terrace Country Club.

11. The Township's proposed plan revision is interim in nature and specifically acknowledges that the treatment facility and the point of discharge of effluent may change in the final plan.

12. The interim solution involves the purchase by the Sewer Authority of the 100,000 gallons per day treatment capacity reserved by Wichard for the Sewer Authority pursuant to the 1978 agreement, and does not involve an expansion of the Wichard treatment plant.

13. The permitted capacity of Wichard is approximately 227,000 gallons per day, and it is currently treating approximately 11,000 gallons per day.

14. Unitech Engineers, Inc. calculated, in a feasibility report prepared for the Township, that the cost of the interim use of Wichard would be $3.364 million.

15. Unitech also analyzed an alternative solution that would involve the conveyance of sewage through Lower Gwynedd Township to be treated at the Ambler Sewage Treatment Plant. Unitech estimated that this alternative would cost the Township $4.447 million, and even without considering any connection fee to Lower Gwynedd, this alternative would cost $3.447 million.

16. By letter dated May 22, 1984, the Montgomery County Planning Commission, the planning agency with area-wide jurisdiction, recommended approval of the Township's interim solution because the proposed solution could be implemented more quickly and would be less costly than the Ambler alternative.

17. Because the Naval Air Station Willow Grove is situated in Horsham Township, the United States Department of the Navy expressed concerns to DER

during the comment period for the Township's proposed plan revision. But, by letter dated June 15, 1984, the Navy informed DER that because the interim solution was a "temporary fix" to the sewage treatment problems of the Township, the Navy's concerns and comments would only focus on the permanent solution.

18. In reviewing the Township's proposed plan revision, DER evaluated comments from the Lower Gwynedd Sewer Group, the U. S. Navy, and two of the appellants in this appeal--Elizabeth Steele and Francis Lagan.

19. By letter dated July 23, 1984, DER approved the Township's proposed revision to its official sewage facilities plan.

20. On October 29, 1984, following a public hearing held on September 25, 1984, the Delaware River Basin Commission approved Wichard's application for an interim modification to Wichard's sewage treatment project, allowing Wichard to treat the 100,000 gallons of sewage per day proposed in the Township's interim solution, which is the subject of this appeal. In this approval, the Delaware River Basin Commission found that the interim solution, "does not conflict with nor adversely affect the Comprehensive Plan, is physically feasible, and should not adversely influence the present or future use and development of the water resources of the Basin."

DISCUSSION

Appellants have the burden of proving that DER abused its discretion in approving the revision of the Township's official sewage facilities plan. 25 Pa. Code §21.101(c)(3).[1]

[1] Although §21.101(c)(3) specifically applies to third party appeals from the issuance of permits or licenses, this Board has applied §21.101(c)(3) by analogy to third party appeals from DER decisions denying revisions to official sewage facilities plans, Eagles' View Lake, Inc. v. DER, 1978 EHB 44; and DER decisions approving revisions to official sewage facilities plans. Swartwood v. DER, 1979 EHB 248, aff'd 56 Pa. Cmwlth. 298, 424 A. 2d 995 (1981).

On the day of the hearing, appellants requested a continuance of the hearing because one of the appellants was ill and unable to attend the hearing. The appellants were unprepared for the hearing, but the Board denied the request for a continuance because the Board had already granted appellants one continuance, at which time the Board informed the appellants that it would not grant any further continuances. Moreover, intervenors would have been financially burdened by a further continuance because their project was to be financed in February 1985. Due process considerations do not require the Board to grant a party an endless series of continuances. It is a well-settled principle of administrative law that the power to grant or refuse continuances is an inherent power of an administrative agency. O'Hara v. Board of Probation and Parole, _____ Pa. Cmwlth. _____, 487 A. 2d 90 (1985). The Board's denial of appellants' request for further continuance was proper in this case in view of the burden that a further continuance would place on intervenors, and in view of the previous continuance granted to appellants and the warning given to appellants that no further continuance would be granted.

Thus, at the hearing in this matter, appellants called only two lay witnesses and presented no other evidence. At the close of the hearing, the intervenors filed a Motion for Directed Verdict. Motions for directed verdict are generally only made in jury trials and not in administrative proceedings. In this case, a hearing was held on the merits, and appellants, upon whom the burden of proof rests, presented no evidence upon which this Board could properly sustain their appeal. Thus, although a motion for directed verdict may be an inappropriate motion, the Board dismisses this appeal based upon appellants' failure to sustain their burden of proof.

At the hearing in this matter, appellants essentially raised two arguments on behalf of their position that DER abused its discretion in approving the Township's plan revision. First, appellants argued that the Wichard treatment plant does not have sufficient capacity to treat the sewage from the areas that the revision proposes to connect to Wichard, and that the discharge of this sewage from Wichard into Park Creek will result in the degradation of Park Creek and various parks through which Park Creek flows. The appellants, however, presented no evidence of any environmental harm resulting from the Township's proposed interim solution. Moreover, the Township's proposed interim solution does not involve any expansion of Wichard, but rather, involves the use of 100,000 gallons per day of treatment capacity reserved by Wichard for the Township pursuant to an agreement executed in 1978. Wichard's NPDES permit authorizes Wichard to discharge 227,000 gallons of treated sewage per day into Park Creek, and this Board already upheld Wichard's NPDES permit, holding, inter alia, that the authorized discharge into Park Creek will not result in any environmental harm. Comly v. DER, 1981 EHB 446. Thus this issue has already been litigated and cannot be relitigated here. Bethlehem Steel v. DER, 37 Pa. Cmwlth. 479, 390 A. 2d 1383 (1978); Allegheny County Sanitary Authority v. DER, EHB Docket No. 83-075-G (Opinion and Order issued: September 6, 1984).

Appellants' second argument is that DER abused its discretion in approving the plan revision because treating the areas in question at Wichard will be more expensive than treating them at Ambler. The Township hired Unitech Engineers, Inc. to do a feasibility report on the proposed interim solution. In the feasibility report, Unitech evaluated the cost of treating the sewage from the areas in question at both the Wichard plant and at the

Ambler plant. Unitech's calculations show that the cost of treating the sewage at Wichard would be $3.364 million, and the cost of treating the sewage at Ambler would be $4.447 million. For sewage to be treated at Ambler, it must be conveyed through Lower Gwynedd Township. Even without considering any connection fee to Lower Gwynedd's system, Unitech's calculations show that the Ambler alternative, at $3.447 million, would still be more expensive than the Wichard alternative. Although appellants allege that Unitech's calculations are inaccurate, they presented no other calculations, or any other evidence to support this position. Thus appellants have not sustained their burden of proof.

CONCLUSIONS OF LAW

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

2. Appellants have the burden of proof in this appeal of DER's approval of a revision to the Township of Horsham's official sewage facilities plan.

3. Appellants did not produce sufficient evidence to sustain their burden of proof.

4. DER's approval of the revision to the Township of Horsham's official sewage facilities plan complied with all applicable provisions of the Sewage Facilities Act, 35 P.S.§§750.1-750.20, and the regulations promulgated under this act.

5. DER did not abuse its discretion in approving the revision to the Township of Horsham's official sewage facilities plan.

ORDER

AND NOW, this 12th day of April , 1985, upon consideration of the findings of fact and conclusions of law made by the Board, the appeal of Francis Lagan, et al., at EHB Docket No. 84-300-M is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

cc: Bureau of Litigation
J. Scott Maxwell, Esq.
James Morris, Esq.
Stephen B. Harris, Esq.
Elizabeth Steele
DATED: April 12, 1985

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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W. P. STAHLMAN COAL CO., INC. :

Appellant :

: Docket No. 83-301-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By Edward Gerjuoy, Member April 29, 1985

Syllabus

This appeal of a DER order requiring Appellant to provide an alternate water supply to a private residence is sustained. DER's action was taken pursuant to 52 P.S. §1396.4b(f). The evidence presented does not support DER's contention that Appellant was responsible for the water loss. DER did not meet its burden of proof. 25 Pa. Code §21.101(b)(3). The burden of proof did not shift to Appellant. 25 Pa. Code §21.101(d) does not apply in this instance; the requirements of §21.101(d)(2) have not been met. In addition, 52 P.S. §1396.4b(f) does not indicate a legislative purpose to place the burden of proof upon the Appellant. Principles of res ipsa loquitur are inapplicable in this statutory context. The existence of a presumption that DER has acted reasonably will not alone suffice to shift the burden to Appellant.

INTRODUCTION

This is an appeal, filed December 30, 1983, of a DER order to the Appellant, requiring the Appellant to provide an alternate water supply to the Harold A. Wilshire residence, which is located in the neighborhood of an area the Appellant had been surface mining for coal. A hearing on the merits of the appeal was held on August 27, 1984; both DER and the Appellant have filed post-hearing briefs, and DER has filed a reply brief. Therefore this appeal now is ready for adjudication.

Before proceeding to our adjudication of the merits of this controversy, however, some earlier interlocutory rulings in this matter should be mentioned. The notice of appeal was accompanied by a petition for supersedeas of DER's order. On January 17, 1984, DER and Stahlman agreed to a stipulated supersedeas, which on February 2, 1984 was entered as an order of the Board. In the stipulated supersedeas DER agreed that:

> Although the order was issued because the Department had determined that the quantity of the Wilshire spring had been diminished, since the groundwater level is relatively high at this time, the quantity of water of the spring is presently adequate.

Then, on March 19, 1984, Stahlman--after agreeing to maintain a temporary water supply for the Wilshires until such time as the Board issued a final order in the appeal--withdrew its petition for supersedeas with DER's consent. However, the Board never has rescinded its order of February 2, 1984. Consequently, to avoid leaving any loose ends in this matter, we herewith terminate the stipulated supersedeas as of the date of this adjudication.

On June 6, 1984, DER filed a motion to quash this appeal as untimely under 25 Pa. Code §21.52(a). Stahlman responded with a request for leave to

file its appeal nunc pro tunc, as is permitted by 25 Pa. Code §21.53(a). The Board decided to allow Stahlman's appeal nunc pro tunc (Opinion and Order at the above docket number, July 10, 1984). At the time, DER objected to the Board's allowance of the appeal nunc pro tunc, but these objections were not renewed at the hearing or in DER's post-hearing or reply briefs. The Board takes no position on whether or not the facts recounted in the preceding sentence imply DER's objections to allowance of this appeal now have been waived.

Therewith, we return to the main line of this adjudication.

FINDINGS OF FACT

1. The Appellee in this appeal is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), which is the agency of the Commonwealth empowered to administer and enforce the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq. ("SMCRA"), and the rules and regulations of the Environmental Quality Board ("EQB") adopted thereunder.

2. Appellant is the W. P. Stahlman Coal Co., Inc. ("Stahlman"), a Pennsylvania corporation, whose mailing address is P.O. Box 69, Clarion, Pa. 16214.

3. Stahlman is engaged in the surface mining of coal, and is licensed to do so by the Commonwealth of Pennsylvania.

4. During 1982 and 1983 Stahlman engaged in mining operations on a mining site covered by Mining Permit 9-38(A3); these are the mining operations which DER believes have necessitated the order that is the subject of this appeal.

5. The phases of Mining and Reclamation at the mining site covered by Mining Permit 9-38(A3) were as follows:

March 24, 1982 - Sedimentation pond #18 installed.

March 14, 1982	- Removing topsoil by use of pans.
May 27, 1982	- Mining in northwestern section, using bulldozer and front end loader.
June 23, 1982	- Mining in same section, using bulldozer, front end loader; removing topsoil, using pan.
July 27, 1982	- Mining in same section, using bulldozer, front end loader.
August 17, 1982	- Backfilling in same section, using bulldozer, front end loader; another front end loader was loading coal.
September 8, 1982	- Dragline moved from Mining Permit 9-38 area to northwestern section of 9-38(A3)
October 28, 1982	- Mining on same section, using dragline.
November 19, 1982	- Mining on the central section of 9-38(A3), using dragline.
December 16, 1982	- Mining on the northeastern section of 9-38(A3), using dragline.
January 12, 1983	- Mining on eastern section of 9-38(A3), using dragline; backfilling with dozer.
March 5, 1983	- Dragline moved off 9-38(A3); backfilling with dozer.
March 22, 1983	- Entire mining site is backfilled except for area where tipple refuse was disposed.
Present	- Entire mine site is backfilled and planted except for area where tipple refuse was disposed; this area is scheduled for planting this fall planting season.

(Bd. Ex. 1, a stipulation of facts, entered into by Stahlman and DER, August 27, 1984).[1]

6. Mr. and Mrs. Harold Wilshire (the "Wilshires") have owned and resided upon property located in Limestone Township, Clarion County, since 1966. T.5.[2]

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[1]"Ex.", here and throughout, denotes "Exhibit". Commonwealth Ex. numbers are preceded by "C";"Bd." denotes this Board's exhibit.

[2]Denotes page 5 of the transcript.

7. The Wilshires' property is located immediately adjacent to the mining site (the "site") covered by Mining Permit 9-38(A3) which was mined as described in Finding of Fact 5.

8. The sole source of a water supply at the Wilshires' residence is a spring which arises on the Wilshires' property. The Wilshires have used this as their water supply since 1966. T.5, 6.

9. The spring emanates from the ground at an uphill point on the Wilshires' property and flows downward through a ravine. It is located approximately 50 to 60 feet from the Wilshires' residence T.8-11.

10. At the time the Wilshires acquired their property, the spring was already in existence. T.5-9.

11. The portion of the site immediately adjacent to the Wilshire property lies to the south and uphill of the Wilshires.

12. The Wilshires' residence and spring lie on the north face of the hill on which the site is located; the surface contour lines are such that water reaching the spring by flowing down along the surface of the hill face would have been flowing approximately from south to north. T.161, 172-S; C.Ex.1.

13. The highwall of the surface mine on the site was located on the boundary line of the Wilshires' property. T.62; C.Ex.1, 3.

14. Mining on the site came as close as 450 feet to the Wilshires' residence. T.53, 55, 79.

15. In July or August of 1981, the Wilshire spring suffered a noticeable diminution of flow for at most a few days. T.12, 13, 25, 90, 155.

16. During this flow diminution in the summer of 1981, the spring never went dry. T.12, 13, 24.

17. From the date when the Wilshires moved onto their property in 1966, until July of 1982, they used the spring for all of their water needs. They drank the water, bathed with it, watered their dogs, and used it to operate the toilet, an automatic washer, and a dishwasher. T.6, 17, 33.

18. During the time period from 1966 until July of 1982, the spring never ran out of water. T.24.

19. During the time period from 1966 until July of 1982, excepting perhaps the few days in the summer of 1981 when a flow diminution was observed (Finding of Fact 15), the spring gave the Wilshires a very ample supply of water, sufficient, e.g., to allow Mr. Wilshire to run a hose all afternoon. T.24.

20. In July of 1982, the Wilshires' spring started to go dry and by August it was completely dry. The spring remained completely dry until October of 1982 when the fall rains came. T.13, 36, 37.

21. From October of 1982 until June of 1983, the spring produced water. Then in June of 1983, the water level started to dwindle and it eventually went dry again. The spring remained dry until the fall rains came in approximately September or October. T.15.

22. From October of 1983 until January of 1984, the spring continued to produce water. For a day or two in January, when everything was frozen, the spring did not produce water. However, once there was a thaw and the snow melted, the spring produced water again. T.15, 16, 41.

23. Except for these few days in January of 1984, the spring has produced an adequate amount of water to meet the Wilshires' needs since October of 1983 though the amount fluctuates in accordance with the amount of rainfall. The spring produces more water during rainy periods and less water during dry periods. T. 16, 17, 41, 42, 43.

24. The summer of 1984 was a very wet summer. T. 35, 43, 192.

25. The Wilshire spring is fed by rainwater which falls on the hillside areas near the spring and then infiltrates into the groundwater flowing to the spring. T. 56, 58; C.Ex.2, 3.

26. On this mechanism, the flow in the Wilshire spring should correlate with the seasonal rainfall in the area. T. 70, 191-3.

27. A spring represents the discharge zone of a groundwater flow or groundwater table. T. 56.

28. The recharge area for a spring is that area which serves as a source of water for the spring. T. 60.

29. The spring on the Wilshires' property is receiving its water from a shallow unconfined aquifer, for which the hillside around and above the spring serves as a water source. T. 56.

30. The groundwater in a shallow unconfined aquifer on sloping ground will flow in approximately the same direction as would water on the surface. T. 61, 62, 159.

31. Such groundwater will flow approximately perpendicular to the surface contour lines. T. 159, 172.

32. The drainage divide for an area marks the separation between the different directions that water falling on a hillside will flow. T. 61, 62.

33. The drainage divide for the area covered by Mining Permit No. 9-38(A3) in the vicinity of the Wilshires' property is located at the top of the hill upon which the mine is situated. T. 61, 62, 64, 138; C.Ex.2, 3.

34. DER's expert Barbara Hajel opined that the pre-mining recharge area for the spring extended all the way up the hillside to the drainage divide mentioned in Finding of Fact 33; this drainage divide is well above the property line marking the northern boundary of Stahlman's mining operations in the vicinity of the spring. C.Ex.2.

35. Hajel believes that as a result of mining, the hillside area mined no longer is part of the recharge area for the spring. C.Ex. 3.

36. On the foregoing bases (Findings of Fact 34 and 35), Hajel computed that mining reduced the recharge area of the spring from about 26 acres to 19 acres, i.e., by approximately 26 percent. T. 65-67.

37. Stahlman's expert Thomas Novotny theorized that the loss of water flow to the Wilshire spring has resulted from siltation clogging of the groundwater path to the spring. T. 161-4, 187-190.

38. Novotny testified that the effects of siltation clogging of the spring would build up slowly, and would first be observed in periods of low rainfall. T. 191-2.

39. No evidence was presented concerning the amount of rainfall during any portion of the years 1981-3.

40. Stahlman conducted no investigations which might have confirmed Novotny's siltation clogging theory.

41. Novotny's conjectures about siltation clogging of the spring were not backed up by any direct observations of such siltation.

42. C.Ex. 2 and C.Ex. 3 show sections of the terrain (pre-mining and post-mining respectively) in a roughly East-West vertical plane through the spring; this plane intersects the surface along the approximately East-West dashed red line shown in C.Ex. 1. T. 61-64, 102-3, C.Ex. 1.

43. The aforementioned dashed line in C.Ex. 1 runs appromately parallel to the contour lines in its vicinity; those contour lines run roughly East-West, or perhaps Northwest to Southeast. C.Ex. 1.

44. Novotny testified this roughly East-West section line of Hajel's is inapposite, because groundwater flowing along that line to the Wilshire spring would not be flowing approximately perpendicular to the contour lines. T. 159-161.

45. Novotny drew on C.Ex. 1 a pair of dot-dashed lines through the spring bounding the range of directions along which he believes groundwater could flow to the spring. C.Ex. 1.

46. Novotny's lines are very different from, and make quite a wide angle with, the section line drawn by Hajel (Finding of Facts 42 and 43).

47. Novotny's dot-dashed lines are very reasonable estimates of the directions of groundwater flow to the Wilshire spring.

48. Hajel's section line was a less reasonable estimate of the direction along which groundwater could flow to the spring.

49. The results of Hajel's calculations (Finding of Fact 36) depend on the distances shown in C.Ex. 2 and C.Ex. 3; therefore these results might be quite different if sections had been taken along the groundwater flow directions favored by Novotny.

50. A two foot thick seam of underclay lies directly beneath the coal seam mined at the surface mine and follows the contour of that coal seam. T. 87.

51. The underclay is a less permeable material than materials above it, and is highly impervious to water. T. 66, 126.

52. The Wilshires' spring is at an elevation of 1462 feet. T. 59.

53. The coal seam (and associated underclay seam) mined by Stahlman outcrops (i.e., becomes exposed at the surface) at points on the surface 31 feet higher in elevation than the spring. T. 129.

54. The seam outcrops at points on the hill well south of the spring, definitely outside and north of the area Stahlman mined. C.Ex. 1, 2, 3.

55. Before mining, the recharge area of the spring could not have included any land lying above the impervious clay seam.

56. The coal seam, and its underlying clay seam, dips in a direction away from the Wilshire spring. T. 85, 86.

57. DER offered no evidence of having tested the possibility that rain water falling on the surface above the aforementioned outcrop can penetrate the impervious clay seam and reach the Wilshire spring.

DISCUSSION

A. Burden of Proof

DER's appealed-from order to Stahlman was issued under the claimed authority of 52 P.S. §1396.46(f). This section of the SMCRA reads:

> (f) Any surface mining operator who affects a public or private water supply by contamination or diminution shall restore or replace the affected supply with an alternate source of water adequate in quantity and quality for the purposes served by the supply. If any operator shall fail to comply with this provision, the secretary may issue such orders to the operator as are necessary to secure compliance.

The last sentence just quoted makes it apparent that the order appealed-from was a discretionary act of DER's. Therefore the Board's scope of review in this appeal is to determine whether DER committed an abuse of discretion. Warren Sand and Gravel Company, Inc. v DER, 20 Pa. Cmwlth. 186, 341 A.2d 556(1975); King Coal Company v. DER, Docket No. 83-112-G (Adjudication, March 18, 1985).

DER has the burden of proof in this appeal. 25 Pa. Code §21.101(b)(3). DER's post-hearing brief argues, nevertheless, that:

> Once the Department met its initial burden of proof by establishing a reasonableexplanation of the water losses the burden then shifted to Stahlman to show that it was not responsible for the water losses. A.H. Grove and Sons, Inc. v. Commonwealth of Pennsylvania, Department of Environmental Resources: 452 A.2d 586, 588 (Pa. Cmwlth. 1982).

DER does not point to any specific language in Grove upholding the proposition that the burden of proof has shifted to Stahlman under the facts of this appeal; we do not read Grove as supporting this proposition. However, elsewhere in its post-hearing and reply briefs, DER also argues that the aforesaid proposition is supported by (a) the claim that DER has offered the only reasonable explanation for Wilshire's water loss; (b) the implications of 25 Pa. Code §21.101(d); (c) the "strict liability standard" imposed on Stahlman by 52 P.S. §1396.4b(f);(d) the general presumption that DER acted reasonably in issuing its order to Stahlman to replace the Wilshires' water supply; and (e) the principle of res ipsa loquitur. We shall examine these arguments seriatim.

(a) If DER actually had offered the only reasonable explanation for Wilshire's water loss, there would be no reason to shift the burden of proof; where DER has shown that its explanation (linking the Wilshire's water loss to Stahlman's mining operations at the site) is reasonable, and where Stahlman has put forth no reasonable alternative explanation, DER has met its burden. This does seem to be the implication of Grove, supra. In the instant appeal, however, we agree that DER has offered a reasonable explanation for Wilshire's water loss, which links the water loss to Stahlman"s mining operations at the site; but we disagree that no alternative reasonable (and possibly even ultimately demonstrable) explanation has been offered. The possibilities urged by Stahlman that the diminution in the Wilshire spring's flow has resulted from unusually dry weather or from siltation clogging of the ground water path to the spring, are not a priori unreasonable. Therefore this argument (a) of DER's is inapplicable to the actual evidence presented in this appeal. In other words, this argument (a) could not provide an acceptable basis for shifting the burden of proof to Stahlman, even if we agreed the argument is well-founded logically, which we do not. In so ruling, we are not at this moment evaluating the sufficiency of the evidence Stahlman has offered in support of its explanation for the flow diminution; we

merely are noting that these explanations cannot be termed unreasonable on their face.

(b) The text of 25 Pa. Code §21.101(d) is:

> (d) Where the Department issues an order requiring abatement of alleged environmental damage, the private party shall nonetheless bear the burden of proof and the burden of proceeding when it appears that the Department has initially established:
> (1) that some degree of pollution or environmental damage is taking place, or is likely to take place, even if it is not established to the degree that a prima facie case is made that a law or regulation is being violated; and
> (2) that the party alleged to be responsible for the environmental damage is in possession of the facts relating to such environmental damage or should be in possession of them.

This section of the Board's rules and regulations is quoted by the Grove court. But the issue in Grove was whether DER could order an automobile service station operator to bear the costs of tests needed to establish which portion of the operator's property was the source of contamination found in nearby residential water wells. Thus we do not see how the Grove holding is relevant to the applicability of 25 Pa. Code §21.101(d) in the instant dispute.

In order that 25 Pa. Code §21.101(d) be applicable, both subsections (d)(1) and (d)(2) must be established. Hawk Contracting and Adam Eidemiller v. DER, 1981 EHB 150 at 170. The evidence in this appeal certainly establishes subsection (d)(1); Stahlman does not seriously dispute DER's allegation that the flow from Wilshire's spring has diminished in recent years, although Stahlman does contest DER's contention that Stahlman's mining activities caused the diminution. On the other hand, as is explained infra, the major "factual" issue in dispute is the amount by which the mining reduced the surface area receiving rainfall that discharged (via groundwater) into the Wilshire spring.

The Board's resolution of this dispute depends totally on whose expert testimony concerning this area reduction the Board finds more convincing, DER's or the Appellant's. Moreover, this expert testimony was almost entirely a matter of drawing inferences from contour maps (notably C.Ex.1) on which were plotted the mined areas of Stahlman's mining site relative to the Wilshire residence; in view of the stipulated Finding of Fact 5, there is no dispute about what areas were mined, and when.

In other words, there is nothing in the evidence which even remotely implies that Stahlman "is in possession of the facts relating to such environmental damage (in this case, the diminution of the Wilshire flow) or should be in possession of them." Since subsection (d)(2) has not been established, 25 Pa. Code §21.101(d) cannot be the basis for shifting the burden of proof to Stahlman. The facts in the instant appeal just are not analogous to Hawk, supra, which DER cites, and wherein the burden of proof was shifted from DER under the authority of 25 Pa. Code §21.101(d). In Hawk, the critical evidence concerned such matters as "the numbers of seams of coal mined, old deep mine workings encountered, the condition of the barrier between the properties, and groundwater encountered during mining." We affirm our ruling in Hawk that disputed evidentiary matters like those just listed are a legitimate basis for shifting the burden under Section 21.101(d). But no such evidentiary matters are at issue in the instant appeal. As for Marcon, Inc. v. DER, 462 A.2d 969 (Pa. Cmwlth. 1983), which DER also cites, we find its facts and legal basis wholly dissimilar to the corresponding features of this appeal. [See also Maskenozha Rod and Gun Club v. DER, 1981 EHB 244.] Marcon involved a proposed sewage discharge to a high quality stream, wherein 25 Pa. Code §95.1(b) imposes an affirmative duty on

the would-be sewage discharger to "demonstrate" the discharge is justifiable; DER points to no regulation imposing a similar (burden of proof shifting) affirmative duty on Stahlman.

(c) DER's reply brief argues as follows:

> The Pennsylvania legislature, recognizing that surface mining activities cause water supply losses and recognizing that the loss of a water supply poses an immediate and serious threat to the public health, made provision, at Section 4.2(f) of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.4b(f) for a quick and simple remedy for private citizens whose water supplies are adversely affected by surface mining activities. Moreover, the legislature established a strict liability standard in that the Department need not prove that an operator acted in a negligent manner to force the replacement of a water supply. This special provision of the law reflects the legislature's intention to put the burden of proof on an operator to show that he is not responsible for a water supply loss once the Department has made a showing that the water supply loss coincided with surface mining activities.

The language of 52 P.S. §1396.4b(f) has been quoted supra, at the very beginning of our discussion on the burden of proof. We see nothing in this language to suggest the inference DER draws without reference to any legislative history, namely that the legislature, in enacting section 1396.4b(f), intended to shift the burden of proof. This argument of DER's for shifting the burden of proof to Stahlman must be rejected.

(d) DER correctly asserts the general presumption that the acts of public officials and agencies are within the limits of their discretion. Mignotti Construction Co. v. EHB, 49 Pa.Cmwlth. 497, 411 A.2d 860 (1980); Plymouth Township v. PennDOT, 37 Pa.Cmwlth. 571, 391 A.2d 42 (1978). However, DER incorrectly asserts that the existence of this presumption can shift the burden of proof.

The presumption is rebuttable. Mignotti, supra. If there is no evidence whatsoever by either side, the party asserting the presumption (in this case DER) wins, but once evidence rebutting the presumption is presented, the presumption is of no consequence. Sawizral v. Hughes, 333 F.2d 829 (3d Cir. 1964); Waugh v. Commonwealth, 394 Pa. 166, 146 A.2d 297 (1959). In other words, although DER has the burden of proof, the existence of the presumption would have put the burden of going forward on Stahlman even if DER had presented no evidence; in the absence of any evidence, the presumption substitutes for the evidence DER might have presented. But the presumption didn't shift the burden of persuasion (the "burden of proof" in the present context) to Stahlman; once Stahlman did put on its evidence, and did offer reasonable explanations--differing from DER's--for the Wilshire spring diminution, the presumption became inconsequential.

(e) DER's reply brief urges that DER's thesis--namely that Stahlman caused the flow diminution in the Wilshire spring--be regarded as established by analogy with the principle of res ipsa loquitur. Of course, as DER recognizes, res ipsa loquitur is applicable only to negligence cases. Under 52 P.S. §1396.4b(f), Stahlman's negligence or lack of negligence is irrelevant to the instant appeal; the sole issue is whether or not Stahlman "affected" the Wilshire spring "by diminution". Irrespective of this point, however, the analogy to res ipsa loquitur is not well taken. Res ipsa loquitur is used to establish a particular causation when all alternatives seem unreasonable. In the present appeal there are reasonable alternatives to DER's thesis, as already explained under (a) above.

In sum, the Board must decide this appeal on the basis of the evidence actually presented, with DER retaining the burden of persuasion. This does not mean, as DER's reply brief indicates DER fears, that DER must disprove the

alternative explanations for the Wilshire spring diminution advanced by Stahlman. DER need do no more than convince the Board, on the basis of all the evidence in favor of all proposed explanations, that DER's explanation is more probably correct than wrong. However, DER's burden of persuasion means DER must do no less.

B. Whether the Burden was Met

DER's expert testified without contradiction that the Wilshire spring is fed by rainwater which falls on the hillside areas near the spring and then infiltrates into the ground. On this basis, the parties agreed that the flow in the Wilshire spring should correlate with the seasonal rainfall in the area. Mr. Wilshire testified that he first experienced an insufficient supply of water from his spring in the summer of 1981. By this time, Mr. Wilshire had been using his spring for sixteen (16) years; however, the Stahlman mining that reasonably conceivably could have affected the Wilshire spring did not begin until March 1982 (Finding of Fact 5). In 1981, Mr. Wilshire's spring did not run dry, and the flow was diminished for no more than a few days. But in the summer of 1982, and again in the summer of 1983, his spring was completely dry for periods of two to three months, until the fall rains came. The spring has been adequate during all of 1984, but the summer of 1984 has been extraordinarily wet.

The parties have advanced three at first sight not unreasonable theories of the Wilshire spring diminution which are consistent with the foregoing facts. DER's expert Barbara Hajel calculates that the "recharge area" collecting rainfall which can enter the groundwater reaching the Wilshire spring was reduced from about 26 acres to 19 acres by Stahlman's mining. This approximately 26 percent reduction in the amount of groundwater available to the spring obviously could cause the spring to fail in dry months, even though the spring was quite adequate in wet months. Stahlman rejects Hajel's calculations; according to Stahlman

there has been inconsequential mining in the recharge area of the Wilshire spring. Stahlman's expert Thomas Novotny suggests that the diminution in the Wilshire spring flow has resulted from siltation clogging of the groundwater path to the spring. On Novotny's view such clogging is the most reasonable way of understanding the first observation of flow diminution in 1981, before the pertinent Stahlman mining operations had begun. In the alternative, Stahlman's post-hearing brief argues that the Wilshire spring flow diminution may have resulted solely from diminished rainfall. On this theory, the summers of 1982 and 1983 must have been very exceptionally dry; the summer of 1981 must have been dry as well, but not as dry as in 1982-83. Of course, it also is conceivable that the diminution in the spring flow could have been caused by a combination of the above theories, e.g., by Stahlman's mining having reduced the discharge area, plus some siltation clogging of the spring, plus diminished rainfall during the summers of 1981-83. Under 52 P.S. §1396.4b(f), however, if Stahlman's operations affected the spring by more than a de minimis amount, the fact that the spring also was adversely affected by other causes probably would not be a defense for Stahlman sufficient to sustain this appeal; but we will not pursue this assertion, which for reasons made manifest infra is purely dictum under the facts of this appeal.

No evidence was presented on the amount of rainfall during 1981-83. Stahlman's brief argues that this deficiency is fatal to DER's case; we do not accept this argument. We reiterate what we said supra; DER does not have to disprove each of Stahlman's theories. It is true that DER's case would have been strengthened by showing that in 1982 and 1983, when the spring ran dry, there was a normal amount of rainfall, whereas the reverse was true in 1981 when the spring had some reduced flow. But DER's thesis is not fatally weakened

by the possibility, conjectured by Stahlman, that 1982 and 1983 were very unusually dry. If Stahlman thought evidence about the weather during the summers of 1982 and 1983 would destroy DER's case, it should have presented such evidence, which was no less available to Stahlman than to DER. In the absence of this rainfall evidence that the 1982 and 1983 summers were unusually dry, it is most reasonable to assume those summers were normal. In other words, we must and will evaluate DER's theory on the evidence actually placed in the record, though recognizing that DER's testimony would have been more convincing if rainfall data supporting DER's theory would have been presented.

As for Stahlman's theory that the Wilshire spring flow has been reduced by siltation, it is merely theory, though not implausible. No drillings or other tests were carried out on the spring in an attempt to demonstrate siltation; no model calculations were presented to show that the amount of siltation to be expected could cause the serious diminutions observed during 1982 and 1983. These siltation speculations, backed by absolutely no evidence, cannot be given much weight.

Thus our analysis of the evidence leads us to the conclusion that the probability DER's theory is correct is affected only slightly at most by Stahlman's speculative alternative theories. If we find DER's testimony has made its theory more credible than not (irrespective of Stahlman's alternative theory contentions), then we probably should hold for DER; otherwise we must hold for Stahlman. We proceed therefore to a critical examination of the evidence crucial to DER's case, namely Hajel's expert testimony.

Hajel's calculations of the reduction in the Wilshire spring drainage area allegedly caused by Stahlman's mining operations are very clearly illustrated

in C.Ex. 2 and C.Ex. 3. She agrees the recharge area on the Wilshire property above the spring was unaffected, but estimates the recharge area extended up the hill well beyond the Wilshire property line (below which Stahlman could not mine, of course). This area beyond (and above) the property line was mined; according to Hajel, the water now falling on this mined area no longer drains toward the Wilshire spring, i.e., this mined area no longer lies within the spring's drainage area. In this fashion, Hajel arrives at her previously quoted figure of a 26 percent reduction in the discharge area feeding the Wilshire spring.

C.Ex. 2 and C.Ex. 3 show pre-mining and post-mining cross sections of the terrain in a roughly East-West vertical plane through the spring; the East-West line of intersection of this vertical plane with the ground surface was drawn by Hajel as a dashed red line on C.Ex. 1, which is a contour map of the area. Stahlman's expert Novotny strongly criticized Hajel's use of this East-West section. According to Novotny, the contour lines in the vicinity of the Wilshire spring and up the hill from the spring run roughly East-West, or perhaps Northwest to Southeast. Therefore, Novotny asserts, the East-West section used by Hajel was quite inapposite. Instead, Novotny argues, the section should have run North-South, or perhaps Southwest to Northeast, i.e., in the direction perpendicular to the contour lines, because this is the direction along which water would flow on the surface. In so arguing, Novotny maintains that the groundwater in unconfined shallow sloping aquifers near the surface, like the aquifers presumably feeding the Wilshire spring, should flow in about the direction surface waters would. Novotny has drawn on C.Ex.1 a pair of dot-dashed lines through the spring bounding the range of directions along which Novotny believes the groundwater reaching the Wilshire spring possibly could flow. These dot-dashed lines, approximately perpendicular to the contour lines near the spring, make quite a wide angle with the

dashed East-West section line drawn by Hajel.

We agree that the contour lines in the vicinity of the Wilshire spring run as Novotny states. Furthermore, we find his criticism of the section used by Hajel quite convincing, and believe his estimates of the possible directions of groundwater flow to the spring are very reasonable. In other words, we find that Novotny's testimony casts very considerable doubt on the 26 percent recharge area reduction figure on which DER so heavily relies.

Probably this finding is enough to conclude that DER has not met its burden of proof. However, the criticism of Hajel's calculations goes further. It is conceivable that a cross section drawn along the direction(s) Novotny favors also would show mining caused a severe reduction in the spring's recharge area. In this event, Hajel's calculations and her conclusion therefrom might have been correct, although she unfortunately used an improperly directed terrain cross section line. But this possibility is ruled out by a fact not heretofore discussed. Both Hajel and Novotny agree that directly beneath the coal seam mined by Stahlman lies a two-foot-thick seam of underclay, highly impervious to water. This seam outcrops (i.e., becomes exposed at the surface) at points on the hill 31 feet higher than and well south of the spring, definitely outside and north of the area Stahlman mined, as is obvious from C.Exs. 1-3. Because the clay is impervious to water, even before mining the recharge area of the spring almost certainly could not have included that portion of the hill lying immediately south of (and therefore above) the outcrop line, because water falling on that higher area and reaching the groundwater could not be expected to penetrate through the clay into the groundwater reserves flowing toward the Wilshire spring. Those groundwater reserves above the clay barrier just would have to flow elsewhere;

in fact, the testimony showed those groundwater reserves, as they followed the slope of the clay layer, actually would flow away from the Wilshire spring.

In short, on the evidence it is improbable that Stahlman's mining --in the sector of C.Ex. 1 along which groundwater (if unimpeded) could flow toward the Wilshire spring--could have affected the discharge area of the spring; the areas Stahlman mined never were in the spring's discharge area, owing to the impervious clay layer which separates groundwater reserves above the layer from the groundwater reserves feeding the Wilshire spring beneath the layer. Perhaps this seeming improbability could have been rebutted by actual tests demonstrating that rainwater falling on the surface area above the clay outcrop and below the Stahlman mining boundary does reach the Wilshire spring; however, no evidence of such tests was offered. We can only conclude that DER did not meet its burden of showing Stahlman's mining caused the Wilshire spring's flow diminutions; or, to put it differently, DER has not met its burden of showing Stahlman "affected" the Wilshire spring in a fashion warranting issuance of the appealed-from order under the authority of 52 P.S. §1396.4b(f). DER's decision to issue the order was an abuse of DER's discretion. Stahlman's appeal must be sustained.

CONCLUSIONS OF LAW

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

2. The Board's scope of review is to determine whether DER has committed an abuse of discretion.

3. The burden of proof herein rests with DER. 25 Pa. Code §21.101(b)(3).

4. Where DER has demonstrated that its explanation for a loss of a residential water supply is reasonable and where the mine operator has put forth

no reasonable alternative explanations, DER has met its burden; there is no reason to shift the burden.

5. Where, however the mine operator puts forth reasonable alternative explanations, the burden does not shift to the operator.

6. The burden of proof could not shift to the operator in this appeal pursuant to 25 Pa. Code §21.101(d) because the requirements of §21.101(d)(2) have not been met.

7. 52 P.S. §1396.46(f) evidences no legislative purpose to place the burden of proof upon the mine operator.

8. The presumption that DER has acted within the limits of its discretion cannot shift the burden of proof to the mine operator.

9. Principles of res ipsa loquitur are inapplicable in the context of a DER order issued under the authority of 52 P.S. §1396.4b(f).

10. DER need not disprove alternative theories offered by the operator as an explanation of the water loss.

11. DER has not met its burden of proof herein.

12. DER abused its discretion in ordering Appellant to provide an alternative water supply to the Wilshire residence.

O R D E R

WHEREFORE, this 29th day of April, 1985 it is ordered that this appeal is sustained. The previously ordered supersedeas is terminated.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: April 29, 1985

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:

: Docket No. 84-114-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By Edward Gerjuoy, Member, April 29, 1985

SYLLABUS

Appellant's appeal is sustained in part and dismissed in part. Appellant has appealed two DER compliance orders and an associated civil penalty assessment. DER did not abuse its discretion in issuing the first of the two orders. Appellant was mining without a permit in violation of section 315 of the Clean Streams Law, 35 P.S. §1396.315, and section 4(a) of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.4(a), as well as 25 Pa.Code §86.11. DER did not arbitrarily exercise its duties in issuing the second compliance order. Appellant failed to comply with the first order within the period set forth therein for compliance. 25 Pa.Code §86.212(a)(3). DER acted reasonably in directing its enforcement actions at Appellant, despite the existence of a subcontractor relationship between Appellant and the operator upon whose property the mining activity was being conducted. The existence of

the subcontractor relationship is immaterial. DER did not arbitrarily exercise its duties in deciding that a civil penalty should be assessed. 52 P.S. §1396.22. DER's calculation of the amount of the penalty in part represents an abuse of discretion; Appellant's unlawful mining conduct was not reckless but negligent. Therefore, an assessment in the amount of $2100 pursuant to 25 Pa.Code §86.194(b) was improper. The maximum amount which should have been figured under that provision would have been $1600. Since 25 Pa.Code §86.194 mandates a minimum assessment of $2000 per acre for mining without a permit, however, a civil penalty in the amount of $2000 is upheld. The penalty in the amount of $4250 for failure to comply with a DER order is upheld. Calculation of a $3750 sum for five days noncompliance was mandated by 52 P.S. §1396.22; the assessment of an additional $500 penalty for failure to comply with a DER order which could have been complied within a very short time does not represent an abuse of discretion.

INTRODUCTION

This is a consolidated appeal of two compliance orders and an associated civil penalty assessment issued by the Department of Environmental Resources ("DER") against Black Fox Mining ("Appellant"). The appeal of the first of the two orders was originally docketed at 83-232-G and that of the second at 83-243-G. The civil penalty assessment appeal was docketed at 84-114-G. By an Order dated May 22, 1984, the appeals were consolidated at the latter docket number. A hearing on the merits was held on October 15, 1984. Both parties have filed post-hearing briefs; DER has filed a post-hearing reply brief as well.

The facts surrounding the issuance of the orders and the assessment of the civil penalty are summarized in the following findings of fact and will not

be repeated in the body of this opinion. Where relevant, the factual bases for our rulings herein have been set forth.

FINDINGS OF FACT

1. Appellant is Black Fox Mining and Development Corporation ("Appellant") which has a business address of Box F, Karns City, PA 16041.

2. Appellee is the Pennsylvania Department of Environmental Resources ("DER") which is the agency of the Commonwealth empowered to administer and enforce the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq. ("SMCRA"), the Clean Streams Law, 35 P.S. §691.1 et seq. ("CSL"), and the rules and regulations promulgated thereunder.

3. On Saturday, October 1, 1983, DER Mine Inspector Andrew Bussard, Jr. visited a site owned by Allegheny River Mining Company ("ARMC") located in Armstrong County, Pennsylvania. (Tr.14, 89).[1]

4. Employees of Appellant were present on the site on October 1, 1983. (Tr.74, 95).

5. A pit had been excavated at the site on October 1, 1983 by Appellant's employees; the pit measured approximately 12 x 20 feet and was filling with water. (Tr.15).

6. The pit had been excavated with the assistance of a high lift owned by Appellant and operated by Appellant's employees. (Tr.90, 125).

7. The high lift had been used to remove overburden. (Tr.125).

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1. References to the transcript of the hearing will be designated "Tr." For the purposes of this adjudication the corrected version of the transcript has been used. The pagination of the corrected version differs slightly from that of the uncorrected version.

8. A coal seam was exposed in the pit. (Tr.15).

9. Appellant's employees used shovels to remove approximately thirty pounds of coal from the pit. (Tr.92, 113, 125).

10. The high lift had been brought into the site over a haul road. The haul road was not damaged in any way by the high lift. (Tr.106).

11. Appellant had not applied for and had not received from DER a permit pursuant to section 315 of the Clean Streams Law, 35 P.S. §691.315, or section 4(a) of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.4(a) authorizing mining at the site. (Request for Admissions 23,24).

12. There was no testimony that ARMC had applied for or received from DER a permit authorizing mining on the site.

13. Less than one acre in toto was affected by the activities described in Findings of Fact 5 through 9 supra. (Tr.24).

14. On October 1, 1983, Inspector Bussard wrote an inspection report which was directed to ARMC and was read to the employees of Appellant present on the site, one of whom was Mr. Pedrotti, sales manager for Appellant. (Tr.16).

15. Inspector Bussard expressly informed the employees of Appellant that the area affected would have to be seeded and mulched by October 8, 1983. (Tr.16).

16. No DER enforcement actions were directed to Appellant on October 1, 1983. (Tr. 28-29).

17. Inspector Bussard ordered the cessation of activities taking place on the site on October 1, 1983. (C.Ex.2)[2]

18. In response to Inspector Bussard's direction, Appellant's employees back-filled the pit on the site on October 1, 1983. (Tr.21, 37).

19. The backfilling was satisfactorily accomplished. (Tr.39).

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2. "C.Ex." designates Commonwealth Exhibit.

20. After the backfilling had been accomplished, the only action necessary to bring the site into compliance with DER requirements was the seeding and mulching of the affected area. (Tr.21).

21. On October 3, 1983, Inspector Bussard discussed the events of October 1, 1983 with his Supervisor, John Matviya and the conclusion was reached that DER would hold Appellant, rather than ARMC responsible for the activities which took place on the site on October 1, 1983. (Tr.18-19).

22. On October 3, 1983, Appellant received a phone call from Inspector Bussard informing Appellant that DER had determined that Appellant, rather than ARMC, would be held responsible for the activities in issue. (Tr.95).

23. On October 3, 1983, Inspector Bussard wrote an inspection report to Appellant based upon his inspection of the site on October 1, 1983; the inspection report bears the date October 1, reflecting the date of the inspection. (C.Ex.1; Tr.19, 30).

24. The inspection report written on October 3, 1983 was mailed to Appellant on that date and received by Appellant on October 4, 1983. (Tr.19,96).

25. The inspection report received by Appellant on October 4, 1983 states that compliance was due by October 8, 1983. (C.Ex.1).

26. On October 3, 1983, Inspector Bussard wrote a compliance order based upon the events of October 1, 1983; this order was directed to Appellant. (Tr.19; C.Ex.2).

27. The compliance order of October 3, 1983 was mailed to Appellant on October 4, 1983 and received by it on October 5, 1983. (Tr.20, 96; C.Ex.2).

28. Appellant filed a timely appeal of this compliance order with this Board which was docketed at 83-232-G.

29. The compliance order received by Appellant on October 5, 1983 expressly states that all affected area is to be seeded and mulched by October 8, 1983. The order also states that compliance is due within seven days. (C.Ex.2).

30. The inspection report written by Inspector Bussard on October 1, 1983 and directed to ARMC was destroyed by Inspector Bussard. No enforcement action was taken against ARMC. (Tr.30).

31. On October 6, 1983 Mr. Pedrotti notified DER that Appellant would not comply with the order Appellant had received the previous day. (Tr.122).

32. On October 11, 1983 Inspector Bussard returned to the site to determine whether Appellant had complied with the terms of the compliance order received by Appellant on October 5, 1983. No compliance had been achieved beyond that accomplished on October 1, 1983. (Tr.22).

33. Inspector Bussard wrote an inspection report based upon his observations of October 11, 1983 and mailed the same to Appellant. Appellant received this inspection report on October 13, 1983. (Tr.22, 98; C.Ex.3).

34. Inspector Bussard wrote a second compliance order based upon his observations of October 11, 1983 that compliance with the first order had not been achieved. (Tr.22; C.Ex.4).

35. The second compliance order was mailed on October 13, 1983 and received by Appellant on October 15, 1983. (Tr.99; C.Ex.4).

36. Appellant filed a timely appeal of the second compliance order with this Board which was docketed at 83-243-G.

37. The second compliance order reiterated the requirement that all affected areas be seeded and mulched. It notes that compliance was due by October 8, 1983. (C.Ex.4).

38. On October 13, 1983 Appellant complied with the first order by seeding and mulching all affected areas. Inspector Bussard wrote an inspection report reflecting this fact. (Tr.24; C.Ex.5).

39. Inspector Bussard believed that the entire area could have been seeded and mulched within four hours. Appellant accomplished the seeding and mulching in approximately half a day. (Tr.25, 124).

40. Appellant was capable of performing the required seeding and mulching by the October 8, 1983 compliance deadline set forth in the first inspection report and the first compliance order. (Tr.124).

41. Mr. Pedrotti testified that Appellant was working as a subcontractor for ARMC at all times relevant to this proceeding. (Tr.85-87, 89-90).

42. Mr. Pedrotti testified that Art Bush, vice president of ARMC, requested that Appellant bring its high lift to the site for the purpose of exploring to determine whether a deep mine would be feasible in the area. (Tr.87).

43. Mr. Pedrotti testified that Appellant was paid by ARMC on an hourly basis for the work it performed. (Tr.91).

44. Mr. Pedrotti testified that ARMC agreed to rent the high lift for the purposes explained in Finding of Fact 40 supra. (Tr.86).

45. Mr. Pedrotti testified that Mr. Bush, of ARMC, directed the Appellant's employees to the area on the site where the excavation was to be conducted and instructed the employees where to dig. (Tr.92).

46. A civil penalty of $2100 was assessed against Appellant for mining without a permit. (C.Ex.6).

47. DER assessed a civil penalty in the amount of $4250 for failure to comply with the first compliance order within the time set for compliance therewith. (C.Ex.6).

48. Appellant timely appealed the civil penalty assessment to the Board; the appeal was docketed at 84-114-G.

49. DER Inspector Supervisor John Matviya calculated the $2100 portion of the penalty based upon 25 Pa.Code §86.194, assessing $2000 for culpability and $100 for seriousness. A factor of zero was assigned to the remaining factors specified in §86.194. (Tr.59).

50. Mr. Matviya calculated the $4250 portion of the penalty based upon section 18.4 of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.22, which requires that a minimum penalty of $750 per day be assessed for each day a violation continues beyond the period prescribed for its correction. Based upon five days noncompliance, Mr. Matviya calculated a penalty of $3750. (Tr.64).

51. Mr. Matviya assessed an additional $500 penalty because Appellant had indicated that it would not comply and because it took a relatively long time to correct a violation which he considered simple to remedy. (Tr. 65-66).

52. Mr. Pedrotti is aware that a permit is required to conduct surface mining in the Commonwealth. (Tr.118).

53. Mr. Pedrotti did not inquire as to the existence of a mining permit before engaging in the excavation activities on the site on October 1, 1983 because he thought that it was the responsibility of ARMC to secure the necessary permit. (Tr.90).

54. Mr. Pedrotti's testimony about the relationship between Appellant and ARMC relative to the work performed on the site by Appellant (Findings of Fact 41-45) was not rebutted by DER.

55. Mr. Pedrotti's testimony about the relationship between Appellant and ARMC relative to the work performed on the site by Appellant (Findings of Fact 41-45) was not confirmed by testimony from ARMC representatives.

56. No ARMC representative was called as a witness by Appellant or DER.

DISCUSSION

Scope of Review and Burden of Proof

In our review of the administrative actions at issue here, we must determine whether DER abused its discretion or arbitrarily exercised its duties and functions. Warren Sand and Gravel v. Commonwealth, DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975). DER acted pursuant to mandatory statutory and regulatory provisions when it issued the second compliance order and when it decided that a civil penalty would be assessed. When DER takes such mandatory action, we primarily are called upon to decide only whether that decision should be vacated or upheld; however, this description of our scope of review does not imply that modification of DER's order (rather than simply vacating it or upholding it) is always inappropriate. King Coal v. DER, Docket No. 83-112-G (Partial Adjudication, March 18, 1985). In contrast, where DER has acted pursuant to discretionary authority granted by statute or regulation, we must determine whether the decision represents a proper exercise of that discretion. We may substitute our discretion if we find that DER has abused its own. This is the standard which must be applied herein to our review of the issuance of the first compliance order. Calculation of the amount of the civil penalty assessment involved both discretionary and mandatory actions.

The burden of proof herein rests with DER pursuant to 25 Pa.Code 21.101(b)(1) and (b)(3).

Conduct Constituting Surface Mining

We first address Appellant's argument that the activities summarized

in Findings of Fact 5-9, supra, did not constitute surface mining. We addressed this argument in an earlier Opinion and Order entered at this docket number, Black Fox Mining and Development Corporation v. DER (Opinion and Order dated September 25, 1984). There we rejected Appellant's contention that it was merely exploring for coal and that, therefore, no permit was necessary.[3] Exploration is merely one form of surface mining. Surface mining consists of the extraction or exposure and retrieval of minerals. 52 P.S. §1396.3. Given this definition, we ruled that if it were established at the hearing on the merits of this appeal that Appellant had removed coal from the pit located on the site, surface mining would be found to have occurred.

At the hearing, Mr. Larry Pedrotti, sales manager for Appellant, testified that he and the other employees of Appellant used the highlift to remove overburden and expose the coal seam. They then removed coal from the pit with the aid of shovels. Approximately thirty pounds of coal were removed. Since no permit authorizing this activity had been issued, the activity constituted a violation of section 4(a) of the Surface Mining Act, 52 P.S. 1396.4(a) as well as section 315(a) of the Clean Streams Law, 35 P.S. §691.315. DER did not abuse its discretion in ordering the cessation of the unlawful conduct and requiring that the damage done to the affected area be remedied. Mining without a permit is a serious violation which DER cannot be expected to ignore or condone. Western Hickory Coal Co. v. DER, EHB Docket No. 82-141-G (Adjudication dated June 2, 1983); aff'd, ___ Pa.Cmwlth. ___, 485 A.2d 877 (1984).

Subcontractor's Liability

At the hearing on the merits of this appeal, Appellant maintained that

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3. Appellant previously had admitted that it had no permit to conduct the activities which took place on the site on October 1, 1983. (Appellant's response to DER Request for Admission 23.)

it was not responsible for this mining activity because it was acting merely as a subcontractor for another mining company, Allegheny River Mining. Appellant does not expressly address this argument in its post-hearing brief; instead Appellant directs the thrust of its assertions regarding the subcontractor relationship to the issue of the degree of Appellant's culpability and the resultant amount of the penalty assessment. Nevertheless, we believe that Appellant's intention of asserting this "lack of responsibility" argument was made sufficiently clear to warrant our excusing the apparent waiver of this issue. Therefore, we address it herein.

Appellant's contention is that it was acting as a subcontractor and therefore bears no responsibility for the illegal activity. This is an affirmative defense with regard to which Appellant bears the burden of proof of establishing the contested facts. 25 Pa.Code §21.101(a). Despite DER's assertions to the contrary, we find that Appellant has met this burden, though just barely.

Mr. Pedrotti testified that Art Bush, vice president of ARMC requested that Appellant bring its high lift to the site for the purpose of exploring to determine whether deep mining would be feasible there. ARMC agreed to rent the highlift and paid Appellant at an hourly rate. According to Mr. Pedrotti, Mr. Bush directed Appellant's employees to the area where the excavation was to take place and instructed the employees where to dig. None of this testimony was contradicted by DER, but neither was it confirmed by ARMC, whom Appellant could have subpoenaed. The absence of a written agreement does no harm to Appellant's position; the parties reasonably might have concluded an oral agreement. Once again, however, Appellant's self-serving testimony that there was an oral agreement could have been considerably strengthened by ARMC testimony. All in

all, nevertheless, recognizing that Appellant's testimony in this regard was not rebutted, we must find that on the evidence Appellant more probably than not was acting as a subcontractor for ARMC.

Our finding that Appellant was acting as a subcontractor for ARMC does not require us to conclude that Appellant cannot be sanctioned by DER for the illegal mining, however. The mere existence of a contractual relationship is no defense to the DER actions appealed here, which were taken in response to a clear violation of the law, i.e., mining without a permit. Appellant cannot escape responsibility for mining without a permit simply by pointing a finger at someone else.

In contract law, an individual acting as an agent for a disclosed principal is not personally liable on a contract between the principal and a third party unless the agent has specifically agreed to assume liability.[4] This principle has no bearing on the present appeal, however. Though we have determined that Appellant probably was ARMC's subcontractor, there was no contractual relationship between ARMC and DER. DER is not enforcing a contract between DER and ARMC or between DER and Appellant; DER is exercising the police powers of the Commonwealth as specified by statute, in this instance the Surface Mining Act and the Clean Streams Law.

The conclusion that Appellant is responsible for the illegal mining activities is clearly supported by the language of the Surface Mining Act itself. The provision of the Act violated here is section 4(a), which provides in relevant part:

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4. See, e.g., Vernon D. Cox and Co., Inc. v. Giles, 267 Pa.Super. 411, 406 A.2d 1107 (1979).

> Before any person shall hereafter proceed to mine minerals by the surface mining method, he shall apply to the department . . . for a permit for each separate operation.
> 52 P.S. 1396.4(a)

"Person" is defined in section 3 of the Surface Mining Act to include "any natural person, partnership, association or corporation," a class into which Appellant clearly falls.

Furthermore, section 3 of the Act provides that:

> When more than one person is engaged in surface mining activities in a single operation, they shall be deemed jointly and severally responsible for compliance with the provisions of this act. 52 P.S. §1396.3.

Thus, we conclude that DER did not abuse its discretion in determining that Appellant should be held responsible for the unpermitted mining which took place.[5] Appellant's conduct amounts to a clear violation of the Surface Mining Act for which it must be held responsible.

DER's Authority to Require Remedial Measures

The first compliance order required that Appellant seed and mulch all area affected by the mining activity. Appellant claims that this requirement amounts to a violation of section 86.212 of Pennsylvania Code Title 25 because the condition created by the excavation activities created no imminent danger to the health of the public and no significant or imminent harm to the land.

We conclude that Appellant's argument is without merit. §86.212 is not the sole authority for the issuance of DER compliance orders. §86.213, for example, grants DER the power to issue such other orders "as are necessary to aid in the enforcement of the acts or the regulations promulgated thereto";

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5. This adjudication, of course, in no way rules upon the responsibility of ARMC for the illegal mining. At the hearing, Inspector Bussard commented that it likely would have been a better practice to have issued compliance orders to both mining companies, an observation with which we concur.

if it were determined that seeding and mulching the haul road had not been properly required, we already have decided that seeding and mulching the remaining area was a proper requirement. Appellant did not seed and mulch this remaining area within the specified time period. Our assessment of the amount of penalty does not depend in any fashion on the area of the haul raod which was supposed to be seeded and mulched. Therefore the issue of whether or not requiring seeding and mulching of the haul road was proper is moot for the purposes of this appeal, and we see no reason to rule on it; certainly we do not think it likely that the facts of this appeal would be repeated sufficiently often to warrant a ruling despite its mootness here. Al Hamilton Contracting Co. v. DER, Docket No. 83-248-G (Opinion and Order, February 23, 1984).

In summary, we have determined that DER did not abuse its discretion in issuing the first compliance order because in fact mining was being conducted without a permit in violation of 52 P.S. §1396.4, and the terms of the order (notably the seeding and mulching requirement) were within DER's authority. DER was justified in issuing the order to Appellant since Appellant's employees were responsible for the coal removal which took place. Issuance of the order was not a violation of 25 Pa.Code §86.212; that regulation is not the sole authority for the issuance of DER orders. We do not decide, because there is no need for us to decide, whether the haul road was "affected".

Timeliness of Compliance

Having determined that the first order was proper, we now turn to Appellant's arguments concerning the propriety of the issuance of the second order. The violation for which the second order was issued was Appellant's failure to comply with the first. Appellant claims that the deadline for compliance set forth on the first order is ambiguous. It bases this argument upon two statements

§86.211(a) specifically authorizes DER to order the correction of violations.[6] It is reasonable to construe "correction" of mining without a permit to mean that the mined area be reclaimed as would be any area that is mined with a permit. Furthermore, §86.212 itself provides that the portion of that section relating to imminent harm to the environment or public health "shall not be construed to limit the department's authority to issue cessation orders . . . (and) shall not be deemed to limit the availability of other remedies at law or in equity." Clearly, DER has the authority to require remedial measures to correct the damage caused by illegal mining activities, whether or not that damage threatens imminent harm. The existence of the damage is sufficient.

Appellant also argues that--whether or not the order to seed and mulch all area affected by mining was proper--the portion of the DER compliance order requiring Appellant to seed and mulch the access road was an abuse of DER's discretion because the access road sustained no harm as a result of Appellant's actions; apparently Appellant feels that if the access road sustained no harm, then it was not "affected". However, Appellant eventually did seed and mulch the road along with the rest of the area DER considered "affected", despite Appellant's view that this requirement was arbitrary and capricious. Further, it will be evident from our discussion infra that whatever ruling we would make on this issue, namely the issue of whether or not the access road really was affected by Appellant's mining activities, would not alter the result herein. DER assessed the civil penalty on two bases: the fact that a cessation order had been issued for the illegal mining, and the fact that Appellant had failed to comply within the time frame set forth in the first compliance order. Even

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6. "Acts" are defined by 25 Pa.Code §86.1 to include, inter alia, the Surface Mining Act and the Clean Streams Law, 35 P.S. §691.1 et seq.

contained in the order. The first statement provides that compliance is due "within seven days"; the second that compliance is due by October 8, 1983. Appellant contends that it understood the latter phrase to mean within seven days of the date it recieved the order (October 5, 1983) and that since compliance was achieved by October 13, 1983, this seven day period had not yet expired. Thus, Appellant would have us conclude, the second compliance order should not have been issued.

We do not find the compliance date of the first order ambiguous. We are aware that Appellant did not receive that order until October 5, 1983. However, under the circumstances of this case it would not be reasonable to conclude that DER intended to allow Appellant seven days from October 5 within which to comply. The order itself bears the date October 1, 1983, reflecting the date of the inspection giving rise to the order. Had compliance been achieved within seven days of October 1, it would have been accomplished by October 8, the date explicitly stated to be the deadline for compliance.

In addition, although no order had been directed to Appellant on October 1, Appellant's employees (one of whom was Mr. Pedrotti) were read the substance of the inspection report prepared by Inspector Bussard on that date. Inspector Bussard testified that he informed the employees that the site would have to be seeded and mulched by October 8, 1983. Thus, when the order was received by Mr. Pedrotti the following Wednesday, he already had reason to know the order's content. The only thing which had changed was the identity of the party to whom the DER enforcement action was being directed. Furthermore, by October 3, 1983 Appellant had received verbal notice from Inspector Bussard that DER intended to hold Appellant, rather than Allegheny River, responsible for the activities which had taken place on October 1. By October 4, Appellant had received Inspector

Bussard's report from the inspection of October 1. That inspection report clearly states that compliance was due "by October 8, 1983." No reference is made to a certain number of days within which compliance was to be achieved. The following day, October 5, Appellant received the first compliance order which, like the inspection report, clearly states that compliance was to be accomplished by October 8. In short, the order cannot be said to be ambiguous; it would not have been reasonable to conclude that the seven day period for compliance began to run from the time Appellant received the order.[7]

Compliance was to be achieved by October 8; it was not accomplished until October 13. Therefore, DER was required to issue the second order, pursuant to 25 Pa.Code 86.212(a)(3). This was a mandatory action and under the instant circumstances we need only determine whether it should be upheld or vacated--modifications would be quite inappropriate. We have concluded that Appellant had sufficient notice of the deadline it was facing and that it failed to meet this deadline. DER's issuance of the second order was not an arbitrary exercise of its duties.

Assessment of the Civil Penalty

The decision to assess a civil penalty against Appellant was governed by provisions of the Surface Mining Act which impose mandatory duties upon DER. Section 18.4 of the Act provides that:

> If the violation leads to the issuance of a cessation order, a civil penalty shall be assessed. If the violation involves the failure to correct, within the period prescribed for its correction a

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7. We note that Appellant has not argued that it would have been impossible for it to comply before October 8. Indeed, Mr. Pedrotti testified that Appellant was capable of complying by that date and that when Appellant did comply with the order, it took approximately half a day to complete all required seeding and mulching.

> violation for which a cessation order, other abatement order or notice of violation has been issued, a civil penalty of not less than seven hundred fifty ($750) dollars shall be assessed for each day the violation continues beyond the period prescribed for its correction. 52 P.S. §1936.22

The $2100 Penalty

The authority for the assessment of the $2100.00 penalty is contained in the first of the two sentences just quoted. Inspector Bussard ordered Appellant to cease its illegal mining activity on October 1, 1983. (The assessment of the $4250.00 penalty, for failing to comply within the required time period, was based upon the latter of these two sentences.)

Since we have already established that the issuance of the cessation order was proper, DER's decision to assess a civil penalty pursuant to §1396.22 must be upheld. The calculation of the amount of this penalty ($2100) presents more intricate problems, involving the application of 25 Pa.Code §§86.193 and 86.194. Pursuant to §86.193(e), where DER finds that an operator has extracted coal or removed overburden or topsoil from an area on which the operator was not permitted to conduct such activities, DER is required to assess a minimum civil penalty of $2000 per acre. The total area affected was less than an acre. Appellant argues that where less than an acre has been affected, the penalty must be proportionately reduced. We see nothing in the regulations to support this argument, and therefore reject it. In other words, we construe the phrase "per acre" in 25 Pa.Code §86.193 as "per acre or fraction thereof."

The calculation does not end there, however. §86.193(g) requires that DER also calculate the civil penalty which would be assessed for the same unlawful activity under §86.194. If the penalty calculated under §86.194 is greater than

that calculated under §86.193, DER must assess the greater amount. DER Inspector Supervisor John Matviya testified that this was the procedure followed in determining the $2100 penalty at issue here. He stated that pursuant to the requirements set forth in §86.194(b)(1) he calculated a sum representative of a penalty for the seriousness of the violation. He concluded that $100 was sufficient, giving consideration to the small area affected by Appellant's activities. He then calculated, pursuant to §86.194(b)(2) an amount of $2000, the minimum assessment allowed where the violator has demonstrated reckless conduct. A value of zero was assigned to the remaining four factors included in §86.194(b).[8] Therefore, following the requirement of §86.193(g), $2100 would be assessed since that sum exceeds the $2000 minimum penalty assessed under §86.193(e).

§86.194 requires this Board to follow the system set forth therein for determining the proper amount of a civil penalty. We find that Mr. Matviya's assignment of $100.00 to the category of "seriousness" and zero to the remaining categories (other than culpability) was reasonable and does not represent an abuse of discretion. We differ, however, with regard to the degree of culpability attributed to Appellant.

Mr. Pedrotti testified that he is aware of the requirement that a permit be obtained before surface mining is conducted. However, he also stated that it is common practice within the industry for the owner of the coal to secure such permits as are necessary to conduct the mining operation and that he assumed this practice had been followed in this case. Given these facts, we conclude that

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8. Appellant maintains that the calculation of the amount of the civil penalty was arbitrary and capricious because DER failed to consider all the factors set forth in §86.194(b). We reject this argument; the record clearly supports the finding that all factors were considered.

Appellant's conduct was not reckless, but simply negligent. The word "reckless" is not defined in the regulation; therefore, we will give the term its customary meaning. 1 Pa.Code §1.7; 1 Pa. C.S.A. §1903(a). As DER itself agrees, "recklessness" implies action taken in conscious disregard of the harm that may result from the action. The testimony gives absolutely no reason to believe that Appellant ever contemplated the possibility that it was mining without a permit. Although Appellant's testimony on this point was wholly uncorroborated and self-serving, DER did not rebut it. Therefore, we cannot term Appellant's action "reckless".

Appellant, however, clearly failed to exercise a reasonable degree of care when it proceeded to excavate and remove coal without first having ascertained whether a permit allowing this activity had been issued. Thus, we conclude that Appellant's conduct was negligent and that, therefore, the maximum penalty which should have been assessed under §86.194(b)(2) should have been no more than $1500, which is the maximum possible penalty for a single negligent violation. Calculation of a penalty in the amount of $2000 under §86.194(b)(2) therefore was an abuse of DER's discretion. The maximum amount which could be assessed under §86.194(b) as a whole, given the foregoing facts, would be $1600. This amount is less than the $2000 minimum penalty required by §86.193(e); thus, we must uphold a penalty of $2000.00 for mining without a permit.

The $4250 Penalty

The DER decision to assess a civil penalty for failure to timely comply with the first DER order was made pursuant to the mandatory language of §18.4 quoted above. Since we have established that Appellant did indeed fail to comply with the first order by October 8, 1983, as required, it is clear that DER's

decision to assess this portion of the penalty must be upheld.

§18.4 provides that DER must assess a minimum penalty of $750 for each day the violation continues beyond the period prescribed for its correction. DER determined that Appellant did not comply with the first DER order until October 13, 1983. The deadline for such compliance, as we have held supra, was October 8, 1983. Therefore DER correctly calculated a penalty of $3750 for five days' noncompliance. We uphold this determination.

In addition to the $3750 mandatory penalty DER assessed an additional $500, which Mr. Matviya testified was based upon the fact that Appellant notified DER that they would not comply with the first DER order. In addition, consideration was given to the fact that this refusal concerned a violation which DER considered to be very easy to correct.

Mr. Pedrotti admitted that after he received the first DER compliance order he phoned Inspector Bussard and informed him that Appellant would not comply with the order. Taking this statement in conjunction with Mr. Pedrotti's admission that Appellant was capable of complying by October 8, 1983, it appears that assessment of the additional $500 above the mandatory amount was not an abuse of discretion, in view of the mandatory penalty prescribed by 25 Pa.Code §86.194(b)(3) for failure to abate a violation within a reasonable time. We therefore uphold the civil penalty assessment for failure to timely comply in the amount of $4250.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter of this appeal. 71 P.S. §510-21.

2. Where DER acts pursuant to a mandatory provision of a statute or regulation, the Board's scope of review primarily is to determine whether the DER action should be upheld or vacated.

3. Where DER exercises its discretion, The Board must review DER's action to determine whether it has abused that discretion; the Board may substitute its discretion for that of DER in the event DER has abused its own.

4. The burden of proof herein rests upon DER pursuant to 25 Pa.Code 21.101(b)(1) and (b)(3).

5. Section 315(a) of the Clean Streams Law, 35 P.S. §691.315(a) and section 4(a) of the Surface Mining Act, 52 P.S. §1396.4(a) and 25 Pa.Code 86.11(a) prohibit any person from mining coal without having first obtained from DER a permit authorizing such mining.

6. Surface mining, as defined in the Surface Mining Act, consists of the extraction or exposure and retrieval of minerals. 52 P.S. §1396.3.

7. Appellant's activities on the site owned by Allegheny River Mining constituted surface mining. 52 P.S. §1396.3.

8. A permit is required under 52 P.S. §1396.4(a), 35 P.S. §691.315(a), and 25 Pa.Code, Chapter 86 even where one intends only to explore for coal, unless DER has granted a waiver of the permit requirement prior to the removal of coal. 25 Pa.Code 86.133. Exploration is merely one type of surface mining. 52 P.S. §1396.3.

9. Appellant's surface mining activities constituted a violation of section 315(a) of the Clean Streams Law, 35 P.S. §691.315(a), section 4(a) of the Surface Mining Act, 52 P.S. §1396.4(a), and 25 Pa.Code 86.11.

10. DER did not abuse its discretion in ordering the cessation of the unpermitted mining activity.

11. DER did not abuse its discretion in requiring Appellant to backfill, seed and mulch the affected area.

12. Appellant's subcontractor relationship with Allegheny River Mining is irrelevant to the issue of Apepllant's liability under the Act for the unpermitted mining and resultant environmental damage.

13. The Surface Mining Act, 52 P.S. §§1396.4(a) and 1396.3, as well as basic public policy, require that Appellant be held responsible for the unpermitted mining activity and resultant environmental damage.

14. DER did not abuse its discretion in directing its enforcement actions to Appellant.

15. The issuance of the compliance orders does not constitute a violation of 25 Pa.Code §86.212.

16. The deadline set for compliance with the first order was not ambiguous.

17. Appellant failed to comply with the first order within the time specified for compliance therewith, in violation of 52 P.S. §1396.24 and 35 P.S. §691.611.

18. DER did not arbitrarily exercise its duties in issuing the second compliance order. 25 Pa.Code §86.212(a)(3).

19. DER did not arbitrarily exercise its duties in deciding to assess a civil penalty. 52 P.S. §1396.22.

20. DER abused its discretion in determining the amount of the penalty for mining without a permit to the extent it based the penalty on the finding that Appellant's conduct was reckless.

21. There was no testimony that Appellant contemplated that it was mining without a permit. Therefore, it cannot be concluded that Appellant acted with conscious disregard. Appellant's conduct was not reckless.

22. Appellant reasonably should have inquired as to the existence of a permit prior to engaging in mining activities. Therefore, Appellant's conduct was negligent.

23. Since Appellant's conduct was negligent rather than reckless, the maximum penalty which could properly be assessed under 25 Pa.Code §86.194(b)(2) for mining without a permit is $1500. DER's assessment of a $2000 penalty under this section was an abuse of discretion.

24. DER did not abuse its discretion in computing the penalty for mining without a permit in assigning a value of zero to the following categories of 25 Pa.Code §86.194(b): speed of compliance, cost to the Commonwealth, savings to the violator and history of previous violations.

25. DER did not abuse its discretion in assessing a penalty of $100 under the category of seriousness set forth in 25 Pa.Code §86.194(b)(1).

26. Uner the facts of this case, the maximum penalty which lawfully could have been assessed under 25 Pa.Code §86.194(b) would have been $1600.

27. Pursuant to 25 Pa.Code §86.193(g), DER must assess a minimum civil penalty of $2000 per acre for mining without a permit.

28. A civil penalty of $2000 is upheld for Appellant's mining without a permit.

29. DER did not arbitrarily exercise its duties in assessing an amount of $3750 for Appellant's failure to timely comply with a DER order. 52 P.S. §1396.22.

30. Appellant failed to comply with a DER order, which could have been complied with in a very short time; therefore, DER did not abuse its discretion in assessing an additional $500 penalty. 25 Pa.Code §86.194(b)(3).

O R D E R

WHEREFORE, this 29thday of April, 1985, it is ordered that:

1. Appellant's appeal is sustained with regard to the assessment of the $2100 penalty for mining without a permit. Pursuant to 25 Pa.Code §86.193(e), a civil penalty in the amount of $2000 is upheld.

2. Except for the reservation set forth in paragraph 1, supra, this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: April 29, 1985

cc: Bureau of Litigation
Alan S. Miller, Esquire, Pittsburgh,
for the Commonwealth
Leo M. Stepanian, Esquire, Butler,
For Appellant

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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MATHIES COAL COMPANY :

:

: Docket No. 82-212-G

: Issued: June 10, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By Edward Gerjuoy, Member,

SYLLABUS

This is an appeal of certain effluent limitations imposed by DER in Appellant's National Pollutant Discharge Elimination System (NPDES) permit. Appellant originally had contested the osmotic pressure limitation and the associated monitoring requirements but subsequently withdrew this portion of the appeal. DER is required to apply the standards set forth in 25 Pa.Code §93.7; therefore, it was not required to take into account the economic consequences upon Appellant of its action in setting the effluent limitations contained in the permit. The effluent limitations are calculated from a formula which takes into consideration the standards set forth in §93.7 as well as the Q7-10 of the receiving stream. The Q7-10 is defined at 25 Pa.Code §93.5(b) as the lowest-seven-consecutive-day average flow that occurs once in ten years. The monitoring point for determining compliance with the effluent

limitations is the point of discharge to the receiving stream. Given this determination, the parties stipulated that there was no point in contesting the Q7-10 value at the point of discharge. The parties agreed that even if the Q7-10 were figured for a point downstream from the discharge, the calculation of the effluent limitations would not be significantly altered. Therefore, since the issue of the Q7-10 value to be used in calculating the effluent limitations has been removed from contention, and since DER was required to apply the standards set forth in 25 Pa.Code 93.7 in calculating those limitations, it follows that the limitations must be upheld. The appeal is dismissed.

FINDINGS OF FACT

1. Appellant, Mathies Coal Company ("Mathies") is a Pennsylvania corporation having its principal office at 1800 Washington Road, Pittsburgh, PA 15241.

2. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), which is the agency of the Commonwealth empowered to administer and enforce the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. Section 691.1 et seq. ("CSL"), and the rules and regulations of the Environmental Quality Board ("EQB") adopted thereunder.

3. Mathies operates a deep mine (the "mine") in Nottingham Township, Washington County, Pennsylvania.

4. In the past, DER has allowed the Thomas Portal of this mine to discharge into Peters Creek, Washington County, under National Pollutant Discharge Elimination System ("NPDES") Permit PA0023337.

5. On or about August 4, 1982, DER--at Mathies' request--issued

Amendment No. 3 to NPDES Permit PA0023337, allowing an increased discharge (in flow volume) from the Thomas Portal into Peters Creek.

6. The aforesaid Amendment No. 3 incorporated various effluent limitations and monitoring requirements on various discharge parameters including inter alia the concentrations of iron, manganese and aluminum, and the osmotic pressure.

7. Mathies timely appealed the effluent limitations and monitoring requirements specifically mentioned in Finding of Fact 6.

8. On April 11, 1983, Mathies moved to amend its Notice of Appeal, so as to strike its objections to the osmotic pressure limitations and monitoring requirements, on the understanding that DER would: (a) give full consideration to future bioassays performed by Mathies in the event that the osmotic pressure of the water discharged at Thomas should increase to a level near the permit effluent limit; and (b) that the Department will amend the NPDES permit in question to provide for quarterly field studies for one year and field studies once every six months thereafter.

9. On April 22, 1983, this Board--on the information that DER did not oppose Mathies' proposed amendment of its Notice of Appeal--amended Mathies' Notice of Appeal as Mathies had requested; the Board's April 22, 1983 Order noted that the above understandings (a) and (b) [in Finding of Fact 8] between Mathies and DER were not part of the Order, though those understandings apparently had been stated correctly by Mathies.

10. DER computed the effluent limitations on the iron, manganese and aluminum concentrations from a formula based on the amount of flow in the Thomas Portal discharge and the so-called Q(7-10) flow in Peters Creek; the formula seeks

to ensure that the final effluent concentrations in Peters Creek, after dilution of the discharge in Peters Creek, do not exceed the effluent concentrations prescribed by 25 Pa.Code Chapter 93 (affidavit of Walter O'Shinski, attached to DER's Motion for Summary Judgment filed November 4, 1983).

11. Q(7-10) is defined in 25 Pa.Code §93.5(b) as "the actual or estimated lowest seven-consecutive-day average flow that occurs once in ten years."

12. Mathies challenged neither the intent nor the substance of DER's formula (Finding of Fact 10).

13. DER used the value of Q(7-10) at a point in Peters Creek immediately above the Thomas Portal; according to DER this value is 0.056 cubic feet per second.

14. Mathies claimed that the value of Q(7-10) at this point (immediately above the Thomas Portal) is effectively zero.

15. Mathies therefore claimed that 25 Pa.Code §93.5(b) required DER to employ the value of Q(7-10) at that point in Peters Creek "where a use identified in §93.4 of this title [Pa.Code Title 25]. . . becomes possible."

16. On October 4, 1984, the Board presided over a hearing on the merits of this appeal.

17. The scope of this hearing was limited to evidence bearing on what value of Q(7-10) DER should have used in computing the effluent limits on Mathies' discharge.

18. DER contends that a "point of first use" (the point defined in Finding of Fact 15) exists in Peters Creek immediately above the Thomas Portal discharge point.

19. Mathies disputes DER's contention that there is a point of first use in Peters Creek above the Thomas Portal.

20. Mathies contends that the point of first use in Peters Creek is not attained until the flow is sufficient to support warm water fish even during the Q(7-10) at that point, i.e., even during the lowest seven-consecutive-day average flow that occurs once in ten years.

DISCUSSION

This appeal, which now is ripe for adjudication, has been the subject of two earlier rulings at the above-captioned Docket Number (Opinions and Orders, January 13, 1984 and January 14, 1985). Those rulings bear on the instant adjudication, and should be reviewed for full understanding of the legal underpinnings of our final order infra in this matter. It is convenient, however, to briefly summarize the aforementioned opinions in the context of this adjudication.

On or about August 4, 1982, DER issued an amendment of Mathies' NPDES Permit PA 0023337. This amendment, at Mathies' request, authorized Mathies to increase its discharge into Peters Creek, Washington County, from the Thomas Portal of the Mathies coal mine. The amendment permits a discharge of 4,000 gallons per minute (gpm), whereas previously the discharge could be at most 420 gpm. However, the amendment imposed, inter alia, the following water quality limitations on the discharge:

	Allowed Concentrations (mg/l)	
Discharge Parameter	Monthly Average	Daily Average
Iron	1.5	3.0
Manganese	1.0	2.0
Aluminum	0.5	1.0

where mg/l denotes milligrams per liter. Mathies appealed these effluent limitations. Mathies also appealed an imposed limitation on the osmotic pressure of the discharge. In view of Finding of Fact 9, however, this portion of Mathies' original appeal no longer is before this Board, and will not be adjudicated or further referred to infra. For similar reasons, the portion of Mathies' appeal challenging DER's originally imposed requirement of quarterly field studies each year is deemed no longer before this Board.

On November 4, 1983 DER moved for summary judgment on the appealed-from effluent limits. Our January 13, 1984 opinion rejected DER's motion for summary judgment.[1] DER computed the above-listed effluent limitations from a formula which Mathies has not challenged. The formula involves, inter alia, the "actual or estimated lowest seven-consecutive-day average flow that occurs once in ten years" [language of 25 Pa.Code §93.4(b)]. Mathies did not challenge DER's use of the formula, but did challenge the value of the aforesaid average flow--the so-called Q(7-10) value--DER used in the formula. DER used the value of Q(7-10) at a point in Peters Creek immediately above the Thomas Portal of Mathies' mine. Mathies claimed this value of Q(7-10) was effectively zero, in which event DER's formula should have employed the value of Q(7-10) "at that point where a use identified in §93.4 of this title . . . becomes possible" [quoting from 25 Pa.Code §93.5(b)].

Therefore there was a genuine issue of material fact, precluding our granting the summary judgment DER requested. In the course of denying summary judgment, however, our January 13, 1984 opinion made some additional rulings which

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1. Actually, DER only asked for summary judgment on the iron and manganese effluent limits it had set. DER's argument would have applied just as well to the aluminum effluent limit, however; our ruling on the motion was equally applicable to all three of the heavy metal limitations Mathies had appealed. Therefore, in what follows we shall ignore the fact that our January 13, 1984 opinion did not specifically refer to the appealed-from aluminum effluent limit.

are consequential to this adjudication. In particular, we ruled:

> 1. DER did not abuse its discretion when it established the aforesaid effluent limits without considering the economic impact on Mathies.
>
> 2. The economic impact on Mathies of DER's effluent limitations is outside the scope of this appeal.
>
> 3. The possible effects, or lack of effects, of the discharge on plant and animal life in Peters Creek is outside the scope of this appeal, except as such facts bear on the point at which the flow is to be estimated in accordance with 25 Pa.Code §93.5(b).

These previously interlocutory rulings now are affirmed and made final.

The appealed-from amended NPDES permit contained the following statements concerning monitoring requirements:

> Samples taken in compliance with the monitoring requirements specified above shall be taken at the following location: at the discharge from the treatment system prior to dilution by other waters.

Mathies' initial notice of appeal did not explicitly challenge this requirement. However, Mathies did challenge this requirement at a later stage of these proceedings. On December 6, 1984 the parties stipulated that this issue, couched as follows, was to be briefed for the Board's resolution:

> If the Q(7-10) at the point of discharge is zero and the Department identifies a point where a use identified in 25 Pa. Code 93.4 becomes possible, whether the stream at that point of first use becomes the monitoring point for determining compliance with effluent limitations in an NPDES permit?

The issue was briefed, and our January 14, 1985 opinion ruled on it. Our ruling was:

> Under the facts of this appeal, it is not an abuse of DER's discretion to require that Mathies' discharge into Peters Creek be monitored at the Thomas Portal discharge point, for the purpose of determining whether Mathies is complying with the DER-imposed effluent limitation on Mathies' discharge.

This interlocutory ruling herewith is affirmed and made final.

The hearing on the merits of this matter was held on October 4, 1984. In view of the above-described rulings 1-3 in our January 13, 1984 opinion, the hearing was limited to evidence bearing on the issue of what value of Q(7-10) DER should have used in computing the effluent limits on Mathies' discharge. Thereafter, on March 15, 1985 the parties agreed to stipulate to Findings of Fact 13, 14, 18 and 19. The parties also stipulated as follows:

> In view of the Board's ruling that the discharge monitoring point does not move downstream, even if the Q(7-10) at the discharge point is zero, there is no further point to contesting before the Board the actual Q(7-10) at the point of discharge. Even assuming the design flow for Mathies' NPDES permit were calculated at a point of first use downstream from the actual discharge point, the iron and manganese effluent limitations in Mathies' NPDES permit either would not change or would result in only an insignificant relaxation.

In other words, Mathies and DER agreed that the Q(7-10) at any sensibly conceivable point of first use downstream from the Thomas Portal, even a point of first use selected on the criterion advanced by Mathies (see Finding of Fact 20), the values of the effluent limitations for iron and manganese [and therefore for aluminum, see footnote 1 supra] would differ at most by de minimis amounts from the appealed-from limitations DER originally set.

It follows that the limitations must be upheld. As discussed in our January 13, 1984 opinion, DER is obliged to obey the regulations in 25 Pa.Code Chapter 93. For this purpose, DER established a formula from which the Mathies discharge effluent limitations--needed to keep in compliance with Chapter 93--could be computed. Mathies has not challenged this formula as such. Originally, Mathies did contest the value of Q(7-10) DER inserted in the formula, but Mathies

now concedes that no reasonably conceivable value of Q(7-10) would have altered DER's computed effluent limitations on Mathies' discharge. As for Mathies' insistence that DER should have relaxed its computed effluent limitations because of the economic impact on Mathies, we only can repeat the language of our January 13, 1984 opinion:

> [I]t was not an abuse of discretion for DER to have established the aforesaid effluent limits without considering the economic impact on Mathies. Indeed, under the circumstances just described, wherein Mathies has offered no possibly meritorious legal defenses to application of the regulations, it probably would have been an abuse of discretion for DER not to apply them.

Finally we note that in view of the foregoing there is no need for us to decide--and we therefore do not decide--at what point in Peters Creek the value of Q(7-10) should have been obtained. Nor need we decide what value of Q(7-10) DER should have employed in computing the effluent limitations; the value of Q(7-10) has become essentially irrelevant to this adjudication, for reasons explained supra. Correspondingly, the record of the hearing on October 4, 1984 has played essentially no role in this adjudication. To complete and preserve the record, however, we herewith affirm our evidentiary rulings at that hearing and in our recently issued Order dated April 29, 1985.

CONCLUSIONS OF LAW

1. Those portions of Mathies' original appeal challenging DER's osmotic pressure limitation and the requirement of quarterly field studies each year are no longer before this Board and will not be ruled on in this adjudication.

2. Our previous rulings, in our Opinions and Orders of January 13, 1984 and January 14, 1985, are affirmed.

3. Our previous rulings, though they referred only to the appealed-from effluent limitation on iron and manganese, are equally applicable to Mathies' appeal of the aluminum effluent limitation DER imposed.

4. DER's effluent limitations on iron, manganese and aluminum are upheld.

5. In reaching Conclusion of Law 4 supra, the Board need not--and does not--rule on the value of Q(7-10) DER should have used to compute the appealed-from effluent limitations.

6. In reaching Conclusion of Law 4 supra, the Board need not--and does not--decide at what point in Peters Creek Q(7-10) should be obtained.

7. Our evidentiary rulings, at the October 4, 1984 hearing on the merits of this matter and in our recently issued Order dated April 29, 1985, are affirmed.

O R D E R

WHEREFORE, this 10th day of June, 1985, Mathies' appeal is dismissed insofar as this appeal challenged DER's effluent limitations on iron, manganese and aluminum; other portions of Mathies' original appeal are deemed no longer before this Board.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR., Member

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: June 10, 1985

cc: Bureau of Litigation
For the Commonwealth, DER: Zelda Curtiss, Esq., Pittsburgh
For Appellant: Daniel E. Rogers, Esq., Pittsburgh and
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COMMONWEALTH OF PENNSYLVANIA

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ARMOND WAZELLE :

:

Docket No. 83-063-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and BOROUGH OF PUNXSUTAWNEY, Intervenor

ADJUDICATION

By Edward Gerjuoy, Member, July 30, 1985

SYLLABUS

This appeal of DER's revocation of Appellant's solid waste disposal permit is dismissed. DER did not abuse its discretion in revoking the permit, pursuant to section 503 of the Solid Waste Management Act, 35 P.S. §6018.503(c). Appellant has demonstrated a lack of ability and intention to comply with the applicable law and has continually failed to comply with the law. His violation history is voluminous and demonstrates little, if any, rehabilitative potential. Therefore, DER had no reason to elect a less stringent enforcement alternative. Where DER takes a discretionary action, it must consider the economic effects of that action. It need not, however, forego enforcement action because of possible adverse economic consequences and it need give little weight to the economic effects of its actions where it is clear that a less economically adverse

action is unlikely to produce the desired result, i.e., compliance with the requirements of the law. Where consideration of economic consequences is required, DER need consider only the direct, reasonably foreseeable economic effects of its action. It need not engage in a detailed economic impact study. The evidence presented in support of the contention that the local residents will incur adverse economic consequences as a result of this permit revocation falls far short of the type of showing required in order for the Board to conclude that DER abused its discretion.

INTRODUCTION

This is an appeal of the revocation of Appellant's Solid Waste Permit No. 100412 by the Department of Environmental Resources ("DER"). Shortly after the appeal was filed, the Board, pursuant to its usual practice, issued Pre-Hearing Order No. 1, requiring that Appellant submit a pre-hearing memorandum delineating the factual and legal issues of the appeal. Appellant failed to file the same despite warnings that this failure could result in the imposition of sanctions. Accordingly, sanctions were imposed, under the authority of 25 Pa.Code 21.124, precluding Appellant from presenting his case in chief. The Opinion and Order was dated September 13, 1983, and was entered at this docket number. Appellant's presentation at the hearing was limited to cross-examination of DER witnesses and the introduction of evidence in rebuttal. Appellant was permitted to file a post-hearing brief, which he has done. Since Appellant filed no pre-hearing memorandum, DER did not file a responsive memorandum. DER has, however, filed a post-hearing brief.

At the first day of the hearings on this matter, held February 8, 1984, the Borough of Punxsutawney petitioned to intervene. The Borough was served by

Appellant's refuse hauling and disposal business and argued that the Borough's interest in the health, safety and welfare of the community was dependent upon having a landfill available in the immediate area. The Board granted the petition to intervene, in accordance with 25 Pa.Code §21.62 which allows intervention where the interests asserted by the petitioner may not be adequately represented by the present parties to the appeal. The intervenor's participation was limited to showing the likely effects of the permit revocation upon the borough and its citizenry.

After the first two days of hearings the Board issued an order directing the parties to prepare memoranda of law on three legal issues for the purpose of establishing the scope of the hearings when resumed. First, the parties were to address the issue of whether the Board need consider evidence of oral communications between Appellant and DER concerning Appellant's alleged violations of law. Appellant had argued that such communications were germane to a determination of the reasonableness of DER's revocation of the permit in that they might demonstrate that Appellant had not received adequate notice of the consequences of the alleged violations. In an opinion and order at this docket number, dated August 21, 1984, the Board ruled that Appellant had received adequate notice of the consequences of his alleged violations via an order of DER dated December 3, 1980. This order warned him that failure to comply would subject him to all penalties set forth in the Solid Waste Management Act. Thus, we concluded that the evidence of oral communications concerning the consequences of alleged violations would not be considered.

The second issue which the parties were requested to address concerned the possible res judicata effect of previously issued, unappealed DER orders directed to Appellant. In addition to the order of December 3, 1980, DER had

issued an order to Appellant on January 18, 1983. Both orders cited numerous alleged violations of law existing at Appellant's landfill. We held that Appellant's failure to appeal the orders at the time they were issued rendered them final and, thus, not subject to attack in this subsequent proceeding. Commonwealth v. Derry Township, 466 Pa. 31, 351 A.2d 606 (1976); Commonwealth, DER v. Williams, 57 Pa.Cmwlth. 8, 425 A.2d 871 (1981). The violations set forth in those two orders are considered established for our purposes here.

The third issue which the Board requested be addressed involved the interests of the intervenor, the Borough of Punxsutawney. We asked the parties to discuss whether, when deciding to revoke Appellant's permit, DER was required to take into account the effects of the revocation upon the Borough. We concluded that the Commonwealth Court decisions in Einsig v. Pennsylvania Mines Corporation, 69 Pa.Cmwlth. 558, 452 A.2d 558, 567 (1982) and East Pennsboro Township v. Commonwealth, DER, 18 Pa.Cmwlth 58, 334 A.2d 798, 803 (1975) required us to hold that, where DER takes a discretionary action, it must consider the economic effects of that action. Since the DER action appealed herein was discretionary, we concluded (in our August 21, 1984 opinion and order) that DER was required to consider the direct, reasonably foreseeable economic effects. We noted, however, that DER is not required to make a detailed economic impact study. In the context of the present appeal, where the Borough of Punxsutawney is raising this issue, we decided that the economic effects which were germane were those direct, reasonably foreseeable effects pertaining specifically to the Borough, e.g., increased collection and disposal costs resulting from the closure of Appellant's landfill. Indirect, remote, essentially speculative economic consequences, however, such as an increase in costs to Borough residents resulting from a decrease in competition within the area, cannot be termed relevant to DER's decision making

process and need not be considered by DER.

Three additional days of hearings were held, on September 26 and 27 and November 5, 1984. At the close of the final day of hearings, the Board issued a limited, thirty-day supersedeas, upon Appellant's petition, to enable the communities which had been using Appellant's services to make other arrangements for their waste disposal. (Opinion and Order dated November 13, 1984 entered at this docket number.) Prior to our granting of the supersedeas, the Commonwealth Court had issued an injunction requiring the cessation of operations at Appellant's landfill. Commonwealth, DER v. Armond Wazelle, No. 2197 C.D. 1984 (unreported opinion dated October 22, 1984). The court found that Appellant had continued to operate the landfill after his permit had been revoked. Inasmuch as the immediate cessation of all disposal at the landfill imposed a significant hardship upon the affected communities, the limited supersedeas was granted, with the proviso that the supersedeas in no way modified the Commonwealth Court's injunction. The supersedeas, of course, has now expired.

On the final day of the hearings, DER sought to introduce evidence of previous summary convictions of Appellant for violations of the Solid Waste Management Act. Some of the citations which had been offered into evidence were not official copies from the magistrate's records. Appellant objected to the introduction of copies which did not display the magistrate's official seal. The Board ruled that the citations would be admitted provided official copies, displaying the magistrate's seal, were obtained. DER subsequently informed the Board that the magistrate destroys records of summary violations three years after issuance; thus, official copies were not available. Under these circumstances, the Board ruled that copies of the citations from DER's files would be admissible if accompanied by copies of transmittal letters and checks representing fines paid,

along with affidavits of the responsible DER inspectors. (Opinion and Order dated November 21, 1984, at this docket number.) Appellant was given the opportunity to object to this ruling, which he has not pursued. Accordingly, those copies of the criminal citations which have been supported with the foregoing documents have been admitted. Original copies also have been admitted.

All parties have submitted post-hearing briefs; thus this matter now is ripe for adjudication.

FINDINGS OF FACT

1. The Appellant is Armond Wazelle, an individual residing at R. D. #5, Box 228, Superior Street, Punxsutawney, PA 15757.

2. The Appellee is the Commonwealth of Pennsylvania Department of Environmental Resources ("DER"), the agency of the Commonwealth authorized to administer the provisions of the Solid Waste Management Act ("SWMA"), 35 P.S. §6018.101 et seq.

3. The Intervenor is the Borough of Punxsutawney, a municipal subdivision of the Commonwealth of Pennsylvania which has its situs in Jefferson County, Pennsylvania.

4. From 1963 until 1984, Appellant operated a landfill on property owned by him in McCalmont Township, Jefferson County, Pennsylvania (Tr. 820-21; C.Ex. 12).[1]

5. The residents of Punxsutawney and other communities near Appellant's landfill have relied very largely on Appellant to pick up their solid waste and to dispose of the waste at his landfill. Appellant collects over half the municipal waste generated in Punxsutawney. (B.Ex. 2, ¶9; Tr. 525-528).

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1. References to the transcript are designated "Tr." References to exhibits are designated "C.Ex." for Commonwealth Exhibit, "App.Ex." for Appellant Exhibit, "B.Ex." for Board Exhibit, and "Stip.Ex." for Stipulation Exhibit.

6. On April 23, 1975 DER issued an order to Appellant finding him in violation of the Solid Waste Management Act because Appellant was operating his landfill without a permit. The order directed him to provide DER with certain information for evaluation of a permit application and also required him to bring the landfill into compliance with minimum DER standards of operation within fifteen days. (Stip.Ex. 14).

7. Appellant did not comply with the order of April 23, 1975. (B.Ex. 2 ¶25).

8. However, eventually Appellant did submit an application for a permit pursuant to the requirements of the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P.L. 788, No. 241. Submittal of the application allowed Appellant to continue in operation while action upon the application was pending. (Tr. 650).

9. Appellant was issued a permit by DER, pursuant to the Act, on July 24, 1978. The permit was designated Solid Waste Permit No. 100412 and allowed Appellant to operate the landfill. (Tr. 650-53; C.Ex. 10).

10. Prior to 1978, no permit had been granted by DER although incomplete permit applications had been submitted by Appellant between 1972 and 1978. (Tr. 650-53; Stip.Ex. 14).

11. Appellant's permit contained, inter alia, the following conditions:

> OPERATING PROCEDURES
>
> (a) Unloading: Unloading areas will be designated by the operator but generally will be within 30 feet of the working face.
> (b) Size of working face: Length of each cell will vary depending upon the quantity of solid waste received each day. The working face shall be of a size to be covered and compacted daily by the available equipment. . . .

(c) Blowing litter control: This will be controlled by daily burial of refuse. . . The entire landfill shall be adequately policed and litter shall be collected routinely from fences, roads and tree line barriers. . .

(d) Spreading and compacting of solid waste: All solid waste shall be spread and compacted in shallow layers, not exceeding a depth of two (2) feet. . . .

(f) A uniform six (6) inch compacted layer of cover material shall be placed on all exposed solid waste at the end of each working day.

(g) Intermediate cover: An intermediate layer of cover material compacted to a minimum uniform depth of one (1) foot shall be placed on compacted eight (8) feet layer in areas where there is clear intention to place another lift on top within one (1) year.

(h) Final cover: A final layer of cover material compacted to a mininum uniform depth of two (2) feet shall be placed over the entire surface of each portion of the final lift. This procedure must be carried out on the completed areas of the landfill.

Final cover over the last lift will be placed within one week of the termination of operations in that lift.

FINAL GRADING

As portions of the landfill are completed, those sections shall receive their final cover within one (1) week. The final finished grade shall not be less than 1 percent nor more than 15 percent.

REVEGETATING

(a) The completed portions of this landfill operation will be reseeded as required by the Solid Waste Management Act.

. . .

OPERATIONAL RECORDS

(a) To assure that proper construction of the landfill is carried out according to operational plans and to provide for the most efficient utilization of the completed site, daily operational records will be maintained including the daily estimates of the weight of the refuse received at the site.

(C.Ex. 1).

12. J. Paul Linnan was the principal DER inspector for Appellant's landfill from late 1972 or early 1973 until mid 1979. (Tr. 478).

13. During the period he was the inspector of Appellant's landfill, Mr. Linnan conducted approximately 80 inspections of the site. (Tr. 479).

14. In the course of his inspections, Mr. Linnan noted the following violations:

a) failure to limit access to the site, 16 violations

b) failure to maintain operating records, 32 violations

c) failure to confine unloading to working face, 6 violations

d) failure to confine the working face itself, 10 violations

e) failure to control blowing litter, 31 violations

f) failure to compact waste, 16 violations

g) failure to apply daily cover, 28 violations

h) failure to apply intermediate cover, 19 violations

i) failure to apply final cover, 26 violations

j) failure to control salvaging, 10 violations

k) failure to manage surface water, 18 violations

l) failure to revegetate, 29 violations

m) failure to control vectors, 18 violations

n) failure to maintain proper slopes, 8 violations

(Tr. 479, C.Ex. 2-C)

15. On December 3, 1980, DER issued a compliance order to Appellant finding him in violation of the Solid Waste Management Act and ordering him to take immediate remedial action. (C.Ex. 10).

16. The order of December 3, 1980 contained the following finding:

Wazelle disposes of approximately sixty (60) cubic yards of solid waste per day at the Wazelle Landfill.

The wastes disposed of at the Wazelle Landfill are predominately municipal wastes; however, residual wastes from Airco-Speer's Punxsutawney Plant are also disposed of at the Wazelle Landfill.

In conjunction with his application for Solid Waste Permit No. 100412, Wazelle submitted Surety Bond No. 13187 to the Department, which bond was written by the United Surety and Financial Guarantee Company of DuBois, Pennsylvania.

The United Surety and Financial Guarantee Company was suspended from doing business in Pennsylvania by the Pennsylvania Department of Insurance. Therefore, Surety Bond No. 13187, which was written by United Surety and Financial Guarantee Company, is no longer collectible, and as such, does not constitute an acceptable landfill closure bond.

When the Wazelle Landfill was constructed, Wazelle's engineers installed stakes marking the perimeter of the landfill and they also installed stakes from which the final elevation and final contours of the landfill could be determined.

During the operation of the Wazelle Landfill, the aforementioned marker stakes have been removed, making it difficult to determine whether final elevation has been reached and whether final contours are being established as required by Solid Waste Permit No. 100412 in the areas of the landfill which have been filled with waste.

Inspections of the Wazelle Landfill by employees of the Department reveal that Wazelle is habitually operating the Wazelle Landfill in violation of the requirements of the Solid Waste Management Rules and Regulations, 25 Pa. Code Chapter 75. Said violations include, but are not limited to, failure to apply a minimum of six (6) inches of compacted soil cover to the refuse at the end of each working day, failure to apply one (1) foot of intermediate soil cover over refuse in areas where such cover is required, and failure to final grade and revegetate areas of the landfill which have been filled with refuse to final elevation. Wazelle's violations of the Solid Waste Management Regulations are specifically set forth in the Department's inspection reports for said facility.

Wazelle has seeded some completed areas of the Wazelle Landfill during the 1980 fall planting season. However, there are additional completed areas of the landfill which require seeding that Wazelle has not seeded.

(C.Ex 10)

17. The order of December 3, 1980 directed Appellant to take the following actions:

A. Upon receipt of this Order, and thereafter, Wazelle shall apply a uniform six-inch compacted layer of soil cover material on all exposed solid waste at the Wazelle Landfill at the end of each working day.

B. By not later than December 5, 1980, Wazelle shall apply a layer of intermediate soil cover, compacted to a uniform depth of one (1) foot, on all completed lifts of the landfill, other than the immediate vicinity of the daily working face, where previously deposited solid wastes are exposed.

C. By not later than December 30, 1980, Wazelle shall submit to the Department a landfill closure bond in an amount equal to Surety Bond No. 13187 as a replacement bond for Surety Bond No. 13187.

D. By not later than January 15, 1981, Wazelle shall submit to the Department full and complete Industrial Waste Disposal at Permitted Landfill Modules (Module No. 1) for both the liquid and the dry industrial wastes which Wazelle receives from the Punxsutawney Airco-Speer Plant. Copies of said Module No. 1's are enclosed with this Order. If the aforesaid Module No. 1's are not submitted to the Department by January 15, 1981, Wazelle shall stop accepting for disposal and disposing of the aforementioned wastes from Airco-Speer.

E. By not later than January 15, 1981, Wazelle shall have a registered professional engineer install marker stakes at the Wazelle Landfill. The perimeter of the landfill shall be marked by stakes and stakes shall be installed which indicate the final elevation and final contours of the landfill.

F. By not later than May 15, 1981, Wazelle shall seed, lime and fertilize all areas of the Wazelle Landfill where previous attempts at revegetation have not, by May 1, 1981, established a vegetative cover which is adequate to prevent

soil erosion at the site. Said revegetation shall be accomplished in accordance with the requirements of the Solid Waste Management Regulations and the reclamation plan which is part of Solid Waste Permit No. 100412.

G. By not later than May 15, 1981, Wazelle shall final cover, final grade and revegetate those areas of the Wazelle Landfill which have been filled with solid waste to final elevation but have not been reclaimed. Said revegetation shall be accomplished in accordance with the requirements of the Solid Waste Management Regulations and the reclamation plan which is part of Solid Waste Permit No. 100412. (C.Ex 10).

18. Appellant did not appeal the order of December 3, 1980.

19. Appellant has never fully complied with paragraphs A, B, C, E, and F of the order of December 3, 1980. (Tr. 75-79; C.Ex. 14-F).

20. Appellant did not comply with the requirements of paragraph D of the order of December 3, 1980 within the time period prescribed by that paragraph of the order. (Tr. 311-312).

21. Appellant submitted the information required by paragraph D of the order of December 3, 1980 after the date set forth in that paragraph as the deadline for submission. (Tr. 75, 340-341).

22. Appellant did not comply with the requirements of paragraph G of the order of December 3, 1980 within the time period prescribed by that paragraph of the order. (Tr. 574).

23. During the period from April 1980 to May, 1981, Ricardo Gilson was the DER solid waste specialist in charge of conducting inspections of Appellant's landfill. Inspector Gilson conducted approximately 13 or 14 inspections of the landfill during that period of time. (Tr. 573).

24. Mr. Gilson has been employed by DER since 1979, during which time he has inspected over 500 facilities, including 30 landfills. (Tr. 571-572).

25. During the period from April 1981 to the time of the hearings in this appeal, Gary Wozniak was the DER solid waste specialist in charge of conducting inspections of Appellant's landfill. Inspector Wozniak conducted approximately 30 inspections of the landfill during that period of time. (Tr. 9, 10, 14).

26. Mr. Wozniak has been employed by DER since 1981, during which time he has conducted over 200 inspections of landfills. (Tr. 9).

27. Both Inspector Gilson and Inspector Wozniak testified that they had never observed a landfill worse than Appellant's. (Tr. 88, 575).

28. Commonwealth Exhibits 2-A and 2-D are accurate representations of Mr. Wozniak's and Mr. Gilson's inspection reports, respectively. (C.Ex. 2-A, Tr 16; C.Ex. 2-D, Tr. 575).

29. During the period of April 1981 through February 1984, Inspectors Gilson and Wozniak observed the following violations at Appellant's landfill:

a) inadequate intermediate cover had been placed on the site. (Tr. 50, 573; C.Ex. 3, photo 9.)

b) inadequate daily cover had been placed on the site. (Tr. 22, 246, 573, 578, 600).

c) revegetation efforts had not been properly undertaken. (Tr. 23, 573, 578, 603).

d) litter control measures had not been properly implemented. (Tr. 438).

e) groundwater monitoring had not been undertaken properly and required data had not been submitted. (Tr. 54, 55, 206-210, 320, 391, 394).

f) waste had not been properly compacted. (Tr. 22, 49; C.Ex. 3, photo 8).

g) vector control measures had not been implemented. (Tr. 39, 240-243, 251-255, 329; C.Ex. 3, photo 7).

h) slopes were excessive. (Tr. 197, 438).

i) waste had been placed outside the permit area. (Tr. 41, 43; C.Ex. 3, photo 3).

j) a 25 foot buffer zone had not been maintained. (Tr. 36; C.Ex. 3, photo 3).

k) operating records had not been adequately maintained. (C.Ex. 2-A, 2-D).

l) unloading had not been confined to the working face. (C.Ex. 2-A, 2-D).

m) the working face itself had not been confined. (C.Ex. 2-D).

n) final cover had not been properly applied. (C.Ex.2-A, 2-D).

o) surface water had not been properly managed. (C.Ex. 2-A, 2-D).

p) erosion control measures had not been properly implemented. (C.Ex. 2-A).

30. During the period that he was in charge of inspections of the Appellant's landfill, Mr. Gilson noted the following numbers of violations:

a) for failure to properly control litter, eight violations.

b) for failure to properly compact waste, three violations.

c) for failure to properly apply daily cover, eleven violations.

d) for failure to properly apply intermediate cover, eight violations.

e) for failure to properly revegetate completed areas, thirteen violations, corresponding to one violation for each inspection conducted.

f) for failure to maintain proper operating records, seven violations.

g) for failure to confine unloading to the working face, one violation.

h) for failure to confine the working face itself, two violations.

i) for failure to apply final cover, three violations.

j) for failure to adequately manage surface water, one violation.

(C.Ex. 2-D; Tr. 575)

31. Mr. Gilson was unable to recall the basis for his conclusion that as of May 5, 1980, waste at the landfill had not been covered for at least two weeks. (Tr. 600).

32. During the period that he was in charge of inspections of Appellant's landfill, Mr. Wozniak noted the following numbers of violations:

a) for failure to properly control litter, nine violations.

b) for failure to properly compact waste, fourteen violations.

c) for failure to properly apply daily cover, fourteen violations.

d) for failure to properly apply intermediate cover, twenty-two violations, corresponding to one for each inspection except the inspection conducted May 26, 1982.

e) for failure to properly apply final cover, twenty-two violations, corresponding to one for each inspection except the inspection conducted May 26, 1982.

f) for failure to properly revegetate completed areas, twenty-three violations, corresponding to one for every inspection conducted, without exception.

g) for failure to control vectors, nine violations.

h) for failure to maintain proper slopes, twenty-one violations.

i) for failure to maintain a 25 foot buffer zone, seven violations.

j) for failure to adequately monitor groundwater, fifteen violations.

k) for failure to maintain adequate operational records, twelve violations.

l) for failure to confine unloading to the working face, three violations.

m) for failure to properly manage surface water, six violations.

n) for failure to properly implement erosion control measures, nine violations.

(C.Ex. 2-A; Tr. 16)

33. Mr. James Rozakis is the Regional Operations Supervisor of the Meadville region for DER's Bureau of Solid Waste Management. (Tr. 409-411).

34. Mr. Rozakis has been employed by DER since 1980. During that period he has conducted over 100 inspections of landfills. (Tr. 411-412).

35. Between November 1982 and September 1984 Mr. Rozakis visited Appellant's landfill on 18 occasions. (Tr. 412).

36. Mr. Rozakis considers Appellant's landfill to be one of the worst he has ever seen. (Tr. 417).

37. Mr. Rozakis observed the following violations at the landfill during his visits to the site:

a) failure to control blowing litter (Tr. 438)

b) failure to maintain proper slopes (Tr. 417, 438)

c) failure to implement vector control measures (Tr. 439)

d) failure to adequately monitor groundwater (Tr. 417, 439)

e) failure to apply adequate intermediate cover (Tr. 417, 438)

f) failure to apply adequate final cover (Tr. 417, 438)

38. Since he is a supervisor, and not an inspector, Mr. Rozakis did not complete inspection reports following his visits to the site. Mr. Rozakis was accompanied by Inspector Wozniak when Mr. Rozakis visited the site. Mr. Wozniak completed inspection reports which were reviewed by Mr. Rozakis for accuracy. (Tr. 440-441).

39. Mr. Rozakis concurs in Mr. Wozniak's evaluations of Appellant's compliance status as described by Mr. Wozniak's testimony at the hearing in this matter. (B.Ex. 2, §18).

40. Appellant has received wet and dry carbon sludge for disposal at his landfill. (Tr. 22-23, 30, 48; C.Ex. 3, photo 2).

41. Appellant has never received DER approval for disposal of wet or dry carbon sludge, a type of residual waste, at his landfill. Appellant had submitted "Module One" forms to DER for approval of disposal of residual wastes at the landfill, but the modules were returned to Appellant as incomplete and were never approved. (B.Ex. 2; Stip.Ex. 8, Stip.Ex. 9, Stip.Ex. 10).

42. An adequate bond for Appellant's landfill site has not existed since at least December of 1980. (Tr. 298-302; C.Ex. 2-A, C.Ex. 10, B.Ex. 2).

43. The bonding company which had underwritten Appellant's bond has filed for bankruptcy. (Tr. 299).

44. Appellant has allowed waste to be placed several hundred feet beyond the permit area. (Tr. 462-467; C.Ex. 13).

45. Groundwater exists beneath Appellant's landfill. (B.Ex.2, ¶6).

46. Surface mining has been conducted in the vicinity of Appellant's landfill. (Tr. 767, 770; App. Ex. F).

47. The presence of abandoned surface mines near a landfill does not make groundwater monitoring impossible. (Tr. 375).

48. Appellant has a DER-approved groundwater monitoring plan at his landfill. (Tr. 380).

49. Appellant has not properly implemented his DER-approved groundwater monitoring plan. (Tr. 380-381).

50. Appellant's groundwater monitoring plan is deficient in the following particulars:

1) Groundwater monitoring point 2A, a down-gradient well, is consistently dry. (B.Ex. 2; Tr. 55).

2) Groundwater monitoring point B, a downgradient spring, is often dry. (B.Ex. 2).

3) Groundwater monitoring point 1A cannot be located for sampling. (Tr. 55).

51. At least one up-gradient and one down-gradient functional monitoring point are required to determine groundwater conditions. (Tr. 371).

52. Due to the fact that the monitoring points designated in Appellant's approved groundwater monitoring plan are often dry, Appellant has been unable to submit quarterly monitoring reports as required. (Tr. 54, 55, 755).

53. Appellant has repeatedly failed to provide adequate quarterly groundwater monitoring reports. (Tr. 320, 750-753; Stip.Ex. 4).

54. Appellant has never submitted a request to amend his groundwater monitoring plan. (Tr. 382).

55. Appellant was made aware of the deficiencies in his groundwater monitoring plan in 1981 or 1982. (C.Ex. 2-A; Stip.Ex. 4).

56. Apepllant's engineer, Mr. Van Plocus, does not believe that violations associated with the following requirements are "serious": litter control, bond submission, application of daily cover, maintenance of operating records, confinement of working face, unloading only at working face, compaction of waste, control of bulky waste, control of dust, prohibition of scavenging, control of salvaging. (Tr. 746-749).

57. Mr. Van Plocus believes that violations concerning groundwater monitoring, erosion control, and surface water management are serious violations. (Tr. 746-749).

58. Mr. Van Plocus did not provide the basis for his conclusions regarding seriousness.

59. Mr. Van Plocus has little or no training in biological or health sciences.

60. On June 15, 1982, an unauthorized waste disposal area was discovered on Appellant's property. This facility is owned and operated by Appellant and has been referred to throughout this proceeding as the "Wazelle dump." (Tr 14, 15, 58).

61. No DER permit has ever been issued for the operation of the dump. (Tr. 14; C.Ex. 11).

62. In response to the discovery of the unpermitted dump, Inspector Wozniak issued a violation notice to Appellant; Appellant continued to use the dump after issuance of the violation notice. (Tr. 60-61).

63. Appellant admitted that wastes were being placed at the dump as late as November of 1984. (Tr. 836).

64. Appellant has not taken and refuses to take measures to limit access to the dump. (Tr. 842).

65. On January 18, 1983, DER issued a compliance order to Appellant which contained the following findings:

> . . .
>
> B. Wazelle owns approximately 122 acres of land designated as Parcel 149 on Sheet No. 505 of the Jefferson County tax maps.
>
> C. Since before July, 1978 and continuing until the present, Wazelle has disposed of municipal, demolition and residual wastes at this property ("Wazelle Dump").
>
> D. Wazelle has never applied for or obtained a Solid Waste Permit authorizing the disposal of solid waste at Wazelle Dump. The disposal of solid waste without authorization by permit violates Sections 201, 301 and 501 of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, 35 P.S. §§6018.201, 6018.301 and 6018.501.
>
> E. Wazelle has transported solid waste or allowed it to be transported to Wazelle Dump, contrary to Section 610(6) of the Solid Waste Management Act, 35 P.S. §6018.610(6).
>
> F. Since at least June 15, 1982 and continuing to the present, the following violations have existed at Wazelle Dump:
>
> (1) Failure to limit access to the site during nonworking hours, contrary to 25 Pa. Code §75.21(m).
>
> (2) Failure to control vectors, contrary to Pa. Code §75.21(p).
>
> (3) Failure to maintain operational records, contrary to 25 Pa. Code §§75.21(r), 75.26(q), and 75.38(b)(8)(x).

(4) Failure to monitor ground water, contrary to 25 Pa. Code §75.24(b)(4)(i).

(5) Failure to manage surface water, contrary to 25 Pa. Code §§75.24(c)(2)(i) and (xviii).

(6) Slopes exceeding 15%, contrary to 25 Pa. Code §75.24(c)(2)(ii).

(7) Failure to use suitable cover material, contrary to 25 Pa. Code §§75.24(c)(2)(ix) and (xi).

(8) Failure to demonstrate the existence of a proper subbase, contrary to 25 Pa. Code §§75.24(c)(2)(x), (xiii) and (xiv).

(9) Failure to place two feet of final cover within two weeks after the end of operations, contrary to 25 Pa. Code §§75.24(c)(2)(xxi) and (xxii).

(10) Failure to stabilize and revegetate the site, contrary to 25 Pa. Code §§75.24(c)(2)(xxii), 75.26(p), and 75.38(b)(8)(ix).

(11) Failure to monitor and vent gas, contrary to 25 Pa. Code §75.24(c)(2)(xxiv).

(12) Failure to spread and compact solid waste in two foot layers, contrary to 25 Pa. Code §75.26(b).

(13) Burning of solid waste on the site, contrary to 25 Pa. Code §§75.26(f) and 75.38(b)(8)(v).

(14) Failure to apply six inches of cover at the end of each working day, contrary to 25 Pa. Code §75.26(l).

(C.Ex. 11).

66. The order of January 18, 1983 required Appellant to take the following actions:

1. After receipt of this Order, Wazelle shall neither dispose of any solid waste nor allow solid waste to be disposed of at the Wazelle Dump.

2. Within twenty-four (24) hours after receipt of this Order, Wazelle shall begin removing from the Wazelle Dump all surface accumulations of municipal and demolition wastes, taking the wastes to a permitted disposal site authorized to accept such wastes.

3. Within forty-eight (48) hours after receipt of this Order, Wazelle shall inform the Department to which disposal site he is taking the municipal and demolition waste.

4. Within twenty-four (24) hours after receipt of this Order, Wazelle shall begin segregating all surface accumulations of residual waste at Wazelle Dump (including but not limited to carbon sludge, plastic window casements, drummed waste, carbon rods, residues and contaminated soil) from the municipal and demolition waste, and storing the residual waste in adequate containers, according to the type and source, at Wazelle Dump.

5. Within thirty (30) days after receipt of this Order, Wazelle shall complete removal of all surface accumulations of municipal and demolition waste from Wazelle Dump.

6. Within thirty (30) days after receipt of this Order, Wazelle shall complete segregation and storage of the residual waste specified in Paragraph 4.

7. Within thirty-five (35) days after receipt of this Order, Wazelle shall provide the Department with receipts for the disposal of the municipal and demolition waste at a permitted disposal site authorized to accept such waste.

8. Within thirty-five (35) days after receipt of this Order, Wazelle shall provide the Department with an inventory of all residual wastes deposited at Wazelle Dump. The inventory shall include:

(a) the types of waste
(b) the quantity of each type of waste
(c) the source of each waste
(d) the dates each type of waste was disposed

9. Within sixty (60) days after receipt of this Order, Wazelle shall either

(a) submit complete Module 1 applications for each type of residual waste at the Wazelle Dump, or
(b) return each type of residual waste to its place of origin and provide the Department with receipts acknowledging acceptance of the waste by the generators, the quantity returned, and the date returned.

10. Until the Department approves the Module 1 applications or Wazelle returns the wastes to their place of origin, Wazelle shall store the residual waste in full compliance with the Solid Waste Management Act and the rules and regulations promulgated thereunder.

11. Within thirty (30) days after each Module 1 is approved, Wazelle shall dispose of the subject residual waste as approved in the Module 1.

12. Within forty-five (45) days after all residual waste is removed from Wazelle Dump, Wazelle shall apply a two-foot layer of approved final cover over the entire disposal area.

13. Within thirty (30) days after receipt of this Order, Wazelle shall submit a plan for ground water monitoring in accordance with the Department's Rules and Regulations for review by the Department. If additional information or revisions are required by the Department, Wazelle shall submit that information or revision within thirty (30) days of notification to do so. Upon approval by the Department, the plan shall be incorporated as an obligation of this Order.

14. Within sixty (60) days after the Department approves the ground water monitoring plan, Wazelle shall complete implementation of the plan.

15. If groundwater monitoring shows the existence of groundwater contamination, Wazelle shall, within sixty (60) days after that determination, take such measures as the Department approves to abate the contamination.

16. By May 15, 1983, Wazelle shall grade and re-vegetate the entire site.

(C.Ex. 11).

67. Appellant did not appeal the DER order of January 18, 1983.

68. Appellant did not immediately cease disposal at the dump as required by paragraph 1 of the order. (Tr. 80).

69. Appellant did not comply with paragraph 2 of the order of January 18, 1983 within the 24-hour time period set forth therein for compliance. No removal of

waste from the dump site took place until June of 1983. (Tr. 80).

70. Appellant has never complied with paragraph 3 of the order of January 18, 1983. (Tr. 79-80).

71. Appellant has never complied with paragraphs 4 and 6 of the order of January 18, 1983; in fact, rather than segregating the various materials and storing them in separate containers at the dump site, Appellant removed wastes from the dump site and deposited them at his landfill without DER approval. (Tr. 81).

72. Appellant did not comply with paragraph 5 of the order of January 18, 1983 within the thirty-day period set forth therein for compliance. No removal of waste from the dump site took place until June of 1983. (Tr. 80, 82).

73. Appellant has never complied with paragraph 7 of the order of January 18, 1983. (Tr. 83).

74. Appellant has not fully complied with paragraphs 8, 9, 10, 11 and 12 of the order of January 18, 1983. (Tr. 83).

75. Appellant has never submitted a groundwater monitoring plan for the dump as required by paragraph 13 of the order of January 18, 1983. Consequently, Appellant has not complied with paragraphs 14 and 15 of the order. (Tr. 418).

76. Appellant has not fully complied with paragraph 16 of the order of January 18, 1983. Some grading was accomplished at the site after the deadline set forth for such action in paragraph 16. No revegetation has been accomplished by Appellant. (Tr. 83, 280, 419).

77. DER Inspector Wozniak testified that Appellant had admitted to Inspector Wozniak that he knew he should not be operating the dump. (Tr. 61).

78. Appellant was unaware of the limits of the area covered by his Solid Waste Permit until two years after it had been issued to him. (Tr. 837).

79. Appellant does not understand many of the technical requirements of operating a landfill. (Tr. 837).

80. Appellant does not understand the legal requirements of operating a landfill. (Tr. 850).

81. Appellant employed an engineer to assist him in meeting the DER requirements. (Tr. 72, 837).

82. Appellant met with his engineer on nearly a daily basis (Tr. 850).

83. Appellant does understand that cover material is required on a landfill. (Tr. 837).

84. On March 18, 1983, DER issued a letter to Appellant notifying him that his solid waste permit, No. 100412, had been revoked. (C.Ex. 12).

85. The revocation letter cited the following findings as one of the bases for the DER decision:

> (1) Between May 5, 1980 and December 3, 1980, various violations existed at Wazelle Landfill, including:
>
> --- Failure to implement vector control procedures, contrary to 25 Pa. Code §75.21(p).
>
> --- Failure to maintain operational records, contrary to 25 Pa. Code §§75.21(r), 75.26(q) and 75.38(b)(8)(x).
>
> --- Failure to apply two feet of final cover within two weeks after final elevation is reached, contrary to 25 Pa. Code §§75.24(c)(2)(xxi) and (xxii).
>
> --- Failure to stabilize and revegetate final cover, contrary to 25 Pa. Code §§75.24(c)(2)(xxii) and 75.26(p).
>
> --- Failure to control blowing litter, contrary to 25 Pa. Code §75.26(k).
>
> --- Failure to apply six inches of daily cover, contrary to 25 Pa. Code §75.26(l).
>
> --- Failure to apply one foot of intermediate cover on completed lifts, contrary to 25 Pa. Code §75.26(n).
>
> --- Failure to replace expired bonds, contrary to Section 505 of the Solid Waste Management Act, 35 P.S. §6018.505.

On December 3, 1980, the Department issued you an Order (attached as Exhibit A) requiring that you operate Wazelle Landfill in compliance with the Solid Waste Management Act and the rules and regulations promulgated thereunder. The Order required that you submit bonds; apply proper daily, intermediate and final cover; mark landfill perimeters; and revegetate disturbed areas. To date, you have not complied with that Order.

Failure to comply with the Solid Waste Management Act, the rules and regulations, and an Order of the Department constitutes unlawful conduct pursuant to Section 610 of the Solid Waste Management Act, 35 P.S. §6018.610.

(2) In addition to the violations addressed in the December, 1980 Order, the following violations exist at the Wazelle Landfill:

--- Disposal of solid waste within 25 feet of property boundaries, contrary to 25 Pa. Code §75.21(s).

--- Slopes in excess of fifteen per cent, contrary to 25 Pa. Code §75.24(c)(2)(ii).

--- Failure to monitor groundwater, contrary to 25 Pa. Code §75.24(b)(4)(i).

--- Failure to monitor and vent gas, contrary to 25 Pa. Code §75.24(c)(2)(xxiv).

--- Failure to spread and compact waste in layers, contrary to 25 Pa. Code §75.26(b).

--- Failure to maintain standby equipment, contrary to 25 Pa. Code §75.26(c).

Failure to comply with the rules and regulations constitutes unlawful conduct pursuant to Section 610 of the Solid Waste Management Act, 35 P.S. §6018.610.

(3) Since at least July, 1978, you have disposed of solid waste at a 122-acre site designated Parcel 149 on Sheet 505 of the Jefferson County Tax Maps ("Wazelle Dump"). You do not possess a solid waste permit authorizing the disposal of solid waste at Wazelle Dump, in violation of Sections 201, 301 and 501 of the Solid Waste Management Act, 35 P.S. §§6018.201, 6018.301 and 6018.501. Failure to comply with the Solid Waste Management Act constitutes unlawful conduct pursuant to Section 610 of the Solid Waste Management Act, 35 P.S. §6018.610.

(4) You have transported solid waste or allowed it to be transported to Wazelle Dump, in violation of Section 610(6) of the Solid Waste Management Act, 35 P.S. §6018.610(6). Failure to comply with the Solid Waste Management Act constitutes unlawful conduct pursuant to Section 610 of the Solid Waste Management Act, 35 P.S. §6018.610.

(5) Since at least June 15, 1982 and continuing to the present, the following operational violations have existed at Wazelle Dump:

--- Failure to limit access to the site during non-working hours, contrary to 25 Pa. Code § 75.21(m).

--- Failure to control vectors, contrary to 25 Pa. Code §75.21(p).

--- Failure to maintain operational records, contrary to 25 Pa. Code §§75.21(r), 75.26(q) and 75.38(b)(8)(x).

--- Failure to monitor groundwater, contrary to 25 Pa. Code §75.24(b)(4)(i).

--- Failure to manage surface water, contrary to 25 Pa. Code §§75.24(c)(2)(i) and (xviii).

--- Slopes exceeding fifteen percent, contrary to 25 Pa. Code §75.24(c)(2)(ii).

--- Failure to use suitable cover material, contrary to 25 Pa. Code §§75.24(c)(2)(ix) and (xi).

--- Failure to demonstrate the existence of a proper subbase, contrary to 25 Pa. Code §§75.24(c)(2)(x), (xiii) and (xiv).

--- Failure to apply two feet of final cover within two weeks after the end of operations, contrary to 25 Pa. Code §§75.24(c)(2)(xxi) and (xxii).

--- Failure to stabilize and revegetate the site, contrary to 25 Pa. Code §§75.24(c)(2)(xxii), 75.26(p), and 75.38(b)(8)(ix).

--- Failure to monitor and vent gas, contrary to 25 Pa. Code §75.24(c)(2)(xxiv).

--- Failure to spread and compact solid waste in two foot layers, contrary to 25 Pa. Code §75.26(b).

--- Burning of solid waste on the site, contrary to 25 Pa. Code §§75.26(f) and 75.38(b)(8)(v).

--- Failure to apply six inches of cover at the end of each working day, contrary to 25 Pa. Code §75.26(1).

Failure to comply with the rules and regulations constitutes unlawful conduct pursuant to Section 610 of the Solid Waste Management Act, 35 P.S. §6018.610.

(6) On January 18, 1983, the Department issued you an Order (attached as Exhibit B) requiring that you remove and properly dispose of all surface accumulations of solid waste at Wazelle Dump; cover, grade and revegetate the site; and submit a groundwater monitoring plan to be implemented within sixty (60) days after Departmental approval. To date, you have not complied with that Order. Failure to comply with an order of the Department constitutes unlawful conduct pursuant to Section 610 of the Solid Waste Management Act, 35 P.S. §6018.610.

(C.Ex. 12).

86. The letter of March 18, 1983 concluded with the following:

The Department has determined that you have failed and continue to fail to comply with the Solid Waste Management Act, the rules and regulations, two orders of the Department, and a permit issued by the Department, and that you have shown a lack of ability or intention to comply with the Solid Waste Management Act, rules and regulations, and permits and orders of the Department as indicated by past and continuing violations. Further, the Department has determined that Wazelle Landfill is and has been operated in violation of the Solid Waste Management Act and the rules and regulations, is creating a public nuisance, and is being operated in violation of the terms and conditions of Solid Waste Permit No. 100412.

Since Solid Waste Permit No. 100412 is no longer valid, it will be necessary for you to cease operations within fifteen (15) days of receipt of this letter and close Wazelle Landfill according to the standards set forth in Chapter 75 of the Rules and Regulations of the Environmental Quality Board, 25 Pa. Code §75.1 et seq. within seventy-five (75) days of receipt of this letter.

(C.Ex. 12).

87. The instant action is an appeal of the revocation decision contained in this letter of March 18, 1983.

88. Appellant continued to dispose of wastes at his landfill until at least the summer of 1984, well over a year after DER had revoked his permit. (Tr. 84, Opinion of Commonwealth Court dated October 22, 1984).

89. Although DER issued its order revoking Appellant's permit and ordering cessation of his landfill operation on March 18, 1983, DER had made no attempt to enforce its cessation order until relatively shortly prior to the final day of hearings on this matter, despite the fact that Appellant openly had continued to operate his landfill.

90. On October 22, 1984, the Commonwealth Court granted DER a preliminary injunction, ordering Appellant to "cease disposing of solid waste at the Wazelle Landfill within twenty-four (24) hours" of the filing of the Court's order.

91. As of November 5, 1984 Appellant had ceased operations at his landfill in compliance with the Commonwealth Court's order. (Tr. 832).

92. Following closure of his landfill Appellant hauled wastes which he had picked up to considerably more distant sites. (Tr. 834).

93. Appellant threatened to cease collection of solid waste unless he would be permitted to dispose of the waste at his landfill. (Tr. 833).

94. The residents of Punxsutawney and of other communities which were served by Appellant for the hauling and disposal of their solid waste had made no alternative plans for hauling and disposal as of November 13, 1984, in the event Appellant were to cease hauling waste.

95. From time to time conditions at Appellant's landfill improved somewhat. During July and August of 1978 Inspector Linnan noted no violations at the site. (C.Ex. 2-C).

96. The decrease in violations in July and August of 1978 corresponded to DER's issuance of Appellant's solid waste permit. (C.Ex. 2-C, C.Ex. 10).

97. Where improvements have been noted in conditions at the landfill, they generally have been very short lived. (Tr. 25, 417, 483).

98. With the exception of the two inspections conducted in July and August, 1978, Appellant never has maintained his landfill in full compliance with the Solid Waste Management Act, the associated regulations and the terms and conditions of his permit.

99. Conditions at Appellant's landfill improved slightly soon after issuance of a DER compliance order issued to Appellant on April 23, 1975. Several violations remained uncorrected, however. (C.Ex. 2-C; Stip.Ex. 14).

100. Conditions at Appellant's landfill deteriorated in the months immediately following issuance of a second DER compliance order to Appellant on December 3, 1980. (C.Ex. 2-D; C.Ex. 10).

101. On August 8, 1977, Appellant pleaded guilty to a summary violation of section 75.26(b) of Title 25 Pennsylvania Code for failure to adequately spread and compact solid waste at his landfill. He was convicted and fined fifty dollars. (C.Ex. 14B).

102. On August 8, 1977, Appellant pleaded guilty to a summary violation of section 75.26(1) of Title 25 Pennsylvania Code for failure to adequately cover solid waste at his landfill. He was convicted and fined fifty dollars. (C.Ex. 14B).

103. On February 28, 1979, Appellant pleaded guilty to a summary violation of sections 9(4) and 14 of the Pennsylvania Solid Waste Management Act and section 75.26(1) of Title 25 Pennsylvania Code for failure to adequately cover solid waste at his landfill. He was convicted and fined two hundred dollars. (C.Ex. 14A).[2]

104. On May 21,1980 Appellant pleaded guilty to a summary violation of section 75.26(1) of Title 25 Pennsylvania Code for failure to adequately cover solid waste at his landfill. He was convicted and fined one hundred dollars. (C.Ex. 14E).

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2. Commonwealth Exhibits 14A and 14B are original copies of the citations.

105. On May 28, 1981 Appellant pleaded guilty to a summary violation of the Solid Waste Management Act, 35 P.S. §6018.101 et seq. for failure to comply with an order of DER dated December 3, 1980, in that Appellant failed to apply a uniform six inch compacted layer of soil on the waste at his landfill at the end of each working day. He was convicted and fined one hundred dollars. (C.Ex. 14F).

106. On May 29, 1981, Appellant pleaded guilty to a violation of the Solid Waste Management Act, 35 P.S. §6018.101 et seq. for failure to comply with an order of DER dated December 3, 1980, in that he failed to apply a layer of intermediate soil cover on all completed lifts at his landfill. He was convicted and fined one hundred dollars. (C.Ex. 14F).

107. On July 8, 1981 Appellant pleaded guilty to a summary violation of the Solid Waste Management Act, 35 P.S. §6018.101 et seq. for failure to comply with a DER order dated December 3, 1980, in that he failed to apply a uniform six inch compacted layer of soil cover material on all waste at his landfill at the end of each working day. He was convicted and fined one hundred dollars. (C.Ex. 14F).

108. On July 9, 1981 Appellant pleaded guilty to a summary violation of the Solid Waste Management Act, 35 P.S. §6018.101 for failure to comply with a DER order dated December 3, 1980, in that he failed to apply a layer of intermediate soil cover on all completed lifts at his landfill. He was convicted and fined one hundred dollars. (C.Ex. 14F).[3]

109. Appellant remedied the violations for which he had been convicted on August 8, 1977 and February 28, 1979 within a month following the convictions. Several other violations on the site remained unchanged, however. (C.Ex. 2-C).

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3. Commonwealth Exhibits 14E and 14F are copies of the original citations; they have been admitted accompanied by transmittal letters from the district magistrate, checks representing fines paid and affidavits of the responsible DER inspectors.

110. Conditions at Appellant's landfill showed no noticeable improvement following his conviction of the remaining summary violations.

111. Revocation of Appellant's Solid Waste Permit does not prohibit him from continuing to haul waste. (Tr 647).

112. Revocation of his permit does affect Appellant's hauling business, in that his costs will increase as a result of having to haul the waste a greater distance, to a landfill other than his own. (Tr. 834, 846).

113. Rates offered by other haulers in the Punxsutawney region for removal of household refuse are essentially the same as those offered by Appellant for the same service. (Tr. 701-703, 843).

114. No evidence was offered to demonstrate what Appellant's increased costs for removal of waste would be following revocation of his permit.

115. Mr. David Weaver, the other major waste hauler in the borough of Punxsutawney, besides Appellant, is willing and able to fill whatever need is created in waste haulage as a result of the revocation of Appellant's permit. (Tr. 704).

116. Mr. Weaver is a direct competitor of Appellant in the waste hauling business within the borough of Punxsutawney. (Tr. 695, 708; B.Ex. 2, ¶9).

117. No testimony was offered concerning the rates Appellant charged his non-residential, i.e. commercial, customers for hauling of their waste.

118. Appellant charges three or four dollars for a small truckload of waste to be deposited at his landfill. (Tr. 844).

119. Appellant charges more than three or four dollars for a large truckload of waste to be deposited at his landfill. (Tr. 844).

120. Airco Inc. is a manufacturing facility located within the Borough of Punxsutawney. (Tr. 507).

121. Prior to 1981 Airco deposited its waste at Appellant's landfill. In 1981 DER notified Airco that its waste no longer could be disposed of at Appellant's landfill. (Tr. 509).

122. Airco has incurred costs amounting to approximately $1696 per month to dispose of thirty months worth of accumulated waste. This cost includes Airco's own equipment and personnel expenses. (Tr. 509-511).

123. No testimony was offered to demonstrate what portion of the aforementioned costs incurred by Airco were solely for disposal of the waste, exclusive of their own equipment and personnel expenses.

124. Prior to 1981, Airco paid Appellant $250 per month for disposal of its wastes at Appellant's landfill. This cost was exclusive of transportation, equipment and personnel expenses. (Tr. 510-512).

125. Appellant never had DER permission to dispose of the type of waste generated by Airco. (B.Ex. 2 ¶7,8).

126. The manager of the Borough of Punxsutawney testified that the costs of waste removal for the borough itself (as a municipal entity, and not its residents themselves) have tripled as a result of the revocation of Appellant's permit. (Tr. 530).

127. Prior to the permit revocation Appellant charged the Borough of Punxsutawney nothing to dispose of its waste. (Tr. 539).

128. Mr. Ronald Strano, a supervisor of Young Township within which a portion of Appellant's landfill lies, projected that his township would incur increased costs as a result of the permit revocation, in that the township would be forced to clean up after residents who had illegally disposed of their waste. (Tr. 867-868).

129. At the time the permit revocation decision was made, Mr. Russell Crawford, DER's Regional Solid Waste Manager, had available to him data indicating that refuse

disposal rates in the Punxsutawney area were approximately three times the rate charged by Wazelle. (Tr. 689).

130. On several occasions, DER employees had discussed with Mr. David Weaver the rates he charged for his waste disposal services, and had been made aware of the rates Mr. Weaver charged. (Tr. 706-707).

131. Appellant's landfill is located five miles from Punxsutawney. (Bd.Ex. No. 2, ¶16).

132. It is not unusual for communities to have to transport their municipal waste 14 to 29 miles to a landfill for disposal. (Tr. 422).

133. The other landfills available in the Punxsutawney area are located 14 and 29 miles from Punxsutawney. (B.Ex. 2, ¶14,15).

DISCUSSION

A. Standard of Review

On March 18, 1983, DER revoked Appellant's Solid Waste Permit No. 100412. The decision to revoke this permit is the matter at issue herein. The burden of proof in this proceeding rests upon DER pursuant to 25 Pa.Code §21.101(b)(2).

The DER revocation was based upon the following determination:

> The Department has determined that you have failed and continue to fail to comply with the Solid Waste Management Act, the rules and regulations, two orders of the Department, and a permit issued by the Department, and that you have shown a lack of ability or intention to comply with the Solid Waste Management Act, rules and regulations, and permits and orders of the Department as indicated by past and continuing violations. Further, the Department has determined that Wazelle Landfill is and has been operated in violation of the Solid Waste Management Act and the rules and regulations, is creating a public nuisance, and is being operated in violation of the terms and conditions of Solid Waste Permit No. 100412.

The first sentence of the quoted paragraph parallels the language of section 503(c) of the Solid Waste Management Act ("Act") 35 P.S. §6018.503(c), which provides that DER may revoke a permit if it finds that the permittee has failed or continues to fail to comply with, inter alia, any provision of the Act, any rule, regulation or order of DER or any condition of a permit issued by DER. In addition, a permit may be revoked where a permittee has demonstrated a lack of ability or intention to comply with the Act or DER rules, regulations, orders or permit conditions. Such a finding must be based upon past or continuing violations.

The second sentence of the quoted paragraph mirrors the language of section 503(e) of the Act, 35 P.S. §6018.503(e), which provides in relevant part that a permit "shall be revocable or subject to modification or suspension" if DER finds that the permitted facility 1) is, or has been operated in violation of the Act, or the rules and regulations adopted pursuant to the Act, or 2) is creating a public nuisance or 3) is being operated in violation of any of the terms or conditions of the permit. (Other circumstances are enumerated in section 503(e), but are not relevant here).

DER argues that section 503(e) imposes a mandatory duty upon DER to act if it finds that one of those circumstances enumerated in subsection (e) exists, but that the provision is discretionary to the extent that it permits DER to choose the appropriate method of acting, i.e., revocation, suspension or modification. It is clear that the choice of the action to be taken is discretionary; the provision sets forth alternatives among which DER must choose. We find the contention that §503(e) is mandatory to be more difficult to resolve. If 503(e) requires that DER take some action with regard to a permit where it finds that certain conditions exist, there is some question as to the purpose underlying

503(c), since it clearly allows DER the discretion to determine whether action should be taken where it finds that those same conditions exist. However, since we have concluded (for reasons explained infra) that DER's decision to revoke Appellant's permit was well within its discretion, we need not decide whether DER was required to take some action regarding the permit.

Our discussion, infra, focuses upon the standards set forth in section 503(c). Since this section imposes a discretionary duty upon DER, our primary scope of review is to determine whether the DER action constitutes a manifest abuse of its discretion. Warren Sand and Gravel v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975).

B. Appellant's Ability or Intention to Comply with the Law

We turn now to the factual issues of this appeal. DER revoked Appellant's permit after having concluded that Appellant had failed and continued to fail to comply with the Solid Waste Management Act, with DER rules, regulations, orders and with his permit. DER also found that Appellant had demonstrated a lack of ability or intention to comply with the aforementioned legal requirements. We have little difficulty finding that Appellant's conduct substantiates this conclusion.

During the period from 1972 through 1983, Appellant was cited for well over five hundred violations of applicable statutes, rules and regulations at his landfill. The DER inspectors who noted the existence of these violations testified to the accuracy of this violation history. The sheer magnitude of this history prevents us from realistically discussing the basis for each factual finding set forth above. With very few exceptions, Appellant made no effort to refute the existence of the violations, choosing instead to direct the Board's attention to the alleged lack of "seriousness" involved. In those few circum-

where Appellant did attempt to rebut the DER findings themselves, the evidence offered was largely unpersuasive.

For example, Appellant attempted to argue that the fact that surface mining had been conducted in the vicinity of Appellant's landfill requires the conclusion that Appellant would be unable to effectively monitor the groundwater. The testimony concerning this contention was purely speculative, however; no evidence was introduced which would tend to show a causal connection between the mining activities and inability to monitor. Appellant stipulated that groundwater exists under the landfill.

Appellant also attempted to show that the DER inspectors were inaccurate in their characterization of the violations existing at Appellant's landfill. Appellant was able to elicit from Inspector Gilson the admission that he could not substantiate with precise dates his statement that, as of May 5, 1980, waste had not been covered in two weeks. Even assuming that such an admission vitiates the existence of that one violation, it nevertheless remains the case that Appellant was cited for dozens of violations of the DER regulations requiring the application of daily cover, 25 Pa.Code §75.26(1). Appellant's attempts at rebuttal barely scratch the surface of this voluminous violation history.

We conclude that on the record before us the bulk of the cited violations were established. This conclusion has been reached even without reference to the many findings of violation which became final by process of law and no longer are at issue in this appeal, e.g., the findings in DER's unappealed-from order of December 3, 1980 (see Findings of Fact 16 and 18).

A large portion of Appellant's rebuttal testimony was devoted to the argument that many of the violations DER alleged--and which we now regard as established--were not "serious". In support of this thesis Appellant presented

the testimony of his engineer, Mr. Van Plocus. Mr. Van Plocus is a professional engineer with limited experience concerning landfills. At the time of the hearings in this matter, Mr. Van Plocus' company was concerned with only two landfills, one of which was Appellant's. No evidence was offered to show that Mr. Van Plocus has had substantial training in biological or health sciences. His conclusions regarding "seriousness" were not supported in any way. Consequently, we consider these statements to be entitled to very little weight.

Mr. Van Plocus apparently believes that only those violations likely to cause pollution of the waters of the Commonwealth are "serious". There is no support for this on this record and, indeed, the law is to the contrary. All violations of duly promulgated regulations are "serious". DER regulations are instituted for the purpose of protecting the public health, safety and welfare. They are a presumptively valid exercise of the Commonwealth's police power. DER v. Locust Point Quarries, 483 Pa. 350, 396 A.2d 1205 (1979). As discussed more fully infra, DER is required to enforce the regulations literally. Moreover, we are not inclined to weigh the relative seriousness of the violations established here. In light of the enormous number of violations it would be pointless to engage ourselves in such a task; in any event the law does not require us to do so.

Furthermore, Mr. Van Plocus himself was willing to admit that some types of violations would be "serious", e.g., a failure to adequately monitor groundwater. The record here establishes that Appellant's groundwater monitoring plan was seriously deficient in several respects. 25 Pa.Code §75.24(b)(4)(i) requires that a groundwater monitoring plan include a sufficient number of points to determine groundwater conditions. This requires at least one up-gradient and one down-gradient well. The implicit, if not explicit, mandate of §75.24(b)(4)(i) is that the monitoring points be located in a manner which permits effective determination of the

groundwater conditions. The up-gradient well at Appellant's landfill could not be located, not even with the assistance of Mr. Van Plocus' engineering firm, which was in charge of providing quarterly reports to DER regarding the groundwater at the site. The monitoring plan called for two down-gradient wells. One of these was consistently dry; the other was sporadically dry. As a consequence of these deficiencies, the quarterly monitoring reports required by §75.24(b)(4)(i) were not submitted with any regularity. They frequently were not submitted at all, and when they were, they were often incomplete. Thus it is clear that Appellant was in violation of §75.24(b)(4)(i). Appellant did not contest the DER contention that this violation persisted at least until the date of the hearings in this matter, i.e., many months after DER first notified him of the existence of deficiencies in his monitoring plan. Appellant never requested DER permission to amend the plan.

Mr. Van Plocus also testified that he would consider failure to adequately manage surface water as well as failure to control erosion to be "serious" violations. During the period from 1973 through 1984, Appellant was cited for 25 violations of surface water monitoring requirements and 9 violations of erosion control requirements. Suffice it to say that even by the standards Appellant would have us apply, his conduct indicates a continued failure or a lack of ability or intention to comply with the requirements of the Solid Waste Management Act, the associated regulations and the terms and conditions of his permit.

Further support for this conclusion is provided by the fact that Appellant accepted residual wastes, a type of waste which he was not permitted to dispose of under the terms of his permit. On repeated occasions Appellant allowed the disposal at his site of wet and dry carbon sludge. His permit never authorized this disposal, although numerous applications for amendment of his

permit--so-called Modules One--were submitted and rejected by DER as incomplete. Acceptance of wastes not authorized by a permit is a violation of the permit conditions themselves, of course, and thus of section 610 of the Solid Waste Management Act, 35 P.S. §6018.610. Moreover, we see no basis for characterizing such a violation as "not serious".

Appellant was apparently unaware of the confines of the area covered by his permit for two years after it was issued to him. A survey of the borders of Appellant's permitted area revealed that waste had been deposited several hundred feet beyond the border, again in violation of the terms of the permit. The record also supports the finding that Appellant continued to operate his landfill after revocation of his Solid Waste Permit, in direct contravention of the DER letter revoking the same. DER was required to seek a Commonwealth Court injunction in order to obtain Appellant's compliance with the requirements of the law.

Without question, the most convincing evidence concerning Appellant's lack of ability or intention to comply with the Act and his ongoing violations thereof was the testimony concerning the existence of an unpermitted waste disposal area on his property, known as the Wazelle Dump. No DER permit ever has been issued for this site. The dump apparently had been in existence for several years before DER detected its existence; it is difficult to avoid the conclusion that this dump was maintained by Appellant in knowing violation of the law. Inspector Wozniak testified that upon discovering the dump he asked Appellant why he would have such a dump when he knew that there were legal problems with maintaining the same. Appellant's response, as related by Inspector Wozniak, was that he knew that what he was doing was wrong. Appellant apparently did not give an explanation. No attempt was made to refute Inspector Wozniak's testimony on

this point. In addition, Appellant continued to allow the dumping of wastes at the site after it had been discovered and DER had issued a notice of violation concerning the same. At the hearing, Appellant testified that people were leaving waste at the dump without his permission. When asked whether he had taken steps to limit access to the dump site [as required by 25 Pa.Code §75.24(m)(3) and (4)], Appellant responded that he would not do so (Finding of Fact 64). In addition, Appellant admitted that he did not understand many of the technical and legal aspects of running a landfill. Given these admissions, it is absolutely indisputable that Appellant either does not intend to comply or is unable to comply with the Solid Waste Management Act and the associated DER regulations. He has been in virtually constant violation of the law since DER first began inspecting his facility. Thus, DER was fully justified in finding that the requirements necessary for taking action under section 503(c) of the Act had been met.

Appellant has raised the argument that DER did not provide him with adequate notice of the consequences of his violations and that, therefore, it abused its discretion. We have ruled previously that Appellant received adequate notice of the consequences of his continued failure to comply with the law and that therefore evidence concerning oral communications between the DER inspectors and Appellant would not be considered. Armond Wazelle v. DER, EHB Docket No. 83-063-G (Opinion and Order dated August 21, 1984). Nevertheless, Appellant now argues that there was a "breakdown in communications" between DER and himself and that, as a consequence, he was unable to ascertain what was expected of him in order to bring the site into compliance. He attributes this "breakdown" in communications to the existence of a personality conflict between Inspector Wozniak and himself. We are not certain that the record substantiates this allegation and, in any event, it is irrelevant to our decision.

More particularly, Appellant's argument that he received inadequate notice lacks merit. He has not claimed that the DER inspectors failed to provide him with copies of the inspection reports which they had completed. Thus, we consider there to be no question that Appellant received notice of the fact of the violations. In addition, between 1975 and 1983 DER issued three orders to Appellant citing numerous violations of the Act and the associated regulations. There is certainly nothing in the law which imposes upon DER an obligation to educate a landfill operator in the basics of complying with legal requirements. It is DER's responsibility to enforce the law; it is not required to act as a consultant. Appellant employed an engineer to assist him in complying with the DER requirements and testified that he met with the engineer on nearly a daily basis. If Appellant lacked an understanding of what was required of him, it cannot be said to be the fault of DER. After more than twenty years in the landfill business, one would reasonably expect that an operator would understand that certain basic requirements must be met. The record here establishes that Appellant consistently failed to meet even the most routine requirements of landfill operation. Moreover, we note that the operating conditions of Appellant's permit for the most part are written in plain English. For example, under paragraph f of the section entitled "Operating Procedures", it is stated that "a uniform six (6) inch compacted layer of cover material shall be placed on all exposed solid waste at the end of each working day." During the period from 1973 through 1983 Appellant was cited for fifty-three violations of this requirement. At the hearing Appellant admitted that he knew how to cover the waste. Suffice it to say that, if Appellant did not understand what else was required, it was his duty to inquire. Appellant's failure to comply with the law can be attributed only to his own inability or inaction.

C. DER's Choice of Enforcement Action

Section 503(c) of the Solid Waste Management Act allows DER to elect among alternative enforcement actions when it finds that the conditions set forth in that section of the Act are present. As we have held, Appellant clearly has failed to comply with the Act and the associated regulations and permit conditions and has demonstrated a lack of ability or intention to comply with the same. Thus, DER was clearly entitled to take some form of enforcement action. The issue now becomes whether the type of action it chose, i.e. permit revocation, was a proper exercise of its discretion.

The record here demonstrates that Appellant has a very limited rehabilitative potential. Over the years DER has taken numerous enforcement actions intending to induce Appellant to operate his landfill in conformity with the standards set forth in the Solid Waste Management Act, the associated regulations, and his permit conditions. With very few exceptions, these enforcement actions have produced no measurable results. Where they have, the results were not lasting. Conditions at the landfill have returned to their previous state of violation within a matter of weeks in most cases. Despite the issuance of the DER letter appealed herein revoking Appellant's permit, Appellant continued to operate the landfill for at least one year after the letter was issued. It was not until Commonwealth Court issued an injunction that Appellant ceased his operations. Appellant continued to operate the unpermitted dump for many months after issuance of a DER order directing its closure. It is not unreasonable to conclude that Appellant has shown very little respect for DER's enforcement authority.

Since 1975, DER has issued three orders to Appellant directing him to take certain specified actions to bring his operations into compliance with legal requirements. Appellant has never fully complied with any of these three

orders, despite warnings contained therein that failure to do so could result in substantial sanctions. Immediately after the issuance of the first of these orders, on April 23, 1975, some limited improvement was shown at the landfill. Several violations remained uncorrected, however, including the requirement that final cover be placed and the areas revegetated. Conditions at the site actually deteriorated following the issuance of the second order, in December of 1980. Inspection reports completed shortly after the issuance of the order showed a greater number of existing violations than those completed prior to the order's issuance. The third order concerned the operation of the unpermitted dump site. Appellant was still permitting the deposition of waste at that site as of the final date of hearings in this matter, twenty-two months following issuance of that order and in direct contravention of its terms.

Between August of 1977 and May of 1981, DER filed at least eight summary violation notices against Appellant pursuant to section 606(a) of the Solid Waste Management Act, 35 P.S. §6018.606(a). Appellant entered pleas of guilty and was convicted of each of these violations in summary proceedings before a district magistrate. At the time that evidence of these summary convictions was introduced at the hearing, counsel for Appellant objected to their use for the purposes of establishing the fact of the underlying violations. This objection was not pursued in Appellant's post-hearing brief. Our research concerning the use of summary criminal convictions in subsequent civil proceedings reveals no bar to our use of the same here for the purpose of establishing the fact of the violations. Since a guilty plea was entered, no factual issues were actually itigated and thus, principles of res judicata cannot apply; however, Appellant is estopped from contesting the fact of the violations. Restatement (2d) of Judgments §85. Given the mandate of section 503(c) that DER consider "past or continuing violations," it is clear that DER--and consequently, this Board--

is entitled to consider violations established under section 606(a) of the Act in assessing actions taken pursuant to section 503(c), such as that at issue here.

In August of 1977 and February of 1979 Appellant pleaded guilty to three summary violations. Inspection reports filed shortly after the issuance of the violations showed no improvement, although those filed approximately one month later did indicate that Appellant had remedied the cited violations. Nevertheless, several other violations remained present on the site.

In 1978, shortly before issuance of the Solid Waste Permit at issue here, conditions at Appellant's landfill were very good. Two consecutive inspections revealed no violations. This period (in July and August of 1978) represents the only period of time since DER began inspecting the landfill in the early 1970's, that no violations were noted. During the course of the following year, however, Appellant's landfill returned to its previous state, with multiple violations noted on each inspection.

In 1980 Appellant pleaded guilty to a violation of the requirement that daily cover be placed on the site. Despite this conviction, inspections throughout 1980 revealed that daily cover was not being placed on the waste at the landfill.

In December of 1980, DER issued one of the three aforementioned orders to Appellant. During the following year, Appellant pleaded guilty to five summary violations of the Act, each citing the failure to comply with the December, 1980 order and specifying particulars in which compliance was deficient. No significant improvement in conditions on the site (including those conditions cited as violations in the summary proceedings) resulted from these criminal convictions. Appellant continued to fail to apply daily and intermediate cover as required by the December 1980 order. Many other violations were noted during 1981. The criminal convictions apparently did nothing to motivate Appellant to

bring his landfill into compliance with the law.

Appellant argues that DER should have chosen a less stringent method of enforcing the provisions of the Solid Waste Management Act. Of course, DER must take a course of action which is reasonable and appropriate under the circumstances. Given the foregoing history of violations and Appellant's persistent failure to respond to DER's enforcement actions, we have no reason to believe that any action short of permit revocation would hold any substantial possibility of assuring compliance with the Act. DER's duty is to enforce the Act; if lesser enforcement actions are not likely to assure that this enforcement is effective, there is nothing to be gained by pursuing them. This is not a case such as that presented in DER v. Mill Service, 21 Pa.Cmwlth 642, 347 A.2d 503 (1975), where DER revoked a permit on the basis of a single (though very serious) violation. Appellant's violation history is enormous. His disregard for DER authority is manifest. We cannot conclude that DER abused its discretion in electing the enforcement action it did, i.e. permit revocation. Under the circumstances which have been recounted, no sanction less severe than permit revocation seems reasonably likely to assure protection of the public health, safety and welfare consistent with the requirements of the Solid Waste Management Act.

D. DER's Duty to Consider the Economic Effects of its Actions

The Intervenor, the Borough of Punxsutawney, has challenged DER's revocation of Appellant's permit on the basis that DER failed to consider the economic effect of the revocation upon the Borough. DER has argued that the Borough does not have standing to assert the interests of its individual citizens. In support of this argument, DER cites two Commonwealth Court decisions which, we agree, hold that a borough does not have standing to assert what is actually an individual property owner's claim. Commonwealth, DER v. Borough of Carlisle,

16 Pa.Cmwlth. 341, 330 A.2d 293 (1974); Ramey Borough v. Commonwealth, DER, 15 Pa.Cmwlth. 601, 327 A.2d 647 (1974). We do not construe the arguments offered by the intervenor here to be equivalent to the assertion of an individual property owner's claim. The Borough is asserting the interests of the Borough as a whole, arguing that DER's permit revocation will adversely affect the health, safety and welfare of the borough's citizenry, something which the Borough clearly is entitled to do. See Franklin Township v. Commonwealth, DER, 499 Pa. 162, 452 A.2d 718 (1975).[4] In the present context, however, the Borough has limited its argument to the economic effects upon the Borough of the DER permit revocation, as stated in our ruling of August 21, 1984 entered at this docket number.

In our earlier ruling we discussed two Commonwealth Court decisions which addressed the issue of when DER must consider the economic consequences of its actions. In Einsig v. Pennsylvania Mines Corporation, 69 Pa.Cmwlth. 558, 452 A.2d 558 (1982) and East Pennsboro Township v. Commonwealth, DER, 18 Pa.Cmwlth. 58, 334 A.2d 798, (1975) the court held that where DER takes a discretionary action it must consider the economic impact of that action.

As we have already ruled, DER's revocation of Appellant's permit was a discretionary action taken under section 503 of the Solid Waste Management Act. Thus, DER was required to give some consideration to the economic effect of its action. The type of consideration which must be afforded, however, is fairly limited.

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4. This adjudication, of course, does not rule upon whether the borough would have had standing to bring this appeal in its own right under the holding of Franklin Township. In such a case the borough would have to meet the three part test for standing of William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 364 A.2d 269 (1975). Here the Borough is participating merely as an intervenor; therefore, it need not demonstrate interests sufficient to confer standing under William Penn. 25 Pa.Code §21.62(c); Campbell v. Commonwealth, DER, 1980 EHB 338.

Einsig and East Pennsboro are consistent with earlier Commonwealth Court decisions addressing this issue. See, e.g., Rochez v. DER, 18 Pa.Cmwlth. 137, 334 A.2d 790 (1975); DER v. Borough of Carlisle, 16 Pa.Cmwlth. 341, 330 A.2d 293 (1974); Bortz v. DER, 7 Pa.Cmwlth. 362, 299 A.2d 670 (1973); Bortz v. Air Pollution Commission, 2 Pa.Cmwlth. 441, 279 A.2d 388 (1971). These decisions all note that DER is required to enforce the law as it stands; it cannot forego enforcement action because of economic consequences. Its discretionary manner of enforcing the law, however, is something which legitimately may be affected by economic considerations. Thus, in the Bortz cases, supra, the issue was whether a coke oven battery should be permitted an additional three years to phase out its operation, since it admittedly could not bring the ovens into compliance with emissions standards given the state of modern technology. The court held that in determining the schedule for compliance, DER should give consideration to the economic effect of the enforcement action upon the regulated industry. The fact that the imposition of the emissions standards would effectively force the company out of business however, was not considered sufficient reason to permit DER to ignore the regulation. The court expressly stated that it was not holding that DER had to assign any weight to the economic considerations.

The Pennsylvania Supreme Court decision in Commonwealth v. Pennsylvania Power Company, 490 Pa. 399, 416 A.2d 995 (1980) permitting DER to impose "technology forcing" penalties for failure to comply with regulatory requirements unattainable by modern technology provides further support for the idea that DER is required to enforce the law as it stands, even where very harsh economic consequences result.

In the present context, the issue of economic consequences has been raised by the Intervenor Borough, rather than Appellant. Consideration of economic

effects upon the surrounding community is within the scope of those interests which Commonwealth Court has held DER should consider. Rochez, supra. It is clear, however, that DER is not required to make a "detailed economic impact study" of such effects. East Pennsboro, 334 A.2d at 803. In our earlier ruling upon this issue (Opinion and Order dated August 21, 1984) we stated that DER must consider those economic effects which are a direct and reasonably foreseeable consequence of the action to be taken.

Intervenor argues that DER should have contacted the Borough and the industries, businesses and residents within the Borough, to determine the possible economic detriment which they would suffer as a result of the action taken. In addition, it argues that DER should have considered "census, employment and other data" concerning the ability of the Borough to withstand the effects of the closure of Appellant's landfill. Such detailed data are precisely the type that we do not believe DER should be required to consider; to hold otherwise essentially would require DER to make a detailed economic impact study. Moreover, we do not see--and we do not believe that the Borough has shown--how the data the Borough wants DER to collect would be used to determine "direct and reasonably foreseeable" consequences of the landfill closure.

It is DER's primary responsibility, in the present context, to enforce the provisions of the Solid Waste Management Act, one of the major purposes of which is to "protect the public health, safety and welfare from the long and short term dangers of transportation, processing, treatment, storage, and disposal of all wastes." 35 P.S. §6018.112(4). DER cannot forego enforcement action taken in conformity with this statutory mandate because of the economic consequences which would ensue. It cannot ignore violations of the law because they will be expensive to remedy. Rochez, Bortz, supra. Intervenor argues that DER should

have chosen another form of enforcement action, something not as stringent as permit revocation, because of the detrimental effects which, it alleges, the Borough will suffer as a result of the challenged action.

We agree that economic factors are properly taken into consideration in determining the course of the enforcement action taken (where the determination is within DER's discretion). Adverse economic effects may result from DER actions; compliance with the law is often more expensive than unregulated conduct. Furthermore, DER must choose a course of action which is reasonable and appropriate under the circumstances. Mill Service, supra. In most cases, therefore, where another method of enforcement would produce the same environmental result, the more economically attractive of the alternatives probably should be adopted. In the present case, however, it is clear that alternative measures were not likely to assure Appellant's compliance with the statutory and regulatory requirements. Thus, economic considerations need be afforded little weight in this appeal, unless there is a showing that the economic consequences of closing the landfill are so very severe that DER's unwillingness to risk the unlikelihood of achieving compliance with environmental regulations by enforcement actions short of closure was an abuse of DER's discretion.

Although the Intervenor contends otherwise, the evidence on the adverse economic consequences of DER's closure action falls far short of the showing described immediately supra. In the first place, revocation of Appellant's permit to receive waste at the landfill does not prevent him from continuing to pick up waste within the Borough. Even if the Appellant were to refuse to pick up wastes now that his landfill is closed (as he threatened to do), the record shows that--as might be expected--competitors of Appellant in the waste pickup business would be glad to serve any customers Appellant might drop, at approximately the rate

Appellant now charges; after all, this is a competitive business. In particular, the testimony of Appellant's present competitor Mr. David Weaver establishes that he and other haulers in the area charge from six to eight dollars per month per household to pick up waste; the Appellant now charges six dollars per month per household. Furthermore, Mr. Weaver testifies that he alone--not to mention other haulers--was willing and able to fill up whatever gap would occur in the hauling business if Appellant discontinued his pickups. Though Mr. Weaver admittedly is a competitor of Appellant, his testimony was unrebutted, and makes sense to us.

Consequently the increased costs to the Borough and to its residents for waste disposal will result primarily from the increased costs a hauler (such as Mr. Weaver) will incur in hauling the waste to a more distant disposal site (than the Wazelle disposal site). Although there was much testimony on the net effect of such increased hauling charges, it was largely inconclusive and often purely speculative. Appellant's facility is located approximately five miles from the Borough of Punxsutawney. However, it is not uncommon for municipal waste to be transported 14 to 29 miles to a landfill for disposal, which is the distance from Punxsutawney to the other landfills in the area. This fact is not inconsistent with the statement of Russell Crawford, DER's Regional Solid Waste Manager, that the disposal costs at alternate sites might increase by a factor of three. While we do not dismiss such an increase as inconsequential, we note that there was no showing that this possible increase would result in rates significantly higher than those other communities are required to bear. In any event these possible economic consequences are not severe enough to imply that DER should have continued to risk the environmentally adverse consequences of Appellant's likely failure to comply with applicable statutes and regulations.

Intervenor's final argument on this issue is that DER did not have available to it, at the time it made the revocation decision, information sufficient to enable it to determine whether increased hauling and disposal costs would result from the permit revocation. This contention is refuted by the record. Mr. David Weaver stated that he had discussed his rates with DER inspectors on several occasions in the past. Mr. Russell Crawford testified that at the time the revocation decision was made, he was aware of the fact that disposal rates at landfills other than Appellant's were approximately three times higher than those charged by Appellant. Thus, DER did have available data to determine the possible increase in hauling and disposal costs resulting from the revocation before it made the decision to take such action. In any event, our hearing is de novo. At the time of our hearing, on the record (e.g., Mr. Crawford's testimony) DER had considered economic costs; the foregoing discussion has explained our conclusion that DER's decision to close the landfill despite increased economic costs to the Borough was not an abuse of discretion.

CONCLUSION

Appellant clearly has demonstrated a continued failure to comply with the legal requirements relevant to the operation of his solid waste disposal facility. In addition, he has demonstrated a lack of ability or intention to comply with those requirements. Therefore, DER was justified in taking some form of enforcement action under section 503 of the Solid Waste Management Act. There was no indication that Appellant would bring his site into compliance with the law if a less stringent enforcement action, such as permit suspension, had been elected. Appellant has shown virtually no inclination to remedy any of the

multitude of violations established in response to previous DER enforcement actions. Indeed, conditions at the site actually deteriorated in the weeks and months following some of the more recent enforcement actions. Therefore, DER's decision to revoke Appellant's permit was not an abuse of discretion for having been an overly severe method of assuring compliance with the requirements of the law. In reaching this decision, DER was required to take economic considerations into account when deciding what type of enforcement action should be taken, though not in deciding whether enforcement action should be taken. Given the fact, however, that a less stringent method of enforcement was not likely to assure compliance, and under the facts about the adverse economic effects on the Borough and its residents which were put on the record, DER did not abuse its discretion by failing to forego permit revocation in favor of another type of action.

CONCLUSIONS OF LAW

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

2. DER bears the burden of proof in a permit revocation appeal. 25 Pa.Code 21.101(b)(2).

3. Where the DER action being reviewed was taken pursuant to an exercise of discretionary authority, this Board must determine whether the action constitutes an abuse of discretion.

4. The Board is entitled to substitute its discretion for that of DER where and only where DER has abused its own.

5. The Board must base its decision upon the record before it.

6. DER's decisions are entitled to a presumption of validity.

7. Section 503(c) of the Solid Waste Management Act, 35 P.S. §6018.503(c), grants DER discretionary authority.

8. DER revoked Appellant's permit pursuant to section 503(c) and section 503(e) of the Solid Waste Management Act, 35 P.S. §§6018.503(c) and (e).

9. Evidence pertaining to alleged oral communications between Appellant and DER inspectors has been deemed irrelevant for the purposes of this appeal because Appellant received notice of the consequences of his violations irrespective of the alleged difficulties in said oral communications.

10. Findings contained in previously issued, unappealed DER orders directed to Appellant are final and hence, are not subject to challenge in this proceeding. Findings of violations set forth in such unappealed orders are considered established for the purposes of this appeal.

11. DER regulations represent a presumptively valid exercise of the Commonwealth's police power.

12. Appellant has repeatedly violated the following legal provisions during the course of his operations at his landfill and at the unpermitted dump site:

a) 35 P.S. §6018.610(1), prohibiting the dumping or depositing of any solid waste onto the surface of the ground unless a permit for such activities exists.

b) 35 P.S. §6018.610(4), prohibiting the disposal of solid waste contrary to the rules and regulations adopted under the Solid Waste Management Act, or orders of DER, or any term or condition of a permit.

c) 25 Pa.Code §75.21(m)(3) and (4), requiring access to the site be restricted.

d) 25 Pa.Code §75.21(r), requiring the maintenance of daily operational records.

e) 25 Pa.Code §75.21(n), prohibiting the unloading of wastes at areas other than the working face.

f) 25 Pa.Code §75.26(i), requiring that the working face be confined to an area no greater than can easily be compacted and covered daily.

g) 25 Pa.Code §75.26(j) and (k), requiring control of blowing litter.

h) 25 Pa.Code §75.26(b), requiring the spreading and compacting of all solid waste in shallow layers not exceeding a depth of two feet.

i) 25 Pa.Code §75.26(l), requiring the application of a uniform six-inch compacted layer of cover material to all exposed solid waste at the end of each working day.

j) 25 Pa.Code §75.26(n), requiring the application of a uniform one-foot layer of compacted cover material to completed lifts.

k) 25 Pa.Code §75.24(c)(2)(xxi) and (xxii), requiring the application of a uniform two-foot layer of compacted cover material to the surface of final lifts within two weeks of placement of waste in the final lift.

l) 25 Pa.Code §75.26(g) and (h), requiring dust control measures to be implemented.

m) 25 Pa.Code §75.21(o) requiring control of salvaging and scavenging at the landfill.

n) 25 Pa.Code §75.24(c)(2), requiring management of surface water.

o) 25 Pa.Code §75.26(p), requiring revegetation of the site.

p) 25 Pa.Code §75.21(p), requiring the control of vectors.

q) 35 P.S. §6018.505, requiring the posting of a bond in connection with the operation of a landfill.

r) 25 Pa.Code §75.24(b)(4)(i), requiring that exploratory borings be drilled ten feet into the groundwater, and requiring at least one up-gradient and one down-gradient monitoring point and requiring the submission of quarterly reports.

s) 25 Pa.Code §75.24(c)(2)(ii), requiring that final grading produce slopes of not less than 1.0% and not greater than 15.0%.

t) 25 Pa.Code §75.24(c)(1)(v), requiring erosion control plans.

u) 25 Pa.Code §75.21(s), requiring the maintenance of a 25-foot zone adjacent to perimeter property lines.

v) 25 Pa.Code §75.21(d) and (g) requiring the operation of a solid waste facility in conformity with the terms of Chapter 75, i.e., in conformity with the terms and conditions of the permit.

13. Appellant failed and continued to fail to comply with the provisions of the Solid Waste Management Act, 35 P.S. §6018.101 et seq., the rules and regulations of DER, DER orders and the terms and conditions of his permit during the period from the early 1970's through the dates of the hearings in this appeal.

14. Appellant has shown a lack of ability or intention to comply with the Solid Waste Management Act, the rules and regulations of DER, DER orders, and the terms and conditions of his permit, as evidenced by his violation history.

15. DER did not abuse its discretion in taking action pursuant to section 503(c) of the Solid Waste Management Act, 35 P.S. §6018.101 et seq.

16. DER is required to enforce the regulations promulgated under the Solid Waste Management Act.

17. DER is not required to explain to landfill operators how they can bring their sites into compliance when violations exist.

18. Where DER exercises its discretion in determining what type of enforcement action is to be taken, it must elect a type of action which is reasonable and appropriate under the circumstances.

19. If less stringent enforcement actions are not likely to produce compliance with the requirements of the law, DER is not obligated to elect them rather than a more severe alternative.

20. DER did not abuse its discretion in revoking Appellant's Solid Waste Permit No. 100412.

21. Appellant is estopped from contesting the fact of his summary violations of the Solid Waste Management Act and the regulations promulgated thereunder in that he pleaded guilty to said violations before a district magistrate.

22. Pursuant to 35 P.S. §6018.503, DER is entitled to consider the fact of Appellant's conviction of summary violations of the Act as part of his history of past or continuing violations.

23. Where DER takes an action which requires the exercise of discretion, it is required to consider the direct and reasonably foreseeable economic effects of its actions.

24. DER cannot forego enforcement action because of possibly adverse economic consequences.

25. Economic consequences are properly considered in the decision making process with regard to the type of enforcement action to be taken.

26. In the present case, DER properly gave consideration to the economic effects of its action upon the Borough of Punxsutawney.

27. DER is not required to make a detailed economic impact study in determining the effects of its action upon the affected community.

28. DER's primary responsibility in the present context is to enforce the provisions of the Solid Waste Management Act.

29. Where another method of enforcement would produce the same result, in most cases DER should elect the more economical of the alternative forms of enforcement.

30. In the present case, alternative enforcement methods would not produce the required result, i.e., compliance with the requirements of the Solid Waste Management Act, the DER rules and regulations, and the terms and conditions of Appellant's permit. Therefore, DER need give little weight to the economic consequences of its actions.

O R D E R

AND NOW, this 30th day of July , 1985, it is ordered that the appeal captioned above is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: July 30, 1985

cc: Bureau of Litigation

For the Commonwealth:
Patti J. Saunders, Esquire, Pittsburgh

For Appellant:
R. Edward Ferraro, Esquire, Punxsutawney

For Intervenor (Borough of Punxsutawney):
A. Ted Hudock, Esquire, Punxsutawney

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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PRESTON HECKLER

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Appellee

Docket No. 81-036-M

(issued August 14, 1985)

ADJUDICATION

By: Anthony J. Mazullo, Jr., Member

Syllabus

Appellant Preston Heckler's appeal of the Commonwealth of Pennsylvania, Department of Environmental Resources' (DER) March 4, 1981 permit denial and order, which denied appellant's solid waste permit application for the land application of sewage sludge for agricultural utilization and which required appellant to cease such activities and to undertake various remedial measures at a site located in Montgomery Township, Montgomery County, Pennsylvania, is dismissed; in addition, the limited supersedeas granted on September 16, 1981, permitting the agricultural utilization of sewage sludge on two fields at the site, is terminated. Appellant is also ordered to comply with the remedial portions of DER's appealed-from order within sixty (60) days.

Appellant failed to meet the burden of proving that DER's permit denial constituted an abuse of discretion or amounted to arbitrary or capricious action. 25 Pa. Code §21.101(c)(1). DER's soil sampling and chemical analysis of those samples (by atomic absorption) established that the concentrations of heavy metals in the soils at the site grossly exceeded the lifetime loading limits set forth in DER's interim guidelines and therefore constituted an environmental hazard and public health danger (of groundwater and/or plant contamination) which DER had the duty to prevent. Article I, Section 27 of the Pennsylvania Constitution; Solid Waste Management Act (SWMA), 35 P.S. §6018.101 et seq. Due to the reliability of DER's sampling methodology and chemical analysis, DER was not required to conduct extraction procedure (EP) toxicity tests, crop tissue analyses, cation exchange capacity tests, lysimeter monitoring or groundwater testing.

Although DER based its permit denial and order upon the fact that heavy metal concentrations in the soils at the site exceeded the lifetime loading limits as set forth in two separate DER interim guidelines--the "Interim Guidelines for Sewage Sludge Use for Land Reclamation" ("Land Reclamation") and the "Interim Guidelines for Sewage, Septic Tank and Holding Tank Waste Use on Agricultural Lands" ("Agricultural Use")-- the grossly excessive concentrations of cadmium present in the soils at the site and the environmental hazard and public health danger particularly associated with such levels of cadmium justified DER's use of only the "Agricultural Use" guidelines' lifetime loading limit for cadmium of three pounds per acre in DER's review of appellant's permit application.

In addition, because DER's "Land Reclamation" guidelines do not appear to apply to the agricultural utilization of sewage sludge at appellant's site, and because DER's use of those guidelines may have affected DER's discretionary review of appellant's permit application, the Board could substitute its discretion for DER's to find that SWMA prohibits the issuance of a solid waste management permit for the land application of sewage sludge for agricultural utilization where DER's "Agricultural Use" guidelines' lifetime loading limit for cadmium of three pounds per acre was grossly exceeded in the soils at the site.

DER met the burden of proving that the remedial portions of its permit denial and order were supported by substantial evidence and the issuance of which did not constitute an abuse of discretion or amount to arbitrary or capricious action. 25 Pa. Code §21.101 (b)(3).

INTRODUCTION

Appellant Preston Heckler appeals from an order of the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), dated March 4, 1981, which, inter alia, denied appellant's permit application for the land application (for agricultural utilization) of liquid and sludge wastes and which required appellant to cease by April 15, 1981 all such operations occurring on appellant's land, located at Upper State Road and Horsham Pike, Montgomery Township, Montgomery County, Pennsylvania. DER's appealed-from order also required appellant to implement a closure plan and to submit a work plan describing the scope and methods of a hydrogeologic study to determine the extent of soil and groundwater contamination at and in the vicinity of the disposal site.

Following the filing of a supersedeas petition, then Board Chairman Paul Waters presided over a supersedeas hearing on May 1, 1981. Thereafter, on June 29, 1981, the parties filed an executed stipulation (dated June 12, 1981) which, inter alia, proposed that appellant be provided with a limited supersedeas, permitting appellant's land application of wastes from May 1, 1981 to June 12, 1981 on field nos. 7 and 8 (as identified on appellant's site plan).

On July 1, 1981, the Board formally adopted the stipulation and extended the limited supersedeas to August 4, 1981. Following hearings on the merits on August 4 and 5, 1981, held before then Board Chairman Paul Waters, the Board, orally at the hearing conducted on August 5, 1981 and by written order dated August 14, 1981, extended the limited supersedeas to September 16, 1981. The Board's order also required appellant to submit a bond to DER in the amount of twenty thousand dollars ($20,000.00), in a form acceptable to DER.

On September 16, 1981, then Chairman Paul Waters issued an order which extended the limited supersedeas until such time when a final adjudication would issue, provided appellant submitted a judgment note to DER in proper form and in the amount of twenty-five thousand dollars ($25,000.00). In addition, by letter also dated September 16, 1981, then Board Chairman Paul Waters informed the parties of his imminent resignation from the Board (effective September 18, 1981) and also informed the parties of his decision to close the record and to deny appellant's request for the admission of extraction procedure (EP) toxicity test results.

Following the receipt of various motions which the Board never acted upon-- appellant's motion for sanctions (due to DER's failure to file its post-hearing brief in a timely fashion) and DER's motion to terminate the limited supersedeas (due to appellant's failure to submit a judgment note as required by the Board's order of September 16, 1981)-- the parties filed post-hearing briefs, appellant signed and delivered to DER a judgment note in the amount of twenty-five thousand dollars ($25,000.00) and the entire record, including by stipulation the notes of testimony of the supersedeas hearing, was presented for final adjudication on the merits. From that record we make the following findings of fact.

FINDINGS OF FACT

1. Appellant Preston Heckler and his son John Heckler (hereinafter collectively referred to as Heckler) reside at 648 Upper State Road, Montgomery Township, Montgomery County, Pennsylvania. (N.T., pp. 134-135).

2. Heckler owns and operates a farm involved in the land application and agricultural utilization of septic tank waste, holding tank waste and sewage sludge, located at the intersection of Upper State Road and Horsham Pike,

Montgomery Township, Montgomery County, Pennsylvania, and comprised of approximately 125 acres. (N.T., pp. 18, 135).

3. The areas where Heckler applies such wastes are divided into twelve (12) fields, designated as Fields 1 through 12. (N.T., p. 18; Exhibits A-1, C-6).

4. Heckler has utilized Fields 1 through 12 for the land application of wastes for approximately twenty (20) years. (N.T., pp. 118, 135, 147).

5. Heckler has never obtained a DER permit to conduct land application of wastes on Fields 1 through 12. (N.T., p. 147).

6. In 1973, DER first requested a permit application from Heckler; in 1974, an application for the land disposal of wastes for agricultural purposes was submitted to DER, but was not approved and no permit was issued. (N.T., p. 136).

7. On July 18, 1980, DER issued an administrative order to Heckler which required, inter alia, the submission of a new permit application for the land disposal of wastes. (N.T., pp. 139-140).

8. On September 18, 1980, Heckler's consultant, Urweiler and Walter, submitted a permit application to DER for land disposal of wastes for agricultural use on Fields 1 through 12. (N.T., pp. 139-140; Exhibit C-6).

9. John Zwalinski, a DER soil scientist, visited the Heckler site on August 27, 1980, for the purpose of evaluating the suitability of the site for land application of wastes. (N.T., pp. 332-333).

10. The primary purpose of Zwalinski's examination of the Heckler site on August 27, 1980 was to evaluate the soils at the site for drainage and depth characteristics. (N.T., pp. 329, 332).

11. On August 27, 1980, Zwalinski sampled soils at various depths in Fields 3 and 5 by excavating several backhoe pits; the purpose of this soil sampling was to determine whether heavy metal concentrations were present at different soil levels or depths in fields known to have been utilized for disposal purposes. (N.T., p. 332; Exhibit A-9(a)).

12. Soils from the backhoe pits were sampled on August 27, 1980 at various depths; soils from each depth were extracted with a knife, placed in bottles, labeled, sealed with legal seals and sent to DER's Harrisburg laboratory for analysis. (N.T., pp. 334-337; Exhibit A-9(a)).

13. Zwalinski prepared a memorandum dated October 6, 1980, which reported and summarized his findings concerning his investigation of the Heckler site on August 27, 1980 and which included his review of the September 18, 1980 permit application materials. (Exhibit A-9(a)).

14. Zwalinski determined that Fields 1,2,3,4,5 and 12 were unsuitable for land disposal of wastes and that only Fields 6,7,8,9,10 and 11 could be considered for agricultural utilization purposes. (Exhibit A-9(a)).

15. Zwalinski personally examined the soils in Fields 3,5,7,8,9,10,11 and 12 during his examination of the Heckler site on August 27, 1980; Zwalinski also relied on soil sampling previously conducted by Heckler's consultant for Fields 1,2,4 and 6, where the consultant's and Zwalinski's evaluations were in agreement. (N.T., pp. 338-340, 489; Exhibit A-9(a)).

16. By letter dated October 9, 1980, DER informed Heckler that only Fields 6,7,8,9,10 and 11 were potentially satisfactory for disposal of wastes, provided that the fields were sampled and analyzed for heavy metal concentrations. (N.T., p. 140; Exhibit A-13).

17. On October 17, 1980, a meeting was held between Heckler's representatives and DER to discuss DER's site evaluation and its review of the permit application. (N.T., pp. 352-355).

18. By letter dated October 23, 1980, DER informed Heckler that soil samples would be obtained by DER from Fields 6,7,8,9,10 and 11, and that limited disposal utilization of Fields 6,7,8,9,10 and 11 was acceptable to DER in the interim. (Exhibit C-1).

19. By letter dated October 24, 1980, Heckler's consultants (Urweiler and Walter) wrote to DER acknowledging DER's determination concerning the suitability of Fields 6,7,8,9,10 and 11 for the land disposal of wastes; on behalf of Heckler, Urweiler and Walter agreed: (1)to conduct joint soil sampling with DER of Fields 6,7,8,9,10 and 11 at the site on October 31, 1980; (2)to comply with DER's land disposal regulations; and, (3)to submit additional information to DER in support of Heckler's permit application. (N.T., p. 154; Exhibit C-2).

20. No evidence concerning the suitability of Fields 1,2,3,4,5 and 12 was offered at either the supersedeas or merits hearings. (N.T., pp. 69, 169).

21. On October 30, 1980, joint sampling of Fields 6,7,8,9,10 and 11 was conducted by Zwalinski and Scott Hughes, an employee of Urweiler and Walter. (N.T., p. 356).

22. On October 30, 1980, Zwalinski used a soil auger to extract soil samples from Fields 6,7,8,9,10 and 11; the soil samples were comprised of soil cores seven inches (7") in length; the soil cores were subtracted from the upper seven inches (7") of soil, the so-called Ap horizon or plow layer, from selected points in each field. (N.T., pp. 330-332, 356-358, 377-379; Exhibit A-9(b)).

23. For the soil sampling conducted on October 30, 1980, four soil cores were extracted from each field and mixed for the purpose of obtaining a single, composite sample for each field; Zwalinski selected each location from which he took soil samples in order to minimize variations in heavy metal concentrations which could be attributed to topographic and/or drainage characteristics. (N.T., pp. 330, 332, 356-358; Exhibit A-9(b)).

24. At each sampling location for the sampling conducted on October 30, 1980, Zwalinski extracted two soil samples for the purpose of splitting them with Urweiler and Walter for subsequent independent chemical analysis. (N.T., pp. 330, 332, 356-358; Exhibit A-9(b)).

25. For the sampling conducted on October 30, 1980, Zwalinski placed the four soil samples from each field into a single sample bottle, so that a single, composite soil sample from each field was obtained. (N.T., pp. 330, 332, 356-358; Exhibit A-9(b)).

26. Hughes forwarded his portion of split samples (taken on October 30, 1980) from the Heckler site to Pennsylvania State University; DER sent its portion of the split samples (of October 30, 1980) from the Heckler site to DER's Harrisburg laboratory. (N.T., pp. 358, 383).

27. At no time during the sampling conducted on October 30, 1980 did Hughes of Urweiler and Walter object to the method of soil sampling or the locations selected for sampling. (N.T., pp. 358-359).

28. Scott Hughes is no longer employed by Urweiler and Walter and the Hecklers discharged Urweiler and Walter due to their dissatisfaction with the consultant's work. (N.T., p. 144).

29. At DER's Harrisburg laboratory, the samples collected on October 30, 1980 from Fields 6,7,8,9,10 and 11 were prepared for analysis to determine heavy metal concentrations using the atomic absorption method; the soil samples were analyzed by laboratory personnel and the results sent to Zwalinski for interpretation. (N.T., pp. 359-360, 508; Exhibit A-9(b)).

30. The atomic absorption method of analysis is capable of determining the concentration of heavy metals in a soil sample. (N.T., pp. 30, 510).

31. The 0" to 7" soil sampling methodology used by DER is commonly accepted in the Commonwealth for agricultural purposes and soils research. (N.T., pp. 380-382).

32. The DER soil sampling methodology is used to determine the heavy metal concentrations which occur in soil at a depth of 0" to 7" because most biological and chemical activity in the soil occurs at this level. (N.T., pp. 379-380).

33. DER conducted soil sampling at the Heckler site at depths greater than 7" for the purpose of determining whether heavy metals were moving downward through the soils toward the groundwater table. (N.T., p. 337).

34. By evaluating heavy metal concentrations in soils at various depths, DER is capable of determining whether maximum or lifetime limits for heavy metals have been exceeded and whether groundwater contamination is threatened as a result of the land application of wastes. (N.T., pp. 337, 382-383).

35. Zwalinski wrote a memorandum to Larry Lunsk of DER (Soild Waste Facilities Chief), dated January 22, 1981, which summarized Zwalinski's findings and which interpreted the results of the chemical analysis of the soil samples taken from the Heckler site on August 27, 1980 and October 30, 1980. (Exhibit A-9(b)).

36. Zwalinski used DER's "Interim Guidelines for Sewage Sludge Use for Land Reclamation" ("Land Reclamation") and DER's "Interim Guidelines for Sewage, Septic Tank and Holding Tank Waste Use on Agricultural Lands" ("Agricultural Use") in order to facilitate his interpretation of the chemical analyses of the soil samples taken from the Heckler site on August 27, 1980 and October 30, 1980. (N.T., pp. 387-391; Exhibits C-7, C-8).

37. Heckler's application for a permit for the land application of wastes was primarily for agricultural purposes under 25 Pa. Code §§75.32(b)(c). (N.T., pp. 87, 318-319; Exhibit C-6).

38. DER's "Agricultural Use" guidelines contain a lifetime limit or maximum heavy metal concentration for cadmium only; DER's "Land Reclamation" guidelines contain lifetime limits or maximum heavy metal concentrations for cadmium, copper, chromium, lead, mercury, nickel and zinc; the lifetime limit or maximum concentration for cadmium is identical (three punds per acre) in both guidelines. (Exhibits C-7, C-8).

39. DER applies its "Land Reclamation" guidelines in evaluating agricultural use permit applications under 25 Pa. Code §§75.32(b)(c) because of DER's belief in the applicability of the "Land Reclamation" maximum lifetime metal limits where land disposal of wastes is proposed in connection with farming or agricultural activities. (N.T., pp. 391, 496).

40. DER limits the concentrations of heavy metals in soils because varying quantities of such metals are often present in solid wastes proposed for land application; excessive concentrations of heavy metals in soils, resulting from the land application of wastes, may result in the contamination of soils, plants and groundwater. (N.T., pp. 235-236, 318, 382-383).

41. Using the analytical values which had been provided to him by DER's Harrisburg laboratory, Zwalinski calculated the total concentrations of heavy metals in the various soil samples which he collected from the Heckler site on August 27, 1980 and October 30, 1980. (N.T., pp. 368, 510; Exhibit A-9(b)).

42. As a result of the soil sampling conducted on October 30, 1980, Zwalinski determined that the soils in Fields 6,7,8,9,10 and 11 exceeded DER's "Agricultural Use" guidelines' lifetime loading limit for cadmium; in addition, Zwalinski determined that the soils in Fields 6,7,8,9,10 and 11 exceeded the following "Land Reclamation" guidelines' maximum allowable concentrations: Field 6 (chromium and nickel); Field 7 (chromium); Field 8 (chromium, copper, nickel, lead and zinc); Field 9 (nickel); Field 10 (copper, nickel and lead); and, Field 11 (chromium, copper, nickel, lead and zinc). (N.T., p. 361, Exhibit A-9(b)).

43. As a result of the sampling conducted on August 27, 1980, DER determined that heavy metals were present in soils sampled at greater depths in

Fields 3 and 5, at levels in excess of the lifetime limits or maximum heavy metal concentrations set forth in both DER's "Agricultural Use" and "Land Reclamation" guidelines. (Exhibits A-9(a), A-9(b)).

44. DER's soil samples taken from Fields 3 and 5 (from backhoe pits) on August 27, 1980 demonstrate a downward migration of heavy metals and the potential for groundwater contamination. (N.T., pp. 375, 377).

45. DER requested but never was provided with the analytical results of the split samples from Fields 6,7,8,9,10 and 11, which were collected by Urweiler and Walter on October 30, 1980. (N.T., pp. 157, 383).

46. As a result of DER's findings concerning heavy metals contamination on the Heckler site, DER issued an order dated March 4, 1981, which denied Heckler's permit for a land disposal site, ordered the cessation of land disposal activities and required the initiation of various remedial measures and studies. (Exhibit C-9).

47. On March 23, 1981, Dr. Bruno Mercuri of Bruno Mercuri and Associates replaced Urweiler and Walter as Heckler's consultant; on April 7, 1981, Mercuri collected soil samples from Fields 6,7,8,9,10 and 11. (N.T., pp. 18, 21; Exhibit A-5).

48. On April 7, 1981, Mercuri sampled soils from Fields 6,7,8,9,10 and 11 using a punch auger device, and Mercuri extracted soil cores of approximately 6" in diameter and 21" in length; Mercuri collected three soil samples from each field in order to obtain a single, composite sample; Mercuri placed the soil samples in glass jars and sent them to Ambric Testing, Inc. for analysis by the atomic absorption method. (N.T., pp. 21-29; Exhibut A-5).

49. The atomic absorption analysis conducted by Ambric Testing, Inc. and interpreted by Mercuri indicated that soils in Fields 6,7,8,9,10 and 11 did not exceed the lifetime limits or maximum concentrations for cadmium or the other heavy metals listed in DER's "Land Reclamation" guidelines. (N.T., p. 32; Exhibit A-5).

50. The Heckler site was the first site that Mercuri had evaluated for suitability for sludge disposal and on which Mercuri had collected soil samples in conjunction with a permit application for land application of wastes. (N.T., pp. 11-13, 94).

51. Mercuri's soil sampling technique was defective because it did not result in obtaining a distinct soil sample from the 0" to 7" level. (N.T., pp. 12, 379-380).

52. Mercuri's soil sampling did not comport with the Environmental Protection Agency (EPA) methodology (as described in 45 Federal Register 33206, May 19, 1980) because the lower one-third of the sample core was not independently sampled as prescribed by the EPA methodology. (N.T., pp. 81-91; Exhibit A-2).

53. The EPA methodology is designed to determine whether or not downward migration of hazardous wastes is occuring, and to determine whether a potential exists for groundwater contamination; the EPA methodology used by Mercuri for his soil sampling is not suitable for determining the concentrations of heavy metals in the 0" to 7" soil level. (N.T., pp. 81-91).

54. The unit of soil contained in an acre of ground to a depth of 7" is also known as an acre-furrow slice. (N.T., pp. 392-393).

55. For the purpose of calculating the concentration of metals in soils on a pounds per acre basis, DER uses the commonly accepted value of two million pounds for the weight of soil present in an acre-furrow slice. (N.T., pp. 15-16, 393).

56. Mercuri's method of calculating concentrations of metals in the soil on a pounds per acre basis was defective because he used an erroneous value for the weight of the soil present in one acre of ground to a depth of his sampling (21"). (N.T., pp. 81-91, 98-103, 395-396, 408).

57. In calculating the concentration of metals present in soils to a depth of 21", Mercuri should have used either a minimum value of six million pounds per acre, or determined the bulk density of the soil to a depth of 21" in order to obtain a correct value for the weight of soil present in one acre of ground to a depth of 21". (N.T., pp. 102, 209-211, 375-377).

58. Due to Mercuri's use of an incorrect pounds per acre conversion, he understated the concentrations of metals present in the soils from Fields 6,7,8,9,10 and 11 at a depth of 7". (N.T., pp. 208-211).

59. DER's "Agricultural Use" guidelines prescribe a minimum of 20" depth of soil to bedrock and/or seasonal high water tables on land application sites. (N.T., p. 24; Exhibit C-7).

60. On May 14, 1981, DER and Mercuri conducted joint soil sampling activities on Fields 6,7,8,9,10 and 11. (N.T., pp. 399-400; Exhibit C-10).

61. On May 14, 1981, DER and Mercuri obtained a series of adjacent soil samples from Fields 6,7,8,9,10 and 11; DER obtained samples from the 0" to 7" range and Mercuri obtained samples from the 0" to 21" range; each set of samples was made of soil composites and sent to Weston, Inc., an independent laboratory, for analysis. (N.T., pp. 399-402; Exhibit C-10).

62. The analysis of DER's 0" to 7" samples of May 14, 1981 showed that Fields 6,7,8,9,10 and 11 exceeded the "Agricultural Use" and "Land Reclamation" guidelines' maximum lifetime limit for cadmium and also exceeded the "Land Reclamation" guidelines' maximum lifetime limits for copper, chromium, lead, nickel, zinc and mercury. (Exhibits C-7, C-8, C-11).

63. The analysis of Mercuri's 0" to 21" samples of May 14, 1981 showed that Fields 6,7,8,9,10 and 11 exceeded the "Agricultural Use" and "Land Reclamation" guidelines' maximum lifetime limit for cadmium and also exceeded the "Land Reclamation" guidelines' maximum lifetime limits for copper, chromium, lead, zinc, nickel and mercury. (N.T., pp. 177-178; Exhibits A-18, C-7, C-8, C-11).

64. On May 14, 1981, a series of water quality samples were taken by both parties from locations accessible on the surface of the Heckler site. (N.T., pp. 188-198; Exhibit C-10).

65. The water quality samples taken by DER (from four locations) and by Mercuri (from three locations) on May 14, 1981 from the Heckler site did not show indications that the groundwater was contaminated by heavy metals. (N.T., pp. 188-196; exhibits A-16, A-17).

66. The four locations from which water quality samples were taken by DER on May 14, 1981 from the Heckler site are not sufficient to make a comprehensive assessment of the condition of the groundwater under and adjacent to the site. (N.T., pp. 523-527, 535-536).

67. A more comprehensive hydrogeologic study of the Heckler site would yield definitive information concerning the condition of the groundwater underlying and adjacent to the Heckler site. (N.T., pp. 524-527, 535-536).

68. Zwalinski's soil sampling (and DER's subsequent atomic absorption analysis) of soil samples taken from the Heckler site on August 27, 1980 and October 30, 1980 resulted in the following levels of cadmium (in pounds per acre) found to exist at the Heckler site:

Pit 1 (Field 3)

0" to 11"	4.14
11" to 24"	.42
24" to 38"	none

Pit 2 (Field 3)

0" to 10"	.84
10" to 22"	none
22" to 38"	none

Pit 3 (Field 5)

0" to 8"	1.22
8" to 23"	.42
23" to 38"	.40

Field 6	
0" to 7"	33.54
Field 7	
0" to 7"	39.08
Field 8	
0" to 7"	19.08
Field 9	
0" to 7"	50.18
Field 10	
0" to 7"	23.75
Field 11	
0" to 7"	66.60

(N.T., pp. 461-462; Exhibit A-9(b)).

69. Heavy metals which are present in the plow layer of the soil can become available for plant uptake under certain conditions. (N.T., pp. 77, 90-91, 232-233, 244, 382-383; Exhibits A-2, A-5).

70. Cadmium has the capacity to accumulate throughout the food chain. (N.T., p. 383; Exhibit A-5).

71. Joint sampling of the Heckler site on May 14, 1981 by appellant (by Mercuri) and by DER (by Zwalinski) yielded the following concentrations of cadmium (in pounds per acre) found to exist in the soils at the site:

	Appellant's sample results (0" to 21")	DER's sample results (0" to 7")
Field 6	16.62	21.00
Field 7	18.72	24.20
Field 8	34.20	38.80
Field 9	18.00	27.80
Field 10	24.40	27.40
Field 11	24.40	20.60

(N.T., pp. 231-232; Exhibits A-18, C-4, C-11)

72. The Constitution of the Commonwealth of Pennsylvania provides, in pertinent part:

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

Const.,Art. I, §27.

73. The Solid Waste Management Act provides, in pertinent part:

> Section 6018.102 Legislative finding; declaration of policy
>
> The legislature hereby determines, declares and finds that, since improper and inadequate solid waste practices create public health hazards, environmental pollution, and economic loss, and cause irreparable harm to the public health, safety and welfare, it is the purpose of this act to:
>
> * * *
>
> (4) protect the public health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage and disposal of all wastes;
> (5) provide a flexible and effective means to implement and enforce the provisions of this act;
>
> * * *
>
> (10) implement Article I, section 27 of the Pennsylvania Constitution...

35 P.S. §§6018.102(4)(5)(10).

DISCUSSION

Appellant Preston Heckler raises a number of arguments purporting to show that DER abused its discretion in issuing its permit denial and order of March 4, 1981. Most of these arguments focus on the alleged lack of credibility on the part of DER's witnesses and an alleged corresponding wealth of credibility on the part of appellant's witnesses. As appellant correctly notes, this case hinges on whether the Board believes the testimony of appellant's witnesses or DER's witnesses. Therefore, we believe that it is incumbent upon us to

set forth those portions of the record which, contrary to appellant's assertions, establish the lack of credibility on the part of appellant's witnesses (particularly Dr. Mercuri)[1] and which establish the credibility of DER's witnesses (particularly Mr. Zwalinski).[2]

In addition, we note that while many appeals before the Board include a so-called "battle of the experts," with appellants invariably introducing the testimony of one or more experts who possess doctorate degrees, often against the testimony of DER's experts who, especially at the field level, generally do not possess doctorate degrees, this case points out the problems associated with an appellant's misguided reliance upon a witnesses' credentials without a corresponding examination of his or her methodologies and practical experience. While we have no intention of unduly questioning the reputation and intelligence of appellant's witnesses, it is sufficient

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1
See Findings of Fact Nos. 48,50,51,52,53,56,57 and 58. Of particular note is the fact that the Heckler site was the first agricultural utilization sludge site for which Dr. Mercuri conducted soil sampling and analysis for heavy metal concentrations.

2
See Findings of Fact Nos. 15,22,23,24,25,27,29,31,32,33,36,41,42, 43 and 55. In addition, of particular note is the fact that Mr. Zwalinski, a DER soils scientist, also testified at length in support of a DER solid waste permit grant (for the agricultural utilization of sewage sludge) in the case of Busfield, et al. v. DER, et al., 1980 EHB 179, aff'd. in part, rev'd. in part, Bedminster Township v. DER, ___ Pa. Cmwlth. ___, 486 A.2d 570 (1985). In Bedminster, Commonwealth Court held, inter alia, that DER's permit grant was supported by substantial evidence-- evidence which included for the most part the testimony of Mr. Zwalinski concerning cadmium levels in the soil. Bedminster, supra, ___ Pa.Cmwlth. at ___, 486 A.2d at 572.
Although appellant notes that Mr. Zwalinski was somewhat obfuscatory while testifying, such difficulty with the fine art of testifying did not cast doubt upon either the subject matter of or the conclusions contained in Mr. Zwalinski's testimony. In any event, we do not believe that Mr. Zwalinski in 1981 (during the hearings in this matter) was devoid of the credibility and experience he possessed in 1980 when he testified in the Busfield case, which was subsequently affirmed in part by Commonwealth Court.

to reiterate that, in cases such as this one, practical experience is often of equal or greater value than advanced college degrees.

Burden of Proof

The Board's responsibility in reviewing DER's issuance of its permit denial and order of March 4, 1981 requires a determination of whether such issuance constituted an abuse of discretion or amounted to arbitrary or capricious action. Morcoal Company v. DER, 74 Pa.Cmwlth. 108,116, 459 A.2d 1303,1307 (1983); Warren Sand and Gravel Company, Inc. v. DER, 20 Pa.Cmwlth. 186,203-4, 341 A.2d 556,565 (1975); Strasburg Associates v. DER, 1984 EHB 423,439-40 (citations omitted). Appellant bears the burden of proof concerning DER's permit denial. 25 Pa. Code §21.101 (c)(1); Pennsylvania Environmental Management Services, Inc. v. DER, et al., 1984 EHB 94,138; Vik-kel Corporation v. DER, et al., 1983 EHB 111, 125; Northeast Land Development Company, Inc. v. DER, et al., 1983 EHB 129,133 (citations omitted).

In addition, although the parties did not brief the issue, DER bears the burden of proof concerning the remaining portions of DER's appealed-from permit denial and order, which required appellant to undertake various remedial actions. 25 Pa. Code §21.101 (b)(3); Harmar Coal Company v. DER, 1984 EHB 543,544. DER has neither argued for nor presented any evidence to justify shifting the burden of proof to appellant concerning the remedial action portions of DER's permit denial and order. Although section 21.101(d) of 25 Pa. Code permits shifting the burden of proof from DER to an appellant

in some circumstances,[3] DER has not argued for shifting the burden of proof pursuant to 25 Pa. Code §21.101(d) and the Board can find no basis in the record for doing so.[4]

Appellant raises a number of arguments that we will address seriatum but in no particular order. Any arguments raised by either DER or appellant which we do not address are deemed to be without evidentiary, legal or logical support or are without merit and therefore not worthy of discussion.

DER's Reliance Upon Atomic Absorption Analyses

In arguing that DER's permit denial and order was not supported by substantial evidence, appellant contends that DER was required to conduct more than the atomic absorption analyses of soil samples which DER used to support its permit denial and order. Specifically, appellant contends

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3 The Board's Rules and Regulations provide, in pertinent part:

> 21.101 Burden of Proceeding and Burden of Proof
> * * *
> (b) The Department shall have the burden of proof in the following cases:
> * * *
> (3) where it orders a party to take affirmative action to abate air or water pollution, or any other condition or nuisance, except as otherwise provided in this rule;
> * * *
> (d) Where the Department issues an order requiring abatement of alleged environmental damage, the private party shall nonetheless bear the burden of proof and the burden of proceeding when it appears that the Department has initially established:
> (1) that some degree of pollution or environmental damage is taking place, or is likely to take place, even if it is not estab- to the degree that a prima facie case is made that a law or regulation is being violated; and
> (2) that the party alleged to be responsible for the environmental damage is in possession of the facts relating to such environmental damage or should be in possession of them.

25 Pa. Code §§21.101(b)(3), 21.101(d).

4 For a discussion of the requirements of 25 Pa. Code §21.101(d), see W.P. Stahlman Coal Company, Inc. v. DER, EHB Docket No. 83-301-G (Adj., April 29, 1985).

that DER should have performed extraction procedure (EP) toxicity tests, crop tissue analyses, cation exchange capacity tests, lysimeter monitoring and groundwater testing. We disagree. As DER correctly notes, having determined (by use of atomic absorption analyses of soil samples) that appellant's site was in violation of DER's lifetime loading limits for various heavy metals, DER was under no obligation to perform additional testing because atomic absorption analysis (generally and as conducted by DER) is capable of accurately determining the levels of heavy metals which are present in the soil.

Moreover, the environmental damage and public health hazards associated with the existence of heavy metals, particularly cadmium, in the soil and/or groundwater, in concentrations in excess of DER guidelines, cannot be doubted and has been addressed by the Board in the past. See e.g., Busfield, supra, 1980 EHB at 194 ("...[the cadmium level of 3.6 pounds per acre] is of special concern because of the affect [sic] its accumulation can have on the human body."); Coolspring Township, et al. v. DER, et al., 1983 EHB 151,180 ("[t]he heavy metals lead, cadmium and mercury are among the trace elements which may prove to be problems during agricultural utilization of sewage sludge..."). Therefore, because the evidence establishes that DER's atomic absorption analysis accurately determined the levels of heavy metals in the soil samples taken from the Heckler site, see Findings of Fact Nos. 11,12,15,22,23,25,29, 30,31,32,33 and 34, and because the evidence also establishes that DER's soil sampling methodology provided a composite soil sample representative of the soils in the particular fields sampled at the Heckler site, see Finding of Fact No. 23, EP toxicity tests, crop tissue analyses, cation exchange capacity tests, lysimeter monitoring and groundwater testing were not required to be undertaken by DER in support of its permit denial and order. Because of

appellant's insistent reliance upon these other testing and/ or monitoring procedures, we will address each one separately.

Extraction Procedure (EP) Toxicity Tests

On September 16, 1981, then Chairman Paul Waters decided to close the record and deny appellant's request for the submission of EP toxicity test results. While the basis of then Chairman Waters' decision is not contained in the record, it most likely was based upon the fact that the EP toxicity test is neither designed nor suitable for determining heavy metal concentrations in soil or the uptake of those metals by plants grown on soils contaminated with such metals. See e.g., 45 Federal Register, Part VII, May 19, 1980; 25 Pa. Code §75.261(g). Rather, the EP toxicity test is designed to determine whether a particular solid waste exhibits certain hazardous waste characteristics, thereby justifying its classification as a hazardous waste. 45 Federal Register, supra; 25 Pa. Code §75.261(g).

Crop Tissue Analyses

Appellant asserts without supporting argument or citation that DER was required to perform crop tissue analyses prior to the issuance of its permit denial and order. While we would be justified in dismissing this assertion outright due to the lack of supporting argument, we note that the levels of heavy metals in the soils at the Heckler site are of such extreme magnitude that crop tissue analyses would have been irrelevant. As Mr. Zwalinski stated in his memorandum to Lawrence Lunsk, DER's Region One (I) Solid Waste Facilities Chief, dated January 22, 1981:

> "[t]he extent of the contamination is quite alarming.... [c]admium, for example, exceeds the maximum allowable lifetime concentrations by 6-80 times....[t]he nature and extent of degradation resulting from a land application operation on this site is to date the most severe case known in Region I."

Exhibit A-9(b). Our review of the sample results and lab reports supports Mr. Zwalinski's conclusions, with the modification (as explained by Mr. Zwalinski during cross-examination) that the figure of eighty (80) times the maximum allowable concentration of cadmium was based upon the inadvertent misplacement of a decimal point. (N.T., pp. 461-62; Exhibit A-9(b)). Therefore, the correct figure is twenty-two (22) times the maximum allowable concentration of cadmium, which still constitutes a grossly excessive concentration of cadmium in the soil and which supports Mr. Zwalinski's testimony concerning the irrelevancy of crop tissue analyses.

Cation Exchange Capacity Tests

Again, appellant asserts without supporting argument or citation that DER was specifically required to perform cation exchange capacity tests prior to the issuance of its permit denial and order. Appellant argues that such tests are common in determining the ability of the soil to immobilize heavy metals. However, Mr. Zwalinski testified on cross-examination that cation exchange capacity tests were not necessary because soil sampling and atomic absorption analysis of the samples showed that heavy metals were migrating downward through the soil and that, therefore, whatever the cation exchange capacity of the soil, such downward migration indicated that the capacity was being exceeded. This conclusion was buttressed by the atomic absorption analysis of appellant's own soil samples, which were taken at a greater depth than DER's soil samples and which showed elevated levels of heavy metals at greater depths in the soils. Moreover, as explained more fully below, potential environmental damage and public health hazards are also threatened by the existence of excessive levels of heavy metals in the plow layer of the soil, which again renders as an irrelevancy in these circumstances appellant's argument concerning cation exchange capacity tests.

Lysimeter Monitoring

Again, appellant baldly asserts that DER was required to conduct lysimeter monitoring prior to the issuance of its permit denial and order. Appellant argues that such monitoring would show the neutralization of heavy metals at the site. However, while the record is bereft of evidence concerning lysimeter monitoring, we note that in Busfield, supra, the Board made the following Findings of Fact:

> 37. Lysimeters, properly placed on the sludge spreading site[,] would give information concerning water passing through the soil.
> 38. The interim guidelines of the Department of Environmental Resources do not provide for the placement of lysimeters.

Busfield, supra, at 185. Therefore, even if we overlook the fact that appellant has not offered any evidence concerning lysimeter monitoring and has therefore failed to meet his burden of proof with respect to DER's permit denial, we note that lysimeter monitoring has no application to the issue of the existence of heavy metals in the soils at the Heckler site and the degradation of those soils by the excessive levels of those heavy metals.

Groundwater Testing

Appellant argues that DER should have performed groundwater testing prior to the issuance of its permit denial and order. Due to the extent of the contamination of the soils with heavy metals, and due to the fact that plant uptake of those metals constitutes an additional potential environmental and public health hazard, appellant's argument is rejected. Further, appellant's own atomic absorption analysis of the soil samples collected by appellant's own expert at greater depths than DER's soil samples, indicates downward migration of heavy metals and the potential for groundwater contamination. Of course, DER's soil samples taken at greater depths, i.e., the backhoe pits in Field nos. 3 and 5, also indicate,

albeit with less certainty due to the levels of heavy metals found at those greater depths, that the potential for groundwater contamination exists at the site.

In addition, having determined that appellant's solid waste disposal site was in violation of DER guidelines and in operation for approximately twenty (20) years without benefit of a permit, DER was under no obligation to perform groundwater testing at the site prior to its issuance of the March 4, 1981 permit denial and order. The burden of performing such testing was properly placed upon appellant in DER's permit denial and order.

Substantial Evidence

Appellant also argues that due to the divergence between DER's and appellant's testing results, it was incumbent upon DER to refer to some other testing besides atomic absorption in support of its permit denial and order. We disagree. The divergence in testing results was caused by the improper soil sampling methodology and incorrect conversion rate (of pounds per acre) employed by appellant's witness. (See Findings of Fact Nos. 48,51,52,56,57 and 58). Therefore, because the evidence establishes the accuracy of DER's soil sampling methodology, atomic absorption analysis and conversion rate, DER's use of the results of those tests comports with the requirement (as stated in the decisions cited by appellant) that DER must use available established methods for determining violations of environmental quality standards-- not "scientific measurement of the environmental hazard" as appellant incorrectly quotes. See e.g., Bortz Coal Company v. Air Pollution Commission, 2 Pa.Cmwlth. 441,458-59, 279 A.2d 388,398 (1971), aff'd. sub nom., Bortz Coal Company v. DER, 7 Pa.Cmwlth. 362, 299 A.2d 670 (1973); North American Coal Corp. v. Air Pollution Commission, 2 Pa.Cmwlth. 469, 279 A.2d 356

(1971).

Further, contrary to appellant's assertions, this case does not involve a complete lack of scientific tests that would justify dismissal for lack of substantial evidence. Rather, DER's soil sampling and atomic absorption analysis constitute sufficient, accurate scientific testing and hence, substantial evidence, in support of its permit denial and order.

DER's Use of Both Sets of Interim Guidelines

Appellant argues that DER utilized two sets of differing and inconsistent guidelines in determining whether the heavy metals cadmium, copper, chromium, lead, mercury, nickel and zinc existed in the soils at the Heckler site in excessive concentrations. DER concedes that it evaluated the Heckler site using the three pounds per acre lifetime loading limit for cadmium in DER's "Agricultural Use" guidelines as well as the lifetime loading limits for the other heavy metals as set forth in DER's "Land Reclamation" guidelines. (See Findings of Fact Nos. 36 and 38). Before addressing this issue, a discussion of the legal status of DER's internal guidelines is in order.

Of course, it is beyond dispute that DER is empowered to base its decisions upon the application of internal guidelines. See e.g., Western Hickory Coal Company v. DER, 1983 EHB 89, aff'd. ___ Pa.Cmwlth. ___, 485 A.2d 877 (1984). Although such guidelines will not be afforded the presumption of validity normally given to duly promulgated regulations, Western Hickory, supra, 1983 EHB at 102 (citations omitted), DER's failure to publish a standard as a regulation does not render that standard unenforceable per se. Western Hickory, supra, 1983 EHB at 102-3 (citing Old Home Manor and W.C. Leasure v. DER, 1983 EHB 396). Rather, DER's issuance of an administrative compliance order is not limited to correcting violations but may

also be used as a means of establishing standards of conduct in futherance of the purposes of the statute upon which DER bases its order. DER v. Butler County Mushroom Farm, 499 Pa. 509, 454 A.2d 1 (1982). In these situations, where DER makes decisions on a case-by-case basis, the Board is free to substitute its discretion for DER's. Warren Sand and Gravel, supra.

DER argues that the policy of protecting the public health, safety and welfare from the dangers of solid waste disposal, as stated in the Solid Waste Management Act (SWMA), 35 P.S. §6018.101 et seq., provided the justification for DER's use of both the "Agricultural Use" and "Land Reclamation" guidelines in its evaluation of appellant's permit application. We disagree. DER can effectuate the policies of SWMA by basing its appealed-from permit denial and order solely upon the concentrations of cadmium DER found to exist in the soils at the Heckler site, which were far in excess of the lifetime loading limit of three pounds per acre as set forth in DER's "Agricultural Use" guidelines. While we are cognizant of the fact that this holding may be confined to the peculiar facts of this case and may represent a Pyrrhic victory for DER, we believe it is appropriate under the circumstances presented herein.

After all, the concentrations of cadmium which exist at the site-- a site used for the unpermitted land application of sewage sludge for approximately twenty (20) years-- are grossly excessive, ranging (in the plow layer of Fields 6 through 11) from 19.08 pounds per acre to 66.6 pounds per acre. (See Finding of Fact No. 68). Because of the existence of cadmium in the plow layer at such excessive concentrations, and because cadmium poses a particular threat to public health, DER could base its appealed-from permit denial and order solely upon DER's "Agricultural Use" guidelines. Both of these issues will be addressed in greater detail below.

The Public Health Threat Associated With Excessive Cadmium Concentrations

Concerning the potential and/or actual environmental harm and public health hazard associated with excessive levels of cadmium in soil, the record contains scant evidence on this issue. Mr. Zwalinski, DER's soils scientist, did testify that cadmium is a carcinogen which has the capacity to accumulate throughout the food chain. (See Finding of Fact No. 70). However, while we believe that a soils scientist can be qualified to testify about food chain activities, we also believe a toxicologist or similar expert would be the proper witness to testify about the effects of cadmium on human beings and other animals. Neither DER nor appellant offered such testimony. However, that deficiency does not unduly concern us because sufficient evidence exists which supports our holding that DER's permit denial and order was justified on the basis of the environmental harm and public health hazard associated with excessive concentrations of cadmium which exist in the soils at the Heckler site. This evidence is of the following character.

In previous Board decisions dealing with the land application of either sewage sludge or residential septage, we have addressed the issue of the environmental harm and public health hazard associated with cadmium's presence in the soil at levels in excess of DER's three pounds per acre lifetime loading limit. In Coolspring Township, supra, we alluded to the fact that "[t]he heavy metals lead, cadmium and mercury are among the trace elements which may prove to be problems during agricultural utilization of sewage sludge..." Coolspring Township, supra, 1983 EHB at 180 (emphasis added). Also, in Busfield, supra, then Chairman Paul Waters stated that a cadmium level as low as 3.6 pounds per acre "...is of special concern because of the affect [sic] its accumulation can have in the human body." Busfield, supra, 1980 EHB at 194, aff'd. in part, rev'd. in part, Bedminster Township, et al. v. DER, et al., ___ Pa.Cmwlth. ___, 486 A.2d 570 (1985). It goes without saying that our concern is not only

"special" but is increased dramatically because in the case at bar we are faced with cadmium concentrations in the plow layer which range from a high of 66.6 pounds per acre to a "low" of 19.08 pounds per acre. (See Finding of Fact No. 68).

Also, appellant's own expert witness, Dr. Mercuri, expressed the concerns associated with excessive levels of cadmium in the soil. Specifically, Dr. Mercuri stated the following:

> ...copper, nickel, zinc and cadmium may present a serious hazard to plants, animals and humans because of their toxicity at relatively high concentrations and their capacity to enter the food chain.

Exhibit A-5, p. 3, memorandum from Dr. Mercuri to appellant's attorney, dated April 14, 1981 (emphasis added).

In the same memorandum, Dr. Mercuri referred to cadmium as "the most troublesome of all the sludge borne metals." In addition, Dr. Mercuri acknowledged on cross-examination that even his own soil samples (taken on May 14, 1981) indicated that the concentrations of cadmium in the soils at the Heckler site were at least three times greater than DER's three pounds per acre lifetime loading limit as set forth in DER's "Agricultural Use" (and "Land Reclamation") guidelines. (N.T., pp. 231-232).

Of course, it cannot be doubted that in cases involving the land application of sewage sludge for agricultural utilization DER has the authority and duty to protect the environment and public health by preventing contamination of the Commonwealth's natural resources, pursuant to both Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania and the Solid Waste Management Act, 35 P.S. §6018.101 et seq. (See Findings of Fact Nos. 72 and 73). As the Board has noted previously, DER's duty in this regard is as follows:

> The department has a duty to ensure that the land disposal of sewage sludge does not create environmental harm, a public health hazard or public nuisance. Article I, Section 27 of the Pennsylvania Constitution; Sections 102 and 104 of the Solid Waste Management Act, 35 P.S. §§6018.102 and 6018.104.
>
> * * *
>
> The department cannot issue a [solid waste management] permit that would have the effect of increasing the heavy metal concentrations in soil that already exceeds [sic] the maximum safe levels of heavy metals. Article I, Section 27 of the Pennsylvania Constitution; 25 Pa. Code §75.32(c)(1).

Vik-kel Corp. v. DER, et al., 1983 EHB 111,126 (Conclusions of Law Nos. 8 and 10).

As noted, the evidence establishes that cadmium concentrations in Fields 6 through 11 on the Heckler site greatly exceed the maximum allowable lifetime loading limit of three pounds per acre, the level which constitutes the maximum safe level according to DER's "Agricultural Use" (and "Land Reclamation") guidelines. In addition, the evidence also indicates two sources of environmental harm and public health hazard which exist at the site due to the grossly excessive levels of cadmium present in the soils at the site.

First, both DER's and appellant's own sampling results (taken before and after the issuance of DER's permit denial and order) indicate that downward migration of cadmium through the soils is occurring at the site, thereby endangering the quality of the groundwater.[5] However, as we have noted,

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5 While potential groundwater contamination is always a major concern, such concern certainly increases where the evidence indicates, as it does herein, that the potentially impacted groundwater supply provides water for residential wells in the vicinity of the Heckler site.

and as DER ordered in its permit denial and order, a more comprehensive hydrogeologic study would yield more definitive information concerning actual and/or potential groundwater contamination at the site. Second, the evidence also indicates that the excessive amounts of cadmium which are present in the plow layer at the site provide another source of potential environmental harm and public health danger. Specifically, the danger exists that cadmium in the plow layer will be available for plant uptake. (See Findings of Fact Nos. 31,32,68 and 70). This is of particular concern in view of the fact that appellant's permit application proposes the growing of crops at the site. (Exhibit C-6). Although appellant's permit application lists corn and wheat as the proposed crops, it is unclear whether these crops will be used for human and/or animal consumption. However, this ambiguity does not alter the fact that entry of excessive amounts of cadmium into the food chain by either means poses a public health hazard.

DER's Use of Interim Guidelines

Although we hold that DER could base its permit denial and order solely upon its "Agricultural Use" guidelines-- applying the lifetime loading limit for cadmium of three pounds per acre-- we are troubled by the possibility that DER's use of its "Land Reclamation" guidelines may have affected DER's review of appellant's permit application. Specifically, we are unable to discount the possibility that DER could have given too much weight to the "Land Reclamation" guidelines when those guidelines arguably do not apply to the evaluation of an unmined farm site which is proposed for the agricultural utilization of sewage sludge. By their terms, the "Land Reclamation"

guidelines provide, in pertinent part:

> The utilization of sewage sludge for purposes of land reclamation includes those projects whose purpose is to establish vegetative growth and/or restore or enhance the soil productivity of surface mined areas or other lands.
>
> These guidelines have been formulated to provide for environmentally sound yet reasonable sludge application rates and methods for land reclamation.

"Interim Guidelines for Sewage Sludge Use for Land Reclamation," undated, p. 1. (Exhibit C-8). Although the phrase "or other lands" appears to be ambiguous (and may be so intentionally), under the doctrine of ejusdem generis, it is restricted by the preceding phrase "surface mined areas" and clearly does not extend to unmined farmland.

In addition, the term "reclamation" is also usually confined to refer to mined areas. It should be noted that the term is not defined in the Solid Waste Management Act or even in the Commonwealth's various coal mining enactments. Rather, the term "reclamation" is defined in the various Rules and Regulations promulgated pursuant to the Commonwealth's mining statutes. 25 Pa. Code §§87.1 ("those actions taken to restore the area affected by surface mining activities as required by this chapter"); 88.1 ("those actions taken to restore mined land as required by this chapter to a postmining land use approved by the Department"); 89.5 ("those actions taken to restore the area affected by underground mining activities as required by this chapter"); and, 90.1 ("those actions taken to restore the area affected by coal refuse disposal activities as required by this chapter").

Therefore, it appears that the "Land Reclamation" guidelines do not apply to the agricultural utilization of sewage sludge on an unmined farm site. However, in light of a lack of evidence in the record concerning the character of the site, and due to the age of the cold record now before us, we decline

to hold specifically whether DER could base its appealed-from solid waste management permit denial and order partly upon internal guidelines which seemingly apply to the reclamation of mined areas.

Moreover, due to the possibilty that we have alluded to-- that DER's review of appellant's permit application could have been affected by DER's use of the "Land Reclamation" guidelines-- our holding that DER could base its permit denial and order solely upon the "Agricultural Use" guidelines does not end the inquiry. Rather, because DER's use of both guidelines constituted a discretionary act on DER's part, we are free to substitute our discretion for DER's. Warren Sand and Gravel, supra. Accordingly, applying the "Agricultural Use" guidelines to appellant's permit application, and using DER's sample results, we find that because the lifetime loading limit for cadmium is grossly exceeded in the plow layers of Fields 6 through 11 on the Heckler site, appellant's permit application must be denied.

The Remedial Portions of DER's Permit Denial and Order

In addition, concerning those portions of DER's permit denial and order which required appellant to perform various remedial measures, we hold that DER has met its burden of proof. Appellant's unpermitted use of the site for approximately twenty (20) years for the land application of off-site generated sewage sludge, and the grossly excessive amounts of cadmium which are present in the soils at the site, justify not only permit denial but also remedial activities performed and financed by appellant.

CONCLUSIONS OF LAW

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

2. Appellant did not met the burden of proving that DER's permit denial amounted to an abuse of discretion or arbitrary or capricious action by DER.

3. DER met the burden of proving that issuance of its permit denial and order, which required appellant to undertake various remedial measures at the Heckler site, did not amount to an abuse of discretion or arbitrary or capricious action by DER.

4. DER could base its permit denial and order solely upon the application of DER's "Agricultural USe" guidelines to the grossly excessive levels of cadmium which exist in the plow layer of the soils in Fields 6 through 11 at the Heckler site.

5. The Environmental Hearing Board can substitute its discretion for DER's.

6. DER's use of both the "Agricultural Use" and "Land Reclamation" guidelines in the evaluation of appellant's permit application constituted a discretionary act by DER.

7. The Solid Waste Management Act prohibits the issuance of a solid waste management permit for the land application and agricultural utilization of sewage sludge on appellant's site due to the fact that the levels of cadmium present in the plow layer of the soils in Fields 6 through 11 exceed the lifetime loading limit of three pounds per acre as set forth in DER's "Agricultural Use" guidelines. 35 P.S. §6018.101 et seq.

CONCURRENCE

By: Edward Gerjuoy, Member

I concur with the result reached by my colleague and with the Order which follows. However, some portions of the Adjudication have implications which I cannot endorse and for this reason the following opinion is presented.

I do not believe that DER has the burden of justifying either the use of or the basis for its Agricultural Use Guidelines or its Land Reclamation Guidelines in this appeal. The denial of Appellant's permit would be presumptively justified simply on the basis of Appellant's failure to comply with the requirements of the Solid Waste Management Act, 35 P.S. §6018.503, by applying the sludge without having first obtained a permit from DER. Given this fact, the use of DER guidelines is of little relevance; the levels of heavy metals in the soil on the Appellant's property far exceed the guidelines in any case. Thus, it would be Appellant's burden to demonstrate why, given his failure to obtain a permit prior to applying the sludge to his fields and given the levels of heavy metals present, DER's denial of the permit was an abuse of discretion.

With regard to the compliance order at issue herein, DER's burden is to demonstrate that the order was justified under the requirements imposed by the Solid Waste Management Act, e.g., 35 P.S. §6018.601 and §6018.602. Here again, it is not DER's burden to establish the basis for the guidelines. The critical fact is that the levels of heavy metals present on Appellant's property are the result of Appellant's application of sludge without a permit, and now greatly exceed the concentrations normally found in soils. DER is entitled to order the Appellant to remedy the situation he has illegally created. It

then becomes the Appellant's burden to show the order was an abuse of discretion because, e.g., the concentrations, though unnaturally large, are not potentially harmful. Thus, to the extent that the Adjudication as written implies that DER has an affirmative burden with regard to the guidelines, I disagree. Moreover, I do not believe that Conclusions of Law 4 and 7 are warranted by the record or by law.

In addition, I feel it necessary to state that certain portions of the opinion which seem to imply that the Board is relying upon Findings of Fact established in previous adjudications are not endorsed by my signature to this opinion. Because the requirements for res judicata or collateral estoppel are not met, the references to these previous findings should be construed merely as examples of earlier treatment of similar factual situations, and not as findings which are in any way binding in the present appeal.

ORDER

AND NOW this 14th day of August, 1985, in consideration of the within Findings of Fact and Conclusions of Law, the appeal of appellant Preston Heckler, docketed at EHB docket no. 81-036-M, is dismissed and the limited supersedeas granted to appellant on September 16, 1981 is terminated. Appellant is ordered to cease all land application of sewage sludge for agricultural utilization purposes on the Heckler site, located at Upper State Road and Horsham Pike, Montgomery Township, Montgomery County, Pennsylvania, immediately upon receipt of this order. Appellant must also comply with the remaining remedial portions of DER's March 4, 1981 permit denial and order within sixty (60) days of receipt of this order.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

Dated: August 14, 1985
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PENNSYLVANIA MINES CORPORATION :

:

: Docket No. 84-152-G

: (Issued August 14, 1985)

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Edward Gerjuoy, Board Member

SYLLABUS

This appeal of a DER Commission's order to Appellant is sustained. A DER Commission, appointed pursuant to 52 P.S. §701-123, had directed Appellant to immediately cease operation of a mine elevator and repair the same when the elevator ceased to function properly in its automatic mode. The Commission's order was based upon 52 P.S. §701-306. §701-306 does not apply to elevators used to transport workmen into and out of a mine. 52 P.S. §701-118 does apply to such elevators. However, under §701-118, there must be shown a condition detrimental to the lives or health of workmen. DER has not shown that requiring the immediate shutdown and repair of the elevator reduces the risk to workmen within the mine. DER has shown that use of the elevator in inspection mode increases the risk to workmen in the mine in the event of an emergency requiring that workmen be rapidly evacuated from the mine. The DER order is an abuse of discretion.

INTRODUCTION

The Pennsylvania Mines Corporation ("PMC") operates a deep mine, the so-called Greenwich No. 2 Mine. One means of entrance to, and exit from, this mine is via the South No. 2 elevator ("the elevator"). This elevator normally is operated in the "automatic" mode, but often also can be operated in an "inspection" mode when the automatic mode fails. On January 17, 1984 DER, citing 52 P.S. §701-306, ordered PMC not to use the elevator in the inspection mode when the automatic mode breaks down; instead, PMC was to refrain from using the elevator at all until it could be put back into service in automatic mode.

PMC requested reconsideration of this order by a Commission, pursuant to 52 P.S. §701-123. A Commission was appointed which, on April 9, 1984, affirmed the order. The Commission's report then was timely appealed to this Board, pursuant to 52 P.S. §701-123 and 25 Pa.Code §21.52(a). In due course, the Board held two days of hearings on the appeal. The parties having filed post-hearing briefs, including a reply brief from DER, this matter now is ripe for adjudication.

FINDINGS OF FACT

1. Appellant PMC is a Pennsylvania corporation, whose mailing address is P. O. Box 367, Ebensburg, PA 15931.

2. PMC operates the Greenwich No. 2 coal mine, which is a deep mine falling under the provisions of the Bituminous Coal Mine Act of 1961, as amended, 52 P.S. §§701-101 et seq. ("the Act").

3. The Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), which is the agency of the Commonwealth empowered to administer and enforce the Act.

4. One means of entrance to and access from the mine is via the South No. 2 elevator.

5. The elevator is designed so that it can be operated in any one of three so-called modes: the automatic mode, the attendant mode and the inspection mode.

6. In the automatic mode the elevator travels at a speed of 900 feet per minute ("ft/min").

7. In the inspection mode, the elevator travels at a speed of 100 ft/min.

8. It often is possible to operate the elevator in the inspection mode although the elevator has suffered an as yet unrepaired operational failure in its automatic mode; in fact, PMC has operated the elevator in inspection mode under such circumstances, without ordering the mine to be shut down.

9. The elevator is powered electrically, in any of its modes.

10. Operation of the elevator in any of its modes involves various electrical devices, e.g., motors, switches, circuit breakers, etc.

11. In the automatic mode, the elevator operates without an attendant, much like elevators in any modern office building; the elevator starts and stops on its own, and doors open and close automatically at landings which are selected by pushing buttons within the elevator or on the landings outside the elevator.

12. The circuits which are operative when the elevator is in automatic mode include: the door operation circuit; the leveling circuit; the high speed acceleration circuit; and the push buttons (inside and outside the elevator) which select the landings at which the elevator stops.

13. In the inspection mode these just-mentioned circuits are not in operation.

14. Therefore, in inspection mode: the doors do not open and shut automatically; the elevator will not accelerate to its potential speed of 900 ft/min; the elevator need not stop level with the landing outside the elevator; and the elevator

cannot be made to stop at a selected landing by pushing the buttons inside the elevator or the elevator call buttons at the landings.

15. Therefore, in inspection mode, the doors must be opened and shut manually; operator intervention is required to bring the elevator level with the landing; and operator intervention is required to bring the elevator to any selected landing.

16. In inspection mode, the elevator is controlled by an operator within the elevator, via a special inspection mode control box.

17. The inspection mode control box normally is stored above the elevator's ceiling; for operation in inspection mode, the control box is brought down (through a trap door in the ceiling) into the elevator proper, where the operator can reach it.

18. In inspection mode, the operator pushes buttons on the control box, which is connected via a cable to an elevator control room located at the top of the shaft.

19. In inspection mode, the operator has just three controls he can select: "up", "down", or "stop".

20. There is a switch which transforms operation from the automatic mode to the inspection mode, and vice versa.

21. The decision to switch from automatic to inspection, and the operation of the elevator in inspection mode, is performed by designated mine employees who are specially trained.

22. In inspection mode, power is cut off from the circuits not being used in that mode, e.g., from the motors opening and shutting the doors in automatic mode, and from the push buttons which select the landings in automatic mode.

23. The elevator doors are designed so that they will stay closed in inspection mode unless pulled open manually.

24. The elevator is designed so that it will not run when the doors are open, whether in automatic mode or inspection mode.

25. DER's inspectors Joseph Sardini and Donald Johnson testified that in September 1983, while riding in the elevator in inspection mode, the doors spontaneously opened half way but the elevator did not stop.

26. PMC's witness Raymond Gielarowski, the president of an elevator maintenance company, testified that all "safety" circuits operational in automatic mode also are operational in inspection mode.

27. Such safety circuits include, e.g.: relays to cut off power if there is overheating; the emergency stop button; a governor switch to prevent excessive speeds; switches to keep the elevator from stopping more than six inches from a landing, etc.

28. Although DER's witnesses disputed Mr. Gielarowski's conclusions about the elevator's safety in inspection mode, there was no refutation of Mr. Gielarowski's assertion that the elevator is designed so that in inspection mode the elevator retains all circuits except circuits involving: the automatic door operation; the leveling circuit; the highspeed acceleration circuit; and the push button circuits.

29. DER's witnesses' testimony about the hazards associated with riding in the elevator in inspection mode after a failure in automatic mode was highly speculative, e.g., the possibility that someone in the elevator would be hit on the head by an object falling through the open trap door (see Finding of Fact 17).

30. No evidence was presented of any elevator rider having been injured while riding in inspection mode after a failure of the automatic mode.

31. Even when the automatic mode is operational, the elevator often is operated in inspection mode for various inspection purposes, e.g., to examine the elevator shaft.

32. A shift consists of about 200 to 250 men.

33. The elevator shaft is 441 feet long; i.e., at 900 ft/min the elevator takes about one minute to complete a round trip, from top to bottom and then back to the top.

34. In automatic mode the elevator capacity is 35 men.

35. In inspection mode, the elevator normally is not permitted to carry more than 20 men, by virtue of an agreement between PMC and the union.

36. In an emergency, this agreement limiting the load in inspection mode to 20 men probably would be ignored.

37. In order to get out of the mine without using the elevator, men in the vicinity of the elevator must walk about 45 minutes underground.

38. When the elevator originally was approved for operation it was tested in all three modes, and would not have been approved for operation in any mode if any one of the three modes had manifested a defect.

39. The elevator first was put into service on January 14, 1984 (PMC Exhibit D).

40. The written approval for operation of the elevator, given to PMC by DER, does not state that a failure in automatic mode requires immediate shutdown of the inspection mode (PMC Exhibit F).

DISCUSSION

A. Scope of Review and Burden of Proof

52 P.S. §701-306, on which DER's appealed-from action relies, reads as follows:

> §701-306. Report of Defective Equipment.
>
> In the event of a breakdown or damage or injury to any portion of the electrical equipment in a mine, or overheating, or the appearance of sparks or arcs outside of enclosed casings, or in the event of any portion of the equipment, not a part of the electrical circuit, becoming energized, the equipment shall be

> disconnected from its source of power, the occurrence shall be promptly reported to a mine official, and the equipment shall not be used again until necessary repairs are made.

Evidently this Section 306 imposes a mandatory duty on the mine operator to discontinue use of electrical equipment which has suffered a breakdown. Commonwealth v. Williams, 63 D.&C. 2d 395 (1969). However, 52 P.S. §701-123, on which DER also relies, is titled "Discretionary power of mine inspectors." The Commission's approval of DER's mine inspector's original January 27, 1984 order to PMC also appears to be a purely discretionary action. Therefore the Board's scope of review in this appeal is to determine whether DER's action was an abuse of its discretion. Warren Sand and Gravel Company, Inc. v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975).

DER's post-hearing brief argues that under the facts of this appeal, PMC has the burden of proof, i.e., that PMC has the burden of showing DER abused its discretion. In so arguing, DER appeals to 25 Pa.Code §21.101(d). PMC argues that §21.101(d) is not applicable, but also argues that DER's burden of proof argument is untimely because it has been raised for the first time in DER's post-hearing brief. PMC therefore claims that shifting the burden of proof to PMC at this late stage of these proceedings (namely, after the hearings have been completed) would be unfair to PMC, because PMC prepared and presented its case on the expectation that DER would have the burden of proof under §21.101(b)(3); indeed §21.101(d), which is a special exception to §21.101(b)(3), never was invoked by DER at the pre-hearing or hearing stages, nor did DER object when asked by the Board to be the first party to go forward with evidence (FTr 24)[1].

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[1] "FTr 24" denotes p. 24 of the first-day's transcript; references to the second and concluding day's transcript will be denoted by "STr". Unfortunately, the reporters separately paginated the two transcripts.

We feel there is considerable merit to PMC's untimeliness argument. We see no reason to rule on this untimeleness issue, however, because PMC's argument that §21.101(d) is inapplicable is correct. As the Board recently has carefully explained, §21.101(d) only is triggered when DER has issued an order "requiring abatement of alleged environmental damage." Pennsylvania Mines Corporation v. DER, Docket No. 84-282-G (Opinion and Order, June 20, 1985). In the present appeal, as in the Pennsylvania Mines appeal just cited, the appealed-from DER order is intended to abate a work-place hazard, not environmental damage. Nor does the presumption of validity which attaches to actions of DER shift the burden of proof to PMC. Pennsylvania Mines, supra. In this appeal, it is DER's burden to show that its action was not an abuse of discretion.

B. Applicability of Section 306

PMC argues that DER's reliance on Section 306 (quoted supra) is misguided, because the elevator is not "electrical equipment", and because the types of automatic mode elevator malfunction requiring operation of the elevator in the inspection mode, e.g., malfunction of the automatic door closing mechanism, are neither "breakdown", nor "damage", nor "injury", nor "overheating" under the statute. DER does not really meet these arguments, but nevertheless insists that the language of Section 306 clearly applies to the elevator and to malfunctions of the elevator's automatic mode.

We are not impressed by DER's insistence or by the PMC arguments summarized immediately supra. We are impressed by the fact, stressed by PMC, that the Act includes another section concerned with defects in electrical equipment, namely 52 P.S. §701-118. This section reads as follows:

§701-118. Duties of electrical inspectors

> In order that the electrical inspector may properly perform the duties required of him, he shall devote his whole time and attention to the duties of his office, and he shall have the right to enter any coal mine for the purpose of inspecting electrical equipment, and if he finds during his inspection any defects in the electrical equipment which may be detrimental to the lives or health of the workmen, he shall have the authority to order the operator, in writing, to remedy such defects within a prescribed time, and to prohibit the continued operation of such electrical equipment after such time, unless the defects have been corrected.

The Act does not define the term "electrical equipment", nor is there any immediately obvious way to decide what sorts of "defects in electrical equipment" fall under Section 118 and what sorts are covered by Section 306. Under standard principles of statutory construction, however, we can conclude that not all defects in electrical equipment require the immediate shutdown of the equipment mandated by Section 306. Otherwise the electrical inspector's discretion under Section 118--to allow defective equipment to operate for a "prescribed time" while the defect is being remedied--would be mere surplusage. 1 Pa.C.S.A. §§1921(a), 1922(2) and 1924.

Moreover, Section 306 of the Act lies within Article III, "Rules for the Installation and Maintenance of Electrical Equipment." Article III includes §§301-334. We have carefully read through all of Article III, and have found not a single explicit reference to mine elevators. We do find mention of, e.g., trolleys (Sections 303 and 327), high voltage motors and transformers (Section 313), storage batteries (Section 314), steam cleaners (Section 315), electrical face equipment (Section 316) and locomotives (Section 329). On the other hand, Article IIK of the Act, titled "Hoisting", which includes §§263-267, has numerous explicit

references to mine elevators. We conclude that the Legislature--though undoubtedly well aware that elevators typically involve electric motors, switches, etc.--thought of elevators as "hoisting equipment" rather than "electrical equipment". Accordingly, we rule that an operational failure of the elevator in its automatic mode is not "a breakdown or damage or injury to any portion of the electrical equipment in a mine" requiring immediate shutdown of the elevator in all modes under Section 306.

Section 306 makes no reference to hazards; electrical equipment to which Section 306 is applicable must not be operated in a defective condition whether or not the defect causes the equipment to be hazardous. However, our ruling that Section 306 is not applicable to the elevator does not mean that DER is powerless to prevent hazardous operation of the elevator. If the elevator suffers a malfunction of any of its electric motors, switches, cables, etc. "which may be detrimental to the lives or health of the workmen," then under Section 118 DER clearly is authorized to set a prescribed time for repair of such malfunctioning equipment, and to prohibit continued operation of said malfunctioning equipment if not repaired within that time; indeed DER does claim this authority under the Act (proposed Conclusion of Law 2), though without referring explicitly to Section 118. Furthermore, we believe DER also has the aforesaid authority under the Pennsylvania General Safety Law, 43 P.S. §25-1 et seq. Bethlehem Mines Corp. v. DER, 1983 EHB 296. In addition, under the General Safety Law there is no apparent requirement that the mine operator be given a reasonable amount of time to repair defective equipment, as might be implied by the language of Section 118; in particular, if the unrepaired elevator is hazardous in all modes, then under various provisions of the General Safety Law, e.g., 43 P.S. §25-7, the elevator can be shut down immediately by DER, and can be kept shut down in all modes until repaired.

C. Hazards of Operating in Inspection Mode

Therewith we arrive at the key question: Is operation of the elevator in the inspection mode after failure of the automatic mode hazardous, and if so what are the hazards? In answering this question, it is necessary to distinguish between three types of hazards: (1) hazards to riders in the elevator, e.g., from falling into the shaft through an open elevator door; (2) hazards to the mine, e.g., from arcing at defective switches, which conceivably could cause an explosion if methane were present in the mine; (3) hazards to personnel within the mine in the event of a mine emergency (e.g., a mine explosion) which has been caused by factors wholly unrelated to the elevator.

DER's testimony and arguments were directed towards establishing each of these three types of hazards. In our judgment, however, DER didn't come close to meeting its burden of showing that there would be hazards of types (1) or (2) when the elevator is operated in inspection mode after a failure of the automatic mode. In so writing, we do not mean to imply that DER must show any one of these hazards is more probable than not. The magnitude of DER's burden is governed by considerations discussed in Coolspring Township v. DER, 1983 EHB 151. In Coolspring we wrote (at 173):

> To meet his burden of showing DER has abused its discretion, an appellant need not show that the undesired and undesirable effects discussed in the preceding paragraph are certain to occur, or even very probably will occur. Requiring such a showing often would be inconsistent with the basic objectives of protecting the public's health, safety and welfare. If the effects, once they have occurred, are sufficiently calamitous, then even a small probability of occurrence may be intolerable; a nuclear power plant meltdown is a compelling, though extreme, illustration. But in any given fact situation, whatever the tolerable probability of occurrence of unwonted effects may be, it is the appellant's burden to show convincingly that this

> probability will be exceeded. The mere speculative possibility of undesirable effects, without the additional showing just described, cannot overcome the presumption of validity attached to duly promulgated regulations of the EQB.

Correspondingly, in the instant appeal DER must present testimony rising above "the mere speculative possibility of undesirable effects." e.g., of a shock hazard to occupants of the elevator in inspection mode because of a loose wire which had caused the automatic mode to fail (testimony of DER's Michael Scarton, STr 44). But DER offered no evidence beyond pure speculation in support of the belief that this particular type (1) hazard might occur; certainly DER presented no evidence that such shock hazard ever had been observed, nor did DER offer any believable mechanism for the creation of a shock hazard of this sort. Evidently a failure of circuits which are energized in automatic mode but not in inspection mode--e.g., of motors which open and shut the doors and of circuits associated with the push buttons which select the landings--cannot be a shock hazard in inspection mode. On the other hand, the failure of an automatic mode circuit which remains energized in inspection mode --e.g., of a circuit associated with the emergency stop button--should be as recognizable in inspection mode as in automatic mode[2].

We have similar problems with DER's attempts to establish other suggested type (1) hazards, e.g., the possibility that elevator riders in inspection mode might be hit on the head by objects falling through the open trap door

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[2] We assume--and the Order which follows is intended to ensure--that the elevator will not be operated in inspection mode if there is a detectable defect of that mode. Thus DER's arguments that transporting men in inspection mode should be totally forbidden after an automatic mode failure--because, e.g., the doors may open while the elevator is moving in inspection mode (see Finding of Fact 25)--have no bearing on the fundamental issue of this case, which is whether the inspection mode is inherently unsafe whenever a failure of the automatic mode remains uncorrected, even if this automatic mode failure has not produced observable deficiencies in inspection mode operation.

which permits access to the inspection mode controls (Finding of Fact 17). DER's attempts to establish the existence of type (2) hazards--e.g., of possible arcing at defective switches in inspection mode after an automatic mode failure--are equally unconvincing, even though (judging by the above quote from Coolspring) for hazards this calamitous DER's burden is minimal.

The type (1) and (2) hazards we have been discussing are associated with elevator defects which (according to DER) can persist into an operable, not obviously defective inspection mode after the elevator is switched from an inoperable or obviously defective automatic mode. The only type (3) hazard of relevance to this appeal, namely the hazard to mine workers during a mine emergency (stemming from the fact that in inspection mode the elevator cannot travel faster than 100 ft/min), obviously is of quite a different sort; this hazard exists whenever the elevator is in inspection mode, whether or not an automatic mode failure has been the impetus for the switch to inspection mode. For this reason, DER's above-discussed inability to meet its burden of showing type (1) and (2) hazards has no bearing on our consideration of this type (3) hazard. Mine emergencies admittedly are unlikely, but we can take judicial notice of the fact that they do occur. The question with which we began this section on the hazards of operating in inspection mode now reduces to: In the event of a mine emergency requiring rapid removal of personnel from the mine, would the inability of the elevator to operate in automatic mode significantly increase the hazard to mine personnel?

The capacity of the elevator in automatic mode is 35 persons. A shift consists of 200 to 250 persons. Thus approximately 7 round trips are required to evacuate the shift from the mine in the event of an emergency. The length of the elevator shaft is 441 feet. Therefore in automatic mode, at 900 ft/min, a round

trip takes about one minute; the shift could be evacuated in about seven minutes in automatic mode, not counting the time taken to load and unload the men. The corresponding time for seven round trips in inspection mode at 100 ft/min would be over an hour, even ignoring the fact that normally (in the absence of an emergency) the maximum load in inspection mode is 20 men. Alternative routes for the men to get out of the mine, instead of by way of the elevator, would take about 45 minutes (Finding of Fact 37). Forty-five minutes is a lot longer than seven minutes, and one cannot be sure these alternative escape routes would be open to the miners underground during a mine emergency.

We conclude that DER has met its burden of establishing the existence of a significant type (3) hazard; in other words, we are convinced that the elevator's inability to operate in automatic rather than inspection mode, because an automatic mode failure had not been repaired, would significantly increase the hazards to miners who find themselves underground during a mine emergency.

D. Was the Order an Abuse of Discretion?

We already have ruled that 52 P.S. §701-306 does not require immediate shutdown and repair of the elevator in all modes after discovery of an automatic mode malfunction. But DER also claims that the elevator permit PMC received requires immediate shutdown of the elevator in all modes after a failure of the automatic mode. This claim largely is based on the testimony of DER and PMC witnesses that when the elevator was approved for operation it was tested in all three modes, and would not have been approved for operation in any mode had any other mode failed.

We find this testimony quite credible, but do not believe such testimony necessarily implies that the elevator--once approved for operation--must be shut

down in all three modes whenever any one mode manifests a defect. The currently effective elevator permit given to PMC by DER on March 8, 1984 reads (in full) as follows (PMC Exhibit F):

> In accordance with Article II, Section 265 of the Pennsylvania Bituminous Mining Laws, permission is hereby granted that no more than (35) persons shall be permitted to be hoisted or lowered at one time, at the South Shaft Portal, Greenwich Collieries Company, No. 2 Mine. The speed of the elevator shall not exceed 900 feet per minute.

This language is word for word the same as the language of the earliest permit for this elevator put into the record (PMC Exhibit E, dated August 31, 1976). In our opinion, this language--which states quite explicitly the permitted operating conditions for the elevator--should not now be supplemented by additional unwritten clauses encompassing presently testified-to mental reservations of the DER inspectors who approved the elevator. In other words, we reject DER's claim that PMC's permission from DER to operate the elevator authorizes DER to require shutdown of the elevator in the inspection mode whenever the elevator manifests an automatic mode failure.

From the totality of our discussion to this point, it follows that DER's order to suspend use of the inspection mode after failure of the automatic mode can be justified (if justifiable at all) only in terms of the increased hazard to men underground forced to rely on the inspection mode in the event of a mine emergency requiring speedy evacuation of the mine. This hazard is best minimized by requiring that any automatic mode failure be repaired as rapidly as possible; it will not necessarily be minimized by shutting down the elevator in all modes, while allowing men to continue working in the mine. If men have to be evacuated from the mine, the elevator in inspection mode is better than no elevator at all. Perhaps DER believes that immediately shutting down the elevator is the best way to ensure

prompt repair of any automatic mode failure. However, there is absolutely nothing in the record to indicate--and we are not going to guess--how many hours or days the repair of an automatic mode failure is likely to be delayed by use of the elevator in inspection mode. We will guess, even without evidence on the record, that there must be some automatic mode elevator failures whose repair would be delayed by continued use in inspection mode, but we also can conceive of other failures whose repair would not be delayed because, e.g., it is necessary to await delivery of a replacement part.

Another factor which we believe must be assessed--in deciding how long (if at all) to permit use of the elevator in inspection mode after an automatic mode failure--is the increased hazard (if any) to men underground traveling to alternative exits when the elevator is shut down. The record also is quite devoid of evidence on this important factor. PMC has alleged (see PMC's proposed Finding of Fact 52) that PMC and the union have agreed the elevator may be used in inspection mode "to transport miners in and out of the mine for more than one shift if parts (to repair an automatic mode failure) are not available within 48 hours." This agreement is not on the record, however, nor is there any evidence to show the agreement is reasonable from the hazard standpoint we have been discussing. In constructing the Order which follows, we have not given any weight to the terms of this alleged PMC-union agreement.

It is our best judgment, based upon the inadequate (for reasons explained) record before us, that DER has not met its burden of justifying immediate shutdown of the elevator in inspection mode under all circumstances when an automatic mode failure occurs, while men continue to be employed in the mine. In ordering immediate shutdown under all circumstances, DER's order was an abuse of discretion, even if we assume it was implicit in DER's order

(it certainly was not explicit) that use of the elevator in inspection mode would be permissible during a mine emergency when the automatic mode had not yet been repaired. On the other hand, we do not believe the record can justify indefinitely prolonged operation of the elevator in inspection mode before repair of the automatic mode is undertaken, especially if using the elevator in inspection mode is preventing repair of the automatic mode. Nor should the elevator ever be allowed to operate in inspection mode, except perhaps during a mine emergency or to move to the nearest landing, unless its inspection mode operation appears to be as designed, without defect. When DER abuses its discretion, we may substitute our discretion for DER's. Warren Sand and Gravel, supra. On the record before us, however, we hardly can do more than guess under what circumstances and for what periods it is reasonable to allow inspection mode operation before insisting that the elevator be shut down and fully repaired.

The Order which follows is consistent with the foregoing considerations.

CONCLUSIONS OF LAW

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

2. 52 P.S. §701-306, entitled "Report of Defective Equipment", imposes a mandatory duty on the mine operator to discontinue use of electrical equipment which has suffered a breakdown.

3. The order issued by the DER Commission appointed under 52 P.S. §701-123 was a discretionary action.

4. The Board's scope of review in this appeal is to determine whether the appealed order constitutes an abuse of DER's discretion.

5. The burden of proof in this appeal rests with DER, pursuant to 25 Pa.Code §21.101(b)(3).

6. 25 Pa.Code §21.101(d) is not applicable in a circumstance where the order appealed is directed toward abatement of a work-place hazard, rather than environmental damage.

7. An elevator used to transport workmen into and out of a mine is not "electrical equipment" within the meaning of 52 P.S. §701-306.

8. 52 P.S. §701-118 includes within the definition of "electrical equipment", equipment other than that included under 52 P.S. §701-306. If this were not the case, the discretion granted the electrical inspector under §701-306 would be meaningless.

9. An elevator used to transport workmen into and out of a mine is "electrical equipment" within the meaning of 52 P.S. §701-118.

10. DER has the authority to cease operation of a mine elevator which is causing a hazardous condition under the Pennsylvania General Safety Law, 43 P.S. §25-7.

11. DER did not demonstrate a safety hazard resulting from the actual operation of the elevator.

12. DER did demonstrate a safety hazard resulting from the fact that the elevator operates at a much slower speed in inspection mode than in automatic mode, thereby significantly increasing the hazard to mine personnel in the event of a mine emergency requiring rapid removal of personnel from the mine.

13. The DER order is an abuse of discretion because 52 P.S. §701-306 does not apply to elevators and requiring immediate shutdown and repair of the elevator therefore cannot be justified.

14. Issuance of a certificate of inspection by DER does not authorize DER to issue an order requiring the shutdown of the elevator in all modes of operation when one mode ceases to function properly.

15. DER has not established that an order requiring immediate shutdown and repair of an elevator, where there has been a failure of the automatic mode, will result in a reduced risk to mine personnel working underground in the mine.

O R D E R

WHEREFORE, this 14th day of August, 1985, it is ordered that:

1. PMC's appeal of the Commission report affirming DER's January 17, 1984 order is sustained, in that the terms of that order are vacated.

2. Until more definite standards have been established by DER, PMC is ordered to comply with the following restriction on operation in inspection mode whenever there has been a failure in the automatic mode (here "failure" includes any failure to operate as designed, even if the automatic mode is not wholly disabled):

a. Before mine workers may be transported in inspection mode, the inspection mode operation must be carefully checked for failures, defined as above; observed failure in inspection mode must be repaired before the elevator can be allowed to transport mine workers in inspection mode.

3. Paragraph 2a is not intended to apply when:

a. There is a mine emergency.

b. The automatic mode failure occurs between landings and there is good reason to bring the elevator promptly to a nearby landing (e.g., to let mine workers trapped inside the elevator get out).

4. This Adjudication does not preclude DER from issuing an appealable order to PMC which, presumably consistent with the holdings of this Adjudication, specifies the circumstances and time durations (which may depend on the circumstances) for permissible use of the elevator to transport mine workers past nearby landings in inspection mode after an as yet unrepaired automatic mode failure.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: August 14, 1985

cc: Bureau of Litigation

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COMMONWEALTH OF PENNSYLVANIA

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HAYCOCK TOWNSHIP :

: Docket No. 83-058-M

: Issued: November 21, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES and
RICHARD J. LANDGREEN, Permittee

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

By Anthony J. Mazullo, Jr., Member

Syllabus

This is an appeal by a municipality from an order of the Department of Environmental Resources (DER), pursuant to Section 5(b) of the Sewage Facilities Act, 35 P.S. §750.5(b), to revise its official sewage facilities plan to provide for a single residence spray irrigation system. The municipality has the burden of proof, and it has not met it. Therefore, the appeal is dismissed.

Single residence spray irrigation systems are subject to the planning requirements of Section 5 of the Sewage Facilities Act, 35 P.S. §750.5, and the regulations contained at 25 Pa. Code, Chapter 71, Subchapter A. Single residence spray irrigation systems are also subject to the permitting requirements of §§202 and 207 of the Clean Streams Law, 35 P.S. §§691.202 and 691.207, and the regulations contained at 25 Pa. Code, Chapter 91.

The owner of the lot in question petitioned DER pursuant to §5(b) of the Sewage Facilities Act, 35 P.S. §750.5(b), and 25 Pa. Code §71.17 to order the municipality to revise its official sewage facilities plan because the municipality refused to do so, and the lot was only suitable for a spray irrigation sewage disposal system, and the official plan did not provide for a spray irrigation system on the lot. DER did not abuse its discretion in ordering the municipality to revise its official sewage facilities plan to accommodate a spray irrigation on the lot in question because the municipality's plan is inadequate to meet the lot's sewage disposal needs, and DER had sufficient information to establish that the lot is generally suitable for a spray irrigation system. The municipality did not meet its burden of proving that the lot in question is clearly unsuitable for a spray irrigation sewage disposal system.

INTRODUCTION

Appellant, Haycock Township, appealed to the Board on March 25, 1983, from an order by the Department of Environmental Resources (DER) directing Haycock Township to revise its official sewage facilities plan to accommodate a single residence spray irrigation system on the property of Richard Landgreen. The Board held an evidentiary hearing on June 11, 1984, following which the Board ordered the parties to submit briefs solely on the preliminary issue of whether Haycock Township could refuse to revise its official sewage facilities plan on the ground that the proposed site violates the Township's "guidelines" regarding spray irrigation systems, when DER has already determined that the proposed site complies with DER's guidelines. Following the receipt of briefs from both Haycock Township and Landgreen on this preliminary issue, the Board issued, on October 2, 1984, an Opinion and Order holding that the Township may

not refuse to amend its official sewage facilities plan on the ground that the proposed spray irrigation system violates its guidelines. Also, the Opinion and Order directed the parties to brief the remaining issues in this case. The Board has received the final briefs and now enters the following adjudication.

FINDINGS OF FACT

1. Appellant is Haycock Township ("Township"), a township of the second class, located in Bucks County, Pennsylvania.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources ("DER"), the agency of the Commonwealth responsible for administering the Clean Streams Law, 35 P.S. §§691.1-691.1001, the Sewage Facilities Act, 35 P.S. §§750.1-750.20, and the rules and regulations promulgated under these acts.

3. Permittee is Richard J. Landgreen ("Landgreen"), who owns 5.5 acres of land located at Sawmill and Old Bethlehem Roads, Haycock Township, Bucks County, Pennsylvania.

4. The Board of Supervisors of Haycock Township adopted by resolution, the Bucks County Official Sewage Facilities Plan dated June, 1970, as the official sewage facilities plan for the Township. DER approved the Township's official sewage facilities plan on September 14, 1971.

5. In July, 1981, Landgreen hired Jimmy D. Kemmerer, a soil scientist, to review his lot's suitability for an on-site septic system to serve a single family residence.

6. Kemmerer dug on the lot approximately ten deep test holes with a backhoe.

7. Kemmerer found that Landgreen's lot was not suitable for any

type of on-site disposal system, and the only feasible sewage disposal system for the lot was a low flow spray irrigation system.

8. Kemmerer asked DER to review the lot's suitability for a single residence spray irrigation system, and on August 4, 1981, Paul Marmo, a DER water quality sanitarian, performed a site evaluation on Landgreen's property.

9. Marmo reviewed the soil profiles from the ten test holes dug by Kemmerer, and augered between the test pits. The depth of the auger holes was approximately twenty inches and the soil was extremely dry (powdery) and very friable. He found that the soils were Mount Lucas silt loam and Towhee, and mottling was exhibited at fifteen to sixteen inches. Estimated slope was three to five percent. Sloping was toward a low spot at the rear of the property. Vegetative cover was of the agricultural field type.

10. After the August 4, 1981 site evaluation, Marmo concluded that Landgreen's site met the design guidelines for spray irrigation systems, and recommended that the spray system be located at the front-center portion of the property with tree buffers along the Old Bethlehem and Sawmill Roads intersection.

11. On November 5, 1981, Kemmerer drew up the preliminary site plan for the sewage disposal system on the Landgreen property.

12. In December, 1981, Kemmerer presented to the Township, a proposed revision to the Township's official sewage facilities plan, which provided for a single residence spray irrigation sewage disposal system on Landgreen's property.

13. By letter dated May 20, 1982, Landgreen informed Glenn Stinson, a DER sewage facilities consultant, that the Township had not responded to

his proposed revision to the Township's official sewage facilities plan, and requested DER to order the Township to revise its official sewage facilities plan pursuant to Section 5 of the Sewage Facilities Act, 35 P.S. §750.5, and 25 Pa. Code §71.17.

14. The Township Board of Supervisors, at a meeting held June 2, 1982, advised Landgreen that the Township would not revise its official sewage facilities plan to accommodate a spray irrigation system on Landgreen's property.

15. By letter dated June 25, 1982, DER informed the Township that Landgreen had petitioned DER to order the Township to revise its official sewage facilities plan, and asked the Township to submit to DER its environmental, planning, zoning, or other objections to Landgreen's proposed revision to its official plan.

16. On August 13, 1982, the Township informed DER that it objected to Landgreen's request for a revision to the Township's official sewage facilities plan because the proposal was inconsistent with the Township's guidelines for single residence spray irrigation systems, the proposal lacked sufficient detail about site testing, and the proposal was not prepared by a professional engineer.

17. On February 24, 1983, DER ordered the Township to submit a revision to its official sewage facilities plan, pursuant to 25 Pa. Code §§71.14(b), 71.16(a), and 71.16(b), that would provide for Landgreen's proposed single residence spray irrigation system. In issuing the order, DER found as follows:

> a. Landgreen's request was denied by Township as evidenced by the minutes of the Township's June 2, 1982 Board of Supervisors meeting.

b. Township's guidelines concerning single residence spray irrigation facilities are inconsistent with the provisions of the Sewage Facilities Act and the Clean Streams Law.

c. The proposal did include sufficient details concerning site testing and suitability.

d. The lot in question is an existing lot and needs no further subdivision.

e. The lot in question is in compliance with applicable zoning; subdivision regulations; local, county and regional comprehensive plans; and any existing Commonwealth plans.

f. The existing plan is inadequate to meet the sewage disposal needs of Landgreen in that the existing plan only provides for on-lot disposal systems for the Landgreen property, Landgreen's property is not suitable for an on-lot disposal system, and the plan does not provide for single residence spray irrigation systems.

18. On March 25, 1983, the Township appealed to this Board, DER's order of February 24, 1983, requiring the Township to revise its official sewage facilities plan.

19. On September 16, 1983, as a result of a pre-hearing conference, the Board ordered Landgreen to resubmit to DER and the Township's engineer, Components II and IV of the planning modules for the spray irrigation system.

20. The resubmission, which was dated October 26, 1983, showed that the soil was "somewhat poorly drained," and the application rate would be .2 inches per week. The main spray area was 24,000 square feet or approximately .55 acres.

21. The preliminary site plan provided for the use of a National Sanitary Foundation approved Norweco Singulair Wastewater Treatment Model 820 with a capacity of 1350 gallons. The plan also provided for a retention tank with a capacity of 1250 gallons, a diversion terrace, and low trajectory, coarse spray nozzles.

22. The preliminary site plan showed that the distance from the spray area to property boundaries, roads, and ponds was at least 25 feet, and the distance from the spray area to wells and occupied dwellings was at least 100 feet. Also, the plan provided for the planting of conifers for permanent vegetative screening.

23. Glenn Stinson said in a letter dated January 30, 1984, that Jimmy Kemmerer had submitted the revised planning modules to DER on October 26, 1983, and that the revised plans met the minimum requirements of DER's guidelines for single residence spray irrigation systems. Responding to the Township's contentions that the revised plans showed the soil quality to be poorly drained, but did not enlarge the spray field to reflect this revision, Stinson said that the soil information available to DER showed the site to be a "somewhat poorly drained soil," and the revised plan showed more than enough suitable spray fields.

DISCUSSION

The burden of proof in this appeal is on the Township. Although the Board's rule pertaining to burden of proof, 25 Pa. Code §21.101, does not specifically address appeals by municipalities from DER orders to revise their official sewage facilities plans pursuant to §5(b) of the Sewage Facilities Act, 35 P.S. §750.5(b), Board precedent is that in these cases, the appealing municipality has the burden of proof. See Lathrop Township Board of Supervisors v. DER, 1979 EHB 259. To sustain its burden of proof, the Township must show that DER, in ordering the Township to revise its official sewage facilities plan, acted arbitrarily and capriciously, or in violation of law. Warren Sand & Gravel Co. v. DER, 20 Pa.Cmwlth. 186, 341 A.2d 556 (1975).

All sewage disposal systems are subject to the planning requirements of the Sewage Facilities Act. The system at issue in this case is a spray irrigation system, which discharges sewage effluent to the surface of the ground and which, by virtue of 25 Pa. Code §73.11(d), is subject to the permitting requirements of §§202 and 207 of the Clean Streams Law, 35 P.S. §§691.202 and 691.207.

Section 71.2(c) of DER's regulations provides that sewage systems discharging to the surface of the ground are governed by Subchapter A of Chapter 71 (sewage facilities planning requirements) and Chapter 91 of Title 25 (general requirements under the Clean Streams Law). Whenever a person applies to DER for a sewage permit under the Clean Streams Law, the municipality must revise its official plan under 25 Pa. Code §71.15(b)(1). Under 25 Pa. Code §91.31, DER may not approve a Clean Streams Law permit for a sewage project, unless the project is included in and conforms to the official sewage facilities plan required by §5 of the Sewage Facilities Act and Chapter 71 of DER's regulations.

In this case, the Township's official plan provides only for an on-lot system for Landgreen's property. But, soil studies showed that the only feasible sewage disposal system for Landgreen's property is a spray irrigation system. Before Landgreen could obtain a permit from DER for a single residence spray irrigation system, the Township's plan would have to be revised in order to indicate that spray irrigation would be the method of sewage disposal for Landgreen's property. Landgreen requested the Township to revise its official plan to provide for a single residence spray irrigation system on his property. Five months later, the Township still had not responded to his request, and Landgreen petitioned DER, pursuant to Section 5 of the Sewage Facilities Act, 35 P.S. §750.5, and

25 Pa. Code §71.17, to order the Township to revise its official plan.

Section 5(b) of the Sewage Facilities Act, 35 P.S. §750.5(b)[1] authorizes private requests to DER to order a municipality to revise its official sewage facilities plan. The regulation that sets forth specific procedures for private requests is 25 Pa. Code §71.17:

> (a) Any person who is a resident or property owner in a municipality may request the Department to order the municipality to revise its official plan where said person can show that the official plan is inadequate to meet the sewage disposal needs of the resident or property owner. The request to the Department shall contain a description of the area of the municipality in question and an enumeration of all reasons advanced by said person to show the inadequacy of the official plan.
>
> (b) Upon receipt of a private request for revision or supplement, the Department shall notify the appropriate municipality and shall request written comments from the municipality to be submitted within 30 days.
>
> (c) In arriving at its decision as whether to order a revision or supplement, the Department shall consider at least the following:
>
> (1) The reasons advanced by the requesting individual in comparison with reasons advanced by the municipality, if submitted.
>
> (2) Past actions by the municipality in approving the plans for the lot or lots in question.
>
> (3) Any applicable zoning; subdivision regulations; local, county, or regional comprehensive plans; or any existing Commonwealth plan.

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[1] §750.5. Official plans

(b) Any person who is a resident or property owner in a municipality may request the department to order the municipality to revise its official plan where said person can show that the official plan is inadequate to meet the resident's or property owner's sewage disposal needs. Such request may only be made after a prior demand upon and refusal by the municipality to so revise its official plan. The request to the department shall contain a description of the area of the municipality in question and an enumeration of all reasons advanced by said person to show the official plan's inadequacy. Such person shall give notice to the municipality of the request to the department.

(4) The existing plan developed under the provisions of this chapter.

(d) The Department shall render its decision, and inform the person requesting and the appropriate municipality, within 60 days after receipt of all information contained in subsections (b) and (c) of this section. If the Department refuses to order a revision or supplement requested under subsection (a) of this section, it shall notify the person in writing of the reasons for such refusal. Any person aggrieved by the action of the Department may appeal to the Environmental Hearing Board pursuant to Chapter 21 of this title (relating to rules of practice and procedure).

DER notified the Township, by letter dated June 25, 1982, of Landgreen's private request, and asked the Township to submit whatever objections it had to Landgreen's requested revision to its official plan. The Township informed DER that it objected to Landgreen's request for a revision to its official plan because the proposal was inconsistent with the Township's guidelines for single residence spray irrigation systems, the proposal lacked sufficient detail about site testing, and the proposal was not prepared by a professional engineer.

In ordering the Township to revise its official sewage facilities plan, DER found, among other things, that the Township's guidelines concerning single residence spray irrigation systems were inconsistent with the provisions of the Sewage Facilities Act and Clean Streams Law, Landgreen's proposal included sufficient details concerning site testing and suitability, the Township's official plan was inadequate to meet Landgreen's sewage disposal needs because it only provided for on-lot systems for Landgreen's property, and Landgreen's property was unsuitable for such systems.

By Opinion and Order dated October 2, 1984, this Board held that, as a matter of municipal law, the Township had no authority to refuse to revise its official sewage facilities plan on the basis that the proposal was inconsistent with the Township's guidelines for single residence spray irrigation systems. Haycock Township v. DER, 1984 EHB 807. This adjudication will dispose of the Township's remaining objections to revising its official plan, namely,

that Landgreen's plan violates applicable regulations and guidelines because it proposes a spray area that is too small, it shows unsuitable soils, it fails to provide sufficient information, and it was not completed by a professional engineer.

Landgreen must obtain two levels of approval from DER for his spray irrigation system. First, he must obtain planning approval, and then he must obtain a permit approval. The Township is trying to block Landgreen's proposal at the planning stage, but most of the Township's objections are issues that should be resolved at the permitting stage.

When DER is reviewing a revision to an official sewage facilities plan, it does not have to determine with 100 percent certainty that the proposal will be successful. Rather, DER should make a determination as to whether the site in question is generally suitable for the sewage disposal method that the revision proposes, and that, therefore, the proposal has a reasonable chance of success. See East Cocalico Township v. DER, 1979 EHB 183; Lathrop Township Board of Supervisors v. DER, 1979 EHB 259. In order to overturn a DER approval of a plan revision, an appellant must show that a site is clearly unsuitable for the method of sewage disposal that the plan revision indicates. See Eagle's View Lake, Inc. v. DER, 1978 EHB 44. Further in this case, the Board is not reviewing a DER approval of a plan revision, but rather, a DER order requiring the Township to revise its plan. When the Township submits its plan revision, DER will review it pursuant to the requirements of the Sewage Facilities Act and 25 Pa. Code, Chapter 71, notably 25 Pa. Code §71.14 (Contents of plans). There will be an opportunity for the parties to appeal to the Board DER's decision to approve or disapprove the plan revision, and the opportunity to appeal DER's decision to approve or disapprove a permit, when and if Landgreen applies for a permit for a spray irrigation system.

The Township contends that Landgreen's proposed spray irrigation

system does not conform to the design requirements for permitting subsurface disposal systems in 25 Pa. Code §73.1 et seq. As previously noted, spray irrigation systems discharge sewage effluent directly to the surface of the ground. Section 71.2(c) of DER's regulations provides that sewage disposal systems that discharge to the surface of the ground are governed by the planning requirements of Subchapter B of Chapter 71, and the permitting requirements of 25 Pa. Code, Chapter 91. Although the planning requirements of Chapter 71 apply to spray irrigation systems, section 71.2(c) also provides that the permitting requirements of Chapter 71, which incorporate the design standards of Chapter 73, see §71.31, apply only to systems employing renovation of sewage in a subsurface absorption area or retention in a holding tank. Therefore, the spray irrigation system was not required to conform to the requirements of Chapter 73.

In determining that Landgreen's lot was suitable for a spray irrigation system, DER applied guidelines for single residence spray irrigation systems established by the DER Bureau of Water Quality Management, but never promulgated as regulations by the Environmental Quality Board. Since these guidelines were not promulgated as regulations, the Board cannot accord them a presumption of validity. Old Home Manor v. DER, 1983 EHB 396; Cambria Coal Co. v. DER, 1983 EHB 30; Allegheny County Sanitary Authority v. DER, 1982 EHB 29. Failure to publish the requirements as a regulation does not, however, make the requirement unenforceable. The Board reviews DER's application of policies or guidelines on a case by case basis, and substitutes its discretion for that of DER if the Board finds that DER abused its discretion. Warren Sand & Gravel Company v. DER, 20 Pa.Cmwlth. 186, 314 A.2d 556 (1975). The Township did not present any evidence that demonstrated that these guidelines were inadequate. DER's review of a sewage disposal system at the planning stage is to

determine whether the site in question is generally suitable for the proposed system. DER's guidelines for single residence spray irrigation systems set forth specific standards for soils, slopes, application rates, buffer zones, and minimum property size, but DER's review at this stage is for general suitability. Thus, the Board concludes that DER's use of these guidelines to determine general suitability in this case was reasonable.

The evidence adduced at the hearing demonstrates that Landgreen's site was suitable for a spray irrigation system according to these guidelines. Landgreen hired Jimmy Kemmerer, a soil scientist, to review his lot's suitability for an on-site septic system for a single family residence. Kemmerer went to the lot and dug approximately ten deep test holes with a backhoe. Kemmerer concluded that Landgreen's lot was unsuitable for any type of on-lot sewage disposal system, and asked DER to review the lot's suitability for a single residence spray irrigation system. Then, a DER water quality sanitarian went to the site, reviewed the soil profiles from the ten test holes dug by Kemmerer, and augered between the test pits. The auger borings showed mottling at fifteen to sixteen inches, and that the soil was a "somewhat poorly drained Mt. Lucas." The vegetative cover was of the agricultural field type. DER's water quality sanitarian also measured the slope of the main spray area, and found that it ranged from three to five percent, the average slope being less than four percent. The final site plan that Kemmerer submitted to DER showed a main spray area of .55 acres, with an additional spray area of .2 acres. The site plan also showed that the distance from the spray area to property boundaries, roads, and ponds was at least 25 feet, and the distance from the spray area to wells and occupied dwellings was at least 100 feet.

DER's guidelines for single residence spray irrigation systems require agricultural areas with somewhat poorly drained soils to have slopes limited to four percent. Landgreen's site, which has an agricultural field type of vegetative cover, and somewhat poorly drained soils, has slopes in the spray area averaging less than four percent. The guidelines set forth a maximum permissible application rate of .2 inches per week on a minimum spray area of .5 acres for deep, somewhat poorly drained soils. The site plans show a main spray area of .55 acres. Also, the guidelines require a buffer zone of 25 feet between the spray area and property boundaries, roads, driveways, unoccupied buildings, streams, water courses, and ponds; 50 feet between the spray area and wells; and 100 feet between the spray area and occupied buildings, downslope dug wells, and springs used for drinking. The site plans show that all of the buffer zone requirements set forth in the guidelines will be met by the proposed spray irrigation system on Landgreen's property.

The Township argues that sixty percent of the main spray area has a slope exceeding four percent, but DER's water quality sanitarian testified that the average slope was less than four percent and that certain measures could be implemented to compensate for areas where the slope was greater than four percent. Thus, DER reasonably concluded that the site was generally suitable in terms of slope requirements, and whether a system can actually be implemented with measures to compensate for slopes over four percent is an issue that should be determined at the permitting stage.

The Township next contends that DER's guidelines require a spray area of .625 acres for a system that serves a four bedroom, single family residence. The Township, however, did not specify any guideline that required a .625 acre spray area, and as far as the Board can determine, DER's guidelines for single

residence spray irrigation systems require a spray area of .5 acres with a maximum application rate of .2 inches per week for deep, somewhat poorly drained soils. Landgreen's site plan shows a main spray area of .55 acres with an additional spray area of .2 acres.

The Township also contends that the soil in Landgreen's proposed spray areas is unsuitable for a spray irrigation system. DER determined that the soil on Landgreen's property was a "somewhat poorly drained Mt. Lucas" with an agricultural field type of vegetative cover. The DER guidelines allow for spray irrigation systems on somewhat poorly drained soils and agricultural areas provided that the slopes are limited to four percent. As previously discussed, the average slope on the site is less than four percent. In presenting its case, the Township called only one witness, the Township's engineer. The gist of the Township engineer's testimony was directed to the methodology or reliability of DER's investigation of the site's soil types and water table levels. The Township's engineer did not point to any actual errors made by DER; his criticisms were confined to the claim that DER could have more thoroughly bolstered its findings that the site met the guidelines pertaining to soil types and seasonal water table levels. DER based its findings on actual observations of the site -- auger borings and backhoe pits. The Township's engineer made no actual field observations. Therefore, the Township did not meet its burden of showing that the soil types on the site were clearly unsuitable for a spray irrigation system.

The Township does cite DER's guidelines for spray irrigation systems, but argues that the site plan does not contain sufficient information to determine whether the buffer zone requirements in the guidelines have been met. The site plan showed that the distances from the spray area to property boundaries, roads, and ponds was at least 25 feet, as required by

the guidelines, and the site plan contained a statement that no wells were located within 100 feet of the spray area. The Township takes issue with the failure of the site plan to show the exact location of the wells. The burden of proof, however, is on the Township. The guidelines require that no wells be located within 50 feet of the spray area, and the site plan demonstrates that DER considered this requirement and determined that it was met. The Township presented no evidence of any well located within 50 feet of the spray area, and, therefore, the Township did not sustain its burden of showing that this guideline was violated.

Finally, the Township argues that Landgreen's application for a plan revision is "fatally defective" because a soil scientist, instead of an engineer, completed the planning modules. In connection with his private request for a revision to the Township's official plan, Landgreen submitted two forms provided by DER, known as "Component II" and "Component IV." Jimmy Kemmerer, a soil scientist hired by Landgreen, completed these forms. One of the forms, Component IV, contained the statement, "This section must be completed by a registered professional engineer for all sewerage projects that require the issuance or modification of a Clean Streams permit, by the Department of Environmental Resources." At the bottom of Component IV, below Kemmerer's signature, the words, "Registered Professional Engineer," were crossed out and replaced with the words, "Soil Scientist." Therefore, Kemmerer did not attempt to misrepresent himself, and DER, in reviewing Component IV, knew that it had been completed by a soil scientist and not a professional engineer. Chapter 71 contains no requirement that Component IV be completed by an engineer, and DER independently evaluates the information in the component after it is submitted. The requirement on the component form likely relates to the requirement in 25 Pa. Code §91.23(b) that plans

and specifications for permits under the Clean Streams Law be prepared by a licensed professional engineer. Since we have previously held that the Department need only determine general site suitability at the planning stage, this deficiency is not fatal. In any event, the Township presented no evidence that the information provided by Kemmerer was inaccurate. Therefore, the Township did not sustain its burden of showing that DER abused its discretion by allowing Landgreen's Component IV to be completed by a soil scientist rather than a professional engineer.

CONCLUSIONS OF LAW

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

2. The Board incorporates its decision, Haycock Township v. DER, 1984 EHB 807, into this adjudication.

3. Appellant, Haycock Township, has the burden of proof in its appeal of a DER order issued pursuant to 25 Pa. Code §71.17, directing the Township to revise its official sewage facilities plan.

4. In ordering the Township to revise its official sewage facilities plan, DER complied with the applicable provisions of the Sewage Facilities Act, 35 P.S. §§750.1-750-20, and all the applicable regulations promulgated under this act.

5. DER did not abuse its discretion in ordering the Township to revise its official sewage facilities plan to accommodate a spray irrigation system on Landgreen's property because the Township's plan is inadequate to meet the sewage disposal needs of Landgreen's property, and DER had sufficient information to establish that Landgreen's lot is generally suitable for a spray irrigation system.

6. Appellant did not sustain its burden of proving that Landgreen's lot is clearly unsuitable for a spray irrigation system.

ORDER

AND NOW, this 21st day of November, 1985, upon consideration of the findings of fact and conclusions of law made by the Board, the appeal of Haycock Township, at EHB Docket No. 83-058-M, is dismissed, and Haycock Township is ordered to revise its official sewage facilities plan in compliance with the order of the Department of Environmental Resources dated February 24, 1983.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling
MAXINE WOELFLING, Chairman

Anthony J. Mazullo Jr.
ANTHONY J. MAZULLO, JR., Member

Edward Gerjuoy
EDWARD GERJUOY, Member

DATED: November 21, 1985

cc: Bureau of Litigation

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FERRI CONTRACTING COMPANY, INC. :

:

: Docket No. 84-134-G
: Issued: January 8, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
MOTION TO QUASH

Synopsis

This appeal of DER's denial of additional funding for certain project change orders under the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq., is dismissed for lack of standing. The contractor's interest in securing the additional funding, although arguably substantial and direct, cannot be said to meet the third prong of the applicable test of standing--immediacy. The interest of a contractor is not within the zone of interests which the Federal Act is intended to protect. Public policy weighs against affording a contractor standing to challenge the DER action. Therefore, the appeal is dismissed.

OPINION

In 1976 the Deer Creek Drainage Basin Authority ("Authority") was awarded a construction grant by the United States Environmental Protection Agency ("EPA") for the purpose of constructing certain sewage facilities. The grant program is operated under the authority of the Federal Water Pollution Control Act, 33 U.S.C. §1251 et seq. and the regulations promulgated pursuant thereto, 40 C.F.R., Subchapter B. After receiving the grant, the Authority contracted with Appellant to construct a portion of the sewers in the Deer Creek Drainage Basin.

In 1979, after the contract between Appellant and the Authority had been entered into, DER and EPA signed a delegation agreement which authorizes DER to administer certain aspects of the federal construction grants program. (See, 40 C.F. R. §35.912). A project change order may result from the contractor encountering conditions during construction which require changes in the contract provisions. The Authority and Appellant executed certain change orders pursuant to a settlement between themselves regarding extra funds required because of problems Ferri experienced as a result of obstructions due to existing underground utilities. Appellant states that the negotiated agreement provides that "the Authority will pay between $225,000 and $300,000, based upon what EPA[1] (sic) would approve. In the instant case, EPA . . . has approved only the total sum of $238,154.29 . . . Ferri simply wants EPA to further consider approval of the

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[1]Although the grant monies are federal funds, as noted above, DER--not EPA--now reviews the eligibility of change orders for additional grant participation. The action being appealed herein was taken by DER, not by EPA.

additional funds up to the ceiling . . . agreed upon between Ferri and the Authority." (Appellant's Memorandum of Law, p. 2-3).

After Appellant and the Authority reached this agreement, the Authority submitted the change orders to DER for review. DER denied a portion of the requested additional funding. The Authority did not appeal this decision. DER has moved to quash the appeal of Ferri on the basis that it lacks standing.

Under Pennsylvania case law a prospective litigant must be able to demonstrate that it has a "substantial," "direct," and "immediate" interest in the subject matter of the litigation. William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). The requirement that the interest be substantial means that "there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law." 346 A.2d at 282. In this appeal this requirement has arguably been met. Although Appellant will be paid at least $238,154.29, had DER approved a greater amount it appears that Appellant may have been entitled to additional payment. Appellant has not provided the Board with a copy of the negotiated agreement regarding the change orders; therefore, we cannot say with certainty that the Authority would be required to pay Appellant an additional amount. It is at least possible that the phrase "based upon what the EPA would approve" (quoted supra) is subject to additional, unstated conditions.

The second William Penn requirement, that the interest be "direct," means that "the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains." 346 A.2d 282. This requirement may be more difficult to meet than the former, in many cases. The United States Supreme Court has interpreted the causation standard to require

that the prospective litigant demonstrate that, absent the action he seeks to challenge, there is a "substantial probability" that the result he seeks would materialize. Warth v. Seldin, 422 U.S. 490, 504 (1975) (quoted in William Penn, 346 A.2d at 283). In the present context, we are willing to assume for the purpose of argument that there is a sufficiently direct causal connection between DER's denial of a portion of the funds for the change orders and Appellant's claimed harm. Again we note, however, that absent the text of the agreement between Appellant and the Authority, it is difficult for us to determine with certainty that DER's denial will have the effect of denying Appellant the money it seeks. Even assuming, arguendo, that Appellant's interest is "substantial" and "direct", we cannot agree that Appellant has standing because we find that Appellant cannot meet the third requirement of the William Penn test.

Appellant must be able to show that its interest is "immediate", e.g., "not a remote consequence of the judgment." Here the inquiry is focused upon "the nature of the causal connection." 346 A.2d 283. In the administrative law context, this requirement is often phrased in terms of a "zone of interests" test. This text is concerned with whether the interest the litigant seeks to protect is "arguably within the zone of interests sought to be protected or regulated by the statute or constitutional guarantee in question." William Penn, 346 A.2d at 284, n.23 (quoting Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970)). The object of this test is to determine whether "protection of the type of interest asserted is among the policies underlying the legal rule relied upon by the person claiming to be 'aggrieved'". William Penn, 346 A.2d at 264.

In the instant case we are required to examine the applicable statute -- the Federal Water Pollution Control Act--and the associated regulations in an

effort to determine whether a contractor's interest in securing payment for work performed is among the policies furthered by the legislative scheme. Appellant has made no effort to direct the Board's attention to any provision of the Federal Act which might indicate such a legislative intent and the Board's own research has revealed no indication of any. Indeed, policy considerations would seem to support a conclusion that disputes regarding a contractor's payment by a grantee (such as the Authority) are best regarded as matters which concern those two parties solely. Appellant's interest in the grant funds derives from its contract with the Authority. Had DER awarded the full amount sought for the change orders, the recipient would have been the Authority, not Appellant. Appellant could have better protected its interest by assuring that the Authority would appeal a DER denial. There is little question that in this event the Authority would have had standing.

Furthermore, contractors in no way are parties to the grant agreement between the grantee and the administrative agency. To give the grantee's contractors standing to appeal any agency decision which the grantee had standing to appeal would have the effect of unnecessarily hampering the administration and enforcement of the federal construction grants program. Moreover, to give contractors standing in such circumstances invites contractors and grantees to negotiate "contingency"contracts for unnecessary construction, in the hope that the agency's sound decisions to disapprove funding can be recovered via the contractor's appeal, without any risk to the grantee. These not unlikely actions obviously are contrary to sound public policy. The thesis that consideration of public policy cannot be ignored in deciding what classes of actions should be made appealable has been enuciated by the Commonwealth Court. Bethlehem Steel v. DER, 37 Pa. Cmwlth 479, 390 A.2d 1383 (1978).

Our conclusion in this regard is supported by the federal decisions examining the standing of contractors under the federal construction grants program. The federal courts have applied the zone of interests test and examined the federal regulatory scheme for indications of an intent that contractors interests be recognized. The regulatory provision which has been viewed as evidencing such an intent reads in pertinent part as follows:

> 40 C.F.R. §35.939
>
> Protests.
>
> (a) General. A protest based upon an alleged violation of the procurement requirements of §35.936 through 35.938-9 of this subpart may be filed against a grantee's procurement action by a party with an adversely affected direct financial interest.

Although this regulation in no way determines the scope of this Board's jurisdiction (which is governed by the Administrative Code, 71 P.S. §510-21, whether DER's action is taken pursuant to federal or state law[2]), it is relevant to an inquiry regarding the policies furthered by the federal program. At least one federal court has read this provision to suggest that a contractor has standing to challenge an administrative decision relating to the construction grants program. In CCIW&M v. EPA, 452 F.Supp. 1847 (D.C.N.J. 1978), the plaintiffs were a successful bidder for a construction contract and its supplier. They sought to challenge an EPA decision to require readvertising of bids for the contract. The court found that 40 C.F.R. §35.939 evidenced an intent that the plaintiffs be permitted to appeal the EPA decision.

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[2] Del-AWARE Unlimited, Inc. v. DER, et al., Docket Nos. 82-177-H and 82-219-H, (Adjudication issued June 18, 1984, at p. 81.)

However, other federal courts have not been so generous. In two recent decisions §35.939 has been examined and a determination reached that it does not suffice as a basis for a contractor's standing. Standard Engineers and Contractors, Inc. v. EPA, 14 E.R.C. 1633, (D. Conn., 1980); J.E. Brenneman Company v. Schramm, 14 E.R.C. 1173 (E.D. Pa. 1979). In addition, DER has directed our attention to a case which appears to conclusively resolve this issue for the purposes of this appeal. In Mount Joy Construction Company, Inc. v. Schramm, 486 F. Supp. 32, (E.D. Pa. 1980) (aff'd mem. 639 F.2d 774 (3rd Cir. 1980)) a distinction was drawn between administrative decisions affecting the initial phases of a grant project and those which determine issues arising long after the grant has been awarded. After careful examination of the language of 40 C.F.R. §35.939, quoted supra, the court decided that "to be protestable the matter must arise under the procurement provisions of §§35.934-35.938-9" and that disputes involving change orders (such as the dispute herein) are not associated with procurement because procurement deals with "that portion of the proceedings when EPA awards the initial grant." 486 F.Supp. at 34.

The Mount Joy decision is consistent with the CCIW&M holding in that the court in the latter case found that the regulations upon which the contractor relied "clearly seek to protect the integrity of the bidding process". 11 E.R.C. at 1851. Finally, we note that the Mount Joy court determined--as we have done in the present case--that the protest procedure established by 40 C.F.R. §35.939 "did not intend to involve (the administrative agency) in contractual disputes handled and determined by state law". 486 F.Supp. at 34. Appellant herein seeks our review of a matter which is ultimately governed by whatever rights it is afforded under its contract with the Authority. Its remedy lies with the Authority--not with DER.

In sum, we find that Appellant cannot demonstrate that protection of its interest is a policy furthered by the federal Act or the associated regulations. Its interest is too remote to confer standing upon it. Public policy weighs against affording Appellant the opportunity to challenge the DER determination at issue herein.

One final point should be addressed. Appellant has argued that the Authority should be joined as an involuntary plaintiff and that Appellant be permitted to stand in the shoes of the Authority for the purpose of prosecuting this appeal. If Appellant has no standing this Board cannot order the Authority to participate in a proceeding in which--but for such an order--there would be no party with the ability to prosecute the appeal. Therefore, Appellant's suggestion that the standing issue be resolved in this manner is without merit.

ORDER

WHEREFORE, this 8th day of JANUARY 1985 it is ordered that the appeal is dismissed for lack of standing.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED:

cc: Bureau of Litigation
Zelda Curtis, Esquire, for DER
Timothy P. O'Reilly, Esquire,
Pittsburgh, for Appellant

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SNYDER TOWNSHIP RESIDENTS FOR ADEQUATE WATER SUPPLIES :

:

: Docket No. 84-355-G
: Issued: January 8, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
MOTION TO DISMISS

Synopsis

Appellants seek to challenge a DER decision denying them a public hearing regarding a mining permit application because the request for the public hearing had not been timely filed. The appeal is dismissed. DER has offered good reasons for concluding that its action is not final and therefore not appealable. Appellants have provided no good reasons for holding the DER action is appealable. The Board is reluctant to so hold in the absence of any legal arguments which can be regarded as rebutting DER's contention of non-finality.

OPINION

This appeal concerns a letter from DER's Bureau of Mining and Reclamation which, inter alia, denies the request of Michael and Debra Bovaird for a public hearing in connection with a mining permit application. The letter states that the request was made well after the expiration of the thirty day period within which such requests will be considered and was therefore denied. The appellants argue that the public advertisement of the opportunity for a public hearing did not comport with the statutory requirements. 52 P.S. §1396.4(b).

DER has moved to dismiss the appeal on the ground that the letter does not constitute an appealable action. In support of this contention DER argues that the permit review process is not complete; if and when a permit is issued, Appellants will have the opportunity to bring an appeal. It is possible, however, that the permit will be denied, in which event Apepllants' concerns presumably will be allayed.

DER's arguments are conclusive unless DER's refusal to grant a public hearing now is affecting the appellants' "personal or property rights, privileges, immunities, duties, liabilities or obligations" in a fashion which would not be adequately addressed by having the Board consider the public hearing refusal only in the course of some later, possibly very much later, appeal of the permit, when and if granted. 2 Pa. C.S. §101; 25 Pa. Code §21.2. Naturally the Board anticipated that this just-mentioned issue would be addressed in the appellants' response to DER's Motion. Instead, Appellants' response consisted of the following single paragraph:

> 1. The decision of the Department of Environmental Resources not to require a public hearing as required by the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq., falls

> within the collateral order exception to the requirement of finality. The decision not to grant a public hearing is collateral to the review of the permit in that it does not address the merits of the application. See Bell v. Beneficial Consumer Discount Company, 465 PA. 225, 348 A.2d 734 (1975).

The Bell, supra, citation is to a case discussing the appealability of a pre-trial order dismissing a class action. At best, the relevance of this citation to the instant appeal is remote. Furthermore, Appellants have not addressed DER's assertion that an opportunity for appeal will be provided if and when the permit is issued. If Appellants were to appeal the permit issuance, the Board would consider the denial of a public hearing to raise serious questions regarding the permit review process. In the present context, however, we cannot say that Appellants have demonstrated any meritorious reasons for holding this DER action appealable.

The issues presented here closely parallel those raised in a related appeal, Snyder Township Residents for Adequate Water Supplies v. DER (Docket No. 84-316-G, Opinion and Order dated October 30, 1984), which involved the appealability of another DER action. There, as here, we explained that Appellants had suggested no good public policy reasons for holding the instant DER action to be "final" and, therefore, appealable. There, as here, we noted that if the permit is granted, an opportunity for appeal will exist. In conclusion, we are reluctant to find that this DER action (of refusing a public hearing)is appealable, in the absence of clearly articulated reasons for so holding, or even of any rebuttal to DER's non-finality contention. Therefore, the appeal is dismissed.

O R D E R

WHEREFORE, this 8th day of JANUARY, 1985 it is ordered that the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: January 8, 1985

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
Lee R. Golden, Esquire

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MATHIES COAL COMPANY :

:

: Docket No. 82-212-G
: Issued: January 14, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

Where the lowest seven-consecutive-day average flow that occurs once in ten years, (Q7-10), is small enough to be reasonably equated to zero, the point of monitoring for compliance with the provisions of 25 Pa. Code, Chapter 93, is the point of discharge. Although 25 Pa. Code 93.5(b) provides that where the Q7-10 is zero the "design flow" shall be based upon the flow at the point where a use identified in 25 Pa. Code 93.4 first becomes possible, this criterion is inapplicable to a determination of the proper monitoring point for ascertaining compliance with effluent limitations. Indeed, use of a monitoring point other than the point of discharge would make it virtually impossible to determine whether the discharge is in conformity with the regulatory requirements. Therefore, DER has not abused its discretion in insisting that the point of discharge be used as the monitoring point.

OPINION

On January 13, 1984, this Board issued an Opinion and Order in the above captioned matter, to which the reader is referred for further details about this dispute. That Opinion and Order determined that a crucial disputed fact in this matter is the value of the flow in Peter's Creek (to which Mathies' coal mine discharges) to be used in computing the effluent limits Mathies' discharge must satisfy under the Clean Streams Law, 35 P.S. §691.5, and the regulations in 25 Pa. Code Chapter 93.

Normally the effluent limits are computed from a formula in which the flow is taken to be (Q7-10), defined as "the actual or estimated lowest seven-consecutive-day average flow that occurs once in ten years." 25 Pa. Code §93.5(b). DER and Mathies do not agree on the value of (Q7-10); Mathies' proposed value is considerably smaller than DER's. Moreover, if (Q7-10) is small enough to be reasonably equaled to "zero flow", then the flow to be used in computing the effluent limits is prescribed by 25 Pa. Code §93.5(b) as follows:

> Where the lowest seven-consecutive-day average flow that occurs once in ten years is zero, the Department shall specify the design flow based on the identified or estimated flow at that point where a use identified in §93.4 of this title (related to statewide water uses) becomes possible.

The just-quoted prescription for the "design flow" raises a legal question concerning the effluent limits on Mathies' discharge, once those limits are computed; the prescription does not specify the point (in the receiving stream) where the discharge is to be monitored for compliance with those limits. By stipulation dated December 6, 1984, the parties have framed the aforesaid legal question as follows:

> If the (Q7-10) at the point of discharge is zero and the Department identifies a point where a use identified in 25 Pa. Code 93.4 becomes possible, whether the stream at that point of first use becomes the monitoring point for determining compliance with effluent limitations in an NPDES permit?

The instant Opinion decides this question, which both parties have briefed.

DER answers the above question in the negative. According to DER, the discharge must be monitored at the point where it first becomes a "discharge", i.e., where the effluent from Mathies' mine first enters Peters Creek (the receiving stream in this appeal). Mathies contends the monitoring point should be the "point of first use" in Peters Creek. We agree with DER, for reasons given infra.

Mathies offers no legal citations in support of its contention. Mathies merely argues that monitoring at the discharge point is inconsistent with seeking a point of first use. Mathies sums up its argument with the following language:

> To our way of thinking it makes much more sense to regard the identification of a downstream point as having much more significance than the Department would like it to have. Mathies contends that the downstream point identified by the Department is supposed to be regarded, in essence, as the point where the stream, as a viable warm water fish habitat, actually begins. Upstream from that point the creek exists as a viable, long term fish habitat only because of the Thomas Portal mine drainage discharge. It is at that point that the impact of the Thomas Portal discharge on Peters Creek, as a natural stream, should logically be measured. That downstream location should be the place where water samples are taken to determine if the effluent standards of the Thomas Portal NPDES permit are being met.

However, the Board believes that Mathies' arguments, insofar as they have merit, already have been taken account in the regulations, which (as explained above) specify that—when the stream flow is sufficiently small at the discharge point—the NPDES effluent limitations are to be based on the flow at the point of first use. Mathies does not object to DER's formula for computing the effluent

limitations, once the design stream flow specified in 25 Pa. Code §93.5(b) has been established (see our January 13, 1984 Opinion and Order in this matter); Mathies merely is objecting to DER's choice of the monitoring point at which compliance with the computed effluent limitations is to be monitored.

But once the proper stream flow for computing the effluent limitations is established, it makes no sense whatsoever to monitor compliance with these effluent limitations anywhere else than at the point of discharge. Except at the point of discharge, measurements of controlled polluted concentrations will be diluted by unknown and incalculable amounts, making it impossible to decide whether Mathies really is complying with the NPDES requirements. Indeed, monitoring downstream from Mathies' discharge point could cause Mathies to be unfairly accused of noncompliance with the effluent limitations if, at some future time, an unidentified pollution source were to begin discharging into Peters Creek downstream from the Thomas Portal but upstream from the monitoring point.

Moreover, as DER points out, Mathies' contention is not consistent with existing legal precedent. In U.S. Steel v. Train, 556 F.2d 822 (7th Cir. 1977), the Court (at 851) specifically rejected U.S. Steel's arguments that its compliance with NPDES discharge limitations for its Gary Indiana plant should be monitored downstream from the plant's discharge points. The Court said:

> By comparison, U.S. Steel's permit proposals call for monitoring only once a week, even at the seven outfalls now sampled five times in eight days, and would replace the monitoring for several pollutants now conducted at each outfall with monitoring at The Pennsylvania Railroad Bridge, four-and-one-half miles downstream. Monitoring at each outfall enables the permittee and EPA to pinpoint the source of any discharges that exceed the plantwide limitations on particular pollutants. Furthermore, the U.S. Steel proposal would, in effect, allow it to use the four-and-one-half mile stretch of the river as an extended treatment facility, something

hardly contemplated by either the Indiana water quality standards or the FWPCA (the Federal Water Pollution Control Act, also known as The Clean Water Act, 35 U.S.C. §1251 et req.)

We cannot say that the EPA exceeded its authority or acted unreasonably when it determined that regular and frequent monitoring at each outfall is necessary to insure prompt detection and rectification of permit violations. (emphasis added)

ORDER

WHEREFORE, this 14th day of January, 1985, it is ordered that:

1. Under the facts of this appeal, it is not an abuse of DER's discretion to require that Mathies' discharge into Peters Creek be monitored at the Thomas Portal discharge point, for the purpose of determing whether Mathies is complying with the DER-imposed effluent limitations on Matnies' discharge.

2. The Board regards the holding in paragraph 1 supra as provisional and interlocutory until confirmed or rejected in the Board's final adjudication of this appeal.

3. Within 15 days from the date of this Order, the parties are to contact each other and arrange a telephone conference call with the Board, for the purposes of discussing the need for additional evidence and setting a schedule for briefing the remaining outstanding issues in this appeal (see paragraph 2 of our January 8, 1985 Order in this matter).

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: January 14, 1985

cc: Bureau of Litigation
Zelda Curtiss
Daniel Rogers

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
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BERWIND NATURAL RESOURCES :

:

: Docket No. 84-130-G
: Issued: January 16, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION TO NAME ADDITIONAL DEFENDANTS

Synopsis

Appellant's Motion To Join Additional Defendants is denied. The Motion asserts that two other coal companies are indispensable parties to this proceeding. Appellant proposes to serve complaints upon these companies if they are joined. The Pennsylvania Rules of Civil Procedure generally do not apply to proceedings before the Board; the General Rules of Administrative Practice and Procedure, 1 Pa. Code, Part II, and the Board's own rules, 25 Pa. Code, Chapter 21, govern. Neither of these provide for compulsory joinder of parties. Further, the Board lacks jurisdiction to adjudicate the claims of private parties vis à vis each other. For these reasons the Board cannot compel the coal companies to join in this appeal. The companies are urged to petition to intervene to protect their own interests, however.

OPINION

Under the above docket number, Berwind has appealed a DER compliance order directing Berwind to abate various (alleged) violations of the Clean Streams Law, 35 P.S. 691.1 et seq., and the Surface Mining Conservation and Recla-

mation Act, 52 P.S. §1396.1 et seq., at the Eureka No. 40 Mine being operated under mine drainage permit 567M011. Essentially the same order, for the same mine under the same mine drainage permit, has been addressed by DER to Jandy Coal Company; in essence, DER's order to Jandy is identical with DER's order to Berwind, except that the order to Jandy substitutes Jandy for Berwind throughout. The order to Jandy has been appealed by Jandy, under EHB Docket No. 84-131-G.

On November 7, 1984, Berwind moved for consolidation of the Berwind and Jandy appeals, on the grounds that consolidation "would result in judicial economy and avoid inconsistent decisions." The Board felt this motion had merit. On October 14, 1984, however, the Board had granted a one year stay of proceedings in the Jandy appeal, after receiving a copy of the following physician's report concerning Andrew Verna, President of Jandy Coal Company:

> Mr. Verna had triple by-pass surgery at Allegheny General Hospital on December 9, 1983. This operation was followed by another operation on July 6, 1984.
>
> Presently, Mr. Verna is recuperating from his latest surgery. At the present time, he also is suffering from loss of hearing, voice, and equilibrium.
>
> It is my opinion that Andrew Verna could suffer serious, irreparable harm by becoming involved in the preparation of any case at this time. Participation in the preparation of any case and actual participation in the trial of any case by Andrew Verna is prohibited. I cannot at this time estimate the length of time Mr. Verna's incapacity will last.

Jandy's counsel objected to consolidation of the Jandy and Berwind appeals on the same medical grounds. In view of Jandy's objection and because consolidation of the appeals might indefinitely delay hearing the merits of the Berwind appeal (since Jandy legitimately might argue that it could not participate effectively in the consolidated appeal until Mr. Verna's health improved), the Board denied

Berwind's motion to consolidate despite its meritorious features. The Board suggested that Jandy should seek to and intervene in the above-captioned Berwind appeal, to protect Jandy's interests.

Jandy has not petitioned to intervene in the Berwind appeal. In the meantime Berwind has filed a "Motion for Leave to Join Additional Defendants" in its 84-130-G appeal. In particular, Berwind asks that Jandy, and a hitherto unmentioned Eastern Mining Corporation which allegedly was Berwind's lessee, be joined as additional defendants because they are "indispensable parties" under the Pa. Rules of Civil Procedure. Attached to Berwind's motion is a complaint which Berwind "proposes to file and serve if leave is granted to join additional defendants." The complaint asks the Board to find that Jandy and/or Eastern Mining are "liable over to Berwind", or alternatively that they are solely, or jointly and severally, liable for the violations at the site.

The Rules of Civil Procedure generally do not apply to proceedings before this Board. Freeport Area School District v. Commonwealth, Human Relations Commission, 335 A.2d 873, 18 Pa. Cmwlth. 400 (1975). Instead, the Board is bound by the General Rules of Administrative Practice and Procedure, 1 Pa. Code, Part II, and by 25 Pa. Code Chapter 21, neither of which provide for compulsory joinder of parties. Sullivan v. Commonwealth, Insurance Department, 408 A.2d 1174, 48 Pa. Cmwlth 11 (1979). Moreover, the Board's jurisdiction is limited to appeals of actions taken by DER 71 P.S. §510-21. There is nothing in that grant of jurisdiction which entitles the Board to adjudicate the rights of parties vis a vis each other; the Board could not accept Berwind's proposed complaint against Jandy and Eastern Mining. Correspondingly, Berwind is appearing before the Board in the above-captioned appeal as an appellant, not as a "defendant", and therefore cannot be allowed to propose "additional" defendants. Furthermore, the Board does not

see why Jandy is an indispensable party in this appeal, where Berwind's objective is to convince the Board that DER's order to Berwind was an abuse of DER's discretion, or an arbitrary exercise of DER's duties or functions. Warren Sand and Gravel, Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). If there is evidence that Berwind is not responsible for the violations DER alleges, Berwind can develop that evidence without having Jandy as a co-party; Jandy will have its opportunity to show it is not responsible for those violations in its appeal.

For the foregoing reasons, Berwind's Motion to Join Additional Defendant must be rejected. Berwind, to protect its rights, should petition to intervene in the Jandy appeal at 84-131-G. Jandy is once again advised to petition to intervene in this appeal.

O R D E R

WHEREFORE, this 16th day of January, 1985, it is ordered that:

1. Berwind's Motion to Join Additional Defendants is rejected.
2. A copy of this Opinion and Order is to be sent to Jandy.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: January 16, 1985

cc: Bureau of Litigation
William F. Larkin, Esquire
Gilbert E. Caroff, Esquire
Norman A. Krumenacker, Jr. Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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CHERNICKY COAL :

: Docket No. 84-226-G
: Issued: January 21, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION FOR SANCTIONS

Synopsis

DER has moved for the imposition of sanctions or, in the alternative, issuance of an order compelling Appellant to fully and adequately answer DER's interrogatories and orders Appellant to answer the same in conformity with the Pennsylvania Rules of Civil Procedures. In the event that the responses supplied by Appellant in compliance with the order entered herein prove inadequate a hearing may be held for the purpose of assessing costs against Appellant.

OPINION

This is an appeal from DER's denial of Appellant's application for renewal of various mine drainage permits. The applications were denied on the grounds that 1) there was no satisfactory showing that pollution of the waters of the Commonwealth will not occur, and 2) the Appellant has shown a lack of ability or intention to comply with the Clean Streams Law, 35 P.S. §691.1 et seq., and the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq.

DER submitted interrogatories to the Appellant shortly after the appeal was filed. Appellant failed to answer the interrogatories within the 30-day period prescribed by Pa. R.C.P. 4006(a)(2). Indeed, no answers were provided until nearly three months after the interrogatories were served.

DER has moved for the imposition of sanctions against Appellant on the basis that the answers which Appellant submitted are inadequate, incomplete and not in conformity with the Pennsylvania Rules of Civil Procedure. DER seeks dismissal of the appeal and an award of costs. Alternatively, DER requests the Board to enter an Order dismissing Appellant's objections to the interrogatories and compelling Appellant to answer certain of the interrogatories in full. Appellant has not responded to the DER motion.

DER's Interrogatories 7 and 8 request the Appellant to provide the substance of the testimony which Appellant's experts are expected to give at the hearing, a summary of the grounds for the experts' opinions and to identify and describe each document relied upon by the experts in reaching their opinions. In response to these requests, Appellant simply referred to its amended "Pre-Trial Memorandum". Appellant's amended memorandum does not provide a summary of the testimony of the experts to be called nor does it identify and describe the documents relied upon by the experts in reaching their opinions. Pa. R.C.P. 4003.5(a)(1) provides:

> A. Parties may through interrogatories require a) any other party to identify each person whom the other party expects to call as an expert witness at trial and to state the subject matter on which the expert is expected to testify and b) the other party to have each expert so identified by him state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. The party answering the interrogatories may file as his answer a report of the expert or have the interrogatories answered by his expert. The answer or separate report shall be signed by the expert.

A comment to the Rule explains that in response to a request for the substance of the facts and opinions to which the expert will testify the responding party may "either have the expert answer the interrogatories himself on this issue or prepare a separate report which the answering party may attach to his answers. The answer or separate report must be signed by the expert." Appellant's amended memorandum does make reference to a report prepared by William A. Baughman for Walter E. Fike, which is attached to the memorandum. The report is not signed by either Mr. Baughman or Mr. Fike. Both Mr. Baughman and Mr. Fike are listed by the Appellant as witnesses, although not as experts.

Appellant's response to Interrogatories 7 and 8 does not conform to the requirement of Rule 4003.5. Therefore, in conclusion, Appellant is ordered to answer DER's Interrogatories 7 and 8 in full compliance with Pa. R.C.P. 4003.5. In the event that Appellant's responses provided in accordance with the accompanying Order are again inadequate, the Board will consider the imposition of sanctions such as those provided in Rule 4003.5(b).

One of the contentions listed by Appellant in its Notice of Appeal was that the application for the permits contained information which would support the contention that mining could take place on the permitted area without pollution to the waters of the Commonwealth. DER's Interrogatory 16 requested Appellant to itemize all costs which it had incurred in obtaining and analyzing the information which forms the basis for the aforesaid contention. In response to Interrogatory 16 Appellant stated that it had not yet incurred all costs associated with the analysis of the information and that therefore it was impossible to answer the Interrogatory. The Board finds it difficult to characterize this response as having been made in good faith. Appellant shall fully answer DER's Interrogatory 16 stating any and all costs which the Appellant has incurred in analyzing the aforesaid information to the present date.

DER's Interrogatory 24 requested the Appellant to identify and describe any and all documents or agreements between the Best Coal Company and Appellant with regard to Mine Drainage Permit No. 1080101. Appellant has objected to this interrogatory on the basis that it is irrelevant and immaterial and would not lead to the discovery of any evidence material to the appeal. We cannot agree. The report discussed above prepared by Mr. Baughman is entitled "Best Coal, Inc. Overburden Analysis Report for the Dreshman Mine". Inasmuch as this report apparently will provide the basis for any and all expert testimony presented by Appellant, the Board believes that DER is fully entitled to inquire into the relationship between Best Coal Company and the Appellant. Therefore, Appellant is ordered to fully answer Interrogatory 24.

DER's Interrogatory 25 requested Appellant to state and describe, in detail, Appellant's financial condition. Appellant has objected to this interrogatory for the reason that it is not relevant and will not lead to discoverable evidence reasonably connected with this appeal; this contention is incorrect. This appeal involves the denial of a mine permit application. One of the two explicitly stated reasons for the denial was the Appellant's lack of ability or intention to comply with the mining laws of this Commonwealth. The financial condition of the Appellant is clearly directly related to its ability to comply with those laws. Therefore, DER is fully entitled to an answer to this interrogatory and Appellant is hereby ordered to provide the same.

DER's Interrogatory 27 requested Appellant to describe the extent of surface mining conducted on Mine Drainage Permit No. 1080101. In response to this interrogatory Appellant refers DER to the information and reports of the Department of Environmental Resources which are not in the possession of the Appellant. DER maintains that this interrogatory requests information which is relevant to this

appeal in that Permit 1080101 is one of the permits for which renewal was sought and that the DER denial of renewal was based in part on violations existing on the site. Appellant's claim that the information is in the possession of DER is not an adequate answer. Appellant is best informed about his own mining operation. If the answer to this interrogatory requires Appellant to summarize a very large number of reports or is otherwise extremely burdensome, Appellant must so indicate. In any event, Appellant must--at the very least--list those specific report titles and page references which will provide the answers to which DER is entitled.

DER's Interrogatory 28 requested Appellant to state the last date upon which Appellant conducted surface mining activities on Mine Drainage Permit No. 1080101. Appellant has objected to this interrogatory on the basis that the term "surface mining activities" is undefined and Appellant is therefore unable to answer the interrogatory. Again, the Board finds it difficult to characterize this answer as having been made in good faith. As DER has pointed out in its Motion, the terms "mine", "surface mining" and "surface mining activities" are defined and described in detail in the laws under which Appellant has conducted its surface mining operations. See, e.g., the Clean Streams Law, 35 P.S. §691.1, the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.3 and 25 Pa. Code §86.1. Appellant shall fully answer DER's Interrogatory 28.

DER's Interrogatory 30 requested that Appellant describe the method and development of mining on Mine Drainage Permit No. 1080101. Appellant has objected to this interrogatory for the reason that the information requested is presently in the possession of the Department. We reiterate that the Appellant is the party best informed about its own mining operations. If providing an answer to this interrogatory will require Appellant to summarize a very large number of reports or if it will otherwise be extremely burdensome, Appellant may provide detailed references to

reports, documents, etc. with page numbers sufficient to provide an adequate answer to this interrogatory.

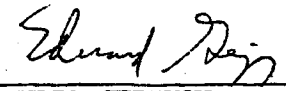
DER's Interrogatories 38 and 39 requested information regarding the geology and groundwater conditions of the areas which have been mined under Mine Drainage Permit No. 1080101. Appellant has claimed it does not have the expertise to answer this interrogatory. Appellant's Notice of Appeal states that Appellant has reason to believe that mining can take place on the permitted area without pollution to the waters of the Commonwealth. DER has indicated in its Motion that Interrogatories 38 and 39 were directed at eliciting information which forms the basis of this contention by Appellant. DER has specifically requested that the information regarding groundwater conditions and geology be provided for those areas in which water was encountered while mining was taking place. Appellant is the party in the best position to provide this information. If Appellant has not employed geologists or other parties with the expertise to provide the information requested by Interrogatories 38 and 39 Appellant may so state. In any event, Appellant shall provide DER with a summary of that information upon which Appellant intends to rely to support its contention that mining may take place on the instant permit area without harm to the waters of the Commonwealth.

DER has moved this Board to dismiss the appeal and to assess costs against Appellant for Appellant's failure to adequately answer these interrogatories. The Board is hesitant to impose the sanction of dismissal in the absence of truly egregious conduct by a party. However, we reserve the right to call a hearing for the purpose of assessing costs against Appellant in the event that the answers provided by Appellant in accordance with the accompanying Order prove to be inadequate.

O R D E R

WHEREFORE, this 21st day of January, 1985, it is ordered that Appellant's objections to DER's Interrogatories 24, 25, 28, and 30 are dismissed. Appellant shall answer DER's Interrogatories 7, 8, 16, 24, 25, 27, 28, 30, 38, and 39 fully, completely and in compliance with the Pennsylvania Rules of Civil Procedure. Appellant shall provide its response to the aforesaid interrogatories within fifteen (15) days of the date of this Order.

ENVIRONMENTAL HEARING BOARD



EDWARD GERJUOY
Member

DATED: January 21, 1985

cc: Bureau of Litigation
Timothy Bergere, Esquire
Henry Ray Pope III, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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MRS. JAMES E. MOYER :

:

: Docket No. 84-284-G
: Issued: January 22, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and NELLO L. TEER CO., INC., PERMITTEE

OPINION AND ORDER

Synopsis

This is an appeal of a DER decision to release a portion of certain surface mining bonds. Appellant has failed to comply with the Board's orders requiring the filing of a pre-hearing memorandum, despite warnings that failure to comply could result in the imposition of sanctions, including dismissal of the appeal. 25 Pa. Code 21.124. Appellant bears the burden of proof. Therefore, the appeal is dismissed.

Opinion

Appellant filed an appeal of DER's decision to release a portion of the bond posted by a mine operator in association with its mining activities. In accordance with its usual practice, the Board issued its pre-hearing order No. 1 to Appellant. This order, dated August 22, 1984, required Appellant to file a pre-hearing memorandum on or before November 3, 1984. When no pre-hearing memorandum had been received by November 16, 1984, the Board issued a notice to Appellant that the pre-hearing memorandum was overdue.

The notice required that the memorandum be filed not later than November 26, 1984 and warned that failure to comply might result in the imposition of sanctions, including dismissal of the appeal, pursuant to 25 Pa. Code 21.124. The notice was sent certified mail; the return receipt indicates that Appellant has received notice that the prehearing memorandum is overdue. Despite this fact, no request for an extension of time for filing the same has been received by the Board. Indeed, the docket in this appeal indicates that Appellant has taken no action to prosecute this appeal since the appeal was perfected in August, 1984.

An Appellant who seeks to challenge DER's release of surface mining bonds bears the burden of proof. Sheesley v. DER and Equitable Coal Company, 1982 EHB 85. Under these circumstances, dismissal of the appeal for failure to file a pre-hearing memorandum, despite repeated admonitions, is appropriate. Anchor Hocking Corp. v. DER, EHB Docket No. 81-196-G, Opinion and Order dated June 1, 1984; Benjamin Coal v. DER, EHB Docket No. 84-148-G, Opinion and Order dated August 9, 1984. The Board will not tolerate disregard of its orders.

O R D E R

WHEREFORE, this 22nd day of January, 1985, it is ordered that the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR., Member

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: January 22, 1985

cc: Bureau of Litigation
Diana J. Stares, Esquire and Joseph K. Kaput, Esquire, Co-counsel for DER
Peter J. Mansmann, Esquire, of Mansmann, Beggy & Campbell, Pittsburgh, for Appel
Nello L. Teer Co., Inc. (Permittee)

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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HARRISBURG, PENNSYLVANIA 17101
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MARLIN L. SNYDER :

:

: Docket No. 84-369-G

: Issued: January 22, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION TO DISMISS

Synopsis

This appeal from a DER compliance order is dismissed as moot. The compliance order has been vacated. Consequently, there is no ruling which the Board can grant.

OPINION

This appeal is taken from a DER compliance order dated October 3, 1984. The appeal was timely filed. DER has filed a Motion to Dismiss the appeal on the ground that the compliance order was vacated by DER on October 30, 1984. Appellant has not responded to the DER Motion.

DER's Motion argues that the appeal is moot, in that there is no relief which this Board can grant. We see no reason to disagree with this contention under the facts of this case. Appellant is no longer subject to the constraints of the compliance order. Therefore, dismissal of the appeal is appropriate. See Al Hamilton Contracting Company v. DER, (EHB Docket No. 83-248-G, Opinion and

Order dated February 23, 1984).

ORDER

AND NOW, this 22nd day of January, 1985, it is ordered that the appeal captioned above is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: January 22, 1985

cc: Bureau of Litigation
Joseph K. Kaput, Esquire
Marlin L. Snyder

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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WESTMONT ENTERPRISES :

:

: Docket No. 84-381-G
: Issued: January 28, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

Appeal is dismissed as having been filed after the expiration of the thirty day period prescribed by 25 Pa. Code 21.52(a). Appellant's request to file an appeal nunc pro tunc is denied; Appellant has demonstrated no deficiency in the operations of this Board to which could be ascribed the untimely filing of the Notice of Appeal.

OPINION

Appellant, Westmont Enterprises, has filed this appeal of a DER order issued on or about April 17, 1984. The Notice of Appeal was filed with the Board on November 15, 1984. Apparently recognizing that under the Board's Rules, 25 Pa. Code 21.52(a), this appeal was not timely filed, Appellant requested leave to file its appeal nunc pro tunc. DER has filed a Petition to Quash the Appeal as untimely; Appellant has not responded to Petition.

25 Pa. Code 21.52(a) provides in relevant part:

> Except as specifically provided in §21.53 of this title (relating to appeals nunc pro tunc),

> jurisdiction of this Board shall not attach to an appeal from an action of the Department unless the appeal. . . is filed with the Board within 30 days after the appellant has received written notice of such action or within 30 days after notice of such action has been published in the Pennsylvania Bulletin. . .

The action which the Appellant seeks to challenge here was in fact published in the Pennsylvania Bulletin on Saturday, May 5th, 1984. Assuming that this is the operative date of notice in the instant case, Appellant's appeal cannot be characterized as timely.

Appeals nunc pro tunc are governed by 25 Pa. Code §21.53 which states that:

> (a) The Board upon written request and for good cause shown may grant leave for the filing of an appeal nunc pro tunc; the standards applicable to what constitutes good cause shall be the common law standards applicable in analogous cases in Courts of Common Pleas in the Commonwealth.

As this Board has repeatedly held, an appeal nunc pro tunc will be allowed only where there has been some breakdown in the operations of the Board itself to which can be attributed the delay in filing the appeal. See Eugene Petricca v. DER (EHB Docket No. 83-239-G; Opinion and Order dated July 23, 1984). Appellant has alleged no such failure of the Board.

Although the Board recognizes that the result of this ruling may be harsh, the Commonwealth Court has ruled that timely filing is a prerequisite to this Board's jurisdiction. Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 76 1(1976). We cannot waive the requirements of 25 Pa. Code 21.52(a). Therefore, this appeal must be dismissed.

ORDER

WHEREFORE, this 28th day of January , 1985, it is ordered that Appellant's Request for Leave to File Appeal Nunc Pro Tunc is denied; DER's Petition to Quash is granted. The appeal captioned above is dismissed.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: January 28, 1985

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
George Shorall, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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LOWER PROVIDENCE TOWNSHIP :

:

: Docket No. 81-078-M
: Issued: January 29, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and ALTERNATE ENERGY STORE, INC., Permittee

OPINION AND ORDER

Synopsis

Alternate Energy Store, Inc.'s (permittee's) Petition to Supplement Record is denied. The Petition, filed after the close of hearings and submission of final briefs, did not set forth persuasive reasons or any legal basis for the Board to reopen the record. 1 Pa. Code §35.231.

OPINION

On November 29, 1984, Alternate Energy Store, Inc., permittee, filed with the Board a Petition to Supplement Record. Hearings in this matter were concluded on June 14, 1984, and all post-hearing briefs were received by the Board by October 31, 1984. In the Petition to Supplement Record, permittee requests the Board to include in the record of this appeal, a series of analyses of wells located in the vicinity of the property that is the subject of this appeal, or in the alternative, permittee requests the Board

to reopen the hearings for receipt of these analyses into the evidence of the case. The analyses were conducted by the United States Environmental Protection Agency in late May and early June of 1984, but permittee alleges that it did not learn of these analyses until after the close of hearings and submission of final briefs. On December 24, 1984, the Board received a letter from Lower Providence Township, appellant, stating that it was opposed to permittee's Petition to Supplement Record.

Except when the Board's rules in 25 Pa. Code Chapter 21 supersede, this Board's procedures are governed by the General Rules of Administrative Practice and Procedure, 1 Pa. Code §§31.1 - 35.251. These general rules permit reopening the proceeding to take additional evidence. 1 Pa. Code §35.231 The Board's rules in 25 Pa. Code Chapter 21 do not supersede 1 Pa. Code §35.231. Richter Trucking Co. v. Department of Environmental Resources, EHB Docket No. 80-106-M (issued April 24, 1984).

Since permittee has petitioned the Board to allow permittee to supplement the record with additional evidence after the hearings have been closed, but before an adjudication has been issued, 1 Pa. Code §35.231 applies. 1 Pa. Code §35.231(a) provides as follows:

> (a) Petition to reopen. At any time after the conclusion of a hearing in a proceeding or adjournment thereof sine die, any participant in the proceeding may file with the presiding officer, if before issuance by the presiding officer of a proposed report, otherwise with the agency head, a petition to reopen the proceeding for the purpose of taking additional evidence. Such petition shall set forth clearly the facts claimed to constitute grounds requiring reopening of the proceeding, including material changes of fact or of law alleged to have occurred Since the conclusion of the hearing. (emphasis added).

Permittee's Petition to Supplement Record is denied because permittee did not set forth clearly the grounds requiring reopening of the proceeding as required by 1 Pa. Code §35.231. Permittee's Petition to Supplement Record consists of a recitation of facts that permittee alleges are re-

levant, and of which permittee alleges it was not aware until after the close of the hearings and submission of final briefs. The Petition did not, however, cite 1 Pa. Code §35.231, or any other legal basis for supplementing the record or reopening the hearings. Although permittee alleges that the facts it wants added to the record are relevant, permittee did not explain why they would be necessary to the disposition of this case. Also, permittee alleged that it was not aware of these facts until after the close of the hearings and submission of final briefs, but permittee did not explain whether its ignorance was attributable to its own negligence, or attributable to circumstances beyond its control.

Administrative rehearings are not matters of right, but pleas to the discretion of the agency. Asplundh Tree Expert Co. v. Unemployment Compensation Board of Review, 80 Pa. Cmwlth 7, 9, 470 A.2d 1097, 1098 (1984). A petition for rehearing is properly denied unless it is shown that circumstances have changed or new evidence has become available. Fritz v. Department of Transportation, 79 Pa. Cmwlth. 52, 54-55, 468 A.2d 538, 539 (1983). For the Board to grant a petition to reopen the record under 1 Pa. Code §35.231, at the very least, the petitioner must show that the additional evidence was not examined at the hearings, and the evidence relates to specific issues that are in contention. Bethlehem Mines Corporation v. Department of Environmental Resources, EHB Docket No. 82-067-G (issued November 13, 1984). Since permittee has not presented persuasive reasons for the Board to allow permittee to supplement the record, permittee's petition is denied.

O R D E R

AND, NOW, this 29th day of JANUARY , 1985, the Petition to Supplement Record filed by Alternate Energy Store, Inc., permittee, on November 29, 1984 at EHB Docket No. 81-078-M, is denied.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

DATED: January 29, 1985

cc: Bureau of Litigation
John Wilmer, Esquire for DER
Marc D. Jonas, Esquire of Hamburg, Rubin, Mullin & Maxwell for Permittee
Richard C. Sheehan, Esquire for Appellant

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
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ORCT CORPORATION,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
Appellee

Docket No. 84-009-M

Issued February 11, 1985

OPINION AND ORDER SUR
APPELLANT'S MOTION FOR RECONSIDERATION

Snyopsis

Appellant ORCT Corporation's Motion for Reconsideration of the Board's Opinion and Order dated December 10, 1984, is denied. Appellant offers no compelling or persuasive reasons for granting said motion. 25 Pa. Code §21.122.

OPINION

Appellant ORCT Corporation (ORCT) moves the Board to reconsider its Opinion and Order dated December 10, 1984, wherein the Board dismissed ORCT's appeal of a fifteen thousand dollar ($15,000.00) civil penalty assessed by Commonwealth of Pennsylvania, Department of Environmental Resources (DER) as a result of ORCT's unpermitted surface mining operations. Dismissal was based upon ORCT's failure to post a bond or cash in the amount of the appealed-from civil penalty assessment, which is a statutorily mandated prerequisite for perfection of an appeal of a civil penalty assessment. Surface Mining Conservation and Reclamation Act (SMCRA) 52 P.S. §1396.22; Clean Streams Law (CSL), 35 P.S. §691.605(b).

The Board's Rules and Regulations with regard to motions for rehearing or reconsideration are as follows:

> (a) The Board may on its own motion or upon application of counsel, within 20 days after a decision has been rendered, grant reargument before the Board en banc. Such action will be taken only for compelling and persuasive reasons, and will generally be limited to instances where:
>
> (1) The decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief such question.
>
> (2) The crucial facts set forth in the application are not as stated in the decision and are such as would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing.

25 Pa. Code §21.122. After careful and thorough review of ORCT's motion and DER's response thereto, the Board finds that the grounds proffered by ORCT in support of its motion provide neither compelling nor persuasive reasons for granting ORCT's motion.

First, ORCT argues that the Board's Opinion and Order dated December 10, 1984, which dismissed ORCT's appeal, could not have been based upon DER's formal motion to dismiss, which the Board received on December 12, 1984. Therefore, ORCT further argues that the Board's dismissal must have been based upon a letter from a DER attorney dated October 31, 1984, received by the Board on November 2, 1984. Counsel for ORCT alleges that he did not see this letter, which included an informal motion to dismiss, until receipt of DER's formal motion, which occurred after the Board's issuance of its Opinion and Order of December 10, 1984.

While counsel for ORCT makes no explicit argument as a result of these facts, ORCT's implicit argument must be that dismissal on December 10, 1984 was improper due to an alleged lack of notice on ORCT's part. However, there is no merit to this argument for the following reasons. One, DER's informal motion to dismiss contained in its letter dated October 31, 1984, indicated that Mr. Joseph Castellucci, a principal of ORCT; was sent a copy of DER's letter, thereby giving notice to ORCT of DER's motion to dismiss. Second, and more importantly, counsel for ORCT addressed the issue of lack of perfection--the only grounds used by the Board in support of its Opinion and Order which dismissed ORCT's appeal--in ORCT's "Reply to Rule to Show Cause and Perfection of Appeal," dated November 9, 1984 and received by the Board on November 13, 1984. In fact, the Board addressed this issue in its Opinion and Order, wherein we stated:

> ...prior to the receipt of ORCT's reply (to the Board's Rule to Show Cause), the Board received on November 2, 1984 a letter (dated October 31, 1984) from DER requesting that ORCT's appeal be dismissed for lack of perfection. DER's letter of October 21, 1984 indicated that Mr. Castellucci was sent a copy of DER's letter; as yet, Mr. Castellucci (or anyone representing ORCT) has not specifically responded to DER's letter. However,

> ORCT, in its reply to the Board's Rule to Show Cause, addresses the issue of lack of perfection, the grounds proffered by DER in its informal motion to dismiss.

ORCT Corporation v. DER, EHB Docket No. 84-009-M (Opinion and Order, December 10, 1984) (emphasis added). Therefore, ORCT's motion for reconsideration cannot be granted upon an alleged lack of notice on ORCT's part.

Third, ORCT argues that the Board's Rules and Regulations, 25 Pa. Code §21.52(c), require the Board to treat a civil penalty assessment appeal filed without posting of cash or bond as a skeleton appeal, thereby permitting appellant to post cash or bond beyond the statutorily mandated thirty (30) day appeal period. However, as DER correctly points out in its reply to ORCT's motion, Section 21.52(c) allows the Board to accept an appeal as a skeleton appeal only if the timeliness requirements of Section 21.52 have been met and the provisions of Section 21.51, relating to form and content of the appeal, have not been met. By virtue of Section 21.52, minor omissions of information in the notice of appeal filed with the Board will not necessarily result in dismissal. However, ORCT cites no authority (and indeed the Board can find none) in support of the contention that Section 21.52 of 25 Pa. Code applies to an appeal which fails to meet the statutory requirements concerning submission of cash or bond as a prerequisite for perfecting an appeal of a civil penalty assessment. SMCRA 52 P.S. §1396.22; CSL, 35 P.S. §691.605(b).

Finally, ORCT advances a number of unsupported arguments which essentially state that ORCT submitted a bond, albeit a self-bond, and if DER or the Board viewed the form of bond as improper, then dismissal without affording ORCT an opportunity to remedy such a defect was unwarranted. Again, counselor for ORCT misses the point. As the Board noted in its Opinion and Order,

the appealed-from civil penalty assessment clearly stated that the sections of SMCRA and CSL requiring the posting of cash or bond had to be complied with as a prerequisite for perfection of the appeal. The consequences of ORCT's mistaken attempt to post a self bond, apparently due to ORCT's misreading of SMCRA, must necessarily fall upon ORCT, which has offered no compelling or persuasive reason for granting its Motion for Reconsideration. Accordingly, the Board enters the following order.

ORDER

AND NOW, this 11th day of February,1985, ORCT's Motion for Reconsideration is denied.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZZELLO, JR., MEMBER

EDWARD GERJUOY, MEMBER

DATED: February 11, 1985

cc: Bureau of Litigation
Joseph K. Kaput, Esq.
J. Philip Bromberg, Esq.

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CHRIN BROTHERS,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Appellee

and

CITY OF EASTON
BOROUGH OF WILSON
PALMER TOWNSHIP
BOROUGH OF WEST EASTON
FORKS TOWNSHIP
TWO RIVERS AREA COMMERCE COUNCIL
EASTON AREA JOINT SEWER AUTHORITY
SAVE OUR LEHIGH VALLEY ENVIRONMENT

Intervenors

Docket No. 84-283-M
(issued 2-13-85)

OPINION SUR
PETITION FOR SUPERSEDEAS

Synopsis

The Board's opinion in support of its supersedeas order of December 21, 1984 sets forth a number of reasons for granting appellant Chrin Brothers' petition for supersedeas from DER's order of July 18, 1984, which required closure of Chrin landfill by December 31, 1984.

Factors to be considered in determining whether or not irreparable harm exists include: expense of compliance with DER's order; loss of customers; and, significant financial harm. 25 Pa. Code §21.78(a)(1). All of the above-cited factors are found to be present.

Appellant also demonstrates a likelihood of prevailing on the merits. 25 Pa. Code §21.78(a)(2). The evidence presented to date did not establish that Chrin landfill was the source of the volatile organic compounds (VOC's) found in both on-site monitoring wells and off-site residential wells.

Appellant also demonstrates no likelihood of injury to the public. 25 Pa. Code §21.78(a)(3). Rather, in view of the public interest in the orderly and economically feasible administration of municipal solid waste operations, the municipalities' statutory duties to provide same, DER's statutory duty to develop area-wide planning of solid waste disposal facilities, and the landfill space crisis which exists in southeastern Pennsylvania, the injury to the public from paying excessive amounts for solid waste disposal at alternate sites would have been significant had appellant's petition for supersedeas been denied.

Appellant also demonstrates that no nuisance or significant pollution or significant hazard to health or safety either exists or is threatened. 25 Pa. Code §21.78(b). Although Chrin landfill exceeded its originally permitted vertical elevation by sixty (60) feet, no nuisance or significant environmental harm was present since the one-to-one waste to soil ratio necessary for leachate renovation at Chrin's natural renovation landfill was maintained throughout the site. In the alternative, due to DER's non-action with regard to Chrin's violation of its originally permitted vertical elevation, DER either ratified the elevation, waived it as a grounds for closure, or was estopped from asserting it as a grounds for closure.

Finally, no significant pollution or significant hazard to health or safety was present as a result of the detection of VOC's in both on-site monitoring wells and off-site residential wells. 25 Pa. Code §21.78(b). The record was bereft of any evidence explaining the confidence level associated with levels of VOC's found below the method detection limits of EPA Method 624. In addition, only one detection of a VOC (out of 15 VOC's detected 18 times in 65 samples) above EPA's recommended ambient water quality standard did not furnish a sufficient basis for the Board to affirm DER's use of EPA's cancer risk assessment model to establish the presence of a significant hazard to health or safety.

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CHRIN BROTHERS,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
Appellee

and
CITY OF EASTON,
BOROUGH OF WILSON,
PALMER TOWNSHIP,
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FORKS TOWNSHIP,
TWO RIVERS AREA COMMERCE COUNCIL,
EASTON AREA JOINT SEWER AUTHORITY,
SAVE OUR LEHIGH VALLEY ENVIRONMENT,
Intervenors

Docket No. 84-283-M

Issued: February 13, 1985

OPINION SUR
PETITION FOR SUPERSEDEAS

Appellant Chrin Brothers, a general partnership which owns and operates Chrin Landfill, located on Industrial Drive in Williams Township, Northampton County, Pennsylvania, filed on August 13, 1984 an appeal of, and petition for supersedeas from, an order of the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), dated July 18, 1984. DER's order, in addition to assessing a civil penalty against appellant in the amount of

forty-five thousand, two hundred and forty dollars ($45,240.00), also required appellant to undertake the following activities:

1. By no later than August 15, 1984, Chrin shall complete all improvements and modifications to the existing leachate collection and handling system at the Chrin Landfill specified in the Chrin Landfill Final Closure Plan (submitted to, but never formally approved by, DER) and shall provide that all leachate collected in the leachate collection lines and manholes be directed into the City of Easton Sewage System or other disposal facilities approved by the Department.

2. By no later than August 15, 1984, Chrin shall implement an expanded groundwater monitoring program at the Chrin Landfill in accordance with the Chrin Landfill Final Closure Plan. Said program shall include:

a. The installation of two new groundwater monitoring wells in the locations shown on Sheet "1" of "7" of the plans submitted to the Department on October 10, 1983, by no later than August 15, 1984.

b. The analysis of samples, as part of the required quarterly monitoring program, from the existing groundwater monitoring wells and the two new groundwater monitoring wells for the following parameters:

1) TDS
2) Cadmium (Total)
3) Chromium (Total)
4) Lead (Total)
5) Zinc (Total)
6) Volatiles Organic Compounds
7) Copper (Total)
8) Nickel (Total)
9) Phenols
10) Cyanide
11) Other parameters listed on the Department's quarterly and annual groundwater monitoring report forms

c. The submission to the Department of annual reports evaluating the effectiveness of the groundwater monitoring program and including recommendations as to proposed changes to the program for the upcoming year. The first such annual report shall be submitted by no later than September 1, 1985.

3. By no later than September 1, 1984, Chrin shall determine if the existing groundwater monitoring wells designated as MP1, MP3 and MP4 in the Chrin Landfill Final Closure Plan are adequate for the

purpose of monitoring effects of the Chrin Landfill on the groundwater and shall submit a report of the determination to the Department. If the Department determines that any of these existing wells are inadequate for said purpose, Chrin shall modify or reconstruct each inadequate well to render it adequate for said purposes within 30 days of being notified in writing by the Department of the need to modify or reconstruct said well or wells.

4. Chrin shall cease all solid waste disposal operations at the Chrin Landfill by no later than December 31, 1984. From the date of this Order until December 31, 1984, Chrin shall conduct solid waste disposal operations at the Chrin Landfill in accordance with 25 Pa. Code Chapter 75 and shall limit disposal operations to filling in depressions and establishing a crown on the top plateau of the site.

5. By no later than August 15, 1984, Chrin shall submit to the Department a grading, terracing and stabilization plan and schedule to bring the western and northern slopes into compliance with 25 Pa. Code Chapter 75 by no later than October 1, 1984. Upon Department approval or modification of said plan in writing, Chrin shall immediately implement the plan as approved or modified.

6. By no later than September 1, 1984, Chrin shall submit to the Department preliminary plans showing the anticipated final topography of the Chrin Landfill after completion of closure in accordance with Paragraphs "4" and "5" herein. Chrin shall submit to the Department final plans of the closed landfill within 30 days of termination of waste disposal operations.

7. By no later than January 31, 1985, Chrin shall complete installation of the gas management system specified in the Chrin Landfill Final Closure Plan.

8. By no later than August 1, 1984, Chrin shall submit to the Department the 1983 Annual Report for the Chrin Landfill.

9. By no later than September 1, 1984, Chrin shall submit to the Department an acceptable collateral bond on forms provided by the Department for the operation of the Chrin Landfill. The bond shall comply with the requirements of Section 505 of the Solid Waste Act, shall be in the amount of one hundred fifty-nine thousand two hundred fifty dollars ($159,250.00), and shall name the Commonwealth of Pennsylvania as obligee.

On August 24, 1984, after conducting a conference with appellant's and DER's counsel, the Board issued a limited supersedeas order which extended the date for compliance with the above-numbered paragraphs 1, 2a, 3, 5, and

6 until October 31, 1984. All the other portions of DER's order of July 18, 1984 remained in full force and effect. As of the date of this opinion, all the above-quoted portions of DER's order have been complied with by the scheduled dates or are scheduled to be complied with by the dates indicated. The only issue herein is the remaining portion of DER's order, paragraph number four, regarding the cessation of solid waste disposal operations by December 31, 1984.

On October 5, 1984, the Board granted intervention to a local citizens' group named Save Our Lehigh Valley Environment (SOLVE). On October 30, 1984, the Board likewise granted intervention to the following entities: City of Easton; Borough of Wilson, Palmer Township, Borough of West Easton; Forks Township; Two Rivers Area Commerce Council (TRACC); and Easton Area Joint Sewer Authority. That brought the total number of parties to ten, quite likely a Board record, although not surprising given the high stakes involved here and the landfill space crisis which exists in southeastern Pennsylvania. It should be noted for the sake of clarity that SOLVE intervened on the side of DER while the other entities cited above intervened on the side of appellant.

On November 1, 2, 5, 14 and 16, and December 10, 11, 12, 1984, Board Member Anthony J. Mazullo, Jr. conducted hearings to determine whether appellant's Petition for Supersedeas should be granted or denied pursuant to 25 Pa. Code §21.78. A view of the site and the surrounding area was conducted as well. Following the conclusion of the supersedeas hearings, and due to the then impending DER-ordered closure date of December 31, 1984, the Board issued on December 21, 1984, an order granting appellant Chrin Brothers' Petition for Supersedeas; the order was issued prior to the Board's receipt

of all the notes of testimony.[1]

Now that the Board has received all the notes of testimony for the supersedeas hearings, and after a complete and exhaustive review thereof, the Board's opinion in support of its order of December 21, 1984, is set forth below.

The burden of proof at this stage of the proceedings rests upon appellant, pursuant to Board Rules and Regulations, 25 Pa. Code §21.101(a), in that appellant is "asserting the affirmative" in its Petition for Supersedeas.

Where a party seeks relief from the Board pursuant to a Petition for Supersedeas, the provisions of 25 Pa. Code §21.78 in its entirety govern the standards to be applied by the Board in reaching its decision.

Under the provisions of Section 21.78(a)(1), appellant must demonstrate that it will suffer "irreparable harm" if the relief requested is to be granted by the Board. The term "irreparable harm" is not defined in the Board's Rules and Regulations, and, we feel, properly so. However, the Board has considered appeals wherein various factors have been found to constitute "irreparable harm," e.g., the expense of compliance with DER orders, William Fiore, d/b/a Municipal and Industrial Disposal Company v. DER, EHB Docket No. 83-160-G (O&O, August 24, 1983); loss of customers, Fiore, supra; and, significant financial or economic harm, Lawrence Coal Company v. DER, 1982 EHB 457.

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[1] The Board's December 21, 1984, order was based upon a review of the notes of testimony for the hearings conducted on November 1, 2, 5, 14 and 16, 1984, as well as the hearing examiner's voluminous notes taken at the hearings conducted on December 10, 11 and 12, 1984.

In the instant appeal, all of the above factors are present, and are significant. The testimony elicited at the hearings establishes to the satisfaction of the Board that the only environmentally sound manner in which the "canyon area" may be closed, without deposit of solid waste therein, would require the deposition of approximately three hundred thousand (300,000) cubic yards of cover material therein, at an estimated average cost of ten dollars ($10.00) per cubic yard, or a total cost of three million dollars ($3,000,000.00). Although testimony was offered by DER to establish the "canyon area" could remain unfilled and properly closed and not cause environmental problems so long as proper erosion and sedimentation controls were constructed--using sedimentation basins, etc.--we are of the opinion that the topography and the presence of trash constituting one side of the "canyon" militates against effective environmental control of surface water runoff. No evidence was offered to base a finding that deposition of waste in the "canyon area" would pose a threat to the environment; in fact, DER staff personnel testified that waste presently on the site and in excess of originally permitted vertical elevations should be removed and redeposited in the canyon area. Therefore, because DER's order compelled cessation of solid waste disposal at the site, and because the canyon area if left unfilled poses a serious threat of environmental harm due to erosion and excessive sedimentation flow, and because DER's order requires cessation of waste disposal operations at the site, appellant's only environmentally sound alternative in compliance with DER's order is to fill the "canyon area" with cover material, and the cost of compliance with DER's order would constitute irreparable harm to appellant.

Another factor to be considered as constituting "irreparable harm" is loss of customers. Appellant presented uncontroverted testimony at the hearings establishing that they had lost approximately thirty percent (30%) of their commercial customers as a direct result of DER's order, because of the uncertainty generated in the community about the future availability of the site for landfill purposes. There is no question that if a supersedeas is not granted, all of appellant's customers will be lost. In addition to the loss of commercial customers presently experienced by appellants, municipal customers of appellants would be lost at least for one year if the landfill were closed for the receipt of waste by December 31, 1984. Such loss of customers, both commercial and municipal, adds to the extent of harm threatened to and suffered by appellants.

A further factor present herein is the harm appellants would suffer in the termination of appellant's landfill and excavating operations if compliance with DER's order is upheld. The termination of these two operations would cause the loss of approximately twenty-eight (28) jobs, and the concomitant loss of revenue to appellants generated by employee labor.

The presence of all of the above factors of loss to the appellants are sufficient to constitute irreparable harm to appellants should their Petition for Supersedeas be denied. However, appellants must also prevail on the remaining standards pursuant to 25 Pa. Code §21.78 in order to be granted a supersedeas order from the Board. Carroll Township Authority v. DER, EHB Docket No. 82-290-H (O&O, January 6, 1983).

The second standard to be applied in the supersedeas proceeding is the likelihood of appellants prevailing on the merits. 25 Pa. Code §21.78 (a)(2). In order for appellant herein to be considered likely to prevail

on the merits, appellants must show that the Board is likely to conclude that DER's order constituted an abuse of discretion. Armond Wazelle v. DER and Borough of Punxsutawney, EHB Docket No. 83-063-G (O&O, November 13, 1984).

The only portion of the order at issue herein is paragraph four thereof whereby appellants are required to cease all solid waste disposal operations at the site by December 31, 1984. The testimony adduced at the hearings from all parties establishes that the primary basis for closure was contamination of offsite residential wells caused by alleged migration of pollutants from the landfill site into the residential wells.

Chrin's experts testified that in their opinion the landfill was not the source of the pollutants found in the residential wells. They also testified that further studies are necessary in order to accurately determine the source of the pollutants found, especially in view of the presence of old and present industrial activities in close proximity to the landfill and the residential wells.

While all parties agree on the fact of the presence of priority pollutants (volatile organic compounds) in the wells in the area, both onsite monitoring wells and neighboring residential wells, there is sharp disagreement concerning the source, or sources, of the pollutants.

DER and SOLVE allege that the landfill is the source of the presence of the pollutants in the neighboring residential wells. In support of this allegation, DER and SOLVE introduced expert testimony to show that the pollutants originate at the landfill, as shown by their presence in the landfill monitoring wells, and migrate into residential wells due to the direction of the groundwater flow. According to their experts, the groundwater

in the area flows from the landfill both northwest toward the residential wells in Glendon and southwest toward the residential wells in Morgan Valley.

Chrin's experts concede the presence of pollutants in both the monitoring wells and residential wells, although there is disagreement concerning the levels of pollutants found. In addition, while Chrin's experts conceded that the general groundwater flow is to the northwest, they do not agree that there is a southwest component to the groundwater flow. However, Chrin's experts conclude that the mere fact of groundwater flow direction is insufficient to pinpoint the landfill as a source of the pollutants, let alone the sole source of the pollutants.

SOLVE's expert considered only the landfill as the possible source of the presence of pollutants in concluding that the landfill was the source of the pollutants. However, he also expressed concern about other industrial sites in the area as possible sources of the pollutants. Moreover, he also conceded that the Lehigh Canal could be a possible source of the pollutants found in the residential wells in the Glendon area. There was disagreement between DER's expert and SOLVE's expert on the significance of the water quality of the unnamed tributary located south of the landfill, the flow of which is partially groundwater and partially surface water. DER's expert contended that the unnamed tributary is a divide and therefore any wells located southwest of the tributary could not be contaminated by groundwater flow from the landfill, yet pollutants were found in some residential wells southwest of the tributary. SOLVE's expert contended that the unnamed tributary is not a divide, therefore the groundwater flowing from the landfill could be the source of pollutants in those wells southwest of the tributary. However, the tributary, when tested, albeit on only one occasion, did not contain any pollutants, despite the fact that a portion of its flow

is groundwater from the landfill. Also, no tests were conducted by SOLVE or DER, or by their experts, to determine the source or sources of the pollutants found in the area southwest of the unnamed tributary. Finally, it should be noted that pollutants were found in a well located at an industrial site northeast of the landfill, at ACV Dynotherm, yet neither SOLVE nor DER explained the significance of this fact. Such failure, especially on DER's part, is particularly distressing, in view of the fact that all parties agree that groundwater flows in a northwest direction from the landfill. The fact that a well located northeast of the landfill shows the presence of pollutants indicates that there could very well be another source, or sources, of pollutants in the area. At the very least, it shows the need for further study of the area and an explanation of the results thereof.

In viewing all of the evidence before the Board at this stage of the proceedings, there is sufficient evidence to indicate that appellant Chrin Brothers has shown the likelihood of prevailing on the merits as to the primary issue of the source of the pollutants found in the area.

The third standard to be applied in the supersedeas proceeding is the likelihood of injury to the public. 25 Pa. Code §21.78(a)(3). Since an order has already been issued granting appellant Chrin Brothers' petition for supersedeas, the Board's conclusion as to the third standard should be obvious to the parties. However, what remains to be done is for the Board to explain why we feel the evidence establishes there is no likelihood of injury to the public while the landfill continues to accept solid waste. On the contrary, in defining the term "public" in the broadest manner and in considering the duties of municipalities with regard to the orderly and

economically feasible administration of municipal waste operations, the Board is firmly of the opinion that there would have been a likelihood of injury to the public had the Board upheld DER's order and denied appellant's petition. That we declined to do so remains, in our opinion, the proper decision, based upon the following reasons.

Again, because "injury to the public" is left undefined in 25 Pa. Code §21.78, the Board must undertake the task of defining the phrase. DER cites our opinion in Chemical Waste Management, Inc. et al. v. DER, et al., 1982 EHB 423, in arguing that injury to the public must be defined as "whether conditions at the site constitute significant pollution or a hazard to health or safety during the period of the supersedeas." (DER brief, p. 4) (citing Chemical Waste, supra at 433-34). Similarly, SOLVE would have the Board limit its definition of injury to the public to a consideration of the contamination of the groundwater allegedly attributable to the landfill and the present and future health and safety risks associated with that contamination. (SOLVE brief, p. 6). Conversely, appellant Chrin Brothers urges the Board to define injury to the public in a more expansive manner, encompassing the increased costs the area's minicipalities would incur (and would therefore have to pass on to their citizens) in finding alternative landfill sites for the disposal of municipal solid waste. (Chrin brief, p. 5). We are of the opinion that the phrase "injury to the public" should indeed be defined as appellant suggests, based upon the following reasons.

At the outset, it should be noted that the definition of injury to the public which both DER and SOLVE urged the Board to adopt is, in reality, the fourth standard of the supersedeas standards set forth in the Board's

Rules and Regulations.[2]

Because of this fact, we do not feel that the Environmental Quality Board, which promulgated 25 Pa. Code, intended to define the phrase "injury to the public" in the manner DER suggests. The definition DER urges the Board to adopt is a separate standard, which Chrin must satisfy in order for its petition to be granted; it cannot be viewed as mere surplusage. Statutory Construction Act, 1 Pa. C.S.A. §1922.[3] Thus, we find DER's and SOLVE's reliance upon the above-quoted section of the Board's opinion in Chemical Waste, supra, to be misplaced.[4] Rather, as appellant argues, "injury to the public" includes the increased costs the area municipalities would have incurred in securing other waste disposal sites had the Board upheld DER's order. We believe that a definition of injury to the public which includes such costs is entirely appropriate under the circumstances.

First, we note that the term "public" may be defined as "a group of people having common interests" or "relating to all the people of the whole area . . ." Webster's Ninth New Collegiate Dictionary. It cannot be

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2 "A supersedeas shall not issue in cases where nuisance or significant (more than de minimis) pollution or hazard to health or safety either exists or is threatened during the period when the supersedeas would be in effect." 25 Pa. Code §21.78(b).

3 Because rules of statutory construction may also be applied to local ordinances, Clavorella v. Zoning Board of Adjustment, ____ Pa. Cmwlth. ____ 484 A.2d 420 (1984), we find no proscription against applying such generally accepted principles to rules and regulations promulgated by the Environmental Quality Board, which, after all, does so pursuant to statutorily defined powers and duties. See, e.g., Solid Waste Management Act, 35 P.S. §6018.105(a).

4 DER's and SOLVE's mistaken reliance upon Chemical Waste, supra appears to stem from the fact that the potential for serious pollution problems provided the only barometer by which "injury to the public" could have been defined in Chemical Waste. Alternatively, of course, Chemical Waste may be distinguished by the fact that the appealed-from DER order at issue therein was not a closure order, but only one which required the landfill operator to undertake certain remedial measures. Consequently, there existed no opportunity in Chemical Waste for a broader definition of injury to the public.

gainsaid that all of the people in the area served by Chrin Landfill share a common interest in the economically feasible and orderly administration of municipal waste operations. Of course, such a public interest is usually provided for and protected by each municipality which is charged with the responsibility of providing solid waste collection and disposal services for its citizens. This responsibility arises from two sources. First, and most importantly, the Solid Waste Management Act (SWMA) provides that "[e]ach municipality shall be responsible for the collection, transportation, processing, and disposal of municipal waste which is generated or present within its boundaries . . ." 35 P.S. §6018.202(a). This duty must be performed by each municipality, it is non-delegable. 35 P.S. §6018.202(c). Second, the responsibility to collect and dispose of municipal waste arises from a duty to protect and enhance the quality of life of all the citizens of the municipality. Franklin Township v. DER, 500 Pa. 1, ____, 452 A.2d 718, 721-22, n. 7 (1982). One aspect of this duty is that such services should be provided in such a way as to impose the least possible burden and expense upon the citizens of the municipality. It would not, after all, enhance the quality of life of the average citizen to be provided waste collection and disposal services, but at an excessive cost. It would be especially injurious to citizens with fixed incomes, yet the evidence indicates that twenty percent (20%) of the City of Easton's population are estimated to fall within this category.

In addition, other evidence adduced at the supersedeas hearings establishes that local expenditures would increase significantly upon closure of Chrin Landfill.[5] This is due to the regrettable yet understandable

[5] Of course, while this would be an acceptable result of an otherwise lawfully ordered landfill closure, it would not be likewise in instances such as this case where closure was not lawfully ordered.

fact that as each area landfill closes, whether voluntarily or at DER's insistence, tipping fees at remaining landfills increase, municipal costs increase, and therefore, public costs increase.[6]

Specifically, the evidence adduced at the supersedeas hearings establishes that, if DER's closure order was upheld and the intervening municipalities were forced by necessity to use Colebrookdale landfill or Grand Central landfill, the following estimated increased costs would be incurred:

Estimated Sewage Sludge Disposal Costs, 1985

	Chrin	Colebrookdale	Grand Central
tipping fee:	$18.00/ton	$35.00/ton	$38.00/ton
Easton	$105,050.	$204,265.	$221,774.
West Easton	4,898.	9,524.	10,340.
Palmer	47,904.	93,146.	101,130.
Forks	25,613.	49,804.	54,073.
Wilson	54,136.	105,265.	114,288.

It must be noted that the preceding figures are only based upon increased tipping fees for sewage sludge disposal and do not take into account the substantial additional expenses each intervening municipality would incur due to increased transportation, labor, truck rental and truck purchase costs. Such costs would necessarily be incurred due to the increased distances involved. (Chrin landfill is located approximately six round-trip miles from Easton; Colebrookdale landfill is located approximately

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[6] Public costs increase directly or indirectly or both; they increase directly through payment of higher solid waste collection rates or increased taxes; they increase indirectly through a reduction in other municipal services, which are cut back in an effort to offset the increased costs of solid waste collection and disposal operations.

ninety-eight (98) round-trip miles from Easton; Grand Central landfill is located approximately thirty (30) round-trip miles from Easton). Moreover, municipal waste disposal costs would likewise increase accordingly. By way of example, the City of Easton's municipal waste disposal costs would increase by thirty-nine thousand dollars ($39,000.00) if Grand Central landfill were used, and by eighty thousand dollars ($80,000.00) if Colebrookdale landfill were used. The record is bereft of estimates for the increased municipal waste disposal costs the other intervening municipalities would incur. Of course, the additional costs cited above with regard to sewage sludge disposal would likewise be incurred with regard to municipal waste disposal.

In addition to the increased municipal cost aspect of "injury to the public," another component exists which we have alluded to and which requires elucidation. We have previously referred to the public's interest in not only economically sound municipal waste operations, but also in the orderly administration of such operations. This is an especially important public interest which is worthy of protection in view of the fact that there is an acute landfill space crisis which exists not only in the immediate Easton area, but in the entire Commonwealth, and particularly in southeastern Pennsylvania. Because of this crisis--the evidence adduced at the supersedeas hearings establishes that there are approximately only 2 to 3.6 years worth of landfill capacity left in southeastern Pennsylvania--it is imperative that DER fulfill its statutory obligation of maintaining a cooperative state and local program of municipal waste program planning. That DER has failed to carry out its responsibilities in this matter can be seen by undertaking an examination of DER's statutory obligations and the policies of the Solid Waste Management Act.

SWMA declares that one of its purposes is to: "establish and maintain a cooperative state and local program of planning and technical and financial assistance for comprehensive solid waste management." 35 P.S. §6018.102(1). To ensure the implementation of this policy, SWMA provides DER with both the power and duty to: "develop a statewide solid waste management plan in cooperation with local governments, the Department of Community Affairs, the Department of Commerce and the State Planning Board; emphasis shall be given to area-wide planning." 35 P.S. §6018.104(3) (emphasis added). However, the evidence adduced at the supersedeas hearings establishes that DER has failed to give emphasis to area-wide planning, and has also failed to cooperate with local governments.

For instance, while a DER employee in charge of statutory compliance for the region testified that DER usually provides informal assistance to municipalities in seeking alternate municipal waste disposal sites upon closure of a landfill which previously served those municipalities, he also testified that no such assistance was provided to the municipalities in the Easton area which would be adversely affected by the closure of Chrin landfill. Such assistance was especially needed here, not only in light of the region's landfill space crisis, but also by virtue of the fact that at least four landfills in the region have been ordered closed by DER since April, 1983.[7]

Under these circumstances, the Board could not state much better than DER already has the need for area-wide planning and state and local government

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[7] The region designated as region one encompasses the following counties: Berks, Bucks, Chester, Delaware, Lehigh, Montgomery, Northampton and Philadelphia. DER has ordered the closure of the following region one landfills: FR&S; Boyertown; Chrin; and Novak.

cooperation. As a DER status report notes:

> "With only 3.6 years of disposal capacity available in the region as a whole, a real need exists for community officials to plan for new facilities to handle future waste loads . . . Southeastern Pennsylvania disposal capacity is also vulnerable since the region has a small number of facilities handling the largest amount of waste of all regions in the state. If one or a small number of facilities would cease operations, waste would be forced to other sites causing disruption of established waste management systems and higher disposal costs."

Pennsylvania Solid Waste Disposal Status Report, May 1984 (author unknown, apparently written by DER since statistics contained in the report were compiled by using annual landfill reports submitted to DER) (Exhibit A-50, originally designated C-50). Of course, while the DER Status Report quoted above states a need for "community officials to plan for new facilities," we believe that the policy of SWMA concerning cooperative state and local planning, DER's duty to implement that policy, and the landfill space crisis that exists in Southeastern Pennsylvania, all required DER to cooperate with local community officials in planning for either new facilities or in securing alternate disposal sites.[8] Due to DER's failure in this regard, the injury to the public attendant to the closure order at issue herein could have been significant had the Board not issued its supersedeas order of December 21, 1984.

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[8] With regard to the planning of new facilities, it should be noted that appellant Chrin Brothers has submitted to DER a permit application providing for the expansion of Chrin landfill. This application , which DER has neither approved nor rejected, was originally submitted to DER in 1978. DER's failure to act upon Chrin's permit application is the subject of a separate appeal docketed at EHB Docket No. 84-326-M. At the supersedeas hearings, the local community officials of the within intervening municipalities expressed strong desires to see DER act upon Chrin's expansion permit application.

The sole remaining standard to be applied in these supersedeas proceedings is that which states "[a] supersedeas shall not issue in cases where nuisance or significant (more than de minimis) pollution or hazard to health or safety either exists or is threatened during the period when the supersedeas would be in effect." 25 Pa. Code §21.78(b). We will examine each component of this standard--nuisance, significant pollution, and significant hazard to health or safety[9] --in turn.

With regard to the issue of whether conditions at or occurrences attributable to Chrin landfill constituted a nuisance, DER's appealed-from order states that the following alleged violations of law and conditions at the landfill fall within this category, in violation of Section 611 of CSL. 35 P.S. §691.611:

> C. The Department has determined that Chrin is depositing and has deposited at the Chrin Landfill a variety of solid wastes and that the groundwater in the vicinity of the Chrin Landfill contains pollutants attributable to the deposition of said solid wastes.
>
> D. The Department has determined that the existing leachate collection and disposal methods utilized at the Chrin Landfill are inadequate to intercept and dispose of current and future leachate generated by the Chrin Landfill in accordance

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[9] Because it contains no technical words, the phrase "significant (more than de minimis) pollution or hazard to health or safety" must be construed by application of the rules of grammar. Statutory Construction Act, 1 Pa. C.S.A. §1903(a). (For a discussion of the applicability of the Statutory Construction Act to Environmental Quality Board rules and regulations, see footnote 3, supra). We believe the most reasonable and the grammatically correct construction of the above-quoted phrase is one that applies the modifying adjective "significant" to both of the nouns separated by the conjunctive "or." Hence, the fourth supersedeas standard will preclude the issuance of a supersedeas order only where, assuming no nuisance exists, either significant pollution or significant hazard to health or safety exists or is threatened during the period the supersedeas would be in effect. 25 Pa. Code §21.78(b).

with the requirements of the Pennsylvania Solid Waste Management Act, the Act of July 7, 1980, No. 97, P.L. 380 P.S. §§691.1 et seq. ("Clean Streams Law"). Specifically, the Department has determined that:

1. On May 6, 1983 and December 15, 1983, leachate originating from the Industrial Drive slope of the Chrin Landfill was mixing with surface water and flowing into the waters of the Commonwealth in violation of Sections 301, 307, and 402 of the Clean Streams Law, 35 P.S. §§691.301, 691.307, and 691.402; and Section 610(1) of the Solid Waste Act, 35 P.S. §6018.610(1).

2. Leachate generated by the Chrin Landfill and presently collected in Manholes "1", "3", and an unnumbered manhole adjacent to Manhole "1" is directed to Manhole "5" from which it discharges to sub-soils and thence to groundwater, a water of the Commonwealth. Such unpermitted discharge of leachate, an industrial waste and a polluting substance, is a violation of Sections 301, 307, and 402 of the Clean Streams Law, 35 P.S. §§691.301, 691.307 and 691.402; and Section 610(1) of the Solid Waste Act, 35 P.S. §6018.610(1).

E. The Department has determined that the existing groundwater monitoring system at the Chrin Landfill is inadequate under the requirements of the Solid Waste Act and Clean Streams Law.

F. The Department has determined that the Chrin Landfill has exceeded the final elevations and boundaries allowed by Solid Waste Management Permit Number 100022 in violation of Sections 201, 301, 302, 610(1), 610(2), and 610(4) of the Solid Waste Act, 35 P.S. §§6018.201, 6018.301, 6018.302, 6018.610(1), 6018.610(2) and 6018.610(4).

G. As a result of a number of inspections of the Chrin Landfill, including inspections conducted on April 26, 1984 and May 22, 1984, the Department has determined that Chrin has not operated the Chrin Landfill in accordance with Solid Waste Management Permit Number 100022, the Solid Waste Act, and 25 Pa. Code Chapter 75 of the rules and regulations of the Department. Specifically, the Department has determined that:

1. The western and northern slopes of the Chrin Landfill have excessive grades and are not terraced or stabilized in violation of 25 Pa. Code §§75.24(c)(2)(ii), 75.24(c)(2)(iii), 75.26(o), and 75.26(p) and therefore in violation of Sections 610(1), 610(2), and 610(4) of the Solid Waste Act, 35 P.S. §§6018.610(1), 6018.610(2), 6018.610(4).

2. The Chrin Landfill does not have an acceptable gas venting and monitoring system in operation in violation of 25 Pa. Code §75.24(c)(2)(xxiv) and therefore in violation of

Sections 610(1), 610(2), and 610(4) of the Solid Waste 35 P.S. §§6018.610(1), 6018.610(2), 6018.610(4).

3. Adequate daily cover material has frequently not been provided at the Chrin Landfill in violation of 25 Pa. Code §75.26(1) and therefore in violation of Sections 610(1), 610(2) and 610(4) of the Solid Waste Act, 35 P.S. §§6018.610(1), 6018.610(2) and 6018.610(4).

4. The annual report of 1983 for the Chrin Landfill has not been submitted to the Department in violation of 25 Pa. Code §75.21(r)(4) and therefore in violation of Sections 610(1), 610(2) and 610(4) of the Solid Waste Act, 35 P.S. §§6018.610(1), 6018.610(2), 6018.610(4).

H. The Department has determined that on May 31, 1983, Chrin accepted for disposal at the Chrin Landfill residual waste from Asbury Graphite Mills Incorporated consisting of graphite waste flakes and waste powder without the required permit and/or approval from the Department in violation of Sections 301 and 302 of the Solid Waste Act, 35 P.S. §§6018.301 and 6018.302.

J. Chrin's existing collateral bond is inadequate to meet the requirements of the Solid Waste Act, including but not limited to its relation to the total estimated cost to the Commonwealth of completing final closure of the Chrin Landfill, as required pursuant to Section 505(a) of the Solid Waste Act, 35 P.S. §6018.505(a).

With regard to DER's allegations, the Board has duly considered and weighed whatever evidence was presented at the supersedeas hearings in support of these allegations and we have determined the following: The allegation set forth in paragraph C is unsupported by the evidence; the conditions noted in paragraphs D(1) and D(2) have been alleviated by the implementation of improvements and modifications to Chrin's leachate collection system; the conditions noted in paragraph E have likewise been alleviated by implementation of groundwater monitoring system improvements; the conditions noted in paragraph F do not constitute sufficient justification for DER's closure order; the conditions with respect to grading and terracing of the northern and western slopes noted in paragraph G(1) have been addressed by Chrin's submission on October 30, 1984, of a closure plan; the condition

noted in paragraph G(2) has likewise been addressed by Chrin's submission on October 30, 1984, of a plan calling for the development of a gas capture and energy generation system; the allegation set forth in paragraph G(3) is unsupported by the evidence; the violation noted in paragraph G(4) has been remedied by Chrin's submission of its 1983 annual report; the allegation set forth in paragraph H is unsupported by the evidence; and, the violation noted in paragraph J has been remedied by Chrin's submission of a bond in the amount of one hundred fifty-nine thousand dollars ($159,000.00). Thus, because all of DER's allegations concerning conditions at and violations by Chrin landfill have been addressed by way of implementation of systemic improvements, or have been ruled upon as being either unsupported by the evidence or providing insufficient grounds for DER's closure order, the Board finds that issuance of its supersedeas order of December 21, 1984, was proper because conditions at or violations attributable to Chrin landfill did not at that time, nor do they now, constitute a nuisance under 25 Pa. Code §21.78(b). However, our conclusion in this regard, as it applies to the allegation set forth in paragraph F, requires further elucidation.

Specifically, paragraph F alleges that Chrin landfill has exceeded its originally permitted final elevations and boundaries. The evidence adduced at the supersedeas hearings established that the highest elevation at the landfill was five hundred and ten (510) feet, sixty (60) feet above its originally permitted elevation of four hundred and fifty (450) feet. However, with regard to horizontal boundaries, the record does not indicate to what extent these boundaries were exceeded. More importantly, however, DER (and SOLVE) failed to prove the adverse environmental consequences, if

any, of these violations.[10] In addition, because the evidence established that the one-to-one trash to soil ratio necessary for the natural renovation of leachate is present throughout Chrin landfill, the Board finds that no nuisance occurs as a result of the boundaries being exceeded at Chrin landfill.

In addition, the evidence established that DER knew of Chrin's elevation of five hundred and ten (510) feet at least since February, 1982, when region one supervisory operations were transferred from DER's Wernersville office to its Norristown office. Also, Chrin never received any violation notices concerning its vertical elevation violation. Finally, both a DER engineer and a DER employee in charge of compliance at Chrin landfill testified that the landfill's final elevation of five hundred and ten (510) feet is acceptable to DER. Thus, the Board finds that, at least with regard to Chrin's violation of its originally permitted vertical elevation, DER either ratified this elevation, waived it as a grounds for closure, or is estopped from asserting it as a grounds for closure.

In the alternative, due to the fact that no adverse environmental consequences have been shown to exist as a result of Chrin's violation of its originally permitted boundaries, the Board finds that such violations are of a de minimis character and therefore did not justify DER's closure order requiring the cessation of landfill operations by December 31, 1984. Clymar Sanitary Landfill v. DER, EHB Docket No. 81-185-M, (Adj. September 22, 1983)

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[10] Although Chrin admittedly exceeded its originally permitted horizontal and vertical boundaries, the Board finds that such violations occurred in good faith, in view of the fact that Chrin Brothers reasonably believed that its expansion permit application would be approved and DER never indicated that exceeding the boundaries was a matter of concern to DER in its review of the expansion application.

Purely technical violations of this sort do not automatically preclude the issuance of a supersedeas order. Armand Wazelle v. DER and Borough of Punxsutawney, EHB Docket No. 83-063-G (O&O, November 13, 1984).

The second component of the remaining supersedeas standard states that a supersedeas order cannot issue if significant pollution either exists or is threatened during the period when the supersedeas would be in effect. 25 Pa. Code §21.78(b). The only evidence which could arguably furnish grounds for a finding of significant pollution is that volatile organic compounds (VOC's) were detected in both onsite monitoring wells and off-site residential wells.[11] However, the Board notes that there is a serious problem with the evidence offered by DER and SOLVE in their attempts to support DER's allegation of significant pollution. This problem exists by virtue of DER's reliance on sampling data which purports to show that VOC's were detected at levels below the method detection limits (MDL's) provided for in Environmental Protection Agency (EPA) Method 624.

EPA Method 624 is the accepted method, used by EPA, DER and industry, for the detection of VOC's in wastewater. See, Federal Register, Vol. 49, No. 209, October 26, 1984, pp. 43373 to 43380. The MDL is defined, in the Method, as "the minimum concentration of a substance that can be measured and reported with 99% confidence that the valve is above zero." Federal Register, supra, at p. 43378. The MDL actually achieved in a given analysis will vary depending on instrument sensitivity and matrix effects. Id. Single operator precision, overall precision, and method accuracy were

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[11] All the other evidence concerning conditions at Chrin landfill--violation of horizontal boundaries and vertical elevation, absence of methane gas venting, allegedly inadequate daily cover, excessive grading on the northern and western slopes--does not furnish sufficient grounds for a finding of significant pollution.

found to be directly related to the concentration of the parameter, and essentially independent of the sample matrix. Id. The Board was given no evidence on the matters of "matrix effect," and "concentration of the parameter"(substance). In view of such omissions in the evidence, the Board is skeptical of the findings in terms of actual presence of VOC's and concentrations thereof.

More importantly, however, the Board is seriously troubled by the introduction of analytical conclusions purporting to prove presence of VOC's at levels below the MDL's achievable through use of Method 624. In addition, no evidence was introduced with regard to the all-important factor in these analyses--that all MDL's are compound specific. Id., Table 1. Without the establishment of the compound specific MDL's of the various substances, the Board is without a proper basis to evaluate the confidence level associated with the alleged presence and/or concentration of VOC's in the groundwater. Without a sound basis upon which to evaluate the confidence level of the suspected VOC's, the Board would, at best, be engaging in speculation, if it attempted to base a finding of significant pollution on the evidence presented to date in these proceedings.

The third component of the remaining supersedeas standard requires that a supersedeas may not issue if significant hazard to health or safety either exists or is threatened during the period when a supersedeas would be in effect. 25 Pa. Code §21.78(b). The only evidence offered in support of this standard related to a Pennsylvania Department of Health determination that in only one VOC found in the offsite residential wells, out of a total of fifteen (15) VOC's found therein, did there exist what might be considered a potential health hazard. The potential health hazard found to exist by

Pennsylvania Department of Health is defined as one additional death that may be attributable to cancer per hundred thousand (100,000) persons, if a person consumed water with a concentration of .33 parts per billion (ppb) of the suspected VOC over a lifetime (70 years) at the rate of two liters per day.[12]

The health hazard was determined by the Pennsylvania Department of Health based on a cancer risk assessment model (CRAM) developed by EPA and the National Academy of Sciences (NAS). Although used by EPA and NAS, cancer risk modelling is not without its skeptics, both within EPA, and in industry. See, e.g., Washington Post, January 3, 1985, pp. A-6 to A-7. Our difficulty with accepting the cancer risk model in this appeal is that the range of sampling and the results thereof are too thin a thread upon which to base a cessation order. One detection of the VOC in question, at a level in excess of EPA's recommended ambient water quality standard[13] cannot be magnified into a finding of significant hazard to health or safety. Even assuming the presence of the suggested level of the VOC identified, we have been unable to find in the record any credible evidence that the landfill is the source of that compound.

Not being unmindful of the fear engendered in the community by reason of the presence of VOC's in wells in the area, we cannot use those fears,

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[12] Although the Department of Health indicated a finding of the VOC (1,1 Dichloroethylene) to be in a range for 1.5 to 7.1 ppb, we note that it was found eighteen (18) times out of sixty-five (65) samples taken, and the MDL for this compound was exceeded only on one occasion. The MDL for 1,1 Dichloroethylene is 2.8 ppb. Federal Register, supra, at p. 43378, Table 1.

[13] There is no evidence in the record to sustain a finding that non-compliance with an EPA ambient water quality standard is a violation of Pennsylvania Law.

without more, to build a foundation to sustain D.E.R.'s order requiring cessation of landfill operation at the site. However, this is not to say that there is not a cause for concern which would best be expressed and implemented by a thorough, systematic and detailed program of groundwater sampling and monitoring throughout the area to determine the exact source and extent of the contamination of the monitoring and residential wells.

Our decision therefore expresses our concern, but our concern alone cannot justify a decision by us to allow the landfill to be closed. On the basis of the record made before the Board to date, no substantial grounds existed upon which to order the landfill to cease operations. Absent such a showing, we cannot now sustain a cessation order.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

cc: Bureau of Litigation
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DATED: February 13, 1985

COMMONWEALTH OF PENNSYLVANIA

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WILLIAM FIORE t/d/b/a MUNICIPAL AND INDUSTRIAL DISPOSAL COMPANY :

:

: Docket No. 85-020-G

: Issued: February 13, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION FOR SUPERSEDEAS

Synopsis

Appellant's Petition for Supersedeas is denied as being without merit. The appeal is of a permit denial. Appellant requests that the Board order DER to issue the permit. A supersedeas will issue only to preserve the status quo during the pendency of an appeal. Appellant's petition requests an alteration in the status quo; such relief can be granted only after a full hearing on the merits. The supersedeas hearing does not serve as a full hearing on the merits.

OPINION

Appellant, William Fiore, appeals DER's denial of his application for a permit, which was submitted pursuant to the Solid Waste Management Act, 35 P.S. §6018.101 et seq.

Fiore has filed a Petition for Supersedeas requesting that the Board order DER to issue the permit. The petition is denied as being without merit. The purpose of a supersedeas is to preserve the status quo during the pendency of an appeal. Parker Sand and Gravel v. DER (EHB Docket No. 83-134-G; Opinion and Order dated September 9, 1983). In this case the existing status quo is that Fiore has no permit for this particular portion of the site; the application did not seek renewal of a previously issued permit. Granting Fiore's request that DER be ordered to issue the permit would radically alter the status quo. Moreover, the Board will not issue such an order absent a full hearing on the merits. Nor is the Board willing to hold an accelerated hearing on the merits of this appeal. Fiore is simply one of many disappointed applicants for permits; a hearing on the merits (if necessary) will be scheduled in due course.

O R D E R

WHEREFORE, this 13th day of February, 1985 it is ordered that Appellant's Petition for Supersedeas is denied as being without merit.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: February 13, 1985

cc: Bureau of Litigation
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WILLIAM FIORE t/d/b/a MUNICIPAL AND INDUSTRIAL DISPOSAL COMPANY, INC. :

:

: Docket No. 84-292-G
: February 13, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

Synopsis

DER's Motion for Summary Judgment is granted. Pursuant to section 503(c) of the Solid Waste Management Act, 35 P.S. §6018.503(c), DER may deny Appellant's application for a hazardous waste transporter's license on the basis of violations of the Solid Waste Management Act previously established by Commonwealth Court. Those violations alone suffice to demonstrate that Appellant has shown a lack of ability or intention to comply with the Solid Waste Management Act. The Commonwealth Court decision renders the existence of the violations res judicata. Therefore, there are no issues of material fact presented. DER is entitled to judgment herein as a matter of law.

OPINION

This appeal concerns DER's denial of Appellant's application for renewal of his hazardous waste transporter's license. The denial was based upon a DER determination that Appellant has shown a lack of ability or intention to comply

with the provisions of the Solid Waste Management Act, 35 P.S. §6018.101 et seq ("SWMA"). DER has moved for summary judgment on the basis that Commonwealth Court has found Appellant to have violated the terms of a consent order and agreement ("CO&A") entered into with DER which concerned the operation of his solid waste disposal facility.[1] DER argues that the Commonwealth Court finding is res judicata and that under section 503 of the SWMA this finding is sufficient to justify the entry of judgment herein in favor of DER.

Section 503(c) provides in relevant part:

> In carrying out the provisions of this act, the department may deny . . . any license if it finds that the applicant . . . has shown a lack of ability or intention to comply with any provision of this act . . . or any rule or regulation of the department or order of the department, or any condition of any permit or license issued by the department as indicated by past or continuing violations . . .
> 35 P.S. §6018.503(c).

The DER denial letter made reference to the Commonwealth Court decision regarding the CO&A as well as to an Appendix which listed several alleged violations of the SWMA as well as the Clean Streams Law, 35 P.S. §691.1 et seq. These alleged violations were communicated to Appellant as notices of violation.

Appellant has raised several arguments in opposition to DER's Motion. The first of these is that DER cannot rely upon mere notices of violation as a basis for denying his license under section 503(c). Appellant argues that because notices do not constitute appealable DER actions, they are not final or entitled to res judicata effect in this proceeding. Since we have determined

[1] Commonwealth, DER v. Wm. Fiore t/d/b/a Municipal and Industrial Disposal Co., Inc., No. 2083 C.D. 1983. Opinion and Order entered October 28, 1983.

that the Commonwealth Court finding regarding the violation of the CO&A provides an ample basis for the license denial, we need not address this argument. Section 503(c) provides DER with authority to deny a license where it finds that the applicant has shown a lack of intention to comply with a DER order such as the aforesaid CO&A. So long as DER has a sufficient basis in proven violations, (for the purposes of this opinion) it need not be required to prove that each violation alleged in the denial letter in fact occurred.

Appellant's second argument concerns the Commonwealth Court decision regarding the CO&A. Before discussing the merits of Appellant's argument on that point, a brief recounting of the circumstances of that decision is appropriate. The CO&A is dated January 25, 1983. In signing it, Appellant agreed to the truth and accuracy of the following factual findings, inter alia:

> F. The department had occasion to conduct inspections of (Appellant's) Phase I Industrial Waste Pit and samples and inspections of September 23, 1982, September 28, 1982, and November 29, 1982, revealed pollutants and contaminants. . . (which discharge) to an unnamed tributary of the Youghiogheny River.
>
> G. This discharge into surface waters of the Commonwealth constitutes a violation of §610(1) of the SWMA, in that solid waste. . . was dumped or deposited or permitted to be dumped or deposited into waters of the Commonwealth and (Appellant) never received a permit from the Department Bureau of Solid Waste Management for said disposal of solid wastes.
>
> * * *
>
> I. This discharge into the waters of the Commonwealth also constitutes a violation of sections 301, 307, and 401 of the Clean Streams Law of Pennsylvania, the Act of June 22, 1937, No. 394, P.L. 1987, as amended, 35 P.S. §691.1 et seq.
>
> * * *

K. On November 14, 1979, the Department granted (Appellant) approval for temporary storage of wastes generated at the Clairton Works for ninety (90) days. . . .

L. Condition No. 2 of the November 14, 1979, approval required the wastes to be removed ninety days after intital waste placement into the pits.

* * *

O. The Department notified (Appellant), by letters dated May 4, 1981, and July 31, 1981, and November 5, 1982, to remove all waste materials and contaminated soils stored in the temporary storage pit.

P. The failure of (Appellant) to remove all waste stored in the temporary storage pit is in violation of the mandatory conditions 2, 3 and 5 of the November 14, 1979, approval letter and is in violation of section 610 of the Pennsylvania Solid Waste Management Act and section 402 of the Pennsylvania Clean Streams Law, supra, and of section 101.4 of the Department's Rules and Regulations. . .

Q. The discharges referred to in Paragraph F, above, constitute a violation of the Solid Waste Management Act, and the Clean Streams Law, on each and every day on which the discharges occur, and also constitute a public nuisance within the meaning of those statutes.

Paragraphs 1 through 11 of the CO&A inposed certain requirements upon Appellant which were designed to remedy the aforesaid violations, inter alia. The Commonwealth Court found that Appellant had violated paragraphs 4, 5, 7, and 9. These paragraphs ordered Appellant to remove all solid waste from the temporary storage pit (see paragraph P supra), to submit a closure plan for the site, to not expand the hazardous waste facility, to not utilize or construct any other hazardous waste disposal facility without a permit from DER, and to pay a civil penalty of five hundred dollars per month until such time as Appellant has received a DER permit for operation of the facility.

Pursuant to paragraph 12 of the CO&A, violations of paragraphs 4, 5, 7, and 9 constitute violations of a DER order.[2]

Appellant argues that, despite the language of section 503(c) of the SWMA concerning the consequences of failure to comply with an order of the departmer DER cannot base the license denial upon the Commonwealth Court's determination. Appellant argues that that decision is presently on appeal and therefore, is not final or entitled to res judicata effect. Appellant is in error. The Pennsylvania Superior Court has recently stated the law on this issue as follows:

> When a court of competent jurisdiction has determined a litigated case on its merits, the judgment entered until reversed, is, forever, and under all circumstances, final and conclusive as between the parties to the suit . . . in respect to every fact which might properly be considered in reaching a judical determination of the controversy. . . (Citing Bearoff v. Bearoff Brothers, Inc., 458 Pa. 494, 327 A.2d 72 (1974) (emphasis added). Philadelphia Electric Co. v. Borough of Lansdale, 283 Pa. Super. 378, 424 A.2d 514 (1981).

We cannot conceive of a clearer statement of the effect of the Commonwealt Court's determination regarding the issues raised herein. The determination that Appellant violated the CO&A is final "under all circumstances" unless and until it is reversed. Therefore, it is conclusive and binding here. This conclusion is thoroughly consistent with the precepts of the Restatement (2d) of Judgments, §13.

Appellant's third contention is that DER's denial was arbitrary, and therefore an abuse of discretion, because DER has no established policy for determining which violations will suffice under section 503(c) to demonstrate the

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[2]Appellant did not appeal the terms of the CO&A. Therefore, those terms are final and enforceable against him. Commonwealth v. Derry Township, 466 Pa. 31, 351 A.2d 606 (1976). 71 P.S. §510-21(c).

required "lack of ability or intention to comply". The language of section 503(c) is clearly discretionary: DER "may" deny a license if it makes the requisite findings. Appellant argues that since such a denial is a discretionary action, "material issues of fact" are created because DER "has no written policy to determine whether alleged violations were major or minor." (Appellant's brief p.8) We are not certain that we understand the thrust of this argument. As we have stated, supra, the Commonwealth court finding is final, conclusive, and binding. Therefore, DER certainly is entitled to rely upon it in determining whether the Appellant has shown a lack of ability or intention to comply with the SWMA. Since the court's decision has res judicata effect, Appellant cannot successfully argue that the facts established by that decision are in dispute. We reject any claim by Appellant that there is a "genuine issue as to any material fact"[3] here. The fact that Appellant has violated a DER order is beyond dispute. The sole remaining question is whether, on the basis of the established facts, DER is entitled to summary judgment as a matter of law. We conclude that it is so entitled.

Appellant makes much of the purported lack of a "policy" governing DER decisions under section 503(c) of the SWMA. Although Appellant has not expressly so stated, we presume his argument is that the lack of an established policy deprives Appellant of notice of which violations might lead to the denial of a transporter's license. (See transcript of Deposition of Mr. Kuchinski, p. 24). Under the facts of this appeal, such an argument cannot

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[3]Pa. R.C.P. 1035(b). Since we have determined that the violations established by Commonwealth Court provide a sufficient basis for the DER action challenged herein, we need not address DER's allegation that Appellant continues to violate the Commonwealth Court order of October 28, 1983.

succeed; Appellant was afforded ample notice of the possible consequences of his failure to comply with the CO&A. Paragraph 12 of the CO&A provides that failure to comply with the terms thereof shall subject Appellant to the remedies and penalties set forth in the SWMA as well as the Clean Streams Law.

This Board recently has held that the violations established by the Commonwealth Court opinion are "serious violations for which one would expect strong sanctions". Fiore d/b/a Municipal and Industrial Disposal Co. v. DER, (EHB Docket No. 83-160-G; Opinion and Order dated April 25, 1984). This conclusion is borne out by the following findings made by the Commonwealth Court in the process of reaching its decision that Appellant had violated the CO&A:

> As a result of (Appellant's actions at his solid waste disposal facility) industrial wastes have been discharged into an unnamed tributary of the Youghiogheny River at the site. The discharges constitute "hazardous waste" within the meaning of the Solid Waste Management Act. 35 P.S. §6018.103.
>
> * * *
>
> Testimony introduced at the hearing in this case indicated that the chemical constituents (which find their way to the unnamed tributary) contain polyaromatic hydrocarbons and other organic chemicals which are constituents of coal tar decanter sludge. Some of the chemicals present in the discharge are either known or suspected carcinogens. It was also established that the McKeesport Water Authority intake for its public water supply system is located on the Youghiogheny River approximately 8.5 miles downstream from the point at which the unnamed tributary enters the Youghigheny River.

Appellant cannot seriously contend that these consequences of his actions should be treated as de minimis violations. DER was fully entitled to rely upon the established violations of the CO&A in deciding to deny Appellant's transporter license application. Those violations alone provide an ample basis for determining that Appellant has shown a lack of ability or intention to comply with the requirements of the SWMA.

Finally, we reject Appellant's argument that DER cannot rely upon violations associated with the operation of his solid waste disposal facility when denying the transporter license application. This argument is without merit. Section 503(c) provides that DER may deny the application if it finds that the applicant "has shown a lack of ability or intention to comply with any provision of this act . . ." 35 P.S. §6018.503(c), (emphasis supplied).

In summary, there remains no genuine issue as to any material fact; DER is entitled to judgment herein as a matter of law.

O R D E R

WHEREFORE, this 13th day of February, 1985, it is ordered that DER's Motion for Summary Judgment is granted. This appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: February 13, 1985

cc: Bureau of Litigation
Dennis W. Strain, Esq., for the Commonwealth
Lee R. Golden, Esq., of the office of Robert P. Ging, Jr., Esq., Pittsburgh, for the Appellant

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DUQUESNE LIGHT COMPANY : Docket No. 83-049-M
: Issued: February 21, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On March 14, 1983, appellant filed a Notice of Appeal with this Board challenging the refusal of DER to allow appellant to self-bond and thus to obtain requested permits under the provisions of the Coal Refuse Disposal Control Act,[1] (CRDCA) for two of its mines.

After pre-hearing memoranda were filed by the parties, DER filed a Motion to Quash For Lack of Jurisdiction and appellant filed thereafter its Response to DER's Motion to Quash.

Subsequent to the filing of the said Motion to Quash and the response thereto, DER denied Duquesne's permit application by reason of the failure of Duquesne to submit a bond which would have otherwise made the permit application complete and sufficient for issuance of the requested permit. Upon Petition by Duquesne, the Board issued a Supersedeas on July 20, 1984,

[1] Act of September 24, 1968, P.L. 1040, No. 318; as amended 1980, October 10, P.L. 307, No. 154, 52 P.S. §30.51 et seq.

staying all action by DER in furtherance of DER's notice to Duquesne to cease operations at its Warwick mines.

The main thrust of DER's motion is that Duquesne has no right to appeal DER's non-action upon appellant's application for permits under CRDCA. DER's position is that so long as appellant is permitted to operate its mines, non-issuance of the permits does not constitute such final action by DER affecting appellant's rights, privileges, immunities, duties, liabilities or obligations.[2]

Duquesne's response is more pointed, in that it underscores the reason (emphasis supplied) for DER's non-action. Duquesne in its Memorandum, details, in funereal-like cadence, the events and circumstances which culminated in the filing of this appeal.

We are not insensitive to appellant's frustration in the present matter. However, DER's position is no less frustrating, as we see it.

The Legislature, under the provisions of CRDCA, authorized DER, in its discretion, to accept self-bonds in the processing of applications for permits thereunder.[3]

Appellant has filed its applications for permits pursuant to CRDCA. In appellant's view the only reason DER has not issued the requested permits

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[2] Administrative Code §1921-A, Act of April 19, 1929, P.L. 177, as amended, 71 P.S. 510-A.

[3] Coal Refuse Disposal Control Act, Act of Oct. 10, 1980, P.L. 807, No. 154, §3, 35 P.S. 30.56, which provides, in pertinent part,

> "And provided further,...or the department, in its discretion (emphasis supplied) may accept a self-bond from the permittee, without separate surety...."

is appellant's insistence upon acceptance by DER of its (Appellant's) self-bond. DER's motion, and Memorandum in support of its Motion, pointedly omit the issue of self-bonding as the basis of its non-action in the processing of appellant's permit applications, but DER's later refusal to issue the permit was based on Duquesne's failure to include a bond with its permit application.

Appellant's Response outlines in great detail the events which led to the filing of this appeal. The facts, as stated by appellant, have not been contested or controverted by DER. Indeed, in its Motion and Memorandum in support of its Motion, DER has elected to ignore the facts and circumstances giving rise to the filing of this appeal. We will, therefore, accept the facts as specified by appellant in its Response, and render a decision on the basis that the facts, as alleged by appellant, are admitted by DER.

Under the admitted facts, DER has failed to act upon appellant's applications for permits for the reason that there are no regulations presently in force which would establish the guidelines under which self-bonding under CRDCA could be effected.

Appellant vigorously asserts that the failure of DER to implement regulations for self-bonding is actionable, per se, because of the length of time which has passed during which time DER, in appellant's view, should have promulgated regulations pursuant to CRDCA.[4]

The legislation giving rise, in the first instance, to appellant's position is CRDCA, and more specifically, Section 3 thereof. (See Footnote 3, supra). However, this section of CRDCA grants to DER the authority, in its discretion (emphasis supplied) to allow self-bonding. Nowhere in CRDCA is

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[4] See appellant's Memorandum In Opposition to DER's Motion to Quash, Statement of Facts, p. 3.

DER required to allow self-bonding.

Standing alone, Section 3 of CRDCA may have been the basis for a tribunal to require DER to exercise its discretion as to self-bonding. However, in such a controversy, it appears that the most appellant may have been granted would be an order directed to DER to exercise its discretion, not an order requiring DER to allow self-bonding.[5]

In the instant appeal, however, the legislation (CRDCA) has been augmented by a regulation promulgated by the Environmental Quality Board.[6] Under the provisions of this regulation DER "will not accept any applications for self-bonding or grant any approval to provide self-bonds for any permit or designated phase of a permit, or issue any permit or designated phase approval with a self-bond guarantee," until the Environmental Quality Board adapts specific regulations to implement self-bonding.

It is in this posture that the Board is now faced with the demand by appellant to require DER to issue a permit allowing appellant to self-bond its two mining operations. DER asserts in its Motion to Quash this appeal that, in its present posture, the appeal does not lie because DER is powerless to allow self-bonding, and its (DER's) consequent non-action is not such "final action" as would confer jurisdiction upon the Board.

Appellant herein seeks action by the Board by reason of DER's non-action on the issue of self-bonding, in the fact of a regulation promulgated by the Environmental Quality Board requiring DER not to allow self-bonding

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5 In a recently filed Memorandum Opinion and Order filed May 21, 1984 by Judge Genevieve Blatt, the Commonwealth Court ordered DER to exercise its discretion pursuant to Section 602(a) of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.602(a). Boyertown Sanitary Disposal Co., Inc. v. Comm. of Pa. Department of Environmental Resources, No. 1017 C.D. 1984, _____ Cmwlth Ct. _____ (1984).

6 25 Pa. Code §86.159, adapted November, 1980, effective August 1, 1982.

pending the promulgation by the Environmental Quality Board of regulations establishing the "criteria, methodology and format" for self-bonding for "mining and reclamation activities."[7]

In order that DER's position be sustainable, its reliance upon the regulation (25 Pa. Code 159) must be reasonable and sustainable by the Board.

Recently, the matter of Agency interpretation of regulations was reviewed by our Commonwealth Court, and the Board stated therein:

> "An administrative agency's interpretation of its own regulation is of controlling weight unless it is plainly erroneous or inconsistent with the regulation. Also, the regulation must be consistent with the statute under which it was promulgated. Dept. of Public Welfare v. Forbes Health System, 492 Pa. 77, 422 A.2d 480 (1980)."

Consumers Life Ins. Co. v. Comm. of Pa. Insurance Dept. 483 A.2d 1055 (Pa. Cmwlth. 1984), at p. 1057.

Also, it has been held that an administrative agency's authority to promulgate regulations is not the power to make law, but is only the authority to adopt regulations to carry into effect the will of the legislature as expressed by the statute. Xerox Corporation v. City of Pittsburgh, 15 Pa. Cmwlth 411, 327 A.2d 206 (1974).

In the appeal at hand, we are faced with a statute authorizing one activity, and a regulation prohibiting the agency from engaging in such activity. Without reaching the ultimate question of the basic validity of the regulation in question, we must seek to determine if the application of that regulation to appellant is violative of appellant's rights as granted in the legislative enactment.

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[7] 25 Pa. Code §86.155.

Is it violative of Duquesne's rights to apply the regulation prohibiting self-bonding under the guise that the regulation was promulgated in furtherance of the statute? We think so.

As applied to Duquesne, the regulation is unenforceable, for the reason that it denies to Duquesne a right granted to Duquesne, i.e., the right to be considered for self-bonding. By applying the regulatory mandate to Duquesne, DER has acted in a manner inconsistent with the statute, and this it may not do. Under the clear language of the statute DER, "in its discretion," may consider self-bonding after consideration of the thirteen (13) standards established in the statute. CRDCA, 35 P.S. §30.56 (a)(1) thru (13). A refusal to exercise that discretion after request by Duquesne to do so, is to act in derogation of the statute, without regard to the reason why the action has been taken. The Legislature has expressed its will, and DER may not use a regulation as a barrier to compliance with the statutory mandate. Where a prospective permittee requests DER to accept a self-bond without separate surety, and provides to DER all the information required under the statute, DER is required to determine if self-bonding is appropriate. Having complied with the statutory mandate of supplying all the required information to DER, Duquesne is entitled to a determination by DER of the propriety of its self-bond application. In its application of 25 Pa. Code §86.153 to Duquesne's request for self-bonding, and by refusing to decide if self-bonding is appropriate for Duquesne, DER has violated Duquesne's rights.

Accordingly, this matter is remanded to DER for the purpose of review by DER of Duquesne's application for self-bonding pursuant to the standards enunciated and specified in the statute, namely, 52 P.S. §30.56(a)(1) thru (13).

The review by DER shall be completed within sixty (60) days of date of this Order, and the Board shall retain jurisdiction of this appeal pending action by DER.

ORDER

AND NOW, this 21st day of February 1985, the Motion to Quash filed by DER is denied, and the appeal is remanded to DER for review and decision by DER within sixty (60) days of Duquesne's application for self-bonding, pursuant to the standards specified by the Legislature in 52 P.S. §30.56(a)(1) thru (13).

The Board retains jurisdiction of this matter pending further action by the parties subsequent to DER's action in compliance with this Order.

The Supersedeas Order issued by the Board on July 20, 1983, remains in full force and effect during the period of the remand to DER, and until further order of the Board.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR., MEMBER

cc: Bureau of Litigation
Marc A. Roda, Esq.
Bob Thompson, Esq.

DATED: February 21, 1985

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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JOHN J. BUDINSKY :

:

: Docket No. 84-302-G
: February 22, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

SYNOPSIS

Summary judgment in favor of DER is granted and the appeal is dismissed. Section 528 of the federal Surface Mining Conservation and Reclamation Act of 1977, 30 U.S.C. §1278, does not operate to grant Appellant an exemption from Pennsylvania's permitting requirements for coal mines. Appellant cannot operate his mine without the repermitting application required by the appealed-from compliance order 25 Pa. Code §86.12. The order does not represent an abuse of DER's discretion.

DISCUSSION

This appeal concerns a DER compliance order which directs Appellant to cease all mining activities at his underground coal mine until such time as he submits a complete repermitting application for the mine in conformity with 25 Pa. Code §86.12.

The essential facts of this controversy are not in dispute. Appellant operates a deep mine which is known as the "Colpat Mine". Prior to the issuance of the compliance order appealed herein, Appellant operated the mine under the authority of a permit issued pursuant to section 315 of the Clean Streams Law, 35 P.S. §691.315. DER determined that this permit expired on March 31, 1983, as a consequence of 25 Pa. Code §86.11 which provides:

> (a) No person shall operate a mine. . . unless such person has first obtained a permit from the Department.
>
> * * *
>
> (c) Except as provided for in §86.12 (relating to continued operation under interim permits). . . on and after eight months from the effective date of this chapter, no person shall engage in or carry out coal mining activites within Pennsylvania, unless that person has first obtained a valid permit issued by the Department.

The effective date of Chapter 86 was July 31, 1982, the date that the regulations were published in the Pennsylvania Bulletin.[1] (The regulations were promulgated in connection with the federal government's award of primary jurisdiction ("primacy") to Pennsylvania pursuant to the federal Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1201 et seq.) Thus, DER determined that Appellant's pre-existing permit expired as of March 31, 1983. However, DER construed the permit to allow interim operations, pursuant to 25 Pa. Code §86.12 until April 24, 1984. When Appellant had not submitted the required repermitting application by April 24, 1984, DER issued the cessation order appealed herein.

The parties have agreed that this appeal turns upon a single legal issue, i.e., whether DER has the authority to require Appellant to submit the repermitting application in order to continue mining. No evidentiary hearings were held.

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[1] 12 Pa. Bull 2882 (July 31, 1982).

Appellant is appearing pro se. He and counsel for DER have submitted briefs on the aforesaid legal issue; DER has now moved for summary judgment. Although Appellant has not responded to the DER motion, we believe that his position is made clear in his previously submitted brief.

Essentially, Appellant's argument is that he is exempt from the permitting requirements of Pennsylvania law by virtue of section 528 of the federal Act, 30 U.S.C. §1278. He argues that when the Pennsylvania legislature adopted the federal requirements in order to be granted primacy, it should have adopted section 528 as well. He states:

> Congress desired to establish uniform national performance standards for the surface mining industry. The goal is to implement (the federal) Act in its entirety, along with individual state laws to reflect local conditions.
>
> * * *
>
> The Secretary of the Interior of the U. S. and the Commonwealth of Pennsylvania failed to comply with the Act in its entirety by diluting it through the elimination of one of its provisions, i.e., Sec. 528.

Section 528 of the federal Act provides that certain surface mining activities are exempt from the requirements of the Act; these include coal removal by a landowner for his own non-commercial use and coal removal for commercial purposes where the surface mining operation affects two acres or less. Appellant claims that his operation would fall within either of these categories and that therefore, DER should not be entitled to require him to submit an application for a permit.[2]

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[2]Since we have determined that the existence of the federal exemption plays no role in Pennsylvania's regulatory scheme, we have no need to examine the factual basis for Appellant's contention.

DER argues that section 528 cannot operate to grant Appellant an exemption inasmuch as it simply is not part of Pennsylvania law. We concur with DER's view. We cannot read into the law an exemption which does not appear on its face, and we can see no basis for holding that section 528 should be part of Pennsylvania law. Pennsylvania amended several of its statutes[3] in 1980 in order to comply with section 503 of the federal Act, 30 U.S.C. §1253, which specifies certain minimum requirements for the regulation of mining activities. When the federal government granted Pennsylvania primacy, the Secretary of the Interior determined that:

> The Pennsylvania Surface Mining Laws provide. . . for the regulation of surface mining and reclamation operations. . . in Pennsylvania in accordance with the Surface Mining Control and Reclamation Act of 1977.[4]

Certainly, this statement evidences, at least prima facie, that the federal government was satisfied that the changes in the Pennsylvania law were satisfactory, from the perspective of the federal Act.

Appellant argues, however, that the Secretary of the Interior failed to conform with the mandate of the federal Act because the failure to require Pennsylvania to adopt the exemption of section 528 somehow "dilutes" the Act. Quite the opposite is true. The absence of this exemption from the Pennsylvania law makes the Pennsylvania regulatory scheme more stringent than the federal.

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[3]See, e.g., the Act of October 10, 1980, P.L. 894, No. 157 (amending the Clean Streams Law) and the Act of October 10, 1980, P.L. 835, No. 155 (amending the Surface Mining Conservation and Reclamation Act).

[4]47 Fed. Reg. 33051 (July 30, 1982).

Furthermore, this greater stringency is fully condoned by Congress Section 505 of the federal Act provides that state laws which "provide for more stringent land use and environmental controls" are not to be construed as inconsistent with the federal Act. 30 U.S.C. §1255. It is elementary constitutional law that the states are free to enact laws regulating activities within their own borders so long as those laws do not conflict with an existing federal regulatory scheme. Thus, it is clear that Congress did not intend to preclude the states from enacting more rigorous environmental controls. Pennsylvania has done so; it requires a permit where the federal government would not, i.e., even small operators are required to comply with the requirements of section 315 of the Clean Streams Law, and 25 Pa. Code, Chapter 86. We note that this opinion is completely consistent with our recent holding in Ralph Bloom, Jr. v. DER (EHB Docket No. 84-145-G; Adjudication dated February 21 , 1985).

As a consequence of the foregoing analysis, it is clear that DER possessed ample authority for the issuance of the compliance order to Appellant. Appellant must submit a complete repermitting application pursuant to 25 Pa. Code §86.12 prior to resuming mining operations at the Colpat mine. DER is entitled to summary judgment as a matter of law.

O R D E R

WHEREFORE, this 22ndday of February, 1985, it is order that DER's Motion Summary Judgment is granted. The appeal captioned above is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO
Member

EDWARD GERJUOY
Member

DATED: February 22, 1985

cc: Bureau of Litigation
Alan S. Miller, co-counsel for DER
Joseph K. Kaput, co-counsel for DER
John J. Budinsky, Appellant

nb

COMMONWEALTH OF PENNSYLVANIA

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TELCO COAL OPERATIONS, INC. :

Appellant :

: Docket No. 82-185-M
82-190-M

v. : Issued: March 1, 1985

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
Appellee
and FLYING "A" COAL COMPANY, Permittee

OPINION AND ORDER
SUR PERMITTEE'S MOTION TO DISMISS

Synopsis

Permittee Flying "A" Coal Company's motion to dismiss the appeals of appellant Telco Coal Operations, Inc. is granted. Following DER's partial revocation of Telco's mining permits for lands located in Mayfield Borough due to Telco's submission of an invalid landowner consent form, and DER's subsequent issuance of mining permits to Flying "A" for the same lands, the only issue placed before the Board was a dispute concerning title to property. Since the Board lacks jurisdiction to settle such disputes, the appeal is dismissed.

OPINION

The appeals of appellant Telco Coal Operations, Inc., (TELCO), docketed at 82-185-M and 82-190-M and never formally consolidated, are before the Board as a result of the following circumstances. By order dated July 14, 1982, appellee Commonwealth of Pennsylvania, Department of Environmental Resources (DER), partially revoked the mine drainage and mining permits (nos. 5376SM24 (t) and 1969-1, respectively) held by TELCO for the operation of a surface mine reclamation bank on seventy-eight (78) acres in Mayfield Borough and Carbondale Township, Lackawanna County, Pennsylvania. DER's partial revocation (of the permits covering the lands in Mayfield Borough) was based upon a DER finding that the consent of landowner form (known as a Supplemental C form), submitted by TELCO as part of its permit applications, was improper in that it was not executed by the true record landowners of the lands in Mayfield Borough. DER's finding followed an informal hearing with representatives of both TELCO and permittee Flying "A" Coal Company (FLYING "A"), the latter having applied for mining permits for the lands in Mayfield Borough for which permits were previously issued to TELCO. TELCO's appeal of DER's partial revocation was docketed on July 19, 1982 at EHB Docket No. 82-185-M. TELCO also filed on July 19, 1982 a Petition for Supersedeas from DER's revocation order; the Board neither reached the merits of nor ruled upon said petition.

Thereafter, on July 22, 1982, DER issued mine drainage and mining permits to FLYING "A" for the lands in Mayfield Borough for which TELCO had held the permits prior to DER's revocation on July 14, 1982. TELCO's appeal of DER's issuance of mining permits to FLYING "A" was docketed on August 3, 1982 at EHB Docket No. 82-190-M. TELCO also filed on August 3, 1982 a Petition for Supersedeas from DER's issuance of mining permits to FLYING "A", the Board neither reached the merits of nor ruled upon said petition.

On August 4, 1982, DER moved the Board to consolidate the two appeals filed by TELCO at Docket Nos. 82-185-M and 82-190-M; FLYING "A", by way of answer to DER's motion, likewise moved the Board to consolidate TELCO's appeals;[1] TELCO did not respond to these

1. FLYING "A" also petitioned the Board for leave to intervene, which petition was never formally granted by the Board although, as permittee, FLYING "A" would be entitled to such intervention, 25 Pa. Code §21.62; 1 Pa. Code §35.28.

motions. Although it is apparent that both appeals involve common questions of law or fact, 25 Pa. Code §21.80--in that both of DER's appealed from actions followed DER's finding that TELCO's Supplemental C form was invalid--the Board did not formally consolidate TELCO's appeals. However, it is clear that all the parties have treated TELCO's appeals if they had been formally consolidated by the Board. In fact, at the request of TELCO, both appeals were continued indefinitely, by Board Order dated September 1, 1982, pending final court action resolving the property ownership issues which gave rise to DER's actions and TELCO's appeals thereof.

After a two year period of inactivity following the Board's grant of a general continuance, the Board on November 27, 1984 requested that TELCO file a status report. TELCO did so on December 7, 1984, informing the Board that the lawsuit filed in the Court of Common Pleas of Lackawanna County which caused the Board to grant a general continuance, captioned Total Energy Leasing Corporation, et al. v James Durkin, Sr., et al. and Flying "A" Coal Company, et al., had been decided in favor of defendants, although plaintiffs' motions for new trial and judgment n.o.v. were (and are) still pending.

By letter filed on December 20, 1984, FLYING "A" responded to TELCO's status report and moved the Board to dismiss the appeals docketed at 82-185-M and 82-190-M. FLYING "A's" motion was based upon the fact that not one, but two, courts had determined that the defendants in the Lackawanna County Court case (James Durkin, Sr., et al., and Flying "A" Coal Company, et al., were the owners of the property in Mayfield Borough for which TELCO had previously been permitted to mine prior to DER's partial revocation. Besides the decision of the Court of Common Pleas of Lackawanna County, FLYING "A" informed the Board that the United States District Court for the Middle District of Pennsylvania had also decided, in a suit instituted by the defendants in the Lackawanna County case (James Durkin, Sr., et al., and Flying "A" Coal Company, et al.), that they were the owners of the property in Mayfield Borough. As with the Lackawanna Court of Common Pleas case, post-trial motions were pending (as of December 20, 1984) before the District Court. However, FLYING "A" argues that all outstanding issues that were

placed before the Board at 82-185-M and 82-190-M had been placed before two courts and decided in favor of FLYING "A" and against TELCO.

TELCO by letter filed with the Board on December 24, 1984, opposed FLYING "A's" motion to dismiss and argued that the two court cases mentioned above had not been finally determined. TELCO's argument was based upon the fact that TELCO's post-trial motions were pending in both cases. However, believing FLYING "A's" motion to dismiss to be well taken, the Board issued an order on January 10, 1985 wherein we ordered:

> ... that respective counsel for the parties submit to the Board a statement of the legal issues remaining to be resolved before the Board, together with a summary of the facts at issue, and citations to statutes, regulations and precedent upon which each party's case rests, within 10 days of date of receipt of this Order, unless counsel for one or more of the parties is of the opinion that no issues remain to be resolved by the Board...

Telco Coal Operations, Inc. v. DER and Flying "A" Coal Company, 82-185-M, 82-190-M (Order, January 10, 1985).

In response to the Board's Order of January 10, 1985, both FLYING "A" and DER argued that no legal or factual issues remained to be decided by the Board. Notwithstanding the fact that post-trial motions had yet to be ruled upon by both the District Court and Court of Common Pleas of Lackawanna County, a fact duly noted by TELCO in its response to the Board's order, FLYING "A" again asked the Board to dismiss TELCO's appeals with prejudice because final decisions regarding the title to property issues present herein had been rendered by the courts. Moreover, FLYING "A" argued that because TELCO's appeals hinged on the issue of title to property, and because the Board lacked jurisdiction to decide such an issue, TELCO's appeals should be dismissed. We now grant FLYING "A's" motion based upon the following reasoning.

First, we need not be detained by TELCO's argument that the term "final court action" does not apply to a decision which has yet to be reaffirmed by the court which rendered it by way of denying the post-trial motions of the losing party. On the contrary, while the law in Pennsylvania is not altogether clear with respect to the res judicata effect of such a decision, we would be inclined to apply the doctrine here in

view of the fact that the jury verdict in the case decided in the Court of Common Pleas of Lackawanna County was handed down on September 30, 1983. Cf. Helmig v. Rockwell Mfg. Co., 389 Pa. 21, 131 A.2d 622 (1957), cert. den. 355 U.S. 832, 78 S. Ct. 46, 2 L.Ed.2d 44, reh. den. 355 U.S. 885, 78 S. Ct. 140, 2 L.Ed.2d 115 (the finality of a judgment could not be affected by a motion for new trial which was filed seventeen months after the judgment was entered and subsequent to affirmance of the judgment by the Supreme Court). However, we decline to apply the doctrine of res judicata herein because the record contains insufficient factual and legal allegations with respect to the prerequisites for applying the doctrine.

Second, and more importantly, we dismiss TELCO's appeals on the basis that the Board lacks jurisdiction to settle disputes involving title to property. Donald T. Cooper and Kathleen Cooper v. DER and Graham K. Shaddick, 1982 EHB 250, 257-58. Of course, while the Board may form a well-founded opinion as to the ownership of disputed property, Cooper, supra. at 258, our opinion herein would be adverse to TELCO considering the fact that two courts had already resolved the crucial issue of ownership of the land in Mayfield Borough in favor of FLYING "A". Therefore, since ownership of the property in Mayfield Borough was the only issue upon which DER's appealed-from actions were based, the Board enters the following Order.

O R D E R

AND, NOW, this 1st day of MARCH, 1985, the appeals of Telco Coal Operations, Inc., docketed at 82-185-M and 82-190-M are hereby dismissed with prejudice.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

DATED: March 1, 1985

Edward Gerjuoy

EDWARD GERJUOY
Member

cc: Bureau of Litigation
Donald A. Brown, Esquire for DER
Solomon Lubin, Esquire of Winkler, Danoff and Lubin, for Appellant
Ralph E. Kates, III, Esquire of Griffith Aponick & Musto for Permittee

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
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THOMAS COAL COMPANY, INC. :

:

: Docket No. 84-273-M
: Issued: March 7, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

Appellant has a license and a mine drainage permit from the Department of Environmental Resources (DER) to mine coal by the surface mining method, and has appealed a compliance order from DER directing appellant to treat discharges from the permitted area so that they would meet the effluent limitations of 25 Pa. Code §87.102. This appeal is dismissed, upon appellant's motion and without objection by DER, because DER terminated the compliance order that was the basis for this appeal, and this appeal is, therefore, moot.

OPINION

Appellant, Thomas Coal Company, Inc., has a license and a mine drainage permit from the Department of Environmental Resources (DER) to mine coal by the surface mining method on 173.2 acres of land in Clearfield County, Pennsylvania. On June 29, 1984, DER issued appellant a compliance order, finding that appellant had allowed waters to be discharged from the permitted area in excess of effluent limitations found at 25 Pa. Code §87.102. The order directed appellant to take certain measures to treat the discharges so

that they would meet the effluent limitations at 25 Pa. Code §87.102. Appellant filed an appeal from the compliance order with this Board on August 2, 1984, alleging that it had not violated 25 Pa. Code §87.102.

Then, on February 11, 1985, appellant filed with the Board a Motion to Dismiss Appeal for Mootness. In this motion, appellant averred that DER had terminated the compliance order that was the basis for this appeal, and that therefore the Board should dismiss the appeal as moot. DER has not responded to appellant's motion to dismiss. Appellant's motion to dismiss is granted because when, during the course of the appeal, events occur that render the Board incapable of granting any relief, the Board must dismiss the appeal as moot. Silver Spring Township v. Department of Environmental Resources, 28 Pa. Cmwlth. 302, 368 A.2d 866 (1977); Cambria Coal Company v. Department of Environmental Resources, 1982 EHB 517.

O R D E R

AND, NOW, this 7th day of MARCH, 1985, the appeal of Thomas Coal Company, Inc. at EHB Docket No. 84-273-M is hereby dismissed as moot.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: March 7, 1985

cc: Bureau of Litigation
Donald A. Brown, Esquire for DER
Carl A. Belin, Jr., Esquire of Belin and Belin for
appellant Thomas Coal Company

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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BELTRAMI ENTERPRISES, INC.

Appellant :

: Docket No. 85-009-M
: March 7, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
Appellee

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

Appellant appealed from a civil penalty assessment issued to appellant by the Department of Environmental Resources (DER). DER's motion to dismiss is granted and this appeal is dismissed with prejudice because the notice of appeal was filed contrary to the requirement of 25 Pa. Code §21.52(a), more than thirty days from the receipt by appellant of the civil penalty assessment.

Since appellant did not respond to DER's motion to dismiss, the Board, as authorized by 25 Pa. Code §21.64(d), finds that appellant has admitted the facts alleged in DER's motion, including the date upon which DER alleges that appellant received notice of the civil penalty assessment.

OPINION

By notice dated December 10, 1984, the Department of Environmental Resources (DER) issued a civil penalty assessment upon Beltrami Enterprises, Inc. (Beltrami). The said assessment was sent to Beltrami via certified mail, return receipt requested, and the return receipt indicates that Beltrami received the assessment on December 12, 1984.

Beltrami appealed the civil penalty assessment to the Board, and the notice of appeal was filed on January 14, 1985.

On February 5, 1985, DER filed with the Board a Motion to Dismiss, alleging that the filing of the notice of appeal more than thirty (30) days after receipt thereof by Beltrami deprived the Board of jurisdiction to hear the appeal. In addition to the filing of said Motion, DER contemporaneously therewith filed an affidavit of service certifying that a copy of the Motion to Dismiss was served upon counsel for Beltrami on the same date as said Motion was forwarded to the Board. To date the appellant has not filed a response to the Motion to Dismiss filed by DER.

When a party filed a motion to dismiss an appeal, the burden of proof lies with that party, and all facts pleaded must be taken in the light most favorable to the other party. (Citations omitted).

Under the provisions of the Board's Rules of Practice, 25 Pa. Code §21.64(d), failure to respond to a motion empowers the Board, among other sanctions available, to treat "all relevant facts stated in such...motion as admitted."[1] Pursuant to such authority, we find that the notice of appeal was received by Beltrami on December 12, 1984.

Section 211.11(a) provided appeals "shall be received by the Board within the time limits, if any, for such filing, and also provides that the "date of receipt by the Board and not the date of deposit in the mails is determinative" (of the date of filing).

---

1. 25 Pa. Code §21.64(d). Any party failing to respond to a complaint, new matter, petition or motion shall be deemed in default and at the Board's discretion sanctions may be imposed in accordance with §21.124 of this title (relating to sanctions); such sanctions may include treating all relevant facts stated in such pleading or motion as admitted.

Under the provisions of Section 21.52(a) of the Board's rules, the Board has no jurisdiction to hear an appeal unless the notice of appeal if filed with the Board "within 30 days after notice" of DER's final action has been received by the appellant. Appellant herein filed its appeal with the Board on January 14, 1985, which date was in excess of 30 days after appellant received the civil penalty assessment from DER.

This Board lacks jurisdiction to hear appeals which are filed more that thirty (30) days after appellant has received written notice of DER's action under appeal. Rostosky v. Comm., DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

Accordingly, this appeal must be dismissed.

O R D E R

AND, NOW, this 7th day of MARCH, 1985, upon motion of DER, the appeal of Beltrami Enterprises, Inc., at EHB Docket No. 85-009-M is dismissed with prejudice.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: March 7, 1985

cc: Bureau of Litigation
Bernard A. Labuskes, Jr., Esquire for DER
Edward E. Kopko, Esquire for appellant

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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MARLIN L. SNYDER :

:

: Docket No. 84-400-G
: March 12, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

DER's Motion to Strike Appeal or To Limit Issues is denied. DER argues that Appellant is attempting to challenge the validity of an earlier DER order in this appeal and that since no appeal of that order was taken it has become final and cannot be challenged in this subsequent proceeding. Appellant's Notice of Appeal only challenges the factual basis of the order appealed from here. No challenge to the content or validity of the earlier order is apparent. Therefore the finality of the earlier order need not be determined at this time.

OPINION

This appeal concerns a compliance order issued to Appellant by the Department of Environmental Resources ("DER"); the order is dated October 30, 1984 and finds that Appellant has failed to backfill concurrently with mining and to install sedimentation controls, in violation of 25 Pa. Code, Chapter 86, and of a DER order dated July 20, 1983.

On February 4th, 1985, DER filed a Motion to Strike, alternatively styled as a Motion to Limit Issues. The twenty-day time period for responding to said Motion has long since passed (see the Board's Pre-Hearing Order No. 2, issued December 5, 1984); Appellant (who apparently is appearing pro se) has not responded to DER's Motion.

DER requests that we strike this appeal, apparently for failure of the Appellant to present issues which are cognizable by this Board. Alternatively, DER requests that the issues in this appeal be limited to those concerning Appellant's compliance (or lack thereof) with the earlier DER order. DER views the statements contained in Appellant's Notice of Appeal as "apparent reference(s)" to the DER abatement order of July 20, 1983 (which DER has attached to its Motion as "Exhibit A"). DER states that Appellant did not appeal this order and that therefore it became final.

We will not rule at this time on the finality of the July 20, 1983 order. If indeed said order was received by Appellant and not appealed by him, its terms have become final and are not subject to attack in this subsequent proceeding, Commonwealth Department of Environmental Resources v. Williams, 57 Pa.Cmwlth 8, 425 A.2d 871 (1981); Armond Wazelle v. Department of Environmental Resources (EHB Docket No. 83-063-G, Opinion and Order dated August 21, 1984). However, the necessary facts to establish finality have

not been placed before us in proper evidentiary form here, e.g., by sworn affidavit. In any event, at this stage of this appeal we are hesitant to find that Appellant is attempting to mount a challenge to the 1983 order; certainly no explicit mention of such order is made in the Notice of Appeal. The sole reasons provided for the taking of this appeal are as follows:

> Site is operating in compliance with terms of issued permits, further backfilling would be counter-productive/economic, site is in maintenance mode pending upgrading of permits to latest system. Sediment controls in compliance with issued permits, temporary pond is installed, new ponds for site designed and part of updated permit application. Remainder of site uses buffer system of sediment control.

It is our opinion that these allegations, on their face, solely attempt to refute or rebut the factual findings of the order appealed from (i.e. the order dated October 30, 1984). Even if the July 20, 1983 order is final, Appellant clearly is entitled to challenge DER findings that he has failed to comply with the terms of that order subsequent to its issuance. The content and validity of the order would be beyond challenge if no appeal had been taken (Williams, supra) but the factual issue of whether by October 30, 1984 there had been compliance with the order's terms seems to be squarely before the Board in this appeal.

ORDER

WHEREFORE, this 12th day of March, 1985 it is ordered that DER's Motion to Strike or to Limit Issues is denied.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: March 12, 1985

cc: Bureau of Litigation
Marlin L. Snyder, Appellant
Joseph K. Kaput, Esquire, for DER

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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JOHN & KATHY PUMO :

:

: Docket No. 84-340-M

: March 14, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and GILL QUARRIES, INC., Permittee

OPINION

Appellants, John and Kathy Pumo, filed an appeal with the board on October 9, 1984, from the issuance by the Department of Environmental Resources (DER), on August 31, 1984, of a permit to Gill Quarries, Inc., allowing various surface mining activities. On October 10, 1984 the board issued its Pre-Hearing Order No. 1, directing appellants to file a pre-hearing memorandum by December 27, 1984. On January 11, 1985, not having received a pre-hearing memorandum from appellants, the board issued a default notice informing appellants that unless they complied with Pre-Hearing Order No. 1 by January 21, 1985, the board may impose sanctions, including dismissal of the appeal. On February 4, 1985, the board received a letter from the attorney for Gill Quarries, Inc., requesting the board to dismiss this appeal because appellants still had not filed a pre-hearing memorandum.

A copy of this letter was also sent to appellants, and the board has not received any response from appellants to Gill Quarries' request for dismissal.

The board's rule of practice and procedure, 25 Pa. Code §21.124 authorizes the board to impose sanctions on a party for failure to abide by a board order. One such sanction authorized by 25 Pa. Code §21.124 is dismissal of the appeal. Although the board is reluctant to enter a final ruling without the benefit of a full hearing on the merits, which would afford a party ample opportunity to present his case, the board will not tolerate a party's consistent refusal to conform to standards required in the prosecution of appeals before this board. Johnston v. Department of Environmental Resources, 1982 EHB 405. On two occasions, the board issued orders to appellant and on both occasions appellant failed to respond. Also, appellant did not respond to Gill Quarries' request for dismissal. Accordingly, this appeal is dismissed.

ORDER

AND NOW, this 14th day of March, 1985, the appeal of John and Kathy Pumo, at EHB Docket No. 84-340-M, is dismissed.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR., MEMBER

Edward Gerjuoy

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation
John Wilmer, Esq./Eastern
John and Kathy Pumo
Gill Quarries, Inc./ D. Barry Pritchard, Jr., Esq.

DATED: March 14, 1985

COMMONWEALTH OF PENNSYLVANIA

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P & N COAL COMPANY :

:

: Docket No. 82-275-M

: Issued: March 15, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

Appellant has appealed a denial by the Department of Environmental Resources (DER) of an application for a mine drainage permit. The appeal is dismissed pursuant to 25 Pa. Code §21.124 because appellant failed to comply with a Board order directing appellant to file a pre-hearing memorandum.

OPINION

P & N Coal Company, appellant herein, appealed from a decision of the Bureau of Mining and Reclamation, Department of Environmental Resources (DER) dated October 5, 1982 which denied appellant's application for a mine drainage permit.

The appellant received the notice on October 5, 1982, and timely filed this appeal on November 3, 1982.

Thereafter, on November 4, 1982, the Board issued its Pre-Hearing Order No. 1, which required, inter alia, the appellant file its pre-hearing memorandum on or before January 19, 1983.

On December 30, 1982, appellant and DER filed a Joint Motion for General Continuance, which motion the Board granted on January 4, 1983.

On February 3, 1983 a Petition For Leave To Intervene was filed with the Board by a group identified as the the Watershed Association, which consisted of townships and water associations located in the watershed of the proposed mining site. The Board granted Intervention status to the Watershed Association by order dated March 15, 1983. Neither appellant not DER filed any objection to the petition for intervention filed by the Watershed Association.

After receipt of status reports over a period of time, and upon Intervenors' objection to further general continuances sought by appellant with the concurrence of DER, the Board issued an ORDER dated January 28, 1985, wherein appellant was directed to file its pre-hearing memorandum "within twenty (20) days of "the date of the Order, "and to advise the Board of its readiness to proceed to hearings within one month of date of "the Order.

The said ORDER of the Board also provided that appellant's appeal would "be dismissed without further notice to appellant" if appellant failed to comply with the ORDER.[1]

---

1. The full text of the order of the Board of January 28, 1985 is as follows:

"And, Now, this 28th day of January, 1985, after review of the documents file with the Board in this appeal, and in view of Appellant's unwillingness to proceed in

Copies of the ORDER were mailed to counsel of record for the parties herein on January 28, 1985.

Appellant has failed to comply with the January 28, 1985 ORDER of the Board in that it has not filed its pre-hearing memorandum nor has it notified the Board of its readiness to proceed to hearings in this appeal.

Pursuant to the provisions of the Board's rules of practice, 25 Pa. Code §21.124,[2] sanctions may be imposed upon a party "for failure to abide by a Board order," including "the dismissal of any appeal." In the instant appeal, appellant has failed to comply with a Board Order and is therefore subject to the imposition of sanctions and was forewarned of same in the Board's January 28, 1985 ORDER.

Accordingly, the appeal is dismissed.

---

1. Continued.

this appeal, and in view of the necessity of the Board to allocate valuable resources to the monitoring of inactive files in the face of an evermounting caseload, the Appellant is hereby ORDERED to file its pre-hearing memorandum within twenty (20) days of date of this ORDER, and to advise the Board of its readiness to proceed to hearings within one month of date of this ORDER, and upon failure to comply with this ORDER, the appeal of P & N Coal Company, Inc. at EHB Docket No. 82-275-M shall be dismissed without further notice to Appellant."

2. 25 Pa. Code §21.124 provides:

"The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. Such sanctions may include the dismissal of any appeal or an adjudication against the offending party, orders precluding introduction of evidence or documents not disclosed in compliance with any order, barring the use of witnesses not disclosed in compliance with any order, barring an attorney from practice before the Board for repeated or flagrant violation or orders, or such other sanctions as are permitted in similar situations by the Pennsylvania Rules of Civil Procedure for practice before the Courts of Common Pleas.

O R D E R

AND, NOW, this 15th day of MARCH, 1985, the appeal of P & N Coal Company, at EHB Docket No. 82-275-M is dismissed for failure to comply with Board Orders.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: March 15, 1985

cc: Bureau of Litigation
Diana J. Stares, Esquire for DER
Robert P. Ging, Jr., Esquire
Louis Emmanuel, III, Esquire

COMMONWEALTH OF PENNSYLVANIA
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ANTHONY J. MAZULLO, JR., MEMBER
EDWARD GERJUOY, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

In the Matter of:

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES, :

Plaintiff :

v. : DOCKET NO. 84-366-G
Issued: March 26, 1985

ALLEN E. HAGER, JR., :

Defendant :

OPINION AND ORDER SUR PRELIMINARY OBJECTIONS

SYNOPSIS

Defendant's preliminary objections are sustained in part and rejected in part. Section 206(g) of the Bituminous Coal Mine Act, 52 P.S. §701-206(g) does not impose a duty upon mine foremen to make and file reports; therefore Counts I and II of DER's complaint are dismissed. Section 703 of the Act, 52 P.S. §701-703 vests jurisdiction over criminal violations of the Act in a tribunal other than the Environmental Hearing Board. Therefore, the Board lacks jurisdiction; Count III of the complaint is dismissed. Certain portions of the complaint appear to contain matter irrelevant to this proceeding; nevertheless, Defendant's motion to strike is dismissed because at this stage of these proceedings, with DER refusing to concede any irrelevancies, the Board cannot be certain what portions of the complaint really are irrelevant.

Defendant's Motion for a More Specific Pleading is denied; greater specificity can be obtained through the mechanisms of discovery. Defendant's Motion to Dismiss for multiplicity is denied; defendant may renew the same at a later date if accompanied by a brief setting forth legal authority in support of defendant's argument. Defendant's general demurrer to Counts I through V of the complaint is denied; defendant does not specifically allege how the delay of which he complains prejudices him in this proceeding. Finally, defendant's Demurrer to Relief Requested is denied; Count IV of DER's complaint sets forth allegations sufficient to support the requested relief.

OPINION

This case arises out of a complaint served upon Mr. Allen E. Hager ("defendant") by the Department of Environmental Resources ("DER"). The complaint seeks revocation of defendant's certificates of qualification as a mine foreman, assistant mine foreman, and mine examiner, which were issued pursuant to section 206 of the Bituminous Coal Mine Act, 52 P.S. §701-206 ("Act"). Paragraph 3 of the complaint states that at all times relevant hereto defendant was acting as a mine foreman. Defendant has not disputed this contention.

Defendant has responded to the complaint by filing preliminary objections, to which DER has responded. Count I of the complaint alleges that defendant violated section 206(g) of the Act, which states:

> §701-206 Qualifications for certification
> * * *
> (g) All applicants who have satisfactorily passed a written examination shall also satisfactorily pass an oral examination, and after being certified but before assuming their duties as mine foremen, mine electricians, assistant mine foremen or mine examiners, shall accompany a certified mine foreman or a certified assistant mine foreman for not less than 2 weeks for training purposes in accordance with a training program submitted by the operator and approved by this department; provided, however, that any applicant who has been granted a prior certificate need not undergo this training. The record of such training shall be maintained at the mine.

Count I of DER's complaint cites defendant for having submitted to DER reports indicating that certain individuals had received their two week underground training in accordance with section 206(g) when, in fact, the mine operator (Emerald Mines Corporation) did not have a training program approved by DER as required by section 206(g).

Defendant demurs to Count I on the basis that section 206(g) imposes a duty upon the mine operator to submit a training program for DER approval, but does not impose this duty upon mine foremen such as defendant. In response to defendant's preliminary objection, DER argues that Count I of the complaint does not charge defendant with failing to submit a training program but rather charges him with submitting reports which were not accurate.

Section 206(g) does not clearly impose any duties upon mine foremen. It is clear that the trainees are to be accompanied by a mine foreman or assistant mine foreman during the period of their training; however, it is not clear that it is the mine foreman who is to make and file reports of such training. Therefore, we must sustain defendant's demurrer to Count I. We cannot support DER's position that section 206(g) imposes duties upon mine foremen to file the reports required by that section, nor can we agree that filing of false reports would amount to a violation of section 206(g).

Defendant demurs to Count II of the complaint. Count II charges defendant with a violation of section 206(g) for allegedly having represented to DER that certain individuals had received their two week underground training from mine foremen or assistant mine foremen when they had received their training from mine examiners instead. Since we have ruled supra that section 206(g) does not under these circumstances impose duties upon mine foremen such as defendant, we must sustain defendant's demurrer to this Count as well.

Defendant demurs to Count III which charges that defendant violated section 703 of the Act by allegedly submitting false reports to DER concerning the training of certain individuals. Section 703 provides:

> §701-703. Criminal penalties
>
> Any person who shall intentionally or carelessly disobey any order given in carrying out the provisions of this act, or do any other act whatsoever, whereby the lives or the health of the persons employed, or the security of the mine or the machinery, are endangered, or who neglects or refuses to perform the duties required of him by this act, or who makes any false statement in any report required by this act, or who is responsible for failure to comply with any decision made in accordance with this act, or who violates any of the provisions or requirements thereof, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, in the court of quarter sessions of the county in which the misdemeanor was committed, unless otherwise specified hereinbefore, be punished by a fine not exceeding two hundred dollars ($200), or imprisonment in the county jail for a period not exceeding three months or both, at the discretion of the court. 1961, July 17, P.L. 659, art. VII, §703.

DER argues that it is not seeking the imposition of the penalties prescribed by section 703; rather, it argues, it is simply seeking a finding that defendant violated section 703 by submitting false reports. We do not see that section 703 can be read to permit such a ruling. The Environmental Hearing Board has power to review actions of DER, pursuant to 71 P.S. §510-21(a), and to exercise certain powers previously vested in those "persons, departments, boards and commissions" set forth in section 1901-A of the Administrative Code, pursuant to 71 P.S. §510-21(b).

The Board's jurisdiction does not include matters in which jurisdiction previously has been granted to "the court of quarter sessions". It is certainly reasonable to conclude that where the legislature has vested jurisdiction in one judicial body it is intended to be exclusive jurisdiction, unless indications to the contrary appear. None have been presented here. Therefore, we sustain

defendant's demurrer to Count III of the complaint as we have not been given any basis to believe we have the jurisdiction to grant the relief DER requests.

Defendant has moved to strike certain portions of the complaint as containing scandalous and impertinent matter. The Board agrees that some portions of the complaint to which defendant has made reference appear to be irrelevant to this proceeding; such irrelevancies deserve to be stricken. However, at this stage of these proceedings the Board cannot be certain precisely what material (on page 2 of Exhibit A of the complaint) which the defendant characterizes as scandalous and impertinent really deserves such characterization. DER has denied the Defendant's allegations in this regard. Therefore, we dismiss Defendant's Motion to Strike, but assure the Defendant that irrelevant portions of DER's complaint are not before the Board and will have no bearing on the outcome of this appeal.

Defendant has requested that the Board issue an order directing DER to supply a more specific complaint or, in the alternative, dismissing DER's complaint in its entirety. We cannot agree with defendant's argument that the complaint is too broad and general to permit defendant to formulate a response. The complaint need not be an all-inclusive narrative of events underlying the claim. Greater specificity may be obtained through the normal procedure of discovery. Defendant's Motion for a More Specific Pleading is denied.

Defendant has appended to his preliminary objections a Motion to Dismiss for Multiplicity, arguing that Counts I, II, III, IV and V are redundant. Since we have sustained defendant's demurrers to Counts I, II and III, we need only address the alleged overlap between Counts IV and V.

Count IV alleges that defendant violated section 210 of the Act, which provides in pertinent part:

> It shall also be unlawful for any ... mine foreman to employ as mine examiner in a bituminous coal mine any person who has not obtained the proper certificate of qualification under this act ...

Count V alleges that defendant violated section 210 of the act and that, therefore, he violated section 279. Section 279 provides:

> It shall be the duty of the operator, superintendent, mine foreman, assistant mine foreman, mine examiner and other officials to comply with and to see that others comply with the provisions of this act.
>
> * * *

Defendant's argument is that the doctrine of multiplicity prohibits the pleading of the same alleged violations of the Act in separate counts as DER has done here. At least as a prima facie matter, the violations alleged in Counts IV and V are not identical. The duties imposed by the two statutory sections are not precisely the same, although it is the case that the facts necessary to establish a violation of section 210 would be identical to those required to establish a violation of section 279. Thus, defendant's argument may have some merit. However, defendant has provided us with no legal authority to support his argument for "multiplicity" and therefore, we deny the Motion. Defendant may renew the same at a later date if accompanied by a brief which provides detailed citations to legal authority supportive of defendant's argument.

Defendant has filed a general demurrer to Counts I through V of the complaint, arguing that the time period which has elapsed since DER first received notice of alleged deficiencies in the training of mine examiners at the Emerald Mine is so great as to result in prejudice to defendant. Defendant also argues that this delay has resulted in the complaint becoming stale.

However, defendant has made no specific statement concerning how he has been prejudiced by this allegedly excessive delay. Therefore, defendant's demurrer to Counts I through V is denied.

Finally, defendant has demurred to the relief requested by DER, arguing that DER has failed to allege properly that defendant failed or refused to perform any duty with which he is charged under the provisions of the Act or that defendant interfered with the safe and lawful operation of the mine. We do not find this to be the case. Count IV of the complaint alleges that defendant violated section 210 of the Act by employing and using certain individuals to act as mine examiners when such individuals had not received proper training as required by the Act. DER further alleges that this failure interfered with the safe and lawful operation of the mine. Defendant has not objected to this count per se; that is, no argument has been raised to the effect that this Count fails to state a viable cause of action, and it in fact appears to be the case that if such a violation were proven, the relief requested by DER would be proper. 52 P.S. §12 provides that certificates of qualification may be revoked where it is established that a mine foreman has failed to perform any duty with which he is charged under the provisions of the law, or has engaged in any actions which interfere with the safe and lawful operation of a mine. The accompanying order is consistent with the foregoing.

O R D E R

WHEREFORE, this 26th day of March, 1985, it is ordered that:

1. Counts I, II and III of DER's complaint are dismissed; we will reconsider our dismissal of Count III if DER can show we have jurisdiction over such a Count.

2. Defendant's Motion to Strike is denied, but irrelevant portions of the complaint assuredly are not before the Board.

3. Defendant's Motion for a more specific pleading is denied.

4. Defendant's Motion to Dismiss for Multiplicity is denied, subject to renewal at a later date if accompanied by a brief conforming to the requirements set forth in the foregoing opinion.

5. Defendant's general demurrer to Counts I through V of the complaint is denied.

6. Defendant's demurrer to the relief requested by the complaint is denied.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

DATED: March 26, 1985

cc: Bureau of Litigation
William F. Larkin, Esq., Pittsburgh, for Plaintiff
R. Henry Moore Esq., Pittsburgh, for Defendant

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
(717) 787-3483

ANTHONY KOVALCHICK,
t/d/b/a BELL COAL COMPANY :

Appellant :

: Docket No. 81-067-M
: Issued: April 15, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Appellee

OPINION AND ORDER

Synopsis

Two subpoenas issued by this Board to appellant, under the authority of 71 P.S. §510-21(g) and 25 Pa. Code §21.114, and served by appellant upon two employees of the United States Department of the Interior are quashed. Appellant cannot procure the testimony of employees of the Department of the Interior at a hearing before this Board unless he complies with federal regulations pertaining to subpoenaing Department of the Interior employees. 43 C.F.R. §2.80, et seq.

OPINION

On February 15, 1985, this Board issued eight subpoenas to the appellant in this matter, so that the appellant could procure the testimony of certain witnesses at a hearing that was scheduled to be held before the Board in this

matter. Section 1921-A(g) of the Administrative Code, 71 P.S. §510-21(g), authorizes this Board to subpoena witnesses, records, and papers. Section 21.114 of this Board's Rules of Practice and Procedure, 25 Pa. Code §§21.1-21.124, provides as follows:

> §21.114 Subpoenas
> (a) Upon request, the Board shall provide to the parties subpoenas for the attendance of witnesses or for the production of documentary evidence.
> (b) The provisions of subsection (a) of this section supplement the provisions of 1 Pa. Code §35.142 (relating to subpoenas).

Section 35.142(a) of 1 Pa. Code provides that when a party applies for a subpoena, the party must specify the general relevance, materiality, and scope of the testimony or documentary evidence sought; and the presiding officer must make a determination of the relevancy and materiality of the evidence sought prior to issuing subpoenas.

In this case, appellant served two subpoenas provided by this Board on employees of the United States Department of the Interior, Office of Surface Mining Reclamation and Enforcement. Council for the Office of Surface Mining Reclamation and Enforcement informed appellant by letter dated February 28, 1985, that to effectively subpoena an agent or employee of the Department of the Interior, appellant must follow the procedures set forth at 43 C.F.R §2.80, et seq., a copy of which was attached to the letter. Appellant did not follow the procedures set forth at 43 C.F. R. §2.80, et seq., and on March 4, 1985, the Department of the Interior filed with this Board a Motion to Quash the subpoenas served by appellant on the two Department employees.

Section 2.82(b) of 43 C.F.R. provides as follows:

> (b) Any person (including a public agency) wishing an officer or employee of the Department to testify in a judicial or administrative proceding concerning a matter related to the business of the Government may be required to submit a statement setting forth the interest of the litigant and the information with respect to which the testimony of the officer or employee of the Department is desired, before permission to testify will be granted.

The effect of this federal regulation, in this case, is that subpoenas, which this Board properly issued, are insufficient to procure the testimony of employees of the Department of the Interior. In addition to obtaining subpoenas from this Board, appellant must obtain permission from the Department of the Interior before appellant can procure the testimony of Department employees at a hearing before this Board.

Pursuant to section 1921-A(a) of the Administrative Code, 71 P.S. §510-21(a), this Board has jurisdiction over appeals from orders, permits, licenses and decisions of the Department of Environmental Resources, and pursuant to Section 1921-A(g) of the Administrative Code, 71 P.S. §510-21(g), this Board has the power to issue subpoenas. But, this Board has no jurisdiction to pass upon the validity of a federal regulation.

It is well settled that validly issued administrative regulations have the force and effect of law. Morton v. Ruiz, 415 U.S. 199, 235, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974); Vitarelli v. Seaton, 359 U.S. 535, 539-540, 79 S. Ct. 968, 3 L. Ed. 2d 1012 (1959); Service v. Dulles, 354 U.S. 363, 388, 77 S. Ct. 1152, 1 L. Ed. 2d 1403 (1957). Thus, appellant must follow the procedures set forth at 43 C.F. R. §2.82 before appellant can procure the testimony of employees of the Department of the Interior.

The requirements of 43 C.F. R. §2.82 do not conflict with this Board's regulation pertaining to subpoenas. Pursuant to 1 Pa. Code §35.142, appellant had to specify to this Board the general relevance, materiality, and scope of the testimony sought, prior to obtaining the subpoenas. 43 C.F.R. §2.82 merely requires appellant to submit to the Office of the Solicitor of the U.S. Department of the Interior, a statement setting forth appellant's interest, and the information with respect to which appellant desires the testimony of the employees of the Department. This requirement is not burdensome since it requires appellant to submit no more information than appellant already had to submit to the Board to obtain the subpoenas. Furthermore, 43 C.F.R. §2.80, et seq. has

the force and effect of law, and thus, this Board quashes its subpoenas that appellant served on two employees of the Department of the Interior without complying with 43 C.F.R. 2.80, et seq.

O R D E R

AND NOW, this 15th day of April, 1985, the subpoenas issued by this Board on February 15, 1985, to Anthony Kovalchick, Bell Coal Company, appellant at EHB Docket No. 81-067-M, and served by Anthony Kovalchick upon Eric Brummer and Larry Beyer, employees of the United States Department of the Interior, Office of Surface Mining Reclamation and Enforcement, are quashed.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR., MEMBER

cc: Bureau of Litigation
John Wilmer, Esq./Eastern
Lynne N. Crenney
Anthony Kovalchick

DATED: April 15, 1985

COMMONWEALTH OF PENNSYLVANIA
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DOAN MINING COMPANY :

:

: Docket No. 84-119-G
: Issued: April 19, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION TO DISMISS

SYNOPSIS

This appeal is dismissed as having been taken from an unappealable DER action. Appellant sought review of a DER letter directed to private property owners which stated that DER believed that Appellant probably had affected the property owners' spring. The letter did not require Appellant to take any actions nor did it bind Appellant to DER's belief, and therefore does not affect Appellant's rights, privileges, immunities, duties, liabilities or obligations. 25 Pa. Code §21.2; 1 Pa. Code §31.3.

OPINION

Doan Mining Company ("Appellant") has appealed a DER action embodied in letters directed to two property owners. The DER letters informed these individuals that DER had found that "circumstantial evidence indicates that mining operations of Doan Mining Company, in all probability, adversely affected

your spring." The letters were copied to, but not directly addressed to, Appellant.

DER has filed a Motion to Dismiss this appeal as having been taken from an unappealable action. Appellant has responded to the DER motion, arguing that the decision or opinion embodied in the letters, if final or unappealed, could be used in future proceedings by the property owners as a basis for establishing Appellant's liability or could be relied upon by DER as the basis for denying or conditioning Appellant's permits.

We note first, that the DER letters do not require Appellant to take any action regarding the property owners' spring. The letters, in fact, impose no obligation whatsoever upon Appellant. Nor, as elaborated infra, do the DER's letters in any way bind Appellant to DER's evaluation of the circumstantial evidence. Thus, we conclude that the DER action embodied in those letters does not affect Appellant's rights, privileges, immunities, duties, liabilities, or obligations. 25 Pa. Code §21.2; 1 Pa. Code §31.3. The action, therefore, is not appealable. Sunbeam Coal Company v. Commonwealth, Department of Environmental Resources, 8 Pa. Cmwlth. 622, 304 A.2d 169 (1973).

If in the future DER does rely upon the opinion embodied in the letters appealed, e.g., as the basis for denying a permit, the content and validity of those letters could not be deemed to be finally established, since Appellant would have had no opportunity to challenge the same. See Commonwealth, Department of Environmental Resources v. Williams, 57 Pa. Cmwlth. 8, 425 A.2d 871 (1981). The possible evidentiary use of the DER letters in a private action brought by the landowners need not concern us here. First, Appellant has not alleged that any such private "collateral" action has been filed. Second, we think it highly

unlikely that even if such an action were brought, the letters at issue here would be treated as conclusively establishing Appellant's liability. Since Appellant has not been afforded an opportunity to challenge the findings contained in the letters, they could not be given res judicata or collateral estoppel effect. Appellant would have the opportunity to challenge the finding in that collateral proceeding. Therefore, we reject Appellant's argument that the possible use of these letters should cause us to treat them as appealable actions here.

O R D E R

WHEREFORE, in light of the foregoing, it is ordered that DER's motion is granted and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: April 19, 1985

cc: Bureau of Litigation
Richard S. Ehmann, Esquire, Pittsburgh,
for Commonwealth of Pennsylvania
Thomas C. Reed, Esquire, Pittsburgh,
for Appellant

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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YELLOW RUN ENERGY COMPANY :

:

: Docket No. 84-423-G
: Issued: April 24,1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION FOR SANCTIONS

SYNOPSIS

Appellant failed to file its pre-hearing memorandum as required by the Board's Pre-Hearing Order No. 1 and failed to respond to DER's Motion for Sanctions which was filed in response to Appellant's failure to comply with Pre-Hearing Order No. 1. Therefore, sanctions are imposed against Appellant precluding the presentation of its case in chief.

OPINION

This is an appeal of a DER bond forfeiture for a mine operation located in Adams Township, Cambria County, Pennsylvania. The site is permitted under Mine Drainage Permit No. 4274SM8 and Mining Permit Nos. 1201-3 and 1201-4. Appellant is the permittee for the site.

Shortly after the appeal was filed, the Board issued Pre-Hearing Order No. 1, directing Appellant to file its pre-hearing memorandum not later than

March 12, 1985. When no memorandum had been filed by that date, counsel for DER submitted a Motion for Sanctions for failure to comply with Pre-Hearing Order No. 1. The Motion also addressed Appellant's failure to respond to DER's Interrogatories which had been served upon Appellant nearly three months earlier. Appellant since has filed a response to the DER interrogatories and DER has withdrawn that portion of the pending Motion dealing with the failure to answer the interrogatories. Appellant has not responded to the Motion for Sanctions and has not filed its pre-hearing memorandum. No request for an extension of time for filing the memorandum has been filed with the Board.

DER bears the burden of proof in a bond forfeiture proceeding. Apollo Corporation v. DER, 1982 EHB 57. Therefore, dismissal of the appeal is not an appropriate sanction. It is clear, however, that Appellant has failed to comply with an order of this Board and, therefore, some form of sanction is appropriate. Consequently, in conformity with our usual practice where the party at fault does not bear the burden of proof, the following sanctions are imposed. See Armond Wazelle v. DER, EHB Docket No. 83-063-G (Opinion and Order dated September 13, 1983). At the hearing on the merits of this appeal, if and when held, Appellant will be limited to cross-examination of DER witnesses, presentation of evidence such as that which would normally be offered in rebuttal, and the filing of a post-hearing brief. In other words, Appellant will not be permitted to present its case in chief.

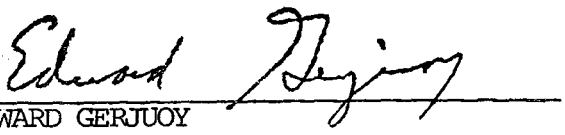
DER has alleged, in a recent letter to the Board, that Appellant's answers to DER's interrogatories are inadequate and that DER will be filing a second Motion for Sanctions in the near future. In light of this fact, and in an effort to avoid possibly unnecessary effort on the part of DER as well as this Board, DER will not be required to file its pre-hearing memorandum until the Board has ruled upon this

second Motion for Sanctions, assuming that said Motion is filed in the near future. In the absence of DER's filing of a second Motion for Sanctions within thirty days of this date, DER shall file its pre-hearing memorandum within said thirty-day period. As an alternative to the filing of its pre-hearing memorandum, DER may file a Motion for Summary Judgment within this thirty-day period, if it believes that Appellant's answers to DER's interrogatories warrant such a Motion.

O R D E R

AND NOW, this 24th day of April, 1985, it is ordered that DER's Motion for Sanctions is granted. Sanctions are imposed against Appellant as stated in the foregoing Opinion.

ENVIRONMENTAL HEARING BOARD



EDWARD GERJUOY
Member

DATED: April 24, 1985

cc: Bureau of Litigation
For the Commonwealth:
Richard S. Ehmann, Esquire, Pittsburgh
For Appellant:
Thomas E. Rodgers, Esquire, Greensburg

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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M. E. MAYSE COAL COMPANY :

:

: Docket No. 85-007-G
: Issued: April 25, 1985

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION TO QUASH APPEAL

SYNOPSIS

DER's Petition to Quash this appeal is granted. The appellant failed to file a copy of his Notice of Appeal with the Environmental Hearing Board within the thirty-day time period prescribed by 25 Pa. Code 21.52(a). Appellant sent copies of his Notice of Appeal to those parties designated in 25 Pa. Code §21.51(f). The service of the Notice of Appeal upon those parties does not excuse the failure to file the Appeal with the Board itself, however. Therefore, the appeal must be dismissed under presently binding precedent.

OPINION

At issue herein is the timeliness of the filing of Appellant's Notice of Appeal. DER has filed a Petition to Quash this appeal to which Appellant has responded. Appellant was not represented by counsel when the Notice of Appeal

was prepared; advice of counsel was sought for the preparation of the response to DER's Petition, however.

The following facts are not in dispute. Appellant failed to mail a copy of his Notice of Appeal to the Environmental Hearing Board. The appeal was docketed with the Board after a copy of the Notice of Appeal was forwarded to the Board by counsel for DER, Mr. Richard Ehmann. Mr. Ehmann mailed a copy to the Board after he learned--upon inquiring as to this appeal's status--that the Board had no record of the appeal. The Notice of Appeal states on its face that Appellant received the DER letter from which this appeal is taken on December 1, 1984. In his response to DER's Petition, Appellant agrees that this date is accurate.

Appellant demands strict proof of the date of filing of the Notice of Appeal. The Board's date stamp appears on the face of the Notice of Appeal which was forwarded to the Board by Mr. Ehmann. (Copies of the date-stamped Notice of Appeal are being forwarded to counsel with this Opinion). In the absence of any allegations going to the accuracy of the Board's docketing procedures, the Board's date stamp is taken as conclusive proof of the date of filing of the Notice of Appeal. See Stephen Luhrs, et al. v. Commonwealth of Pennsylvania Department of Environmental Resources and Energy Resources, Ltd. (EHB Docket No. 82-231-H, Opinion and Order dated January 17, 1983).

Therefore, we proceed to rule upon the merits of Appellant's argument. Appellant contends that, being a layman, he was misled by the Notice of Appeal form furnished by the Environmental Hearing Board. The form contains a section where an appellant is to indicate to whom copies of the Notice of Appeal were sent. It is this section which Appellant claims misled him into believing that he had properly filed the Notice of Appeal by serving copies of the same upon the officer

of DER responsible for the action appealed and the DER Bureau of Litigation. Although Appellant has not so characterized this argument, we construe it to be a request for leave to file an appeal nunc pro tunc, based upon an alleged deficiency in the operations of this Board. See Eugene Petricca v. DER, (EHB Docket No. 83-239-G, Opinion and Order dated January 13, 1984).

Unfortunately, we find that Appellant's argument lacks merit and that, therefore, the Board is without jurisdiction to hear this appeal. Rostosky v. DER, 26 Pa.Cmwlth 478, 364 A.2d 761 (1976); 25 Pa.Code 21.52(a). The first sentence of the Notice of Appeal form reads as follows:

> Any party desiring to appeal any action of the Department of Environmental Resources must file its appeal with this Board at the above address within 30 days from the date of receipt of notification of the Action.

The portions of the sentence which are underlined above appear in italics on the Notice of Appeal form. The Board's correct address appears at the top of the form. Under these circumstances we cannot conclude that Appellant's failure to send a copy of his Notice of Appeal to the address set forth under the heading "Environmental Hearing Board" on the Notice of Appeal can in any way be ascribed to the Board itself. We have previously ruled that negligence of an appellant cannot justify a nunc pro tunc filing. Petricca, supra.

We realize that this result may be harsh; we are, however, bound by Commonwealth Court precedent. This Board simply does not have jurisdiction under 25 Pa.Code 21.52(a) to hear an appeal which has been filed after the expiration of the thirty-day time period set forth in that regulation. Rostosky, supra. In so stating, we recognize the possibility--discussed by us in Samuel Hostetler v. DER, Docket No. 82-024-G (Opinion and Order, April 22, 1982)--that the holding in

Rostosky may bear re-examination when an appeal mistakenly has been filed with DER. Such re-examination is the Commonwealth Court's prerogative, however, not this Board's.

O R D E R

WHEREFORE, this 25th day of April, 1985 it is ordered that the appeal captioned above is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

ANTHONY J. MAZULLO, JR.
Member

DATED: April 25, 1985

cc: Bureau of Litigation
Richard S. Ehmann, Esquire, Pittsburgh, for DER
Michael E. Mayse, Boswell, pro se Appellant (w/ encl)